2-17-17

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

CASE NO.: 1225 WDA 2016

COMMONWEALTH OF PENNSYLVANIA,
APPELLEE

vs.

JOSEPH DEAN BUTLER,
APPELLANT

BRIEF FOR THE APPELLANT

APPEAL FROM JUDGMENT OF SENTENCE, DATED AUGUST 4, 2016, BY THE HONORABLE WILLIAM R. SHAFFER IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA, DOCKETED AT C.A. 1538 OF 2014.

JOSEPH L. SMITH, ESQUIRE
ASSISTANT PUBLIC DEFENDER
ATTORNEY FOR THE APPELLANT
PA I.D. #: 308699
BUTLER COUNTY GOVERNMENT CENTER
P.O. BOX 1208
BUTLER, PA 16003-1208

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases:

Pennsylvania Supreme Court Cases:

Pennsylvania Superior Court Cases:

Pennsylvania SCommonwealth Court Cases:

Pennsylvania Crimes Code:

Pennsylvania Judicial Procedure:

STATEMENT OF JURISDICTION

Jurisdiction of this Honorable Court is invoked under the Judicial Code as enacted by Act 1976, July 9, P.L. 586, No. 142, as amended, and more particularly, Pennsylvania Consolidated Title 42, Section 742, as further clarified by Pennsylvania Rule of Appellant Procedure 301(a)(2), and Rule 341(a). Jurisdiction is vested exclusively in this Honorable Court since the Order in Question is a final sentencing order of a criminal matter imposed by the Court of Common Pleas of Butler County, Pennsylvania.

ORDER OR DETERMINATION IN QUESTION

Pursuant to Pennsylvania Rule of Appellate Procedure 2115(a), the verbatim text of the Orders in question is set forth as follows:

ORDER OF COURT

AND NOW, this 25th day of July, 2016, the Defendant appeared represented by Attorney Smith.

On or about July 27, 2015, the Sexual Offenders Assessment Board was ordered to perform an evaluation of the Defendant following his plea of guilty to the offense which triggers a Sexually Violent Predator determination.

On or about October 28, 2015 the Commonwealth filed a motion for a hearing after receiving notification from the Board that, in the opinion of the Board, the Defendant met the criteria to be classified as a Sexually Violent Predator.

A hearing was scheduled for December 2, 2015, and was rescheduled to various dates subsequently upon motion of the Defendant, as the Defendant requested their own expert report to be furnished.

On or about May 25, 2016, the Commonwealth presented the testimony of Julia Lindemuth, a member of the Pennsylvania Sexual Offenders Assessment Board. Dr. Wettstein was unavailable on that date and proceedings were rescheduled for July 20, 2016. Testimony was concluded on that date. The Court took the matter under advisement following the conclusion of the hearing to review Dr. Wettstein's written report.

Following the hearing, the Court determines that the Commonwealth has proved by clear and convincing evidence that the Defendant is a Sexually Violent Predator. Therefore, it is ORDERED that the Defendant shall be designated as such.

A copy of this Order shall be immediately submitted to the Defendant, his attorney, the Pennsylvania Board of Probation and Parole, the Pennsylvania Department of Corrections and the Pennsylvania State Police and the Sexual Offender Assessment Board.

Sentencing is continued and is rescheduled for August 4, 2016, at 9:00 a.m. in Courtroom 2.

At that time a Gagnon II hearing shall be scheduled at the case docketed at 1214 of 2012.

BY THE COURT,

/s/ WILLIAM R. SHAFFER, JUDGE

See attached, July 26, 2016 Order of Court, Appellant exhibit 1.

SENTENCE

AND NOW, this 4th day of August, 2016, the Sentence of the Court is:
Defendant is directed to pay the costs of prosecution:

(X) Statutory Sexual Assault (F-2) Pay fine of $____
Count 1 Offense

Defendant is to undergo imprisonment for not less than 12 months nor more than 30 months.

(X) Corruption of Minors (F-3) Pay fine of $____
Count 4 Offense

Guilty but, NO FURTHER PENALTY.

(X) Defendant stands committed to the custody of:
( ) the Butler County Prison Reentry Eligible: No ___ Yes ___
(X) the Department of Corrections for confinement in such state penal or correctional institution or facility as the Department of Corrections shall determine. NOT RRRI eligible.

(X) Defendant is to receive credit for time served from Jan. 1, 2016
( ) Defendant is eligible for work release and/or community service if space is available and Defendant qualifies under the prison guidelines.
( ) Defendant is directed to participate in Butler County Prison Drug and Alcohol Program.

(X) Defendant is to be placed on probation for a period of 90 months with the State Probation Board and must attend any counseling as directed by probation officer. The period of probation shall be consecutive to the Defendant's release from incarceration and expiration of parole.

( ) Defendant is directed to attend the Drug and Alcohol School or Phase II to be held as the Butler Alcohol Countermeasures Program, 222 W. Cunningham Street, Butler, PA. The registration fee shall be paid as the time of enrollment.

( ) Defendant is directed to pay restitution – see attached Restitution Order.

(X) Special condition(s) of sentence (if any):
( ) Costs/Fines/Restitution are due immediately/on or before _____.
( ) Costs/Fines/Restitution $_____ is due at sentencing and $_____ is due each month.

(X) Costs are payable in monthly installments until paid in full.

( ) Probation supervision fee does/does not apply. In addition, the defendant is ordered to enroll and pay for electronic reporting services if directed to by his/her probation officer.

( ) Defendant shall perform _____ hours of community service under the direction of the Adult Probation Office, within _____ of sentencing.

(X) This sentence is to run concurrent with 1214-12.

( ) This sentence is consecutive to any other sentence currently being served.

( ) Pursuant to 18 Pa. C.S.A.6111.1f, the Clerk of Courts shall notify the Pennsylvania State Police of this conviction as it relates to 18 U.S.C.A.§922g(3).

BY THE COURT,

/s/ WILLIAM R. SHAFFER, Judge

See attached, Sentence Order, Appellant exhibit 2.

The actual Order of Court, dated July 25, 2016; Sentencing Order, dated August 4, 2016; Post Sentence Motion, dated August 8, 2016; Order Denying Post Sentence Motion, dated August 9, 2016; and the Trial Court's Rule 1925(a) Memorandum Opinion, dated August 16, 2016, are contained within the Certified Reproduced Record transmitted to this Honorable Court, and a reproduced copy are attached to this appellate brief and identified as Appellant exhibits 1 thru 5.

STATEMENT OF QUESTIONS INVOLVED

I. WHETHER THE COMMONWEALTH PRESENTED SUFFICIENT EVIDENCE TO PROVE BEYOND CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE TRIAL COURT'S DETERMINATION THAT APPELLANT IS A SEXUALLY VIOLENT PREDATOR UNDER 42 PA.C.S.A. § 9799.24(e)(3)?

Suggested Answer: No. The Commonwealth failed to present sufficient evidence to support the trial court's conclusion that Appellant is a sexually violent predator.

II. WHETHER THE "SEXUALLY VIOLENT PREDATOR" DESIGNATION AS PROVIDED UNDER PENNSYLVANIA'S SEXUAL OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) IS UNCONSTITUTIONAL AND VIOLATES APPELLANT'S FUNDAMENTAL RIGHT TO PROTECT HIS REPUTATION AS SEXURED BY PENNSYLVANIA CONSTITUTION ARTICLE I, SECTION 1?

Suggested Answer: Yes. The sexually violent predator designation, as provided under SORNA, is unconstitutional and violates Appellant's fundamental right to protection of his reputation afforded to him under the Pennsylvania Constitution.

STATEMENT OF THE CASE

I. Concise Statement

Appellant Joseph Dean Butler (hereinafter "Appellant") appeals the trial court's finding that he is a sexually violent predator pursuant to 42 Pa.C.S.A. § 9799.24(e)(3), in that the Commonwealth failed to present beyond clear and convincing evidence to demonstrate as such. Furthermore, Appellant challenges the constitutionality of the "Sexually Violent Predator" designation under Pennsylvania's Sexual Offender Registration and Notification Act (hereinafter "SORNA"), in that it violates Appellant's fundamental right to protect his reputation as secured by the Pennsylvania Constitution, Article I, Section 1.

II. Factual Disposition

Appellant was charged with one count each of Statutory Sexual Assault (Felony 2nd Degree); Child Pornography (Felony 3rd Degree); Criminal Use of a Communication Facility (Felony 3rd Degree); and Corruption of Minors (Felony 3rd Degree), with said information being filed on or around September 23, 2014.

On February 4, 2015, Appellee filed a Motion in Limine seeking to introduce evidence of Appellant's prior bad acts at trial and a hearing on said motion was scheduled. However, prior to the hearing and trial court ruling on said motion, Appellant entered a guilty plea.

On July 27, 2015, Appellant entered a guilty plea to one (1) count of Statutory Sexual Assault (Felony 3rd Degree), under 18 P.S. § 3122.1(a)(1), and one (1) count of Corruption of Minors (Felony 3rd Degree), under 18 P.S. § 6301(a)(1)(ii). The trial court

accepted Appellant's guilty plea and ordered that the State Sexual Offender Assessment Board (hereinafter "SOAB") complete an assessment of Appellant as required by SORNA, as the Corruption of Minors conviction is among the sexually violent offenses enumerated under 42 Pa.C.S.A. § 9799.14.

The SOAB conducted an evaluation of Appellant and issued its October 22, 2015 report, recommending that Appellant be designated a Sexually Violent Predator (hereinafter "SVP"). On October 28, 2015, Appellee file a Praecipe to Schedule an SVP Hearing and Sentencing, wherein Appellant was notified that Appellee intended to request that he be designated an SVP. On November 19, 2015, Appellant filed a motion requesting that the trial court authorize a defense expert to conduct a Megan's Law Assessment, with said request being granted. On November 20, 2015, the trial court authorized Dr. Robert Wettstein to conduct a Megan's Law SVP Assessment and to prepare a report regarding said findings.

