APPENDIX TABLE OF CONTENTS

PROCEEDINGS IN FEDERAL COURT

PROCEEDINGS IN PENNSYLVANIA COURTS

APPENDIX TABLE OF CONTENTS (Cont.)

PROCEEDINGS IN NEW YORK COURTS

APPENDIX TABLE OF CONTENTS (Cont.)

OTHER DOCUMENTS

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING CERTIFICATE OF APPEALABILITY (MAY 16, 2019)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

WILLIAM S. RITTER, JR.,

Appellant,

v.

JOHN R. TUTTLE; ET AL.,

C.A. No. 19-1171

(M.D. Pa. Civ. No. 3-15-cv-01235)

Before: AMBRO, KRAUSE and PORTER, Circuit Judges.

Ritter's application for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c). Jurists of reason would agree without debate that the District Court correctly concluded that Ritter was not entitled to a new trial under the Full Faith and Credit Clause. *See U.S. ex rel. Cannon v. Maroney*, 373 F.2d 908, 910 (3d Cir. 1967); *see also Baker ex rel. Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 238 (1998) ("Michigan lacks authority to control courts elsewhere by precluding them, in actions brought by strangers to the Michigan litigation, from determining for themselves

what witnesses are competent to testify and what evidence is relevant and admissible in their search for the truth."); *People v. Patterson*, 587 N.E.2d 255, 256-57 (N.Y. 1991). Jurists of reason would also agree without debate that the trial court did not violate Ritter's due-process rights by admitting evidence of his prior acts under Pa. R. Evid. 404(b). *See, e.g., United States v. Knope*, 655 F.3d 647, 657 (7th Cir. 2011).

By the Court,

/s/ Cheryl Ann Krause
Circuit Judge

Dated: June 5, 2019
MB/cc: William S. Ritter, Jr.

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (DECEMBER 14, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM S. RITTER, JR.,

Petitioner,

v.

JOHN TUTTLE, ET AL.,

Respondents.

No. 3:15cv1235

Before: James M. MUNLEY, United States District Judge, CARLSON, Magistrate Judge.

Before the court for disposition is a report and recommendation (hereinafter "R&R") filed by Magistrate Judge Martin C. Carlson. The R&R suggests the denial of William S. Ritter, Jr.'s petition for a writ of habeas corpus, and the denial of a certificate of appealability. Ritter (hereinafter "petitioner") has filed objections to the R&R, and the matter is ripe for disposition.

Background

The Court of Common Pleas of Monroe County convicted petitioner in 2011 of various offenses relating

to an attempted sexual exploitation over the internet of a person he believed to be a fifteen-year-old girl.

The Pennsylvania Superior Court summarized the factual background of this case as follows:

> On February 7, 2009, Detective Ryan Venneman of the Barrett Township Police Department was conducting undercover operations investigating the crime of internet sexual exploitation of children in a Yahoo Instant Messenger chat room. Detective Venneman was acting as a young female named "Emily" when he was contacted online by Ritter, posing as "delmarm4fun," a 44—year—old male from Albany, New York. At the onset of the online chat, "Emily" specifically identified herself to Ritter as a 15—year—old female from the Poconos.
>
> The online conversation was sexual in nature. During the conversation, Ritter provided "Emily" with a link to his webcam, asking her to share photographs with him. Ritter was particularly interested in whether "Emily's" ex-boyfriend took "any traditional ex pics" of her, by which he meant nude or provocative photographs. In response to Ritter's repeated requests to send-additional photos, "Emily" transmitted a photograph to which Ritter replied, "that'l [sic] get a reaction." Ritter then stated that he was "waiting for ["Emily"] to put up another pic so [he] can continue to "react." The webcam was operational at the time and displayed a man's face and upper body area. When queried as to what he meant by "react," Ritter responded that he reacted

"below the screen," "where [his] hands are," indicating his hands are "down lower." Ritter then communicated to "Emily" that he was having a "big reaction here" and asked "Emily" if she would like to see more. Ritter then adjusted the webcam to focus on his genital area where he exposed himself to "Emily" and proceeded to masturbate.

Ritter turned off the webcam for a period of time. He, however, continued to engage in sexually explicit communications with "Emily," including asking her if she tasted her ex-boyfriend's penis, her favorite sexual position, if her ex-boyfriend ejaculated inside her, if he used a condom, and if she performed oral sex on him. "Emily" cautioned Ritter that she was only 15 years old and she did not want them to get in trouble because of their respective ages. Unfazed by "Emily's" age, Ritter asked "Emily," "you want to see it finish?" Ritter then turned on the webcam and ejaculated in front of the camera for "Emily." Detective Venneman then notified Ritter of his undercover status and the undercover operation and directed Ritter to call the police station.

Ritter was subsequently charged with unlawful contact with a minor (sexual offenses), 18 Pa. Cons. Stat. Ann. § 6318(a)(1), unlawful contact with a minor (open lewdness), 18 Pa. Cons. Stat. Ann § 6318(a)(2), unlawful contact with a minor (obscene and other sexual materials and performances), 18 Pa. Cons. Stat. Ann. § 6318(a)(4), corruption of

minors, 18 Pa. Cons. Stat. Ann. § 6301(a)(1), criminal use of a communications facility, 18 Pa. Cons. Stat. Ann. § 7512(a), and indecent exposure, 18 Pa. Cons. Stat. Ann. § 3127.

Prior to trial, the Commonwealth uncovered information, via a Google search, of Ritter's prior arrests from online sex sting operations in New York. The public internet search yielded news articles reporting that, in April 2011, Ritter communicated online in a chat room with an undercover police officer posing as a 14—year—old female and arranged to meet the "girl" at a local business in Albany. Ritter arrived at the designated location and was questioned by the authorities; however, he was released without any charges being filed. Two months later, Ritter was again caught in the same kind of sex sting after he tried to lure what he thought was a 16—year—old female to a fast food restaurant. Ritter was subsequently charged, but the Albany District Attorney placed the case on hold.

Upon discovery of the publicly available articles regarding Ritter's prior engagement in internet sex stings, the Commonwealth requested and later received copies of those records from the Albany County District Attorney's Office. The Commonwealth provided Ritter with copies of the records in compliance with Pa. R. Crim. P. 573. Unbeknownst to the Commonwealth, the New York state records were sealed at the time they were forwarded to the Commonwealth,

prompting the Commonwealth to return the records to the Albany County District Attorney's Office. A petition to unseal the records was subsequently filed and granted by the trial court in Albany County.

Thereafter, the Commonwealth filed a notice of prior bad acts as well as a motion *in limine* seeking to introduce the New York arrest records at trial. In response thereto, Ritter filed a motion for dismissal/change of venue as well as a motion *in limine* seeking to preclude this evidence. The trial court held a hearing on the motions. At the hearing, the Commonwealth's exhibits, consisting in part of the New York arrest records, were admitted under seal. After the hearing, the trial court entered an order and accompanying opinion granting the Commonwealth's motion *in-limine,* permitting evidence of-Ritter's prior bad acts in New York to be admitted at trial.

Following a jury trial, Ritter was found guilty of all but one count. Prior to sentencing, the Supreme Court of the State of New York, Appellate Division reversed and vacated the order of the Albany County court unsealing Ritter's records. Ritter then filed a motion for a new trial pursuant to Rule 704(B) or in the alternative to postpone sentencing. The trial court sentenced Ritter on October 26, 2011. At the time of sentencing Ritter made an oral motion for extraordinary relief. After extensive argument regarding the New York records, the trial court denied Ritter's request for a new trial and sentenced Ritter to an

> aggregate period of 18 to 66 months' imprisonment.

Commonwealth of Pennsylvania v. Ritter, No. 975 EDA 2012, 2013 WL 11250812 *1-2 (Pa. Super. Ct. Nov. 6, 2013).

He appealed the case to the Pennsylvania Superior Court, which affirmed his conviction on November 6, 2013. *Id.* Petitioner appealed to the Pennsylvania Supreme Court, which denied the appeal on May 21, 2014. *Commonwealth of Pennsylvania v. Ritter*, 625 Pa. 658 (May 21, 2014). The instant petition followed on April 20, 2015.

Petitioner, however, filed this case prematurely, before exhausting his state court remedies. Specifically, he had not filed a motion under Pennsylvania's Post Conviction Relief Act. *See* 42 Pa. Cons. Stat. Ann. § 9501 *et seq.* We stayed his petition to allow him time to exhaust the state court procedures. He filed a motion for post conviction relief in state court. The Court of Common Pleas denied the petition on October 6, 2016, the Pennsylvania Superior Court denied it on September 12, 2017, and the Pennsylvania Supreme Court denied it on May 21, 2017. Thus, we lifted the stay on December 6, 2017. (Doc. 40).

The instant petition asserts that the trial court violated petitioner's federal constitutional rights by admitting at trial evidence of the two New York arrests. The parties briefed their respective positions and Magistrate Judge Carlson issued an R&R. Petitioner filed objections to the R&R, bringing the case to its present posture.

Standard of Review

In disposing of objections to a magistrate judge's report and recommendation, the district court must make a *de novo* determination of those portions of the report against which objections are made. 28 U.S.C. § 636(b)(1)(c); *see also Sullivan v. Cuyler*, 723 F.2d 1077, 1085 (3d Cir. 1983). The court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. *Henderson v. Carlson*, 812 F.2d 874, 877 (3d Cir. 1987). The district court judge may also receive further evidence or recommit the matter to the magistrate judge with instructions. *Id.*

As noted above, this case involves a petition for habeas corpus relief filed pursuant to 42 U.S.C. § 2254 (hereinafter "section 2254"). We may grant a petitioner's section 2254 habeas corpus petition "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254.

Discussion

As set forth in the various opinions issued by the state courts, before the prosecution at issue, the petitioner had been arrested twice on similar charges involving internet sex sting investigations.[1] These arrests, however, took place in New York state not Pennsylvania. The Pennsylvania authorities became aware of these arrests through an internet "Google"

---

[1] It unclear if both of these incidents led to formal arrests. For convenience, and as it doesn't affect our analysis, we will refer to both of these previous encounters with law enforcement as "arrests".

search of the petitioner. *Commonwealth v. Ritter*, No. 975 EDA 2012, 2013 WL 11250812 *1-2 (Pa. Super. Ct. Nov. 6, 2013). The Commonwealth of Pennsylvania requested from New York state the records of these arrests. New York provided the records, but Pennsylvania officials later learned that the records were sealed. *Id.* Accordingly, they returned the records and filed a motion to unseal them. The trial court in New York granted the motion to unseal the records. *Id.*

The Commonwealth then filed a motion *in limine* to admit this evidence as "evidence of prior bad acts" into the trial. *Id.* The court granted the motion, and the evidence was indeed admitted at trial. After the trial, but before sentencing, the New York Appellate Court reversed the trial court and found that the records should not be unsealed. *Id.* Evidently, the court ordered the records re-sealed.