Due to the schedules of both Appellant's and Appellee's respective expert witnesses, the SVP proceedings were bifurcated into two separate days of testimony. On May 25, 2016 Appellee presented the testimony of Julia Lindemuth (hereinafter "Ms. Lindenmuth"), whom is employed by the Pennsylvania Sex Offender Assessment Board. (T. 5/25/2016, P. 1, L. 21-22). Ms. Lindenmuth was recognized by the trial court as an expert, able to provide a professional opinion with respect to sexually violent predators, and her report was admitted into evidence. (T. 5/25/2016, P. 3, L. 11-23).

Ms. Lindemuth testified that she conducted an SVP assessment on Appellant as a result of a referral from the trial court, ordered due to the statute under which Appellant entered a guilty plea. (T. 5/25/2016, P. 4, L. 1-8). Appellant declined an interview with

Ms. Lindenmuth and her assessment was based solely on documents provided through the investigation of Appellant. (T. 5/25/2016, P. 4, L. 14-23). In authoring her assessment, Ms. Lindenmuth relied on the facts of the instant case, as reported in the police report, affidavit of probable cause, and probation documents. (T. 5/25/2016, P. 5, L. 9-19). Ms. Lindenmuth relayed that the instant offense involved an ongoing eight month sexual relationship between, Appellant, whom was twenty-one years old at the time, and a fifteen-year old female. (T. 5/25/2016, P. 5, L. 20 – P. 6, L. 6). Specifically, Appellant and the victim began dating on October 1, 2013 and began a sexual relationship on October 27, 2013, which lasted through June of 2014. (T. 5/25/2016, P. 14, L. 16-21 & P. 6, L.2-6). Ms. Lindenmuth described the relationship between Appellant and the victim as a romantic relationship, with no evidence of coercion, and that Appellant intended a lifelong relationship with the victim. (T. 5/25/2016, P. 12, L. 21 – P. 13, L. 21). It was agreed that but for Appellant being twenty-one years old rather than the age of the fifteen year old victim, the relationship between them would have been a normal relationship. (T. 5/25/2016, P. 16, L. 16-20).

In conducting her assessment, Ms. Lindenmuth also testified that she considered Appellant's historical information. Specifically, she indicated that when Appellant was seventeen years old he exchanged nude images with an approximately twelve-year old female.[1] (T. 5/25/2016, P. 6, L. 10-22). She also indicated that Appellant was on adult probation at the time of the instant offense for having had a sexual relationship with a fourteen-year old female. (T. 5/25/2016, P. 6, L. 23 – P. 7, L. 2). Appellant was nineteen

[1] Ms. Lindenmuth testified that the victim was twelve years old at the time of the offense. However, her written report and Dr. Wettstein's testimony both indicate that the victim was thirteen years old at the time of the offense and that while Appellant sent nude images to the victim, there were no nude photographs taken of the victim.

years old in June of 2012, the time of said offense. Nonetheless, Ms. Lindenmuth confirmed that Appellant's instant guilty plea to Corruption of Minors is the only SORNA qualifying offense in Appellant's history. (T. 5/25/2016, P. 13, L. 25 – P. 14, L. 7). Although Ms. Lindenmuth indicated that Appellant had received sex offender treatment as a juvenile, and that she was unable to testify as to the quality of said treatment, in her opinion it was ineffective based on the fact that Appellant was unsuccessful in maintaining an offense-free life. (T. 5/25/2016, P. 9, L. 17-25 & P. 17, L. 11-17).

Ms. Lindenmuth testified that despite considering all fourteen factors that the SOAB asks that she consider, the determining factor in her assessment was her diagnosis that Appellant sufferers from a paraphilic sexual interest in pubescent children. (T. 5/25/2016, P. 8, L. 14-22). Furthermore, Ms. Lindenmuth clarified, "in my opinion [Appellant] has a paraphilic sexual interest and that makes him more likely to reoffend than someone who does not have a paraphilic sexual interest." (T. 5/25/2016, P. 10, L. 12-15). Ultimately, Ms. Lindenmuth concluded that Appellant does meet the criteria under the statute as a sexually violent predator. (T. 5/25/2016, P. 10, L. 24-P. 11, L. 1).

Following the conclusion of Ms. Lindenmuth's testimony the record was left open and SVP proceedings ultimately continued to July 20, 2016 for the testimony of defense expert Dr. Robert Wettstein (hereinafter "Dr. Wettstein"), whom the trial court also permitted to testify as an expert and render an expert opinion.

Similar to Ms. Lindenmuth, Dr. Wettstein also rendered his professional opinion without interviewing Appellant or any other parties directly, but rather based on the twenty-three documents provided to him, which included among others: police

complaints, affidavits of probable cause, and police reports from Appellant's 2009 juvenile prosecution and 2012 and 2014 prosecutions; plea agreements; presentence investigations; documentation from both adult and juvenile probation; Appellant's psychiatric records; Appellant's academic and testing records and student transcripts; and Ms. Lindenmuth's SOAB report in the instant matter. (T. 7/20/2016, P. 3, L. 25 – P. 4, L. 6).

Dr. Wettstein testified that, while the current issue is whether Appellant is an SVP based upon his current offense, he considered Appellant's entire background and history in formulating his report. (T. 7/20/2016, P. 5, L. 5 – 9). Dr. Wettstein also explained that the only diagnosis which could be made regarding Appellant based on his history is attention deficit hyperactivity, which he had been previously diagnosed with. (T. 7/20/2016, P. 5, L. 24 – P. 6, L. 6). Dr. Wettstein also indicated that in reviewing Ms. Lindenmuth's report and all supporting documentation, he disagrees with Ms. Lindenmuth's conclusion that Appellant is an SVP. (T. 7/20/2016, P. 6, L. 7 – 16). Although Dr. Wettstein considered all fourteen (14) factors under the SVP statute, they are not dispositive of whether someone is a sexually violent predator. (T. 7/20/2016, P. 17, L. 4 – 9 and L. 18 – 23). More specifically, there are two main issues with Ms. Lindenmuth's conclusion: (1) that Appellant has a paraphilic disorder and (2) that his underlying behavior is predatory in nature. (T. 7/20/2016, P. 6, L. 19 – P. 7, L. 6).

First and foremost, Dr. Wettstein explained that under the DSM Five, a required element of a diagnosis of a paraphilic disorder that there is "six months of conduct or sexual arousing fantasy or urges or behaviors." (T. 7/20/2016, P. 7, L. 7 – 16). Further described, "a diagnosis of paraphilic disorder is made if there are recurrent, intense,

sexually arousing fantasies, urges, behaviors involving nonhuman objects, the suffering or humiliation of oneself or one's partner, children or other clinically or legally non-consenting persons all of which occurs over a period of at least six months." (T. 7/20/2016, P. 18, L. 7 – 18). Dr. Wettstein further explained that, while the relationship between Appellant and the victim lasted for eight months, the victim was not under the age of consent throughout the length of this course of conduct. Rather, the victim turned sixteen, the age of consent, within three months of the initiation of their sexual activity. If the victim is "not under the age of consent during the course of conduct that they had sex, and there's no crime there's no mental disorder." (T. 7/20/2016, P. 8, L. 4-7). In other words, once the victim turned sixteen, there was no diagnosable situation as she was now a legally consenting participant, and, thus, the course of conduct did not extend for the six month required period to make a diagnosis of a paraphilic disorder. (T. 7/20/2016, P. 19, L. 10 – 20).

Dr. Wettstein also explained that the facts presented in the documents, reviewed by both himself and Ms. Lindenmuth, indicate that Appellant and the victim had an ongoing romantic and sexual relationship. The victim told the police that this was consensual activity between them. (T. 7/20/2016, P. 9, L. 12-20). Thus, once the victim reached the age of consent, there wouldn't be a crime and there wouldn't be a question about the presence of a psychiatric disorder. (T. 7/20/2016, P. 9, L. 23 – P. 10, L. 1). Rather, Ms. Lindenmuth presented the issue that if there is criminal behavior then it's automatically a paraphilic disorder. (T. 7/20/2016, P. 10, L. 3 – 6). "It's much too simple to say, well, there's an underlying crime here, therefore, there's a paraphilic disorder. Making a psychiatric diagnosis requires more context, you have to understand the fact

here this was a consensual relationship between the two of them. They had known each other for a number of years prior to the relationship. That's an important consideration." (T. 7/20/2016, P. 10, L. 25 – P. 11, L. 7).

The second issue Dr. Wettstein raised is the question of whether the conduct by the defendant was predatory with regard to the victim. (T. 7/20/2016, P. 13, L. 23 – 25). To determine predation, it requires that you understand Appellant's intentions and the purpose of what he was doing. (T. 7/20/2016, P. 14, L. 1-3). The records indicate that Appellant "met the victim through friends. He didn't find her on the internet looking for victims. He was not in bathrooms looking for victims. He was not at the mall looking for victims. This was a dating relationship. They participated mutually in it. So, that's an important consideration in trying to understand his behavior here." (T. 7/20/2016, P. 14, L. 3 – 10). Dr. Wettstein did not find Appellant's behavior to be predatory in nature, which is an inherent component of a finding of a sexually violent predator. (T. 7/20/2016, P. 14, L. 11-16).

Dr. Wettstein went on to further explain that Appellant's behaviors in 2009 and 2012 also were not predatory in nature. In 2009, Appellant sent a photograph to a victim that was four years younger than him. The victim in 2012 was five years younger than Appellant and, again, was a dating relationship between them. (T. 7/20/2016, P. 21, L. 5 – 14). The relationship in 2012 and relationship in the instant matter were both romantic reciprocal relationships, wherein Appellant was not trying to exploit or take advantage of a much younger or vulnerable child. (T. 7/20/2016, P. 22, L. 2 – 6). Rather Appellant was in a dating relationship with teenage girls within four or five years of his age. (T. 7/20/2016, P. 23, L. 6-7). Dr. Wettstein found that Ms. Lindenmuth, rather than looking

at the broad picture, merely looked at the underlying offense and determined that because there was an offense it must have been predatory, which is completely incorrect. (T. 7/20/2016, P. 23, L. 17 – 20).

Dr. Wettstein concluded his direct testimony with the explanation that he "was not able to diagnose a paraphilic disorder or paraphilia not otherwise specified. That's a disorder that's often misused in these kinds of situations...[and there is] no information from [Appellant] or the victim that [Appellant] behaved in a predatory manner in this particular case with regard to the victim. Just because a crime occurs doesn't make it a psychiatric disorder and doesn't make it predatory conduct so that's a common misunderstanding." (T. 7/20/2016, P. 14, L. 22 – P. 15, L. 7). Finally Dr. Wettstein indicated that in his opinion, rendered to a reasonable degree of psychiatric certainty, Appellant is not a sexually violent predator. (T. 7/20/2016, P. 15, L. 8 – 14).

Following the conclusion of testimony at the SVP Hearing, the trial court took the matter under advisement to further review the reports of Ms. Lindenmuth and Dr. Wettstein. The trial court ultimately found that Appellee had demonstrated by clear and convincing evidence that Appellant met the definition of an SVP and designated him as such. Appellant was subsequently sentenced pursuant to the terms of his negotiated plea agreement, namely incarceration for a period of at least twelve and no more than thirty months, followed by 90 months of state probation.

Appellant filed a Post Sentence Motion, seeking the trial court to reconsider Appellant's SVP designation and to remove said designation. However, the Post Sentence Motion was denied without a hearing and the within appeal followed.

III. Procedural History

On September 23, 2014, information was filed against Appellant alleging one (1) count each of: Statutory Sexual Assault in violation of 18 P.S. § 3122.1(a)(1); Child Pornography in violation of 18 P.S. § 6312(d); Criminal Use of a Communication Facility in violation of 18 P.S. § 7512(a); and Corruption of Minors in violation of 18 P.S. § 6301(a)(1)(ii). Appellee provided Appellant with discovery on October 6, 2014. Appellant's subsequent Call of the List dates were continued upon the request of Appellant on December 3, 2014 and January 16, 2015 respectively due to continuing negotiations. Appellant then filed a *pro se* Motion for Dismissal of Counsel on February 20, 2015. On March 12, 2015, Appellant requested another continuance to afford him the opportunity to hire private counsel. Ultimately, Appellant decided to proceed with representation from the Office of the Public Defender and was rescheduled for Call of the List on May 6, 2015.

On April 1, 2015, Appellee filed a Motion in Limine, 404 B Notice of Prior Bad Acts and a hearing on said motion was originally scheduled for April 13, 2015. This date was initially moved to April 30, 2015, upon the request of Appellant due to counsel's unavailability. However, due to Appellee's unavailability, the hearing on the Motion in Limine was then continued and rescheduled to occur immediately before Jury Selection.

At the time of Appellant's May 6, 2015 Call of the List, a final continuance was requested by Appellant due to continuing negotiations and Appellant was rescheduled for Call of the List on July 15, 2015, followed by Jury Selection on July 16 & 17, 2015, and a Jury Trial on July 27, 2015. However, rather than proceed to trial, on July 27, 2015, Appellant entered into a negotiated plea agreement wherein he plead guilty to Count 1 –

Statutory Sexual Assault and Count 4 – Corruption of Minors. The Corruption of Minors offense triggered SORNA, under 42 Pa.C.S. § 9791, et. seq., and the SOAB was directed to conduct an SVP assessment of Appellant.

On October 11, 2015 an SVP Assessment was completed and on October 28, 2015 Appellee filed a Praecipe for SVP Hearing and to Schedule Sentencing. Said hearing and sentencing were originally scheduled for December 2, 2015 and were then moved to December 8, 2015 upon the request of Appellee due to Ms. Lindenmuth's unavailability.

On November 19, 2015, Appellant filed a Motion for the Appointment of Defense Expert to Conduct a Megan's Law Assessment. Said motion was granted and Dr. Wettstein was authorized to conduct an SVP Assessment for Appellant. However, the December 8, 2015 SVP Hearing and Sentencing were then continued until March 8, 2016 upon the request of Appellant due to Dr. Wettstein's request for ninety (90) days to complete his assessment and report. Said hearings were then continued a second time, until May 10, 2016, upon Appellant's request, again to further consult with Dr. Wettstein. The SVP Hearing and Sentencing Hearing were moved yet again to May 25, 2016, this time at the request of Appellee due to counsel's unavailability.

On May 25, 2016, the trial court heard the expert testimony of Ms. Lindenmuth and admitted her October 11, 2015 SVP Assessment into evidence. The record was then left open to take the testimony of Dr. Wettstein on June 24, 2016. However, upon the trial court's own motion, the bifurcated SVP Hearing was continued to July 6, 2016. Due to Dr. Wettstein's unavailability, Appellant's request for a continuance was granted and the matter was rescheduled for July 20, 2016. The trial court heard the expert testimony of

Dr. Wettstein on July 20, 2016 and admitted his June 1, 2016 report into evidence. At the conclusion of Dr. Wettstein's testimony, the trial court took the matter under advisement. By Order of Court dated July 25, 2016 and docketed July 26, 2016, the trial court ordered Appellant designated a SVP.

On August 4, 2016, the trial court sentenced Appellant pursuant to the terms of his negotiated plea agreement. At Count 1 – Statutory Sexual Assault, Appellant was sentenced to undergo imprisonment of not less than twelve not more than thirty months, followed by 90 months of state probation. At Count 4 – Corruption of Minors, Appellant received no further penalty.

On August 8, 2016, Appellant filed a Post Sentence Motion, seeking the trial court to reconsider Appellant's SORNA designation as an SVP and to remove said designation. However, on August 9, 2016, the trial court denied Appellant's Post Sentence Motion without a hearing.

On August 15, 2016, Appellant exercised his right to a direct appeal by filing a Notice of Appeal. On August 16, 2016, the Butler County Clerk of Courts granted Appellant's in forma pauperis status as he is indigent and incarcerated. Also, on August 16, 2016, the trial court directed that Appellant file and serve his concise statement of matters complained of on appeal within twenty-one days. Appellant's concise statement was filed on August 25, 2016. The trial court issued its Opinion in compliance with Pa.R.A.P. 1925(a) on September 12, 2016. The Official transcriptions of the July 27, 2016 Plea, May 25, 2016 and July 20, 2016 Sexually Violent Predator Proceedings, July 25, 2016 Status Conference, and August 4, 2016 Sentence Proceedings were made and filed of record. This matter is now ripe for review by this Honorable Court.

SUMMARY OF THE ARGUMENT

In this appeal, Appellant raises the issues that (1) the trial court erred in finding that the Commonwealth presented sufficiently clear and convincing evidence to support a finding that Appellant is a sexually violent predator and designating Appellant as such and (2) the "sexually violent predator" designation, as provided under Pennsylvania's Sexual Offender Registration and Notification Act (SORNA) is unconstitutional and violates Appellant's fundamental right to protection of his reputation, as secured by the Pennsylvania Constitution Article I, Section 1.

Appellant asks this Honorable Court to reverse the trial court's Judgment of Sentence in regard to the Sexually Violent Predator determination and to affirm all other provisions of Appellant's sentence not inconsistent therein.

ARGUMENT

I. WHETHER THE COMMONWEALTH PRESENTED SUFFICIENT EVIDENCE TO PROVE BEYOND CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE TRIAL COURT'S DETERMINATION THAT APPELLANT IS A SEXUALLY VIOLENT PREDATOR UNDER 42 PA.C.S.A. § 9799.24(e)(3)?

On July 27, 2015, Appellant entered a guilty plea to one (1) count of Statutory Sexual Assault in violation of 18 P.S. § 3122.1(a)(1) and one (1) count of Corruption of Minors in violation of 18 P.S. § 6301(a)(1)(ii). Of these offenses, only the Corruption of Minors charge implicates SORNA, under 42 Pa.C.S.A. § 9799.14. Within ten (10) days following a conviction for an offense specified under § 9799.14, but prior to sentencing, the trial court is required to order the Sexual Offender Assessment Board

(SOAB) to conduct an assessment to recommend whether the offender meets the definition of a "sexually violent predator" (SVP). 42 Pa.C.S.A. § 9799.24 In completing said assessment, the evaluator is required to consider the following fourteen (14) factors:

> (1) Facts of the current offense, including:
> (i) Whether the offense involved multiple victims.
> (ii) Whether the individual exceeded the means necessary to achieve the offense.
> (iii) The nature of the sexual contact with the victim.
> (iv) Relationship of the individual to the victim.
> (v) Age of the victim.
> (vi) Whether the offense included a display of unusual cruelty by the individual during the commission of the crime.
> (vii) The mental capacity of the victim.
> (2) Prior offense history, including:
> (i) The individual's prior criminal record.
> (ii) Whether the individual completed any prior sentences.
> (iii) Whether the individual participated in available programs for sexual offenders.
> (3) Characteristics of the individual, including:
> (i) Age.
> (ii) Use of illegal drugs.
> (iii) Any mental illness, mental disability or mental abnormality.
> (iv) Behavioral characteristics that contribute to the individual's conduct.
> (4) Factors that are supported in a sexual offender assessment field as criteria reasonably related to the risk of reoffense.
> 42 Pa.C.S.A. § 9799.24(b)

Upon the receipt of the SOAB assessment, the Commonwealth may file a praecipe to schedule an SVP Hearing. Furthermore, at said hearing, the offender shall have the right to counsel; the opportunity to be heard; to call witnesses, including expert witnesses; and to cross-examine witnesses. 42 Pa.C.S.A. § 9799.24(c)

At the SVP hearing, it is the burden of the Commonwealth to prove by clear and convincing evidence that the offender is a sexually violent predator. *Id.* This standard "has been described as an 'intermediate' test, which is more exacting than a

preponderance of the evidence test, but less exacting than proof beyond a reasonable doubt." *Commonwealth v. Meals*, 912 A.2d 213, 219 (Pa. 2006). "The clear and convincing standard requires evidence that is 'so clear, direct, weighty, and convincing as to enable the [trier of fact] to come to a clear conviction, without hesitancy, of the truth of the precise facts [in] issue.'" *Id.* (quoting *Commonwealth v. Maldonado*, 838 A.2d 710, 714 (Pa. 2003)).