Because the records were eventually ordered re-sealed, albeit after the trial, the petitioner argues that they should not have been used during his trial, or in any post-trial proceeding, and a new trial should be held. The Pennsylvania courts have consistently denied this claim. Now, petitioner makes this issue the basis for his habeas corpus petition.

As noted above, we may only grant relief to the petitioner under section 2254 if "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254.[2]

The petitioner argues that the state court's actions in admitting the New York state records violates the Full Faith and Credit Clause of the United States

---

[2] Apparently, petitioner is no longer in custody.

Constitution. Art. IV, Section 1, United States Constitution. This clause requires that each state recognize the laws, judicial decisions, and public records of other states. Specifically, the Constitution provides in pertinent part: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." *Id.*

Here, petitioner argues that Pennsylvania failed to provide full faith and credit to New York's determination that the records at issue should be sealed. In failing to provide full faith and credit, petitioner argues that they also denied him due process of the law guaranteed by the Fourteenth Amendment to the Constitution. We disagree.

Petitioner's argument fails for several reasons. First, at the time of the trial, the records were unsealed. Thus, the state trial court did provide full faith and credit to New York's judicial determinations at the time. It was only after the trial and verdict, when the Pennsylvania record already contained information on the New York arrests, that New York state court re-sealed the records.

Then the question becomes whether a new trial was necessary once the appellate court in New York ruled that the records should be sealed. We conclude that a new trial was unnecessary. The petitioner points to no relevant case law which supports his position, and our research has uncovered none.

Further, the information at issue, was publicly available even when the records were officially sealed by New York state. In fact, the prosecutors were only put on notice of the arrests due to a "Google" search. Even today an internet search reveals newspaper

articles which discuss the petitioner's New York state arrests.[3] The Wikipedia entry on the petitioner also discusses his New York state arrests. https://en.wikipedia.orci/wiki/Scott_Ritter#Arrests_and_conviction (last visited on December 13, 2018)

Additionally, it appears that admission of the evidence itself would not be a violation of federal law. In fact, the Federal Rules of Evidence allow for the admission of such evidence. *See* Fed. R. Evid. 404(b) (providing that evidence of a crime, wrong or other act "may be admissible for . . . proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or lack of accident.").

Moreover, even if the evidence should not have been admitted, petitioner has not been prejudiced. As the Superior Court noted other "overwhelming evidence of Ritter's guilt" was presented. *Commonwealth v. Ritter*, No. 975 EDA 2012, 2013 WL 11250812 *5 (Pa.

---

[3] Without any substantive analysis, the petitioner argues that such extrinsic evidence should not be considered by the court because at his trial it would have been inadmissible hearsay. Beyond noting the issue, the petitioner does not provide a full analysis of this issue. Thus, it is difficult for us to respond to his argument. Suffice it to say that even if the internet or newspaper articles are hearsay, many exceptions to the hearsay rule exist, and it is not unlikely that the evidence would have been admissible.

Further, besides the articles, the prosecution could have potentially called to the stand the undercover investigators used in the previous stings to explain the investigations and how the petitioner had attempted inappropriate conduct with minor females over the internet. Thus, we are convinced that even if the records had been sealed at the time of the trial, the prosecution could have found a way to present the evidence of the prior arrests, or the facts surrounding them.

Super. Ct. Nov. 6, 2013). The trial court reviewed some of this evidence in its opinion.

> The facts ascertained at trial established that Detective, purporting to be a 15-year-old minor female, engaged in conversations of a sexual nature with Defendant over the Internet. Defendant displayed his-penis-over-a-web camera and began to masturbate so that Detective could witness. Defendant was advised several times that Detective was a '15-year-old female' yet continued to engage in the act of masturbation over the Internet.

Commonwealth v. Ritter, No. 2238 Criminal 2009, Court of Common Pleas Monroe County Pa, attached to *Commonwealth v. Ritter*, 2013 WL 11250812 (Pa. Super Ct. Nov. 6, 2013) at 16.

During the online chat, the undercover officer obtained the telephone number of the person with whom he was chatting. The detective called the number and the person he talked to indicated his name was William Scott Ritter Jr. of Delmar, New York. *Id.* at 6-7. Further investigation indicated that the telephone number itself it was a wireless number assigned to William Ritter of Delmar, New York. *Id.* at 7. The detective acquired several photographs of the petitioner and compared them with the web camera video obtained during the masturbation. *Id.* The detective determined that masturbator in the video matched petitioner's pictures. *Id.*

Thus, certainly overwhelming evidence, without evidence of the other arrests, supports the conclusion that the petitioner was the person who explicitly masturbated online to a person who purported to be

a fifteen-year old female. These actions are the basis for all the crimes which the jury convicted the petitioner. Accordingly, even if the evidence was improperly admitted it was, as the Pennsylvania court stated, "harmless error" and the petitioner suffered no prejudice.[4]

For all of these reasons, we will overrule the petitioner's objections and deny his petition for a writ of habeas corpus. We also find that the petitioner has not made a substantial showing of the denial of a constitutional right. Therefore, we will decline to issue a certificate of appealability. An appropriate order follows.

BY THE COURT:

/s/ James M. Munley
Judge, United States District Court

Date: December 14, 2018

---

[4] Petitioner also argues that the Pennsylvania courts and this court should not have access to the documents at issue because they are currently under seal in New York state. We find no merit to this argument. The records are part of the record of petitioner's state court case. Without an examination of the evidence, it would be impossible to provide a full analysis of the petitioner's claim.

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (DECEMBER 14, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM S. RITTER, JR.,

Petitioner,

v.

JOHN TUTTLE, ET AL.,

Respondents.

No. 3:15cv1235

Before: James M. MUNLEY, United States District Judge, CARLSON, Magistrate Judge.

AND NOW, to wit, this 14th day of December 2018, it is hereby ORDERED as follows:

1) The petitioner's objections to the magistrate judge's report and recommendation (Doc. 44) are OVERRULED;

2) The magistrate judge's report and recommendation (Doc. 43) is ADOPTED in that William S. Ritter, Jr.'s habeas corpus petition is DENIED;

3) For the reasons set forth in the accompanying memorandum, we decline to issue a certificate of appealability; and

4) The Clerk of Court is directed to close this case.

BY THE COURT:

/s/ James M. Munley
Judge, United States District Court

REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA (JULY 5, 2018)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM RITTER,

Petitioner,

v.

JOHN TUTTLE, ET. AL.,

Respondents.

Civil No. 3:15-CV-1235

Before: Martin C. CARLSON,
United States Magistrate Judge, MUNLEY, Judge.

I. Introduction

This is a federal habeas corpus petition lodged by William Ritter, a man who was convicted in the Court of Common Pleas of Monroe County in 2011 of various offenses relating to his attempted sexual exploitation over the internet of a person Ritter believed to be a 15 year old girl. In fact, the person that Ritter attempted to exploit sexually was an undercover police officer posing as a young girl.

Ritter's attempt to exploit this child was not his first attempted predatory foray on the Internet targeting minor girls. Quite the contrary, Ritter had twice previously been caught up in undercover sting investigations in New York state when he endeavored to solicit children to engage in sexually explicit conduct, only to learn that he had been communicating with undercover police officers.

Ritter's sexual recidivism now forms the basis for this habeas corpus petition, with Ritter arguing that the admission of his prior, similar bad acts in New York state, while expressly authorized by a New York court at the time of his trial, later violated a New York state court sealing order, and somehow constituted conduct that was so egregious that it offended constitutional due process.

For the reasons set forth below, we disagree and recommend that Ritter's petition for writ of habeas corpus be denied.

II. Statement of Facts and of the Case

The factual background of this case was aptly summarized by the Pennsylvania Superior Court in its decision affirming Ritter's conviction on these attempted child sexual exploitation charges. As the Superior Court explained:

> On February 7, 2009, Detective Ryan Venneman of the Barrett Township Police Department was conducting undercover operations investigating the crime of internet sexual exploitation of children in a Yahoo Instant Messenger chat room Detective Venneman was acting as a young female named "Emily"

when he was contacted online by Ritter, posing as "delmarm4fun," a 44-year-old male from Albany, New York. At the onset of the online chat, "Emily" specifically identified herself to Ritter as a 15-year old female from the Poconos.

The online conversation was sexual in nature. During the conversation, Ritter provided "Emily" with a link to his webcam, asking her to share photographs with him. Ritter was particularly interested in whether "Emily's" ex-boyfriend took "any traditional ex pies" of her, by which he meant nude or provocative photographs. In response to Ritter's repeated requests to send additional photos, "Emily" transmitted a photograph to which Ritter replied, "that'l [sic] get a reaction." Ritter then stated that he was "waiting for ["Emily"] to put up another pie so [he] can continue to 'react.'" The webcam was operational at the time and displayed a man's face and upper body area. When queried as to what he meant by "react," Ritter responded that he reacted "below the screen, ""where [his] hands are," indicating his hands are "down lower." Ritter then communicated to "Emily" that he was having a "big reaction here" and asked "Emily" if she would like to see more. Ritter then adjusted the webcam to focus on his genital area where he exposed himself to "Emily" and proceeded to masturbate.

Ritter turned off the webcam for a period of time. He, however, continued to engage in sexually explicit communications with "Emily,"

including asking her if she tasted her ex-boyfriend's penis, her favorite sexual position, if her ex-boyfriend ejaculated inside her, if he used a condom, and if she performed oral sex on him. "Emily" cautioned Ritter that she was only 15 years old and she did not want them to get in trouble because of their respective ages. Unfazed by "Emily's" age, Ritter asked "Emily," "you want to see it finish?" Ritter then turned on the webcam and ejaculated in front of the camera for "Emily." Detective Venneman then notified Ritter of his undercover status and the undercover operation and directed Ritter to call the police station.

Ritter was subsequently charged with unlawful contact with a minor (sexual offenses), 18 Pa. Cons. Stat. Ann. § 6318(a)(1), unlawful contact with a minor (open lewdness), 18 Pa. Cons. Stat. Ann. § 6318(a)(2), unlawful contact with a minor (obscene and other sexual materials and performances), 18 Pa. Cons. Stat. Ann. § 6318(a)(4), corruption of minors, 18 Pa. Cons. Stat. Ann. § 6301(a)(1), criminal use of a communications facility, 18 Pa. Cons. Stat. Ann, § 7812(a), and indecent exposure, 18 Pa. Cons. Stat. Ann. § 3127.

Prior to trial, the Commonwealth uncovered information, via a Google search, of Ritter's prior arrests from online sex sting operations in New York. The public internet search yielded news articles reporting that, in April 2011, Ritter communicated online in a chat room with an undercover police officer

posing as a 14-year-old female and arranged to meet the "girl" at a local business in Albany. Ritter arrived at the designated location and was questioned by the authorities; however, he was released without any charges being filed. Two months later, Ritter was again caught in the same kind of sex sting after he tried to lure what he thought was a 16-year-old female to a fast food restaurant. Ritter was subsequently charged, but the Albany District Attorney placed the case on hold.