In the instant matter, following Appellant's guilty plea to Corruption of Minors, the trial court ordered the SOAB to conduct an assessment to determine if Appellant met the definition of a sexually violent predator. Upon the request of Appellant, the trial court also authorized a defense expert witness to conduct an assessment regarding Appellant's designation as an SVP. On May 25, 2016 and July 20, 2016, a bifurcated hearing was held wherein Ms. Lindenmuth, an SOAB board member, testified that Appellant met the definition of an SVP and Dr. Wettstein, the defense expert witness, testified that Appellant did not meet the definition of an SVP. The trial court ultimately found that Appellee proved by clear and convincing evidence that Appellant is a sexually violent predator and designated him as such.

In Appellant's first issue, he raises the claim that the Appellee failed to present sufficient evidence to support the trial court's finding that Appellant is a sexually violent predator. Any "challenge to the sufficiency of the evidence is a question of law requiring a plenary scope of review." *Commonwealth v. Krouse*, 799 A.2d 835, 837 (Pa.Super. 2002) (citing *Commonwealth v. Weston*, 749 A.2d 458, 460 (Pa. 2000)). The corresponding standard of review is "whether the evidence admitted at trial and all reasonable inferences drawn therefrom, when viewed in the light most favorable to the

Commonwealth as the verdict winner, is sufficient to support all the elements of the offenses." *Id.*, at 837-38 (quoting *Commonwealth v. DeJesus*, 787 A.2d 394, 398 (Pa. 2001)). The appellate court "may not weigh the evidence and substitute [it's] judgment for that of the fact-finder," whom is free to accept "all, part or none" of the evidence presented. *Id.*, at 838 (quoting *Commonwealth v. Vetrini*, 734 A.2d 404, 407 (Pa.Super. 1999)).

When "reviewing the sufficiency of the evidence regarding the determination of SVP status, [the appellate court] will reverse the trial court only if the Commonwealth has not presented clear and convincing evidence sufficient to enable the trial court to determine that each element required by the statute has been satisfied." *Id.*

It is well established that "'SVP status does not automatically apply to persons who commit sexual offenses against children' and ... if it did, it would amount to an 'unconstitutional presumption.'" *Meals*, 912 A.2d at 218 (citing *Krouse* (citations omitted)). Rather, "the SVP classification has been specifically limited by the legislature to those offenders who have a 'mental abnormality or personality disorder that makes [them] more likely to engage in predatory sexually violent offenses.'" *Krouse*, 799 A.2d at 842 (citations omitted). "Furthermore, 'predatory' conduct, which is indispensable to the designation, is defined as an 'act directed at a stranger or at a person with whom a relationship has been initiated, established, maintained or promoted in order to facilitate or support victimization.'" *Commonwealth v. Evans*, 2015 WL 7902216, 9 (Pa.Super. 2015) (citing *Meals*, 912 A.2d at 218-19 (quotations omitted). Additionally, the Pennsylvania Superior Court has "determined that the 'salient' inquiry' for the trial court is the 'identification of the impetus behind the

commission of the crime,' coupled with the 'extent to which the offender is likely to reoffend.'" *Commonwealth v. Dixon,* 907 A.2d 533, 536 (Pa.Super. 2006) (citing *Commonwealth v. Bey,* 841 A.2d 562, 566 (Pa.Super. 2004)).

In designating an offender an SVP, although § 9799.24 does not specifically required the trial court to make findings regarding the fourteen factors to be considered under § 9799.24, the Pennsylvania Superior Court has held that "the trial court should include on the record its reasons for finding the [offender] to be an SVP in relation to the statutory factors." *Krouse,* 799 A.2d at 843 (citations omitted). However, in the instant matter, the trial court merely found that "the Commonwealth has proved by clear and convincing evidence that [Appellant] is a Sexually Violent Predator," without any further explanation as to the reason for finding as such. *See* July 26, 2016 Order of Court, Appellant Exhibit 1.

Typically the appellate court reviews whether the record supports the findings of fact made by the trial court before then reviewing the legal conclusions made thereon. *Krouse,* 799 A.2d at 838. However, in cases "where the trial court has stated its legal conclusions but has not provided specific findings of fact, [the appellate court] will review the entire record of the post-conviction SVP hearing as [its] scope of review is plenary." *Id.* Accordingly, "if it appears based on all of the evidence viewed in a light most favorable to the [Appellee] that an SVP classification can not be made out in a clear and convincing manner, then the [appellate court] will be obliged to reverse the SVP designation." *Id.* Furthermore, "[t]he fact that the trial court found the testimony of [Appellee's witness] credible does not necessarily lead to the conclusion that

[Appellee] proved beyond clear and convincing evidence all the elements of an SVP classification as required by § [9799.24]." *Id.*, at 840.

"To deem an individual a sexually violent predator, the [Appellee] must first show [the individual] has been convicted of a sexually violent offense set forth in section [9799.14]." *Commonwealth v. Prendes*, 97 A.3d 337, 357-58 (Pa.Super. 2014) (citing *Commonwealth v. Askew*, 907 A.2d 624, 629 (Pa.Super. 2006)). In the instant matter, it is acknowledged that Appellant entered a guilty plea to Corruption of Minors, which is an enumerated offense under § 9799.14(b), a Tier I sexual offense.

"Secondly, [Appellee] must show that the individual has 'a mental abnormality or personality disorder that makes [him] likely to engage in predatory sexually violent offenses.'" *Id.*, at 358. The Commonwealth presented the testimony of Ms. Lindenmuth, whom indicated that in her opinion Appellant suffers from a paraphilic sexual interest in pubescent children. However, this opinion is contrary to the required elements of a paraphilic disorder. Namely, a paraphilic disorder can only be made if there are recurrent, intense, sexually arousing fantasies, urges, or behaviors involving nonhuman objects, the suffering or humiliation of oneself or one's partner, children or other clinically or legally non-consenting persons *all of which occurs over a period of at least six months.* (emphasis added)

It is undisputed that the victim and Appellant were both willing participants in their sexual activity and that the victim was fifteen years old at the initiation of the sexual activity. It is acknowledged that when the victim was fifteen years old, she was under the age of consent and, therefore, would be a "legally non-consenting person." However, after three months of sexual activity as a willing, albeit legally non-

consenting participant, the victim turned sixteen years old and became a legally consenting party. Thus, there was only a three month duration of behavior that would potentially meet the criteria of a paraphilic disorder. As such, by definition, a proper diagnosis of a paraphilic disorder cannot be made in the instant matter.

The Appellee must first demonstrate by clear and convincing evidence that Appellant suffers from a mental abnormality or personality disorder that makes him likely to engage in predatory sexually violent offenses. It is only after this burden is met that the trial court then makes a final determination on Appellant's SVP status. *Prendes*, 97 A.3d at 358. (citing *Commonwealth v. Kopicz*, 840 A.2d 342, 351 (Pa.Super.2003)). As a "mental abnormality or personality disorder" is an essential element of the Appellee's burden, without such a diagnosis, the trial court cannot designate Appellant an SVP.

Nonetheless, Appellee has also failed to demonstrate by clear and convincing evidence that Appellant is likely to engage in predatory sexual offenses. Once a mental abnormality or personality disorder has been diagnosed, the Appellee then has the burden of demonstrating that due to said disorder Appellant is likely to engage in predatory sexual offenses. "Predatory" is defined by statute as an "act directed at a stranger or at a person with whom a relationship has been initiated, established, maintained or promoted, in whole or in part, in order to facilitate or support victimization." *Commonwealth v. Dengler*, 890 A.2d 372, 374 (Pa. 2005) (citing 42 Pa.C.S.A. § 9799.12.

In the instant matter, it is undisputed that Appellant and the victim met each other through mutual friends. After years of knowing each other, they began a

reciprocal romantic relationship. Had Appellant and the victim waited an additional three months to consummate their relationship, there would have been no crime at all. Even Appellee's witness, Ms. Lindenmuth, testified that but for the victim's age, the relationship between the Appellant and victim would be a normal relationship and that there was no evidence of coercion. There was no evidence whatsoever that Appellant was trying to exploit or take advantage of a much younger or vulnerable child.

At best, Ms. Lindenmuth relied on *prior* bad acts of the Appellant, none of which constituted SORNA triggering sexually violent offenses. Specifically, Ms. Lindenmuth cited an offense when Appellant was seventeen years old where he sent a nude picture to his younger brother's twelve year old girlfriend[2]; and a second offense when Appellant was nineteen years old wherein he had a reciprocal romantic and sexual relationship with a fourteen year old girl. In the second incident, had the girl been one year older *or* the Appellant one year younger, there again would have been no crime at all. Again, this was a relationship wherein both parties were willing participants, but due to the five year age difference between them the girl was not a legally consenting party. Importantly, neither of these offenses constituted sexually violent offenses as defined by § 9799.24.[3]

It is necessary for Appellee to show beyond clear and convincing evidence that (1) Appellant suffers from a mental abnormality or personality disorder and (2) that said disorder makes Appellant likely to engage in predatory sexually violent offenses.

---

[2] Again, Ms. Lindenmuth testified that this victim was twelve years old, but her written report and the testimony of Dr. Wettstein both indicate that the victim was thirteen years old and four years younger than Appellant at the time of the offense.

[3] Statutory sexual assault is only classified as a sexually violent offense when the perpetrator is at least eight years older than the victim, under 18 Pa.C.S.A. § 3122.1(a)(2), or when the perpetrator is at least eleven years older than the victim, under 18 Pa.C.S.A. § 3122.1(b). *See* 42 Pa.C.S.A. § 9799.14 and 18 Pa.C.S.A. § 3122.1.

Appellee has failed to meet its burden of proof in both regards. At best, Appellee has provided testimony which indicates that Appellant, in the past, has engaged in criminal conduct that is not classified as a sexually violent offense. Furthermore, it is only after Appellee has met this burden that the trial court would then make a final determination in regard to Appellant's SVP status. Without Appellee first meeting this burden, the issue of an SVP designation is not appropriately before the trial court and the trial court's designation of Appellant as a sexually violent predator should be reversed.

Nonetheless, because the trial court did not include any findings of fact supporting Appellant's SVP designation, it is necessary to review the entire record. For the reasons stated *supra*, Appellant does not meet the criteria of a sexually violent predator. A further analysis of the fourteen factors the SOAB is required to consider when making an SVP recommendation also leads to the conclusion that Appellant is not a sexually violent predator. *See* Commonwealth Exhibit 2, Sexually Violent Predator Assessment, Pages 7 – 11.

1. Whether the offense involved multiple victims:

   It is undisputed that the instant offense involved only one victim. Per Ms. Lindenmuth's report, the offense continued over a period of eight months. However, it is also undisputed that the victim turned sixteen years old three months into the relationship and that both the victim and Appellant were willing participants. Therefore, by law and contrary to Ms. Lindenmuth's report, the offense occurred over a three month period.

2. Whether the individual exceeded the means necessary to achieve the offense:

It is undisputed that the offense did not exceed the means necessary to achieve the offense. Per Ms. Lindenmuth's report, Appellant and the victim engaged in a sexual relationship as part of their "romantic/dating" relationship. Though the victim was legally unable to give consent for sexual activities, she was cooperative.

3. The nature of sexual contact with the victim:

   It is undisputed that Appellant and the victim engaged in multiple instances of vaginal and oral sex.

4. The relationship of the individual to the victim:

   Per Ms. Lindenmuth's report, Appellant and the victim were involved in a romantic/dating relationship for approximately 8 months, but that it was unclear on how they met. However, Dr. Wettstein testified that they had met through mutual friends and had known each other for years.

5. Age of the victim:

   It is undisputed that at the onset of the relationship the victim was fifteen years old and Appellant was twenty-one. Three months into the relationship, the victim turned sixteen years old.

6. Whether the offense included a display of unusual cruelty by the individual during the commission of the crime:

   It is undisputed that there is no evidence to suggest a display of unusual cruelty by Appellant during the commission of the instant offense.

7. The mental capacity of the victim:

It is undisputed that there is no evidence to suggest the victim suffered from any type of diminished capacity, however she was a minor and for the first three months of the relationship was legally unable to consent to sexual activity with any individual more than four years her senior.

8. The individual's prior criminal record (sexual and nonsexual):

   Per Ms. Lindenmuth's report, Appellant was adjudicated delinquent in 2009 for Obscene and other Sexual Materials and Performances, where he sent nude images of himself to a thirteen year old female. It is undisputed and should be noted that Appellant was seventeen years old at the time. Ms. Lindenmuth also reports that in 2013 Appellant was convicted of Statutory Sexual Assault, wherein he engaged a fourteen year old victim in multiple instances of oral sex and vaginal intercourse. It is undisputed and should also be noted that this was a reciprocal romantic relationship at a time when Appellant was nineteen years old. Had the victim been one year older or Appellant one year younger the acts would not have constituted a crime. Neither of these offenses were sexually violent offenses under § 9799.14

9. Whether the individual completed any prior sentences:

   Appellant successfully completed his juvenile adjudication. He was on probation for his 2013 conviction at the time of the instant offense.

10. Whether the individual participated in available programs for sexual offenders:

    Ms. Lindenmuth reports that Appellant successfully completed juvenile sex offender treatment at Adelphoi Village and was considered a minimal risk to

reoffend. Appellant had not completed sex offender treatment following his 2013 conviction.

11. Age of the individual:

    Appellant was twenty-one years old at the time of the instant offense.

12. Use of illegal drugs by the individual:

    It is undisputed that there is no evidence to suggest that Appellant used illegal drugs during the commission of the instant offense.

13. Any mental illness, mental disability, or mental abnormality:

    It is undisputed that Appellant was diagnosed with Attention Deficit Hyperactivity Disorder and was treated as a child. Per Ms. Lindenmuth's report, Appellant shows a behavior pattern consistent with a paraphilic sexual interest, specifically Other Specified Paraphilic Disorder. This topic and reasons to reject Ms. Lindenmuth's opinion regarding the paraphilic disorder have been adequately addressed *supra.*

14. Behavioral characteristics that contribute to the individual's conduct:

    Per Ms. Lindenmuth, there are no additional behavioral characteristics to note.

When considering the evidence presented in the light most favorable to Appellee, the fourteen factors Ms. Lindenmuth was required to consider when formulating her recommendation on Appellant's SVP status, lend to the conclusion that Appellant does not meet the criteria of an SVP. For the reasons thoroughly explained *supra*, Appellant's prior criminal history and proposed "mental abnormality" do not meet the definition of or form a justifiable basis to designate Appellant an SVP. Furthermore, but for Ms. Lindenmuth's report that Appellant had not completed sex

offender treatment following his 2012 conviction, *all* other factors weight in favor of Appellant *not* being a sexually violent predator. The instant offense involved one victim, whom was a willing participant. There were no excessive means used. The nature of the sexual contact was within the normal bounds of a typical romantic relationship. The victim reached the age of consent three months into the relationship and became a legally consenting participant. There was no mental cruelty and the victim does not suffer from any mental deficiency. Appellant was twenty-one years old, which is five to six years older than the victim. There was no illegal drug use and Appellant did not exhibit any additional behavioral concerns. For all of the foregoing reason the trial court's designation of Appellant as a sexually violent predator should be reversed.

II. WHETHER THE "SEXUALLY VIOLENT PREDATOR" DESIGNATION AS PROVIDED UNDER PENNSYLVANIA'S SEXUAL OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA) IS UNCONSTITUTIONAL AND VIOLATES APPELLANT'S FUNDAMENTAL RIGHT TO PROTECT HIS REPUTATION AS SECURED BY PENNSYLVANIA CONSTITUTION ARTICLE I, SECTION 1?

In the instant appeal, Appellant challenges the validity of the "Sexually Violent Predator" (hereinafter "SVP") designation under 42 Pa.C.S.A. § 9799.10, et seq., also known as the Pennsylvania Sexual Offender Registration and Notification Act (hereinafter "SORNA"), alleging that said act violates his fundamental right to protection of his reputation. An SVP designation attaches to an individual if they have been convicted of certain enumerated offenses prior to the effective date of the current SORNA, or if they are determined to be an SVP following an assessment by the Sexual

Offender Assessment Board (hereinafter "SOAB") and a hearing wherein the trial court determines whether the Commonwealth has demonstrated by clear and convincing evidence that the individual is a sexually violent predator. 42 Pa.C.S.A. § 9799.12

An individual who has been designated an SVP is required to register under and abide by the requirements of SORNA for life. Additionally, an individual with an SVP designation is required to: (1) attend at least monthly counseling sessions in a program approved by the SOAB, and (2) personally appear at a registration site at least quarterly, to verify their registration information, be photographed, and state their compliance with the required counseling. Additionally, the individual's name, address, offense, photograph, and a statement indicating that they are a sexually violent predator is provided in written notice to the following individual: neighbors; the children and youth agency located within the individual's county; each school located within the municipality; each school located within a one-mile radius of the individuals' residence; all day care centers located within the municipality; and all colleges and universities located within 1,000 feet of the individual's residence. Finally, this information is also made publicly available to anyone upon request.

All of the above heightened requirements and notifications are in addition to the basic requirements that attach to all individuals who are convicted of sexually violent offenses, as enumerated under § 9799.14. Namely, those requirements mandate in person verification of the following information at varying intervals:

> **(b) Information provided by sexual offender.**--An individual specified in section 9799.13 (relating to applicability) shall provide the following information which shall be included in the registry:
> (1) Primary or given name, including an alias used by the individual, nickname, pseudonym, ethnic or tribal name, regardless of the context

used and any designations or monikers used for self-identification in Internet communications or postings.
(2) Designation used by the individual for purposes of routing or self-identification in Internet communications or postings.
(3) Telephone number, including cell phone number, and any other designation used by the individual for purposes of routing or self-identification in telephonic communications.
(4) Valid Social Security number issued to the individual by the Federal Government and purported Social Security number.
(5) Address of each residence or intended residence, whether or not the residence or intended residence is located within this Commonwealth and the location at which the individual receives mail, including a post office box. If the individual fails to maintain a residence and is therefore a transient, the individual shall provide information for the registry as set forth in paragraph (6).
(6) If the individual is a transient, the individual shall provide information about the transient's temporary habitat or other temporary place of abode or dwelling, including, but not limited to, a homeless shelter or park. In addition, the transient shall provide a list of places the transient eats, frequents and engages in leisure activities and any planned destinations, including those outside this Commonwealth. If the transient changes or adds to the places listed under this paragraph during a monthly period, the transient shall list these when registering as a transient during the next monthly period. In addition, the transient shall provide the place the transient receives mail, including a post office box. If the transient has been designated as a sexually violent predator, the transient shall state whether he is in compliance with section 9799.36 (relating to counseling of sexually violent predators). The duty to provide the information set forth in this paragraph shall apply until the transient establishes a residence. In the event a transient establishes a residence, the requirements of section 9799.15(e) (relating to period of registration) shall apply.
(7) Temporary lodging. In order to fulfill the requirements of this paragraph, the individual must provide the specific length of time and the dates during which the individual will be temporarily lodged.
(8) A passport and documents establishing immigration status, which shall be copied in a digitized format for inclusion in the registry.