Upon discovery of the publicly available articles regarding Ritter's prior engagement in Internet sex stings, the Commonwealth requested and later received copies of those records from the Albany County District Attorney's Office. The Commonwealth provided Ritter with copies of the records in compliance with Pa. R. Crim. P. 573. Unbeknownst to the Commonwealth, the New York state records were sealed at the time they were forwarded to the Commonwealth, prompting the Commonwealth to return the records to the Albany County District Attorney's Office. A petition to unseal the records was subsequently filed and granted by the trial court in Albany County.

Thereafter, the Commonwealth filed a notice of prior bad acts as well as a motion *in limine* seeking to introduce the New York arrest records at trial. In response thereto, Ritter filed a motion for dismissal/change of venue as well as a motion *in limine* seeking

> to preclude this evidence. The trial court held a hearing on the motions. At the hearing, the Commonwealth's exhibits, consisting in part of the New York arrest records, were admitted under seal. After the hearing, the trial court entered an order and accompanying opinion granting the Commonwealth's motion *in limine,* permitting evidence of Ritter's prior bad acts in New York to be admitted at trial.
>
> Following a jury trial, Ritter was found guilty of all but one count. Prior to sentencing, the Supreme Court of the State of New York, Appellate Division reversed and vacated the order of the Albany County court unsealing Ritter's records. Ritter then filed a motion for a new trial pursuant to Rule 704(B) or in the alternative to postpone sentencing. The trial court sentenced Ritter on October 26, 2011. At the time of sentencing Ritter made an oral motion for extraordinary relief. After extensive argument regarding the New York records, the trial court denied Ritter's request for a new trial and sentenced Ritter to an aggregate period of 18 to 66 months' imprisonment.

(Doc. 41-7.)

Thus, Ritter's case comes before us cast against this tawdry backdrop of repeated episodes of attempted sexual exploitation of young girls. Notwithstanding Ritter's persistent attempts at sexual misconduct targeting minors, in this case Ritter insists that the state court's reliance at trial upon evidence that was lawfully obtained from New York authorities pursuant

to a state court order which was later vacated was an error of such profound and constitutional dimensions that it justifies extraordinary federal habeas corpus relief.

Ritter unsuccessfully litigated this claim when he pursued a direct appeal of his conviction and sentence, (Doc. 41-7 and 41-8), and then initially attempted to advance these claims in a federal habeas corpus petition which he filed on April 20, 2015. (Doc.1.) However, it was apparent from the face of Ritter's petition that he had not fulfilled his basic responsibility of exhausting his state remedies with respect to these post-conviction claims by pursuing post-conviction relief in state court. Therefore, the district court stayed further consideration of Ritter's petition until he completed the exhaustion of these post-conviction remedies. (Doc. 24.)

Protracted state post-conviction proceedings then ensued over the next two years. (Does. 26-37.) These post-conviction proceedings concluded in September of 2017 when the Pennsylvania Superior Court affirmed the denial of Ritter's state post-conviction petition, finding that Ritter was no longer in custody and therefore was no longer entitled to state PCRA relief. (Doc. 39, Ex. S.)[1] We then ordered renewed merits

[1] Ritter's amended habeas corpus petition devotes great time and attention to what Ritter deems to have been unfair treatment in the course of these state post-conviction proceedings. Ritter also argues at great length that the fact that he has completed service of his state sentence while these state proceedings were pending does not render this federal habeas corpus petition moot. (Doc. 39.) Because we have chosen to fully consider the merits of Ritter's underlying claims, and have found that those underlying claims are completely lacking in merit, we need not address these other collateral issues presented by Ritter.

briefing of Ritter's claims, (Doc. 40.) This petition is now fully briefed by the parties and is, therefore, ripe for resolution.

For the reasons set forth below, we find that Ritter's conviction was supported by overwhelming evidence, and that the admission of evidence of similar acts committed by Ritter in New York does not offend constitutional due process principles. On this score, we note that the Commonwealth acted in complete good faith in procuring and presenting this evidence, having obtained a New York state court order unsealing the records of Ritter's prior sexual predatory behavior at the time of his Pennsylvania trial. Therefore, regardless of what rulings New York state courts may have made on this question after-the-fact as a matter of New York state law, the immutable fact remains that when this evidence was presented in Ritter's Pennsylvania trial it had been lawfully obtained pursuant to court order from a New York state court. Moreover, there was nothing inherently improper about the use of this evidence at trial. Quite the contrary, the evidence seems plainly admissible, and Ritter may not convert matters of statutory interpretation relating to New York laws into errors of constitutional significance which warrant federal habeas corpus relief. Therefore, we recommend that Ritter's petition for writ of habeas corpus be denied.

III. Discussion

A. Substantive Standards for Habeas Petition

A state prisoner seeking to invoke the power of this Court to issue a writ of habeas corpus must satisfy

the standards prescribed by 28 U.S.C. § 2254, which provides in part as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State;
>
> [. . .]
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

28 U.S.C. § 2254 (a) and (b).

As this statutory text implies, state prisoners must meet exacting substantive and procedural benchmarks in order to obtain habeas corpus relief. At the outset, a petition must satisfy exacting substantive standards to warrant relief. Federal courts may "entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). By limiting habeas relief to state conduct which violates "the

Constitution or laws or treaties of the United States," § 2254 places a high threshold on the courts. Typically, habeas relief will only be granted to state prisoners in those instances where the conduct of state proceedings led to a "fundamental defect which inherently results in a complete miscarriage of justice" or was completely inconsistent with rudimentary demands of fair procedure. *Reed v. Farley*, 512 U.S. 339, 354 (1994).

Thus, claimed violations of state law, standing alone, will not entitle a petitioner to § 2254 relief, absent a showing that those violations are so great as to be of a constitutional dimension. *See Priester v. Vaughan*, 382 F.3d 394, 401-02 (3d Cir. 2004). This principle has particular relevance in the instant case. At bottom, Ritter's petition advances an evidentiary argument grounded upon alleged violations of New York state law. Specifically, Ritter seems to assert that the use in a Pennsylvania criminal trial of evidence obtained from a New York court pursuant to court order violated his constitutional rights once another New York state court subsequently vacated this unsealing order based upon its interpretation of the applicable New York state statute.

Such state law evidentiary claims typically are not cognizable in federal habeas corpus proceedings since it is well-settled that "[a]dmissibility of evidence is a state law issue. *Cf. Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) (declining to pass upon state evidentiary issue in habeas proceeding)." *Wilson v. Vaughn*, 533 F.3d 208, 213 (3d Cir. 2008). Simply put, "[a] federal court may not grant habeas corpus relief for errors of state law." *Reinert v. Larkin*, 211 F.Supp.2d 589, 608 (E.D. Pa. 2002),

affd sub nom. Reinert v. Larkins, 379 F.3d 76 (3d Cir. 2004).

B. Ritter's Petition Fails on its Merits

Judged by these standards we find that Ritter's petition for writ of habeas corpus fails on its merits. While Ritter has advanced his post-conviction petition in a passionate and prolix fashion, his persistence and passion do not alter the fundamental character of his claims, At bottom, Ritter's complaint is that Pennsylvania authorities who were prosecuting him for attempting to lure a minor through the Internet to engage sexually explicit conduct learned through publicly available accounts that authorities in a neighboring state, New York, had caught Ritter twice engaging in very similar conduct. While records relating to this prior illicit activity by Ritter had been sealed under New York state law, the Pennsylvania prosecutors sought, and obtained, a state court order in New York releasing this information to them. They then obtained a ruling from the Pennsylvania trial court, which was subsequently affirmed by the Pennsylvania Superior Court, permitting them to introduce this evidence at Ritter's trial. In Ritter's view, a subsequent New York state court ruling which vacated the initial state court order releasing this information on state statutory interpretation grounds somehow rendered this entire procedure so constitutionally infirm that he was entitled to federal habeas corpus relief vacating his conviction and sentence.

We disagree.

In our view, Ritter's contention fails for several core reasons.

First, Ritter's argument conflates state evidentiary rulings with federal constitutional guarantees. Ritter may not glibly assert a federal constitutional infraction based solely upon some adverse state evidentiary ruling regarding the admissibility of bad acts evidence. Quite the contrary, it is well-settled that the "Due Process Clause does not permit the federal courts to engage in a finely-tuned review of the wisdom of state evidentiary rules: 'It has never been thought that [decisions under the Due Process Clause] establish th[e federal] Court as a rule-making organ for the promulgation of state rules of criminal procedure.'" *Marshall v. Lonberger*, 459 U.S. 422, 438, n.6 (1983). "Nor do our habeas powers allow us to reverse [a] conviction based on a belief that the trial judge incorrectly interpreted the [state] Evidence Code in ruling that the prior [act] evidence was admissible as bad acts evidence in this case." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Therefore, to the extent that Ritter invites us to transmute these state court evidentiary rulings into matters of constitutional due process dimensions, we should decline this invitation.

Moreover, to the extent that Ritter asks us to set aside state court evidentiary rulings, he ignores the statutory mandate of 28 U.S.C. § 2254 which requires federal courts to give an appropriate degree of deference to the factual findings and legal rulings made by the state courts in the course of state criminal proceedings. There are two critical components to this deference mandated by 28 U.S.C. § 2254. First, with respect to legal rulings by state courts, under § 2254(d), habeas relief is not available to a petitioner for any claim that has been adjudicated on its merits in the state courts unless it can be shown that the decision was

either: (1) "contrary to" or involved an unreasonable application of clearly established case law; *see* 28 U.S.C. § 2254(d)(1); or (2) was "based upon an unreasonable determination of the facts," *see* 28 U.S.C. § 2254(d)(2). Applying this deferential standard of review, federal courts frequently decline invitations by habeas petitioners to substitute their legal judgments for the considered views of the state trial and appellate courts. *See Rice v. Collins*, 546 U.S. 333, 338-39 (2006); *see also Warren v. Kyler*, 422 F.3d 132, 139-40 (3d Cir. 2006); *Gattis v. Snyder*, 278 F.3d 222, 228 (3d Cir. 2002), In addition, § 2254(e) provides that the determination of a factual issue by a state court is presumed to be correct unless the petitioner can show by clear and convincing evidence that this factual finding was erroneous. *See* 28 U.S.C. § 2254 (e)(1). This presumption in favor of the correctness of state court factual findings has been extended to a host of factual findings made in the course of criminal proceedings, and fatally undermines the claims made here by Ritter. *See, e.g., Maggio v. Fulford*, 462 U.S. 111, 117 (1983) (per curiam); *Demosthenes v. Baal*, 495 U.S. 731, 734-35 (1990).

In fact, Ritter simply has not shown that the Pennsylvania state court rulings entailed either an unreasonable application of clearly established law or an unreasonable determination of facts. Quite the contrary, these state court rulings, which permitted introduction of acts of a very similar nature in Ritter's attempted child exploitation case are entirely consistent with settled case law which has long recognized the relevance of such evidence, both in state and federal court. Thus, the Pennsylvania rules of evidence expressly allow for introduction of such proof when it is

relevant to questions of motive, intent, absence of mistake, or shows the existence of a common scheme, plan or design. *See e.g.*, *Commonwealth v. Cousar*, 928 A.2d 1025, (Pa. Super. 2007); *Commonwealth v Aikens*, 990 A.2d 1181 (Pa. Super. 2010); *Commonwealth v. O'Brien*, 836 A.2d 966 (Pa. Super. 2003). "Moreover, the Federal Rules of Evidence expressly allows such testimony in sex crime cases. In fact, Federal Rules of Evidence 413 and 414 provide that when a criminal defendant is accused of child molestation or sexual assault, 'the court may admit evidence that the defendant committed any other child molestation' or sexual assault, and '[t]he evidence may be considered on any matter to which it is relevant.' Fed. R. Evid. 413, 414. No Court of Appeals which has considered the constitutionality of Fed. R. Evid. 413 or 414 has concluded that they violated due process, *see United States v. Schaffer*, 851 F.3d 166, 177 n.56 (2d Cir. 2017) (collecting cases across Courts of Appeal, all of which have held that Rule 413 or 414 do not violate the Due Process Clause)." *Allison v. Superintendent Waymart SCI*, 703 F. App'x 91, 97 (3d Cir. 2017). Accordingly, it has been held that an argument by a habeas corpus petitioner, like the claim advanced here by Ritter, which is based on allegations that a state court erred in introducing other similar sexual misconduct evidence at a state trial, simply finds no purchase as a federal constitutional claim warranting habeas corpus relief. *Id.*

Notwithstanding this settled case law, Ritter insists that the subsequent New York court decision vacating this state court order that unsealed his prior sex offense records based upon the court's interpretation of a New York state statute somehow raises issues

of constitutional dimension which compel federal habeas corpus relief. We disagree. At bottom, Ritter's argument invites us to equate an alleged error by a state court in the interpretation of a state statute with a federal due process violation. However, the equivalence which Ritter attempts to draw is a false equivalence. In fact, the Supreme Court has expressly rejected the notion that alleged state court errors in the application of state law present questions of a constitutional dimension justifying federal habeas corpus relief. For example, in *Wilson v. Corcoran*, 562 U.S. 1 (2010) a state prisoner brought a federal habeas corpus claim which was premised upon alleged errors by the state court in the application of state law. In terms that are equally applicable here, the Supreme Court rejected the argument that these alleged state court errors in applying state law rose to the level of a cognizable federal habeas corpus claim, stating that:

> [I]t is only noncompliance with federal law that renders a State's criminal judgment susceptible to collateral attack in the federal courts. The habeas statute unambiguously provides that a federal court may issue the writ to a state prisoner "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). And we have repeatedly held that "'federal habeas corpus relief does not lie for errors of state law.'" *Estelle v. McGuire*, 502 U.S. 62, 67, 112 S. Ct. 475, 116 L.Ed.2d 385 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780, 110 S. Ct. 3092, 111 L.Ed.2d 606 (1990)). "[I]t is not the province of a federal habeas court to

> reexamine state-court determinations on state-law questions." 502 U.S., at 67-68, 112 S.Ct. 475.

Wilson v. Corcoran, 562 U.S. 1, 5, (2010) (emphasis in original). *See also Estelle v. McGuire*, 502 U.S. 62, 72 (1991) ("Nor do our habeas powers allow us to reverse [a] conviction based on a belief that the trial judge incorrectly interpreted the [state] Evidence Code in ruling that the prior [act] evidence was admissible as bad acts evidence in this case.")

Finally, Ritter's preoccupation with these matters of statutory interpretation under New York law ignores a transcendent, immutable and fundamental truth—the compelling evidence of his guilt. The evidence discloses that on three separate occasions Ritter trolled the Internet, attempting to lure children to engage in sexually explicit conduct in order to indulge his erotic gratification. Such conduct is criminal and reprehensible, and in the absence of any viable constitutional claim Ritter simply cannot be heard to complain that the compelling, powerful evidence of his guilt has led to his conviction. Recognizing that habeas relief will only be granted to state prisoners in those instances where the conduct of state proceedings led to a "fundamental defect which inherently results in a complete miscarriage of justice" or was completely inconsistent with rudimentary demands of fair procedure, *Reed v. Farley*, 512 U.S. 339, 354 (1994), we find that these matters of state law presented by Ritter in this petition simply do not rise to the level of a federal claim warranting extraordinary habeas corpus relief. Therefore this petition should be denied.

IV. Recommendation

Accordingly, for the foregoing reasons, upon consideration of this Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254, and the Response in Opposition to this Petition, IT IS RECOMMENDED that the Petition be denied and that a certificate of appealability should not issue. The Petitioner is further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636(b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his

or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 5th day of July, 2018.

/s/ Martin C. Carlson
United States Magistrate Judge

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING (JULY 10, 2019)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

WILLIAM S. RITTER, JR.,

Appellant,

v.

JOHN R. TUTTLE;
ATTORNEY GENERAL PENNSYLVANIA,

No. 19-1171

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(M.D. Pa. No. 3-15-cv-01235)
District Judge: James M. Munley

Before: SMITH, Chief Judge,
MCKEE, AMBRO, CHAGARES, JORDAN,
HARDIMAN, GREENAWAY, JR.,
SHWARTZ, KRAUSE, RESTREPO, BIBAS,
PORTER, and MATEY, Circuit Judges.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the

circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court *en banc*, is denied.

BY THE COURT,

/s/ Cheryl Ann Krause
Circuit Judge

Dated: July 10, 2019
MB/arr/cc: WSR

ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA (SEPTEMBER 12, 2017)

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v.

WILLIAM SCOTT RITTER JR.,

Appellant.

No. 3333 EDA 2016

Appeal from the PCRA Order October 6, 2016
In the Court of Common Pleas of Monroe County
Criminal Division at No(s): CP-45-CR-0002238-2009

Before: BOWES, J., OTT, J. and
Ford ELLIOTT, P.J.E.

Memorandum by OTT, J.:

William Scott Ritter, Jr., appeals, *pro se,* from the order entered October 6, 2016, in the Monroe County Court of Common Pleas dismissing his first petition for collateral relief filed pursuant to the Post Conviction Relief Act ("PCRA").[1] Ritter seeks relief from judgment of sentence of an aggregate term of 18 to 66 months' imprisonment imposed October 26, 2011, following his jury conviction of, *inter alia*, indecent

[1] 42 Pa. C.S. §§ 9541-9546.

exposure and three counts of unlawful contact with a minor, based upon sexually explicit communications he had with a police detective who was posing as a 15-year-old female. On appeal, Ritter contends the PCRA court abused its discretion when it failed to consider newly discovered evidence that would have precluded the Commonwealth from presenting evidence of Ritter's prior arrests for similar crimes in New York state. Because we conclude Ritter is no longer eligible for PCRA relief, we affirm.

The facts underlying Ritter's arrest and conviction are well known to the parties, and were summarized by a panel of this Court in the memorandum decision affirming Ritter's sentence on direct appeal. *See Commonwealth v. Ritter*, 91 A.3d 1273 [975 EDA 2012] (Pa. Super. 2013) (unpublished memorandum). Therefore, we need not reiterate them herein. The following facts, however, are relevant to the issues raised on appeal:

> Prior to trial, the Commonwealth uncovered information, via a Google search, of Ritter's prior arrests from online sex sting operations in New York. The public internet search yielded news articles reporting that, in April 2011, Ritter communicated online in a chat room with an undercover police officer posing as a 14-year-old female and arranged to meet the "girl" at a local business in Albany. Ritter arrived at the designated location and was questioned by the authorities; however, he was released without any charges being filed. Two months later, Ritter was again caught in the same kind of sex sting after he tried to lure what he thought was a

16-year-old female to a fast food restaurant. Ritter was subsequently charged, but the Albany District Attorney placed the case on hold.

Upon discovery of the publicly available articles regarding Ritter's prior engagement in internet sex stings, the Commonwealth requested and later received copies of those records from the Albany County District Attorney's Office. The Commonwealth provided Ritter with copies of the records in compliance with Pa. R. Crim. P. 573. Unbeknownst to the Commonwealth, the New York state records were sealed at the time they were forwarded to the Commonwealth, prompting the Commonwealth to return the records to the Albany County District Attorney's Office. A petition to unseal the records was subsequently filed and granted by the trial court in Albany County[.][1]

Thereafter, the Commonwealth filed a notice of prior bad acts as well as a motion *in limine* seeking to introduce the New York arrest records at trial. In response thereto, Ritter filed a motion for dismissal/change of venue as well as a motion *in limine* seeking to preclude this evidence. The trial court held a hearing on the motions. At the hearing, the Commonwealth's exhibits,

---

[1] Ritter filed a motion to vacate the order entered unsealing the record in Albany County which was denied. Ritter then appealed that decision to the Supreme Court of the State of New York, Appellate Division.

> consisting in part of the New York arrest records, were admitted under seal. After the hearing, the trial court entered an order and accompanying opinion granting the Commonwealth's motion *in limine*, permitting evidence of Ritter's prior bad acts in New York to be admitted at trial.
>
> Following a jury trial, Ritter was found guilty of all but one count. Prior to sentencing, the Supreme Court of the State of New York, Appellate Division reversed and vacated the order of the Albany County court unsealing Ritter's records. Ritter then filed a motion for a new trial pursuant to Rule 704(B) or in the alternative to postpone sentencing. The trial court sentenced Ritter on October 26, 2011. At the time of sentencing Ritter made an oral motion for extraordinary relief. After extensive argument regarding the New York records, the trial court denied Ritter's request for a new trial and sentenced Ritter to an aggregate period of 18 to 66 months' imprisonment. Ritter filed post-sentence motions, which the trial court denied.

Id. at *2 (emphasis added).

As noted *supra*, Ritter's judgment of sentence was affirmed on direct appeal. On appeal, Ritter argued, *inter alia*, that the trial court erred in failing to grant a new trial when the Supreme Court of New York Appellate Division reversed the Albany County court's order unsealing Ritter's arrest records. *See id.* at *3. The panel determined the information regarding Ritter's prior arrests for Internet sex crimes was

relevant and its "probative value outweighed any prejudicial effect to Ritter." *Id.* Moreover, because the records were "unsealed at the time of their production to the Commonwealth . . . and at that time of Ritter's jury trial[,]" the panel concluded the trial court did not err in permitting the Commonwealth to admit the records into evidence. *Id.* (emphasis in original). Subsequently, on May 21, 2014, the Pennsylvania Supreme Court denied Ritter's petition for allowance of appeal. *Commonwealth v. Ritter*, 92 A.3d 811 (Pa. 2014).