(9) Name and address where the individual is employed or will be employed. In order to fulfill the requirements of this paragraph, if the individual is not employed in a fixed workplace, the individual shall provide information regarding general travel routes and general areas where the individual works.
(10) Information relating to occupational and professional licensing, including type of license held and the license number.
(11) Name and address where the individual is a student or will be a student.
(12) Information relating to motor vehicles owned or operated by the individual, including watercraft and aircraft. In order to fulfill the requirements of this paragraph, the individual shall provide a description of each motor vehicle, watercraft or aircraft. The individual shall provide a license plate number, registration number or other identification number and the address of the place where a vehicle is stored. In addition, the individual shall provide the individual's license to operate a motor vehicle or other identification card issued by the Commonwealth, another jurisdiction or a foreign country so that the Pennsylvania State Police can fulfill its responsibilities under subsection (c)(7).
(13) Actual date of birth and purported date of birth.
(14) Form signed by the individual acknowledging the individual's obligations under this subchapter provided in accordance with section 9799.23 (relating to court notification and classification requirements).
42 Pa.C.S.A. § 9799.16

Furthermore, SORNA requires an in person verification within three business days to update any changes to the following information:

(1) A change in name, including an alias.
(2) A commencement of residence, change in residence, termination of residence or failure to maintain a residence, thus making the individual a transient.
(3) Commencement of employment, a change in the location or entity in which the individual is employed or a termination of employment.

(4) Initial enrollment as a student, a change in enrollment as a student or termination as a student.
(5) An addition and a change in telephone number, including a cell phone number, or a termination of telephone number, including a cell phone number.
(6) An addition, a change in and termination of a motor vehicle owned or operated, including watercraft or aircraft. In order to fulfill the requirements of this paragraph, the individual must provide any license plate numbers and registration numbers and other identifiers and an addition to or change in the address of the place the vehicle is stored.
(7) A commencement of temporary lodging, a change in temporary lodging or a termination of temporary lodging. In order to fulfill the requirements of this paragraph, the individual must provide the specific length of time and the dates during which the individual will be temporarily lodged.
(8) An addition, change in or termination of e-mail address, instant message address or any other designations used in Internet communications or postings.
(9) An addition, change in or termination of information related to occupational and professional licensing, including type of license held and license number.
42 Pa.C.S.A. § 9799.15

Finally, in addition to these basic registration requirements, the personal information of all individuals registered under SORNA is made available online to the general public regardless to their geographic location. This website makes available the individual's: name; year of birth; address for their residence; address where they are enrolled as a student; employer's address; photograph; physical description; license plate number(s) and a description of said vehicle(s); a list of the sexually violent offense(s) convicted of; whether the individual is in compliance with SORNA registration; a statement as to whether or not the victim was a minor; the beginning date and date of

most recent registration; whether or not the individual is designated an SVP; and their incarceration status. 42 Pa.C.S.A. § 9799.28 The only information prohibited from publication is the identity of the victim, individual's social security number, information related to arrests not resulting in a conviction, and travel and immigration documents. *Id.*

Once an individual has been designated an SVP by the court, said designation attaches to them for life. There is no mechanism under the current act in which the individual can seek to have his SVP status revisited. This is irrespective of whether the offender has sought treatment and rehabilitated. Furthermore, because SVP status is a lifetime designation, the individual's registration information is made available through the website and notice will be published to all neighbors and the above named institutions for the remainder of the offender's life.

"Article 1, Section 1 of the Pennsylvania Constitution provides, in relevant part, '[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property and reputation, and of pursuing their own happiness.'" *Pennsylvania Bar Ass'n v. Commonwealth*, 607 A.2d 850, 855 (Pa.Cmwlth. 1992). The Pennsylvania Supreme Court has recognized the "special value placed upon an individual's reputation by the Pennsylvania Constitution and stated that the Pennsylvania Constitution establishes reputation as a fundamental right in the same class with life, liberty and property, which cannot be abridged by government without compliance with state constitutional standards of due process and equal protection." *Id.*, at 856. As such, "reputation is a fundamental right under the Pennsylvania Constitution, and it is entitled to the protection of procedural due process." *Id.*

Appellant alleges that the SVP designation and corresponding heightened reporting and publication requirements under SORNA violates his constitutional right to the protection of his reputation and lacks the necessary safeguards of procedural and substantive due process. As the protection of reputation is a right protected by procedural due process, the "courts must balance the interests of the individual in procedural protections against the interests of the government in proceeding without protections to determine what due process requires." *Id.* (citing *Pennsylvania Coal Mining Association v. Insurance Department*, 370 A.2d 685, 698 (Pa. 1977)).

Unlike prior versions of Megan's Law, SORNA does require that prior to a designation as an SVP, Appellant is entitled to a hearing wherein he can cross examine witnesses, call his own witnesses, and testify on his own behalf. The Appellee bears the burden of demonstrating by clear and convincing evidence that Appellant meets the definition of a sexually violent predator, namely that he suffers from a mental abnormality or personality disorder which renders him more likely to engage in predatory sexually violent offenses. However, once designated an SVP, there is no mechanism to determine whether the individual continues to be at a heightened risk of engaging in predatory sexually violent offenses. This leaves the individual without opportunity to challenge their SVP heightened registration and notification requirements by establishing to a fact finder that the offender has reformed and no longer poses a threat to the public. Rather, the designation attaches to the individual for life.

One of the essential qualities of reputation is that it can be improved. Likewise, an individual whom at age twenty may have been at a heightened risk of engaging in predatory sexual behavior is unlikely to be at such a risk of behavior at age eighty. This is

especially true where the individual is mandated to participate in on going treatment aimed at rehabilitation. In the matter at hand, Appellant was convicted of one sexually violent offense at age twenty-one. Due to the SVP designation, he will be required to participate in at least monthly counseling for the remainder of his life. Even if Appellant were at a heightened risk of re-offending at the present time, it is almost certain that his risk of re-offending will decrease over time. However, under SORNA, he will have no opportunity to revisit his risk of re-offending and SVP status.

An SVP designation without a subsequent opportunity to demonstrate rehabilitation and a decreased risk of recidivism constitutes an irrebuttable presumption that sexually violent predators are incapable of rehabilitation. "Irrebuttable presumptions are violative of due process where the presumption is deemed not universally true and a reasonable alternative means of ascertaining that presumed fact are available." *Taylor v. Pennsylvania State Police*, 132 A.3d 590, 605 (Pa.Cmwlth. 2016) (citing *In re J.B.*, 107 A.3d 1, 15 (Pa. 2014).

It cannot be said that all sexually violent predators are incapable of rehabilitation. Furthermore, not all individuals designated as an SVP are going to re-offend. However, under SORNA, they are all lumped into the same category wherein they are designated an SVP for the remainder of their life. On the contrary, a reasonable alternative means to ascertain whether an individual represents a recidivism risk is available in the form of follow up SVP hearings, or a similar hearing, to determine the offender's current likelihood of re-offending and risk to the public. The follow up hearing, which could either be scheduled at certain intervals (i.e. every ten years) or upon the request of the

offender, would be no less burdensome than a lifetime of SORNA registration and public notification.

Therefore, as the right to protection of reputation is a fundamental right protected by due process, it is not universally true that all individuals with an SVP designation will pose a lifelong heightened risk of recidivism and danger to the public and reasonable means exist to re-evaluate an offender's SVP designation, the current SORNA regulations as applied to sexually violent predators violates Appellant's procedural due process.

However, the issues with the SVP designation under SORNA do not end with a violation of procedural due process. It also violates Appellant's right to substantive due process. Again, the right to protection of reputation is an inherent and indefeasible right. "The constitutional analysis applied to the laws that impede upon [such an] inalienable [right] is a means-end review, legally referred to as a substantive due process analysis. Under that analysis, courts must weigh the rights infringed upon by the law against the interest sought to be achieved by it, and also scrutinize the relationship between the law (the means) and that interest (the end)." *Nixon v. Commonwealth,* 839 A.2d 277, 286-87 (Pa. 2003) (citations omitted). "Where laws infringe upon certain rights considered fundamental, such as the right to privacy, the right to marry, and the right to procreate, courts apply a strict scrutiny test." *Id.*, at 287 (citations omitted). Under the strict scrutiny test, "a law may only be deemed constitutional if it is narrowly tailored to a compelling state interest." *Id.*

Again, the right to the protection of one's reputation is a fundamental right afforded by Article I, Section 1 of the Pennsylvania Constitution. Thus, an infringement of this

right triggers a strict scrutiny analysis and Appellant's "fundamental right to reputation may only be abridged if SORNA is narrowly tailored to advance a compelling state interest." *Taylor*, 132 A.3d at 609 (citing *Pennsylvania Bar Ass'n,* 607 A.2d at 857). The publication and dissemination of an individual's name, address, place of employment, photograph, and other identifying information along with the designation that the individual is a "sexually violent predator" to all neighbors, local schools, daycare providers, and anyone else whom requests said information clearly constitutes a harm to one's reputation. The individual will most certainly be shunned wherever their SVP designation is known. This will likely negatively impact the individual's ability to secure employment and obtain housing. In society, there are few, if any, designations more condemning than "sexually violent predator." For individuals whom have been designated an SVP, such as Appellant, this information is not only available to the world via the internet; but, through the notification provisions of § 9799.27, it is specifically forced on neighbors whom would otherwise not even bother to inquire.

The General Assembly set forth that the purpose of SORNA is to strengthen the Commonwealth's laws regarding registration of sexual offenders. 42 Pa.C.S.A. § 9799.11 The legislature declared that "[s]exual offenders pose a high risk of committing additional sexual offenses and protection of the public from this type of offender is a paramount governmental interest." *Id.* Appellant acknowledges that the government has a compelling state interest in protecting its citizens from sexually violent offenses. However, SORNA, and more specifically the provisions and notification requirements regarding individuals with an SVP designation, are not narrowly tailored to achieve this goal.

"The second step in strict scrutiny ... places the burden of proof on the government to show that the law is narrowly tailored to the compelling state interest." *In re R.M.*, 2015 WL 7587203, 20 (Pa.Super. 2015) (citing *Citizens United v. Fed. Electrician Comm'n*, 558 U.S. 310, 340 (2010). "A statute is not narrowly tailored when a 'less restrictive alternative [to accomplish the legislative goal] is readily available.' Neither is a statute narrowly tailored if it is over-inclusive, covering situations which are not pertinent to the legislative goal." *Id.* (citations omitted)

In *Taylor v. Pennsylvania State Police*, the Pennsylvania Commonwealth Court found that "[a]n extensive review of the law has shown that courts of this Commonwealth have not specifically addressed whether SORNA's registration and notification provisions are narrowly tailored to meet the government's compelling interest in protecting the public. Nor have courts assessed whether the public distribution of a sexual offender's personal information on a government website violates substantive due process. Further, the United States Supreme Court has not addressed this issue." *Taylor*, 132 A.3d at 609.