On April 6, 2015, Ritter filed a timely, *pro se* PCRA petition, again challenging the trial court's admission of his New York arrest records. Ritter argued that a February 5, 2015, decision of the Albany County, New York court, precluding any reference to the now-sealed arrest records during his New York state Sexual Offenders Registration Act ("SORA") hearing, must be afforded "full faith and credit" in his Pennsylvania proceedings. *See* PCRA Petition, 4/6/2015, at 12-18. By order dated January 14, 2016, the PCRA court denied Ritter's motion without first conducting a hearing.

Ritter filed a timely appeal. However, both the PCRA court and the Commonwealth asked this Court to remand the matter because the PCRA court failed to provide Ritter with the requisite notice of its intent to dismiss the petition without first conducting an evidentiary hearing pursuant to Pa. R. Crim. P. 907. On July 12, 2016, this Court entered a *per curium* order vacating the order denying PCRA relief and remanding for further proceedings. *See Commonwealth v. Ritter*, 380 EDA 2016, Order, 7/12/2016.

On August 29, 2016, Ritter requested the PCRA court conduct a *Grazier*[2] hearing, so that he could continue to proceed *pro se.* Three days later, Ritter filed a *pro se* petition for an evidentiary hearing. Thereafter, on September 9, 2016, the PCRA court conducted a *Grazier* hearing, and entered an order granting Ritter's request to proceed *pro se.* Subsequently, on September 15, 2016, the court issued a Pa. R. Crim. P. 907 notice of its intent to dismiss Ritter's petition without first conducting an evidentiary hearing. Although Ritter filed a 44-page response, the PCRA court entered an order dismissing Ritter's petition on October 6, 2016. This timely appeal follows.[3]

Before we may address the issues Ritter raises on appeal, we must first determine if Ritter is statutorily eligible for PCRA relief. Although not addressed by the PCRA court or either party, it is well-established that to be eligible for PCRA relief, a petitioner must prove that at the time relief is granted he is "currently serving a sentence of imprisonment, probation or parole for the crime[.]" 42 Pa. C.S. § 9543(a)(1)(i). "Case law has strictly interpreted the requirement that the petitioner be currently serving a sentence for the crime to be eligible for relief." *Commonwealth v. Plunkett*, 151 A.3d 1108, 1109 (Pa. Super. 2016), *appeal denied*, A.3d ___, 2017 WL 2081583 (May 15, 2017).

This Court's decision in *Plunkett* is diapositive. In that case, the defendant filed a timely PCRA petition

---

[2] *Commonwealth v. Grazier*, 713 A.2d 81 (Pa. 1998).

[3] Although the PCRA court did not direct Ritter to file a concise statement of errors complained of on appeal pursuant to Pa. R.A.P. 1925(b), Ritter, nevertheless, filed concise statement on November 2, 2016.

while on probation following a conviction of theft by deception. *See Plunkett, supra*, 151 A.3d at 1109. The PCRA court conducted a hearing on the issues raised in the petition and, in June of 2015, entered an order denying relief. The defendant subsequently filed a timely appeal. Thereafter, in January of 2016, while the appeal was pending in this Court, the trial court entered an order terminating the defendant's probationary sentence. *See id.* On appeal, this Court determined the defendant was not entitled to relief because he was no longer serving a sentence for the conviction at issue. The panel opined: "[W]e find the statutory requirement that a PCRA petitioner be currently serving a sentence is applicable to the instant circumstance where the PCRA court's order was issued while petitioner was still serving the required sentence, but that sentence terminated prior to the resolution of his appeal." *Id.* at 1113. *See also Commonwealth v. Turner*, 80 A.3d 754 (Pa.2013) ("Because individuals who are not serving a state sentence have no liberty interest in and therefore no due process right to collateral review of that sentence, the statutory limitation of collateral review to individuals serving a sentence of imprisonment, probation, or parole is consistent with the due process prerequisite of a protected liberty interest"), *cert. denied*, 134 S. Ct. 1771 (U.S. 2014); *Commonwealth v. Stultz*, 114 A.3d 865, 872 (Pa. Super. 2015) (finding appellant was no longer eligible for relief on DUI convictions for which he had completed his sentence, but considering collateral claims with regard to conviction of fleeing while DUI), *appeal denied*, 125 A.3d 1201 (Pa. 2015).

Here, Ritter was sentenced to a maximum term of 66 months' imprisonment on October 26, 2011. The sentencing transcript reveals that Ritter was taken into custody immediately following the hearing. *See* N.T., 10/26/2011, at 225. Although, in his post-sentence motion, Ritter requested bail pending appeal, the court denied his request. *See* Order, 3/20/2012. Accordingly, Ritter's sentence expired on April 26, 2017, and he is statutorily ineligible for PCRA relief.[4]

Because Ritter is no longer serving a sentence for the convictions that are the subject of this PCRA petition, he is not entitled to PCRA relief, and we affirm the order on appeal.[5]

Order affirmed.

Judgment Entered.

/s/ Joseph D. Seletyn, Esq
Prothonotary

Date: 9/12/2017

---

[4] In fact, Ritter acknowledged this in two prior filings. *See* Motion for Post-Conviction Collateral Relief, 4/6/2015, at 5 (stating "Petitioner will complete his period of parole on April 2[6], 2017"); Letter to PCRA court dated 8/25/2016, at 1 (requesting the court "expeditiously process" his petition because his "parole expires on April 26, 2017").

[5] We note that because Ritter was still serving his sentence at the time the PCRA court issued its Rule 907 notice and accompanying opinion, the court addressed the merits of the issues raised on appeal. However, it is well-settled that "we may affirm a PCRA court's decision on any grounds if the record supports it." *Commonwealth v. Benner*, 147 A.3d 915, 919 (Pa. Super. 2016) (quotation omitted).

ORDER OF THE COURT OF COMMON PLEAS OF MONROE COUNTY 43RD JUDICIAL DISTRICT DISMISSING PCRA PETITION (OCTOBER 8, 2016)

COURT OF COMMON PLEAS OF MONROE COUNTY FORTY-THIRD JUDICIAL DISTRICT COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM SCOTT RITTER, JR.,

Defendant.

No. 2238 CRIM 2009
PCRA

Before: Stephen M. HIGGINS, Judge.

AND NOW, this 6th day of October 2016, after review of Defendant's Response to Notice of intent to Dismiss PCRA Petition, it is hereby ORDERED that Defendant's PCRA Petition is DISMISSED.

Defendant is hereby ADVISED of the following:

a) that he has the right within 30 days from the date of this Order to file an appeal with the Pennsylvania Superior Court;

b) that he has the right to assistance of counsel in the preparation of the appeal; and,

c) if indigent, he has the right to appeal *in forma pauperis* and to proceed with assigned counsel.

It is further ORDERED that the Clerk of Courts is directed to serve this Order on Defendant by certified mail, return receipt requested.

BY THE COURT:

/s/ Stephen M. Higgins
Judge

cc: Michael Rakaczewski, Esquire, ADA
William Scott Ritter, Jr., pro se, via certified mail, return receipt
Public Defender's Office
Clerk of Courts

ORDER OF THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT DENYING PETITION FOR ALLOWANCE (MAY 21, 2014)

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Respondent,

v.

WILLIAM SCOTT RITTER, JR.,

Petitioner.

No. 936 MAL 2013

Petition for Allowance of Appeal
from the Order of the Superior Court

PER CURIAM

AND NOW, this 21st day of May, 2014, the Petition for Allowance of Appeal is DENIED.

ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA (NOVEMBER 6, 2013)

IN THE SUPERIOR COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

v.

WILLIAM SCOTT RITTER, JR.,

Appellant.

No. 975 EDA 2012

Appeal from the Judgment of Sentence October 26, 2011
In the Court of Common Pleas of Monroe County
Criminal Division at No(s): CP-45-CR-0002238-2009

Before: PANELLA, J., ALLEN, J., and PLATT, J.*

Memorandum by PANELLA, J.

Appellant, William Scott Ritter, Jr., appeals from the judgment of sentence entered on October 26, 2011, in the Court of Common Pleas of Monroe County. After careful review, we affirm.

On February 7, 2009, Detective Ryan Venneman of the Barrett Township Police Department was con-

* Retired Senior Judge assigned to the Superior Court.

ducting undercover operations investigating the crime of internet sexual exploitation of children in a Yahoo Instant Messenger chat room. Detective Venneman was acting as a young female named "Emily" when he was contacted online by Ritter, posing as "delmarm4fun," a 44-year-old male from Albany, New York. At the onset of the online chat, "Emily" specifically identified herself to Ritter as a 15-year-old female from the Poconos.

The online conversation was sexual in nature. During the conversation, Ritter provided "Emily" with a link to his webcam, asking her to share photographs with him. Ritter was particularly interested in whether "Emily's" ex-boyfriend took "any traditional ex pits" of her, by which he meant nude or provocative photographs. In response to Ritter's repeated requests to send additional photos, "Emily" transmitted a photograph to which Ritter replied, "that'l [sic] get a reaction." Ritter then stated that he was "waiting for ['Emily'] to put up another pic so [he] can continue to 'react.'" The webcam was operational at the time and displayed a man's face and upper body area. When queried as to what he meant by "react," Ritter responded that he reacted "below the screen," "where [his] hands are," indicating his hands are "down lower." Ritter then communicated to "Emily" that he was having a "big reaction here" and asked "Emily" if she would like to see more. Ritter then adjusted the webcam to focus on his genital area where he exposed himself to "Emily" and proceeded to masturbate.

Ritter turned off the webcam for a period of time. He, however, continued to engage in sexually explicit communications with "Emily," including asking her if she tasted her ex-boyfriend's penis, her favorite sexual

position, if her ex-boyfriend ejaculated inside her, if he used a condom, and if she performed oral sex on him. "Emily" cautioned Ritter that she was only 15 years old and she did not want them to get in trouble because of their respective ages. Unfazed by "Emily's" age, Ritter asked "Emily," "you want to see it finish?" Ritter then turned on the webcam and ejaculated in front of the camera for "Emily." Detective Venneman then notified Ritter of his undercover status and the undercover operation and directed Ritter to call the police station.

Ritter was subsequently charged with unlawful contact with a minor (sexual offenses), 18 Pa. Cons. Stat. Ann. § 6318(a)(1), unlawful contact with a minor (open lewdness), 18 Pa. Cons. Stat. Ann. § 6318(a)(2), unlawful contact with a minor (obscene and other sexual materials and performances), 18 Pa. Cons. Stat. Ann. § 6318(a)(4), corruption of minors, 18 Pa. Cons. Stat. Ann. § 6301(a)(1), criminal use of a communications facility, 18 Pa. Cons. Stat. Ann. § 7512(a), and indecent exposure, 18 Pa. Cons. Stat. Ann. § 3127.

Prior to trial, the Commonwealth uncovered information, via a Google search, of Ritter's prior arrests from online sex sting operations in New York. The public Internet search yielded news articles reporting that, in April 2011, Ritter communicated online in a chat room with an undercover police officer posing as a 14-year-old female and arranged to meet the "girl" at a local business in Albany. Ritter arrived at the designated location and was questioned by the authorities; however, he was released without any charges being filed. Two months later, Ritter was again caught in the same kind of sex sting after he tried to lure what he thought was a 16-year-old female to a

fast food restaurant. Ritter was subsequently charged, but the Albany District Attorney placed the case on hold.

Upon discovery of the publicly available articles regarding Ritter's prior engagement in internet sex stings, the Commonwealth requested and later received copies of those records from the Albany County District Attorney's Office. The Commonwealth provided Ritter with copies of the records in compliance with Pa. R. Crim. P. 573, Unbeknownst to the Commonwealth, the New York state records were sealed at the time they were forwarded to the Commonwealth, prompting the Commonwealth to return the records to the Albany County District Attorney's Office. A petition to unseal the records was subsequently filed and granted by the trial court in Albany County[1].

Thereafter, the Commonwealth filed a notice of prior bad acts as well as a motion *in limine* seeking to introduce the New York arrest records at trial. In response thereto, Ritter filed a motion for dismissal/ change of venue as well as a motion *in limine* seeking to preclude this evidence. The trial court held a hearing on the motions, At the hearing, the Commonwealth's exhibits, consisting in part of the New York arrest records, were admitted under seal. After the hearing, the trial court entered an order and accompanying opinion granting the Commonwealth's motion *in limine*, permitting evidence of Ritter's prior bad acts in New York to be admitted at trial.

---

[1] Ritter filed a motion to vacate the order entered unsealing the record in Albany County which was denied. Ritter then appealed that decision to the Supreme Court of the State of New York, Appellate Division.

Following a jury trial, Ritter was found guilty of all but one count. Prior to sentencing, the Supreme Court of the State of New York, Appellate Division reversed and vacated the order of the Albany County court unsealing Ritter's records. Ritter then filed a motion for a new trial pursuant to Rule 704(B) or in the alternative to postpone sentencing. The trial court sentenced Ritter on October 26, 2011. At the time of sentencing Ritter made an oral motion for extraordinary relief. After extensive argument regarding the New York records, the trial court denied Ritter's request for a new trial and sentenced Ritter to an aggregate period of 18 to 66 months' imprisonment. Ritter filed post-sentence motions, which the trial court denied. This timely appeal followed.

On appeal, Ritter raises the following issues for our review.

1. Did the trial judge err in allowing the prosecution to bring out at trial the Appellant's two police encounters involving like conduct in New York in 2001?

    a. Should the trial judge have granted the Appellant a new trial when it became known that the New York courts had ruled on October 20, 2011 that the evidence of the Appellant's police encounters in New York in 2001 should never had been unsealed and made available to Pennsylvania prosecutors?

    b. Did the trial judge abuse her discretion in admitting the New York evidence under Rule 404(b) and Rule 403?

c. Should the trial judge have granted the Appellant's motion for mistrial at the conclusion of the prosecutor's cross-examination of the Appellant and his closing speech to the jury which emphasized the New York evidence?

d. Should the trial judge have granted the Appellant's motion for a mistrial during the cross-examination of the Appellant with a statement he allegedly made to New York investigators?

e. Has the Commonwealth established that this error was harmless beyond a reasonable doubt?

Appellant's Brief, at 2-3.

"We review a trial court's decision to grant . . . a motion *in limine* with the same standard of review as admission of evidence at trial." *Commonwealth v. Flamer*, 53 A.3d 82, (Pa. Super. 2012) (citation omitted). "The admission of evidence is a matter vested within the sound discretion of the trial court, and such a decision shall be reversed only upon a showing that the trial court abused its discretion." *Commonwealth v. Weakley*, 972 A.2d 1182, 1188 (Pa. Super. 2009). "[If] the trial court overrides or misapplies the law, discretion is then abused and it is the duty of the appellate court to correct the error." *Commonwealth v. Surina,* 652 A.2d 400, 402 (Pa. Super. 1995) (internal citations and quotations omitted). "In determining whether evidence should be admitted, the trial court must weigh the relevant and probative value of the evidence against the prejudicial impact of that evidence." *Weakley*, 972 A.2d at 1188 (citation omitted).

After a careful review of the certified record, as well as the briefs of the parties, we are confident that the trial court did not err in allowing the admission of Ritter's New York records into evidence. The New York records were unsealed at the time of their production to the Commonwealth by the Albany County Court and at the time of Ritter's jury trial. The records elicited a common scheme or plan as well as Ritter's propensity for crimes involving the Internet sexual exploitation of children and their probative value outweighed any prejudicial effect to Ritter.

The trial court ably and methodically reviewed and analyzed all of the issues raised by Ritter related to admissibility of the New York records in its opinion filed on March 20, 2012. As such, we affirm Issues 1(a) and (b) on the basis of that well-written decision. *See* Trial Court Opinion, filed 3/20/12.

Similarly, the issues presented by Ritter in subsections (c), (d), and (e) *supra*, lack merit. Ritter argues that the trial court erred in denying his motion for a mistrial at the conclusion of the Commonwealth's cross-examination of Ritter and, the Commonwealth's closing argument to the jury as both elicited improper testimony relating to statements Ritter made to New York investigators. We disagree.

"The decision to declare a mistrial is within the sound discretion of the [trial] court and will not be reversed absent a flagrant abuse of discretion. A mistrial is an extreme remedy . . . [that] . . . must be granted only when an incident is of such a nature that is unavoidable effect is to deprive defendant of a fair trial." *Commonwealth v. Bracey*, 831 A.2d 678, 682-683 (Pa. Super. 2003) (internal quotation marks and citations omitted; brackets in original).

Here, Ritter takes issues with the following exchange during the Commonwealth's cross-examination:

> PROSECUTOR: So you're saying that in February of '07 you must be back in this dark place again that you were in in 2001; right?
>
> RITTER: Not as severe, but, yes, I was.
>
> PROSECUTOR: And you were back doing the same thing in regard to masturbating and so forth over the Internet; right?
>
> RITTER: Yes, sir.
>
> PROSECUTOR: And, obviously, that's a problem; correct?
>
> RITTER: Yes, sir.
>
> PROSECUTOR: You tried the best you could to contain it but you couldn't contain it; right?
>
> RITTER: Yes, sir.
>
> PROSECUTOR: Just one thing. Going back to 2001. You actually told Tom Breslin that you needed help because your problem progressed to the point where you wanted to meet underaged girls.

N.T., Trial, 4/13/11, at 123-124. Defense counsel, Attorney Kohlman, objected to this line of questioning and immediately requested permission to approach the bench where he motioned for a mistrial. *See id.*, at 124. The trial court denied counsel's request for a mistrial, but permitted Attorney Kohlman to place his reasons for requesting a mistrial on the record. *See id.*, at 124-125.

The crux of defense counsel's reasoning was that "40 some minutes" of cross-examination was "focused solely on events in New York" and, in particular, relative to out-of-court statements made by Ritter during the course of investigations in New York. *See Id.*, at 125. Defense counsel argued that the out-of-court statements referenced by the Commonwealth on cross-examination were not in the discovery provided by the Commonwealth and that the "first time that [the defense] had any notification whatsoever of anything else to deal with other than the chats themselves, was approximately 11:30 in the morning on Monday the day before trial." *Id.*, at 125-126. As such, defense counsel argued that it was "extraordinarily prejudicial" to allow the information to be used during cross-examination. *Id.*, at 126.

In contrast, the Commonwealth argued that Ritter opened the door to such questioning on cross-examination by his own testimony that "he has a problem, that he goes on the Internet, that there is a sexual contact between adults." *Id.*, at 127. The Commonwealth queried Ritter in an effort to elicit "what kind of conduct" Ritter was referring to because Ritter said "he masturbates in front of woman" and "the whole reason he does this in '01 is to get caught by the police because he has a problem, he needs help." *Id.*, at 127.

The trial court denied defense counsel's request for a mistrial because "[Ritter] testified that he never intended to enter in an adult chat room for the purpose of having inappropriate conversations with a minor." *Id.* As such, the testimony elicited on cross-examination was appropriate.

We can find no abuse of discretion in this ruling. Ritter opened the door to cross-examination on this issue by his own testimony.

Lastly, we can find no abuse of discretion on the part of the trial court in denying Ritter's motion for mistrial at the conclusion of the Commonwealth's closing argument.

> It is well established that a prosecutor is permitted to vigorously argue his case so long as his comments are supported by the evidence or constitute legitimate inferences arising from that evidence.
>
> In considering a claim of prosecutorial misconduct, our inquiry is centered on whether the defendant was deprived of a fair trial, not deprived of a perfect one. Thus, a prosecutor's remarks do not constitute reversible error unless their unavoidable effect . . . [was] to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that they could not weigh the evidence objectively and render a true verdict. Further, the allegedly improper remarks must be viewed in the context of the closing argument as a whole.

Commonwealth v. Luster, 71 A.3d 1029, 1048 (Pa. Super. 2013) (en banc) (internal quotation marks and citations omitted).

Here, Ritter contends that the Commonwealth "went way beyond the boundaries of intent and mistake and knowledge and for all the world was arguing common schedule, plan and design" in his closing

argument. *See* N.T. Trial, 4/14/11, at 63. Specifically Ritter takes issue with the following comments by the Commonwealth: (1) that the New York cases were important because in those incidents, Ritter twice engaged in internet chats with what he should have believed was an underage girl, *see id.*, at 36; (2) that the prosecutor referred to the screen name that Ritter had used, "On Exhibit", as supporting an inference that he was an "exhibitionist." *see id.*, at 42; (3) that in both New York chats, Ritter referred to masturbation; *see id.*; (4) that in the New York cases in 2001 Ritter claimed he wanted to be caught; *see id.*, at 43-47; and (5) that since Ritter had been engaged in similar chats in two previous occasions in New York, he had to know that in his 2009 chat in Pennsylvania, the other party could be a minor and that conversation would be illegal. *See id.*, at 50, 53. *See*, Appellant's Brief at 17-19.

Based upon our review of the record, we are confident that the Commonwealth's closing arguments were fully support by the evidence presented or were suitable inferences derived therefrom. As stated previously, the admission of the New York evidence was permissible as it was relevant under Rule 404(b) and unsealed at the time of its admission. Therefore, any reference to the New York information was proper. The statements made by the Commonwealth were in no means inflammatory to such a degree that it would fix bias and hostility against Ritter in the minds of the jury. For these reasons, and in light of the overwhelming evidence of Ritter's guilt, we find a new trial is not warranted on this basis.

Judgment of sentence affirmed. Jurisdiction relinquished.

Judgment Entered.