SORNA, and more specifically the heightened requirements and notification provisions for those designated an SVP, are not narrowly tailored to achieve the goal of public safety because SORNA and the enhanced SVP registration laws have never been shown to reduce recidivism and do not specifically target individuals who are likely to re-offend. Rather it is a blanket application of law to all individuals whom at one time, perhaps decades ago, were either convicted of an enumerated offense or following a hearing were determined to suffer from a mental abnormality or personality disorder that made them more likely to engage in a predatory sexually violent offense. To avoid

excessiveness the Legislature could easily "provide some means for a sexually violent predator to invoke judicial review in an effort to demonstrate that he no longer poses a substantial risk to the community." *Commonwealth v. Williams,* 832 A.2d 962, 983 (Pa. 2003) Rather, the statute in its current form provides no mechanism to demonstrate rehabilitation and a reduced risk to the community, rending an SVP designation a lifelong stigma.

A 2013 study by Dr. Grant Duwe, a researcher at the Minnesota Department of Corrections, found that sexually violent predators are far less likely to re-offend than traditionally believed. His study involved data from the Minnesota Department of Corrections and data from other recidivism studies to arrive at an estimated rate of sexually violent predators reoffending. The study found that after four years from their release from incarceration 10% of sexually violent predators will reoffend. After ten years a total of 20% will have reoffended. After fifty years, which is a projected life time given the age of the sexually violent predator at the time of their release, a total of 30% of sexually violent predators will reoffend. This number may seem high, but on the converse 70% of sexually violent predators will not re-offend throughout their lifetime. Furthermore, these numbers are based on a subsequent arrest, not on actual convictions. When considering data for actual convictions, 82.4% of sexually violent predators will not reoffend. Brandt, Jon, MSW, LICSW. "SVP Risk: Challenging 'Likely to Reoffend'." *Sexual Abuse: A Journal of Research and Treatment.* 11 October 2013. Web. 16 February 2017. (http://sajrt.blogspot.com/2013/10/svp-risk-challenging-likely-to-

reoffend.html)[4] While it is acknowledged that the state has a compelling interest in closely monitoring the 30% of sexually violent predators whom will be re-arrested, without a mechanism to re-evaluate their posed threat to society, the current statute does so at the expense of the fundamental rights of the over 70% of individuals that will not re-offend. As the means simply do not justify the ends, the current statute does not pass constitutional muster.

It is the duty of the court to "uphold the constitutional protections for all [its] citizens, including those who have been convicted of sexual offenses." *Taylor*, 132 A.3d at 610. As Appellant's right to the protection of his reputation has been infringed upon and the statute impeding on said right is not narrowly tailored to a compelling state interest, the "sexually violent predator" designation under SORNA constitutes a breach of both procedural and substantive due process in violation of Appellant's fundamental rights afforded to him under the Pennsylvania Constitution.

Accordingly, the "Sexually Violent Predator" designation under SORNA should be declared unconstitutional and the trial court's designation of Appellant as a sexually violent predator should be reversed.

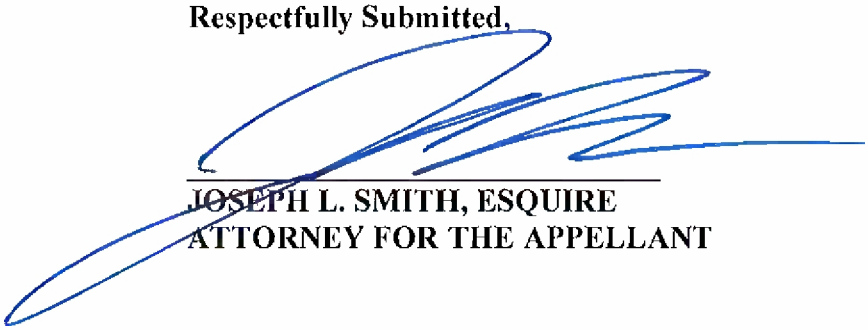
[4] Citing Duwe, Grant. (2013) "To what extent does civil commitment reduce sexual recidivism? Estimating the selective incapacitation effects in Minnesota." *Journal of Criminal Justice, 42(2)*, 193-202. Retrieved from http://www.sciencedirect.com/science/article/pii/S0047235213000482

CONCLUSION

For all of the foregoing reasons, Appellant urges this Honorable Court to reverse the trial court's Judgment of Sentence in regard to the Sexually Violent Predator determination and to affirm all other provisions of Appellant's sentence not inconsistent therein.

Dated: February 17, 2017

Respectfully Submitted,



JOSEPH L. SMITH, ESQUIRE
ATTORNEY FOR THE APPELLANT

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYVANIA	:	
Appellee	:	
	:	
vs.	:	**NO.: 1225 WDA 2016**
	:	
JOSEPH DEAN BUTLER	:	
Appellant	:	

PROOF OF SERVICE

I HEREBY certify that I have this date, and pursuant to Pennsylvania Appellate Rule 2185, in the manner set forth below, served two copies of the foregoing document upon the Appellee:

Delivered by First Class United States Mail:

Terri M. Schultz, Esquire
Assistant District Attorney
P.O. Box 1208
Butler, PA 16003-1208
(delivered VIA interoffice mail ONLY)

Joseph Dean Butler, Appellant
Inmate No.: MR2616
SCI Pittsburgh
3001 New Beaver Ave.
Pittsburgh, PA 15233

DATED: February 17, 2017

Joseph L. Smith, Esquire
Assistant Public Defender
Attorney for the Appellant
Pa. I.D. # 308699
Public Defender's Office
P.O. Box 1208, Butler, PA 16003
Phone: (724) 284-5335
Facsimile: (724) 284-0013
E-mail: jsmith@co.butler.pa.us

IN THE COURT OF COMMON PLEAS
BUTLER COUNTY, PENNSYLVANIA

COMMONWEALTH	:	CA NO.: 1214 of 2012
	:	1538 of 2014
	:	
VS.	:	
	:	
JOSEPH D. BUTLER	:	

Appearances:

For the Commonwealth: Patricia J. McLean, Esq., ADA
For the Defendant: Joseph L. Smith, Esq.

ORDER OF COURT

AND NOW, this 25th day of July, 2016, the Defendant appeared represented by Attorney Smith.

On or about July 27, 2015, the Sexual Offenders Assessment Board was ordered to perform an evaluation of the Defendant following his plea of guilty to the offense which triggers a Sexually Violent Predator determination.

On or about October 28, 2015 the Commonwealth filed a motion for a hearing after receiving notification from the Board that, in the opinion of the Board, the Defendant met the criteria to be classified as a Sexually Violent Predator.

A hearing was scheduled for December 2, 2015, and was rescheduled to various dates subsequently upon motion of the Defendant, as the Defendant requested their own expert report to be furnished.

On or about May 25, 2016, the Commonwealth presented the testimony of Julia Lindemuth, a member of the Pennsylvania Sexual Offenders Assessment Board. Dr. Wettstein was unavailable on that date and proceedings were rescheduled for July 20 2016. Testimony was concluded on that date. The Court took the matter under advisement following the conclusion of the hearing to review Dr. Wettstein's written report.

Following the hearing, the Court determines that the Commonwealth has proved by clear and convincing evidence that the Defendant is a Sexually Violent Predator. Therefore, it is ORDERED that the Defendant shall be designated as such.

A copy of this Order shall be immediately submitted to the Defendant, his attorney, the Pennsylvania Board of Probation and Parole, the Pennsylvania Department of Corrections and the Pennsylvania State Police and the Sexual Offenders Assessment Board.

Sentencing is continued and is rescheduled for August 4, 2016, at 9:00 a.m. in Courtroom 2.

At that time a Gagnon II Hearing shall be scheduled at the case docketed at 1214 of 2012.

BY THE COURT,

WILLIAM R. SHAFFER, JUDGE

klf

LISA WEILAND LOTZ
CLERK OF COURTS
ENTERED AND FILED
2016 JUL 26 AM 9:58
BUTLER COUNTY
COURT OF COMMON PLEAS

SCHEDULED
7-26-16
SS

(10)

7-26-16
mcc
cc
da
Dft # 1214-12@BCP
atty Smith-PD # 1538-14
CP

PBPP
Dept of Corr - cert
PA State Police
SOAB

45.
PSI
ADD-ON

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	: CRIMINAL DIVISION
	: CR No. 1538/2014
vs.	: OTN # T 493151-1
	:
Joseph Dean Butler	:

SENTENCE

AND NOW, this 4th day of August, 2016, the Sentence of the Court is:
Defendant is directed to pay the costs of prosecution:

(X) Statutory Sexual Assault (F-2)_____ Pay fine of $_____
Count 1 Offense

Defendant is to undergo imprisonment for not less than 12 months nor more than 30 months.

(X) Corruption of Minors (F-3)_____ Pay fine of $_____
Count 4 Offense
Guilty but,
NO FURTHER PENALTY!

(X) Defendant stands committed to the custody of:
( ) the Butler County Prison Reentry Eligible: No ___ Yes ___
(X) the Department of Corrections for confinement in such state penal or correctional institution or facility as the Department of Corrections shall determine. NOT RRRI eligible

(X) Defendant is to receive credit for time served, being _____ days from Jan 1, 2016

( ) Defendant is eligible for work release and/or community service if space is available and Defendant qualifies under the prison guidelines.
( ) Defendant is directed to participate in Butler County Prison Drug and Alcohol Program.

(X) Defendant is to be placed on probation for a period of 90 months with the STATE ~~County~~ Probation Board and must attend any counseling as directed by probation officer. The period of probation shall be consecutive to the Defendant's release from incarceration. at ex penalty parole.

DEFENDANT'S EXHIBIT 2

COMMONWEALTH v. Butler CR No. 1538/2014

( ) Defendant is directed to attend the Drug and Alcohol School or Phase II to be held at the Butler Alcohol Countermeasures Program, 222 W. Cunningham Street, Butler, PA. The registration fee shall be paid at the time of enrollment.

( ) Defendant is directed to pay restitution - see attached Restitution Order.

(X) Special condition(s) of sentence (if any):
( ) Costs/Fines/Restitution are due immediately/on or before _____.

( ) Costs/Fines/Restitution -$_____ is due at sentencing and $_____ is due each month.

(X) Costs/~~Fines/Restitution~~ are payable in monthly installments until paid in full.

( ) Probation supervision fee does/does not apply. In addition, the defendant is ordered to enroll and pay for electronic reporting services if directed to by his/her probation officer.

( ) Defendant shall perform _____ hours of community service under the direction of the Adult Probation Office, within _____ of sentencing.

(X) This sentence is to run concurrent with/~~consecutive to~~ 1214-12.

( ) This sentence is consecutive to any other sentence currently being served.

( ) Pursuant to 18 Pa. C.S.A.6111.1f, the Clerk of Courts shall notify the Pennsylvania State Police of this conviction as it relates to 18 U.S.C.A.§922g(3).

8-4-16: BOP (-)
8-5-16

BY THE COURT,

WILLIAM R. SHAFFER, Judge

Copies/Date _____
MCC
DA or AG
Victim Advocate
BOP
Co. Prob.
Def. or Atty. Smith
Judge
Affiant Imm - Co. Jail
Collections
Enforcement
Other: PA Board of Pardons
Optional: ( ) Dept. of Corrections (Cert)
( ) PBPP
( ) Deputy I
Total Copies _____

PSP - Megan Hamsher

(13).

LISA WEILAND LOTZ
CLERK OF COURTS/CLERK OF COURTS
ENTERED AND FILED

2016 AUG -4 PM 12:10

BUTLER COUNTY, PA
COURT OF COMMON PLEAS

Defendant's Rights At Sentencing

1. You may make a statement on your own behalf. Both counsel may present argument and information relative to your sentencing. [Pa.R.Crim.P. 704C(1)]

2. You have the right to an attorney to help prepare and file any post-sentence motions or appeals. You have the right to proceed with presently assigned counsel. If you cannot afford an attorney, on your request, the Court will appoint an attorney free of charge. You also have the right if indigent to proceed in forma pauperis. [Pa.R.Crim.P. 704(C)(3)(a)(b)]

3. You have the right to decide whether to file a post-sentence motion and appeal after decision on that motion, or to appeal without first filing post-sentence motions. [Pa.R.Crim.P. 704(C)(3)(a)]

4. Within 10 days from today, you have the right to file written post-sentence motions. This may include:
   (a) a motion to challenge the validity of your plea of guilty or nolo contendere, or the denial of a motion to withdraw such a plea;
   (b) a motion for judgment of acquittal;
   (c) a motion in arrest of judgment;
   (d) a motion for a new trial; or
   (e) a motion to modify your sentence.
   [Pa.R.Crim.P. 704(C)(3)(a), 720(A)(1),(B)(1)(a)]

5. Any post-sentence motions filed with this court will be decided within 120 days. If the judge fails to do so, the motions are deemed denied. [Pa.R.Crim.P. 704(C)(3)(c), 720(B)(3)(a)]

6. The issues raised before or during trial are deemed preserved for appeal whether or not you file post-sentence motions. [Pa.R.Crim.P. 704(C)(3)(d)]

7. You have the right to appeal to the Pennsylvania Superior Court within 30 days from today or within 30 days of decision by this Court on any post-sentence motions. [Pa.R.Crim.P. 720(A)(2),(3)]

8. You may have a qualified right to bail under Pa.R.Crim.P. 4009(B). [Pa.R.Crim.P. 704(C)(3)(e)]

I hereby acknowledge that I was present when the judge advised me of my rights and I acknowledge receipt of a written copy of the same.

Date: 8 4 16

Signature

LINDA WELLAND LOTZ
CLERK OF COURTS
ENTERED AND FILED
2016 AUG -4 PM 12:04
BUTLER COUNTY
COURT OF COMMON PLEAS

Formrights

Defendant's Name (please print)

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CRIMINAL LAW DIVISION
	:	
VS.	:	C.A. NO.: 1538 of 2014
	:	
JOSEPH DEAN BUTLER	:	

POST-SENTENCE MOTION FOR SENTENCE MODIFICATION

AND NOW, comes the Defendant, Joseph Butler, by and through his attorney, Joseph L. Smith, Esq., Assistant Public Defender and files the following:

1. On August 4, 2016, the Defendant appeared before the Court and was sentenced at the above-captioned case.
2. On July 25, 2016, following lengthy litigation and consideration of expert testimony by the Sexual Offenders Assessment Board and the appointed Defense Psychiatrist, the Court determined the Defendant to be designated as a Sexually Violent Predator.
3. The Defense Expert, Robert M. Wettstein, M.D., rendered expert testimony and a detailed report outlining that a "diagnosis of the defendant having a paraphilic disorder is unsupported by the available information" and that there was no indication that the defendant "behaved in a predatory manner . . . ."
4. Although the age differential makes the conduct illegal by statute, the defendant's discount of that or choice was related to his poor judgment or impulsivity from ADHD which is not a sexual disorder.
5. The Defendant now timely files this Post-Sentence Motion for Sentence modification.
6. The Defendant seeks to have the Court reconsider his Sexually Violent Predator designation and determine that such designation is unsupported by the evidence presented.

7. Pursuant to 42 Pa.C.S.A. § 9799.24(e)(3) the Commonwealth must prove by "clear and convincing evidence that the individual is a sexually violent predator."
8. The Defendant avers that the Commonwealth failed to meet their burden of providing by clear and clear and convincing evidence the factors underpinning a sexually violent predator designation.
9. The evidence presented by the Commonwealth was insufficient to permit the Court to determine the defendant suffered from a serious psychological defect permitting such designation.
10. The Defendant avers that the Sexually Violent Predator designation has the direct effect of social punishment and shamming above and beyond merely promoting public safety through a civil, regulatory scheme, and violates his fundamental right to protect his reputation as protected by the Pennsylvania Constitution Article I, Section 1.
11. The Defendant additionally avers that the Sexually Violent Predator designation further violates his right to protect his reputation as the term itself is inflammatory and the terms "violent" and "predator" are more of a misnomer.
12. The Defendant asks the Court to reconsider his SORNA designation as a Sexually Violent Predator and remove such designation.

WHEREFORE, the Defendant requests that this Honorable Court grant him relief in the form of sentence modification of his above-captioned cases.

RESPECTFULLY SUBMITTED,

JOSEPH L. SMITH, ESQUIRE
ASSISTANT PUBLIC DEFENDER

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CRIMINAL LAW DIVISION
	:	
VS.	:	C.A. NO.: 1538 of 2014
	:	
JOSEPH DEAN BUTLER	:	

ORDER OF COURT

AND NOW, this _____ day of _____, 2016, upon consideration of the within filed Post-Sentence Motion for Sentence Modification, it is hereby **ORDERED, ADJUDGED, and DECREED** that a hearing on the matter is scheduled for the _____ day of _____, 2016, at _____, ___.m. in Courtroom No.: 2, before the Honorable William R. Shaffer.

BY THE COURT,

_____
WILLIAM R. SHAFFER
JUDGE

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CRIMINAL LAW DIVISION
	:	
VS.	:	C.A. NO.: 1538 of 2014
	:	
JOSEPH DEAN BUTLER	:	

CERTIFICATE OF SERVICE

I HEREBY certify I am this day serving upon the persons and in the manner indicated below. The manner of service satisfies the requirements of Pa.R.Crim.575.

SENT BY INTER-OFFICE MAIL:

The Honorable William R. Shaffer
Judge's Chambers
Butler County Government Center
P.O. Box 1208
Butler, PA 16003-1208

Terri Schultz, Assistant District Attorney
District Attorney's Office
Butler County Government Center
P.O. Box 1208
Butler, PA 16003-1208

DATED: 8-8-2016

Joseph L. Smith, Esquire
Assistant Public Defender
I.D. No.: 308699
Butler County Public Defender's Office
P.O. Box 1208
Butler, PA 16003-1208

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY,
PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA	:	CRIMINAL LAW DIVISION
	:	
VS.	:	C.A. NO.: 1538 of 2014
	:	
JOSEPH DEAN BUTLER	:	

ORDER OF COURT

AND NOW, this 9 day of August, 2016, upon consideration of the within filed Post-Sentence Motion for Sentence Modification, it is hereby ORDERED, ADJUDGED, and DECREED that ~~a hearing on the matter is scheduled for the ____ day of _____, 2016, at _____, ___.m. in Courtroom No.: 2, before the Honorable William R. Shaffer.~~ THE MOTION IS DENIED

BY THE COURT,

WILLIAM R. SHAFFER
JUDGE

LISA WEILAND LOTZ
CLERK OF COURTS
ENTERED AND FILED
2016 AUG 10 AM 10:20
BUTLER COUNTY
COURT OF COMMON PLEAS

8-10-16
pacc
ica
(5)
da
atty Smith - PD
appeal clerk

DEFENDANT'S EXHIBIT 4

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA CRIMINAL DIVISION

vs. C.A. No. 1538 of 2014

JOSEPH DEAN BUTLER

ORDER OF COURT

AND NOW, this 16th day of August, 2016, the Defendant is hereby directed to file of record and to concurrently serve on the judge pursuant to Pa.R.A.P. 1925(b)(1) a concise statement of errors complained of on appeal no later than twenty-one (21) days after the entry on the docket of this Order. Any issue not properly included in the statement timely filed and served pursuant to Pa.R.A.P. 1925(b) will be deemed waived.

The Defendant shall be permitted to appeal *in forma pauperis*.

LISA WEILAND LOTZ
CLERK OF COURTS
ENTERED AND FILED
2016 AUG 16 PM 2:45
BUTLER COUNTY
COURT OF COMMON PLEAS

By the Court,

William R. Shaffer, Judge

8-17-16:
MC
EA
CP
Def w/ BCP
Name- Appeal Clerk (5) LW.