/s/ Joseph D. Seletyn, Esq
Prothonotary

Date: 11/6/2013

ORDER OF THE COURT OF COMMON PLEAS OF MONROE COUNTY 43RD JUDICIAL DISTRICT ON DEFENDANT'S RULE 720 POST-SENTENCING MOTION FOR A NEW TRIAL OR IN THE ALTERNATIVE RESENTENCING (MARCH 20, 2012)

COURT OF COMMON PLEAS OF MONROE COUNTY FORTY-THIRD JUDICIAL DISTRICT COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v.

WILLIAM SCOTT RITTER, JR.,

Defendant.

No. 2238 Criminal 2009

Before: Jennifer Harlacher SIBUM, Judge.

OPINION

Defendant, William Scott Ritter, Jr., has been charged by Criminal Complaint with three separate counts of Unlawful Contact with a Minor, 18 Pa. C.S. § 6318(a)(1), (2), (4); Criminal Use of Communication Facility, 18 Pa. C.S. § 7512(a); Possessing Instruments of Crime, 18 Pa. C.S. § 907(a); Indecent Exposure, 18 Pa. C.S. § 3127(a); five individual counts of Criminal Attempt to commit the crimes of Unlawful Contact with a Minor, Obscene and Other Sexual Materials and

Performances, Corruption of Minors, Criminal Use of a Communications Facility, and Indecent Exposure, 18 Pa. C.S. § 901(a); and five individual counts of Criminal Solicitation to commit the crimes of Unlawful Contact with a Minor, Obscene and Other Sexual Materials and Performances, Corruption of Minors, Criminal Use of a Communications Facility, and Indecent Exposure, 18 Pa. C.S. § 902(a).

The charges stem from an internet investigation by the Barrett Township Police Department. As part of the investigation, Detective Ryan Venneman ("Detective") of the Barrett Township Police Department was conducting undercover operations and investigating the crime of Internet sexual exploitation of children via the computer. While conducting the investigation, Detective purported to be a 15-year-old minor female named "Emily." Detective was then contacted by an individual identified as "delmarm4fun," a 44-year-old male from Albany, New York. The conversation was initiated by "delmarm4fun" in a Yahoo Instant Messenger chat room.

During the conversation, "delmarm4fun" was advised that "Emily" was a 15-year-old female from the Poconos, Pennsylvania. The conversation was sexual in nature, during which "delmarm4fun" requested "Emily" to give him another picture so he could continue to "react". Shortly after, he provided the purported 15 year old a link to his web camera. The camera displayed a male's face and upper body area. "Delmarm4fun" later adjusted the camera to focus on his penis area and began to masturbate. "Emily" asked him if he had a phone number where "she" could call him. "Delmarm4fun" provided a cell phone number of 518-365-6530.

"Delmarm4fun" continued to masturbate on web cam arid again asked "Emily's" age. He was advised a second time that she was 15 years old. He stated he didn't realize that she was 15 and turned off his web camera. He then stated he did not want to get in trouble and said "I was fantasizing about fucking you." "Emily" replied "I guess u turned it off np". "Delmarm4fun" responded by asking "Emily" if she wanted "to see it finish". He again sent to "Emily" a link to his web camera which showed him masturbating and then ejaculating.

Detective then called the Nextel wireless phone number provided by "delmarm4fun" and advised the individual that he was a Police Officer with the Barrett Township Police Department, During the conversation, "delmarm4fun" provided his personal information as William Scott Ritter Jr. of Delmar, New York ("Defendant"). Detective obtained several photographs of Defendant, and compared them to the web camera video obtained while "delmarm4fun" was masturbating on camera. Detective determined that the photos and video were of the same person

On April 22, 2009, Detective secured a Court Order for Nextel Wireless to provide subscriber information for the wireless number of 518-365-6530. On October 13, 2009, Detective received the subscriber information confirming the wireless number was assigned to William Ritter of Delmar, NY at the time of the incident on February 7, 2009. Defendant was later charged with the above stated crimes.

Defendant waived his right to a preliminary hearing and to a formal arraignment in anticipation of entering into a negotiated plea to one count of Unlawful Contact with a Minor, 18 Pa. C.S. § 6318(a)(4),

a felony of the third degree. The Commonwealth filed a Criminal Information on January 11, 2010 charging Defendant with a single count of Unlawful Contact with a Minor. Defendant filed an Omnibus Pretrial Motion and a Motion for Discovery on January 14, 2010. Both motions were withdrawn on February 3, 2010. Defendant thereafter did not enter a plea of guilty to the Unlawful Contact charge.

On June 15, 2010, the Commonwealth filed a Notice of Prior Bad Acts pursuant to Pa.R.E. § 404 as well as a Motion *In Limine* seeking to allow testimony of Defendant's prior bad acts at trial. Specifically, the Commonwealth sought to admit at trial evidence of charges filed in New York State against Defendant for offenses similar to those at issue before this Court. A hearing on the Commonwealth's Motion was scheduled for June 28, 2010 and thereafter continued generally at the request of counsel for the Commonwealth with the concurrence of Defendant to be relisted for hearing upon application of either counsel

On June 16, 2010, the Commonwealth filed a Motion for Leave to Amend the Criminal Information arguing that the Commonwealth should be permitted to amend the Criminal Information to include all counts charged in the Criminal Complaint. The Commonwealth argued that it filed the one-count Information in reliance on the earlier plea agreement reached with Defendant in which Defendant agreed to waive his preliminary hearing and plead guilty to the Unlawful Contact with a Minor charge in exchange for the Commonwealth withdrawing the remaining charges alleged in the Criminal Complaint. In reliance on this agreement, the Commonwealth filed a Criminal Information with one count of 18 Pa. C.S. § 6318(a)(4)

with the understanding that if the case was not resolved with a guilty plea, all charges in the Criminal Complaint would be reinstated. The Commonwealth's Motion was granted. An Amended Criminal Information was filed charging Defendant with Unlawful Contact with a Minor (sexual offenses), 18 Pa. C.S. § 6318(a)(1); Unlawful Contact with a Minor (open lewdness), 18 Pa. C.S. § 6318(a)(2), Unlawful Contact with a Minor (obscene and other sexual materials and performances), 18 Pa. C.S. § 6318(a)(4); Criminal Attempt to Commit Obscene and Other Sexual Materials and Performances, 18 Pa. C.S. § 901; Criminal Attempt to Commit Corruption of Minors, 18 Pa. C.S. § 901; and Criminal Use of a Communication Facility, 18 Pa. C.S. § 7512.

On August 10, 2010, Defendant filed a Motion for Dismissal/Change of Venue as well as a Motion *In Limine* to exclude evidence regarding past allegations of misconduct pursuant to Pa.R.E. § 404. The Commonwealth filed a second Motion *In Limine* on August 27, 2010 seeking to preclude the defense experts' testimony as to: (1) proper undercover procedures in conducting online chat investigations; (2) the results of a forensic review of the Defendant's household computers; and (3) the ability of consenting participants in adult internet chat rooms to fantasize and assume that other adult participants are doing likewise. A hearing on all motions, including the Commonwealth's first Motion *In Limine,* was held on August 31, 2010.

At the hearing, counsel for both parties represented to the Court that the Commonwealth had obtained records of Defendant's New York arrests which were sealed by a court of that state in 2001. The records in question were admitted as Commonwealth's Exhibits

1 through 11, and placed under seal pending a decision by this Court on the parties' respective Motions *In Limine*. The Commonwealth's Exhibits are comprised of the following documents:

1. Criminal Complaint filed in the present case;
2. Transcript of chat log dated February 7, 2009;
3. Wikipedia computer print outs re: Defendant
4. January 14, 2010 letter from Monroe County Assistant District Attorney Michael Rakaczewski to Albany County, New York District Attorney P. David Soares requesting New York investigator's name and file re: Defendant;
5. February 8, 2010 letter from Robert G. Muller, Senior Criminal Investigator, Albany County, New York District Attorney's Office to Monroe County ADA Rakaczewski forwarding Defendant's criminal file;
6. April 23, 2010 letter from Defense Counsel to Monroe County District Attorney David Christine re: New York records of Defendant;
7. June 2, 2010 letter from Monroe County ADA Rakaczewski to Albany County, New York Chief Assistant District Attorney David M. Rossi returning records;
8. June 2, 2010 letter from Monroe County ADA Rakaczewski to Albany County, New York Chief Assistant District Attorney David M. Rossi enclosing proposed Motion to unseal records;

9. June 29, 2010 Order of the Albany County Court, Stephen W. Herrick, Judge, unsealing criminal records of Defendant;

10. New York State arrest records for Defendant;

11. August 24, 2010 letter from Defense counsel Gary Kohlman, Esquire to Monroe County ADA Rakaczewski re: Defense experts.

The Commonwealth further represented to the Court that the Commonwealth came into possession of Defendant's New York records as a result of an internet "Google" search Assistant District Attorney Rakaczewski performed on Defendant's name. The "Google" search revealed the Wikipedia computer results set forth in Commonwealth Exhibit #3. As a result of the Internet search results, Attorney Rakaczewski sent a letter to Attorney Soares of the District Attorney's Office in Albany County, New York, advising Attorney Soares that the Monroe County District Attorney's Office was "prosecuting [Defendant] in similar charges to his arrest in Albany County in 2001" and requesting that Attorney Soares' Office "provide [ADA Rakaczewski] with the name of the officer or detective who investigated these cases, as well as copies of your documents." [*See* Exhibit 4.] Attorney Soares' Office responded by sending copies of their entire file as well as the contact information for the Investigator on the case. [*See* Exhibit 5.] The discovery received contained police reports concerning alleged criminal incidents involving Defendant that took place in 2001 in New York State. [*See* Exhibit 6.]

After receipt and review of the records from New York State, ADA Rakaczewski sent copies of the records to counsel for Defendant. Thereafter, on April 23,

2010, defense counsel wrote to the Monroe County District Attorney advising that the Defendant's New York records were subject to a New York sealing and expungement order requiring that the records be sealed and/or destroyed. [*See* Exhibit 6.] The letter further stated that the Commonwealth's possession of the records was "illegal," demanded that the Commonwealth "turn–over" all copies of the records, "divulge" how the Commonwealth came into possession of same, and meet with defense counsel to discuss defense counsel's views on "where this case should go at this point." [*Id.*]

In response, the Commonwealth returned the original documents received to the Albany Chief Assistant District Attorney. [*See* Exhibit 7.] The Commonwealth also provided the Chief ADA in Albany with a Motion to be filed in the New York State Supreme Court for Albany County requesting to have the records unsealed ex parte pursuant to New York State Criminal Procedure Law § 160.60(1)(D). [*See* Exhibit 8.] The Office of the Albany County District Attorney filed the *ex parte* motion on behalf of the Barrett Township Police Department and the Monroe County District Attorney's Office. [*See* Exhibit 9.] By Order dated June 29, 2010, the Honorable Stephen W. Herrick of the State of New York, Albany County Court, ordered that the Albany County District Attorney's Office, as well as the Colonie Police Department and the Colonie Town Court make their file pertaining to Defendant available to the Monroe County District Attorney's Office and the Barrett Township Police Department. [*Id.*]

After hearing and consideration of both parties' briefs, the Court issued an Opinion and Order on

December 16, 2010 denying the Commonwealth's Motion to Exclude Expert Testimony as to Forensic Review of Defendant's Computers and denying Defendant's Motions to Dismiss, Exclude Prior Bad Acts and for Change of Venue. The Court granted the Commonwealth's Motions to Allow Evidence of Prior Bad Acts, Exclude Expert Testimony as to Undercover Police Procedures, and Exclude Expert Testimony regarding fantasy based conversation. The Order also directed that the Commonwealth's Exhibits #1-11 be unsealed.

Jury trial commenced on April 12, 2011. A verdict was reached on April 14, 2011 convicting Defendant of six of the seven charges, including: Unlawful Contact with a Minor—Indecent Exposure, Unlawful Contact with a Minor—Open Lewdness, Unlawful Contact with a Minor—Dissemination of Obscene or Sexually Explicit Materials or Performances, Criminal Attempt—Corruption of a Minor, Criminal Use of a Communication Facility, and Indecent Exposure.[1]

Sentencing in this matter was scheduled for May 17, 2011, and Defendant was directed to undergo an assessment with the Pennsylvania Sexual Offenders Assessment Board pursuant to 42 Pa. C.S. § 9795.4 (relating to Registration of Sexual Offenders) for purposes of determining whether Defendant is a sexually violent predator. After various Motions for Continuance, sentencing and hearing on Defendant's potential status as a sexually violent predator ("SVP hearing") were ultimately rescheduled to October 26, 2011.

---

[1] Defendant was acquitted of Criminal Attempt—Dissemination of Obscene or Sexually Explicit Materials or Performances.

On October 21, 2011, Defendant filed a Rule 704(B) Motion for New Trial or, in the Alternative, to Postpone Sentencing. In his Motion, Defendant related that while the case in Pennsylvania proceeded, Defendant took steps to challenge the June 29, 2010 Order of the New York Court granting the *ex parte* motion to unseal the records pertaining to his 2001 arrests. On November 8, 2010, Defendant filed a Motion to Vacate the *ex parte* Order in the Albany County Court, which was denied on December 29, 2010. In March of 2011, Defendant appealed that Order. On October 20, 2011, the Third Department of the Appellate Division of the New York State Supreme Court reversed the December 29, 2010 Order of the Albany County Court denying Defendant's Motion to Vacate and vacated the Albany County Court's June 29, 2010 Order. In its decision, the New York Appellate Court held that the Pennsylvania authorities did not seek the sealed records for permissible purposes under New York State's sealing statute, C.P.L. § 160.50. As such, Defendant asserted in his Motion that he was entitled to a new trial, or in the alternative for sentencing to be postponed.

Hearing on Defendant's Motion for Extraordinary Relief was scheduled for October 26, 2011, the same date and time as sentencing and the SVP hearing, and oral argument was heard by both parties. Counsel for Defendant was permitted extensive opportunity to argue his position, however, the Court informed Counsel that Defendant's filing of its written motion for extraordinary relief prior to sentencing was invalid, as Rule 704 does not permit the filing of a written motion prior to sentencing. *See* Pa. R. Crim. P. § 704; *Commonwealth v. Askew*, 907 A.2d 624 (Pa. Super.

2006). As such, Defendant orally withdrew his written Rule 704(B) Motion, and renewed same orally in open court. Because the issue presented by Defendant appears to one of first impression in this Commonwealth, the Court found that Defendant's right to the requested relief was not clear and that the Court was, therefore, required under Rule 704 to proceed with the SVP hearing and sentencing.

At the hearing, the Court heard testimony from Paula Brust of the Pennsylvania Sexual Offender's Assessment Board regarding Defendant's assessment and concluded that Defendant was a sexually violent predator. Immediately following the hearing, and after considering the arguments of Counsel and the Pre-Sentence Investigation Report ("PSI") prepared by the Monroe County Probation Department, Defendant was sentenced to undergo a period of incarceration in a state correctional institution of not less than 18 months with a maximum not to exceed 66 months. Defendant was also ordered to comply with the registration requirements set forth at 42 Pa. C.S. § 9795.1 pertaining to Megan's Law.

On November 7, 2011 Defendant filed a Rule 720 Post-Sentencing Motion for a New Trial or, in the Alternative, Resentencing along with a brief. A hearing on the Motion was held on December 8, 2011, at which time Defendant reiterated his position from the Rule 704(B) hearing, as well as made additional argument that the Court should vacate Defendant's convictions due to a lack of sufficiency of the evidence and because the weight of the evidence did not support the jury's verdict. On December 22, 2011, Defendant filed a supplemental brief in support of his position; the

Commonwealth filed a brief in opposition on January 12, 2012. We are now prepared to decide this matter.

DISCUSSION

By filing his Rule 720 Motion, Defendant moves the Court to vacate Defendant's convictions and order a new trial, or, in the alternative, to resentence him and, at the very minimum, to set forth conditions that will allow him to be released on bail pending the outcome of his appeal. We will deny Defendant's Motions for the reasons stated below.

Motion for New Trial

Defendant first argues that at time of trial, the Commonwealth made extensive use of records, specifically two transcripts of online chats that Defendant had with undercover New York police officers, relating to two previous arrests of Defendant in 2001 in Albany County, New York. Defendant avers that the transcripts had been sealed pursuant to a New York Statute, and that the Commonwealth obtained an *ex parte* order from the County Court unsealing the records and extensively used the sealed material in presenting its case at trial, Defendant argues that since the Appellate Division of the New York State Supreme Court ultimately vacated the Albany County Court's Order unsealing the records that were used at trial, this Court must give "full faith and credit" to the New York Appellate Court's decision and grant Defendant a new trial at which the improperly-obtained evidence of Defendant's prior bad acts is not introduced. We disagree for several reasons.

First, at the time we allowed the admission of evidence of Defendant's 2001 records, a valid Albany

County Court Order existed to which we gave "full faith and credit," At that time, we stated that we would not usurp the power and decision of a New York Court with respect to the interpretation of a New York Statute. The fact that this Order was vacated after Defendant's conviction does not automatically entitle Defendant to a new trial. We have found no Pennsylvania law, or New York law binding upon this Court, that requires the Court to hold a new trial other than for issues of fundamental fairness or due process. Under the circumstances at hand, we find that a new trial is not warranted because the admission of the records was, at worst, harmless error. Based upon the evidence presented at trial, we conclude that even if the New York records were deemed inadmissible, the Commonwealth would still have presented sufficient evidence of the offenses charged for the jury to find Defendant guilty beyond a reasonable doubt.

Second, even if certain records utilized by the Commonwealth at trial should have remained sealed as "official records and papers" as provided by the New York unsealing statute,[2] we find that the evidence derived from such records could still have been obtained from other sources. For example, we find nothing in the New York statute that would have prohibited a police officer with personal knowledge of the arrests from testifying to their details.[3] Moreover, the Attorney

---

[2] N.Y Crim. Proc. Law § 160.50(1)(c).

[3] Under New York State law, once a criminal action is terminated in favor of a person, "[A]ll official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal,

for the Commonwealth acknowledged that a majority of the documents he used at trial were found on the Internet and were public information. Indeed, a Google search for "William Scott Ritter New York arrests" yields over 134,000 results, including links to news stories, commentaries, and official records, all detailing Defendant's previous sexual crimes.

Finally, we find that the transcripts of the 2001 chat logs as well as information solicited from the detective involved in the 2001 arrests are not "official records and papers" subject to the New York sealing statute. In *Harper v. Anglofillo* the New York Superior Court stated:

> [A]lthough CPL 160.50 specifies judgments and orders of a court as items "included" in the category of official records and papers, the statute is otherwise silent on the nature of such "official" material (*see*, CPL 160.50[1][c]) further supporting the conclusion that bright line rules are not wholly appropriate in this area. Indeed, such records and papers are not always subject to easy identification and may vary according to the circumstances of a particular case.
>
> Thus, in *Matter of Dondi*, we held that "on the facts of this case" certain "testimonial

---

relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available 10 any person or public or private agency. N.Y Crim. Proc. Law § 160.50(1)(c) (McKinney 2004). However, no bright line test exists to determine what evidentiary items are included in the category of "official records and papers." *Harper v. Anoiolillo*, 680 N.E.2d 602, 604 (N.Y. 1997)

> evidence" consisting of an incriminatory tape recording constituted an official record subject to CPL 160.50(1)(c). However, in *Matter of Hynes v. Karassik*, we affirmed the Appellate Division's determination that "two tape recordings introduced into evidence at the criminal trial were not within the definition of 'official records and papers' protected by the sealing statute." Consequently, while some recordings may qualify as an official record under certain circumstances, not all tape recordings will qualify as an official record in every case. . . .

680 N.E.2d 602, 604-05 (N.Y. 1997) (internal citations omitted). Further, New York courts have held that records such as investigative and audit reports prepared by a prosecutor as well as tape recordings made in the course of an investigation do not constitute "official records and papers" within the meaning of CPL 160.50(1)(c). *See People v. Neuman*, 428 N.Y.S.2d 577, 579 (N.Y. App. Div. 1980); *Hynes v. Karassik*, 405 N.Y.S.2d 242, 243 (N.Y. 1978). Courts are clear that there is no bright line test for determining what are or are not "official records and papers," and that the evidence must be viewed and a decision made on a case by case basis. *Id.* Here, we find that the transcripts of the 2001 chat logs as well as the information obtained from the detective involved in the 2001 arrests are not testimonial in nature and are more akin to tape recordings and investigative reports than judicial orders or official police records. Thus, the evidence at issue does not constitute "official records and papers" under the statute and was properly admitted at trial as evidence of Defendant's prior bad acts.

Defendant equates this case to cases that arise in the context of unlawfully obtained evidence under the Fourth Amendment of the Constitution or Article I, Section 8 of the Pennsylvania Constitution and makes detailed arguments as to whether New York or Pennsylvania law should apply to determine whether or not the previous arrest records should be suppressed. However, we need not address those arguments as the issue here is not one of suppression, but rather one of admissibility. There is no question that the Commonwealth lawfully obtained the records in question, regardless of whether they were provided by Albany County or downloaded from the internet. While the New York Appellate Division subsequently ruled that the records should not have been unsealed, this ruling in no way makes the Commonwealth's use and possession of the records unlawful.

While New York law may allow the Defendant to have the official records sealed, in essence this is mere formality. New York courts cannot purge accounts of the arrests from the internet, newspapers, and the minds of those who witnessed them. We ruled in our December 16, 2010 Opinion that evidence of the Defendant's prior bad acts, including previous arrests, was admissible and we stand by that ruling now. Even if the records in question were never unsealed, there were various avenues through which the Commonwealth could still have introduced evidence of Defendant's previous arrests. As such, Defendant's Motion for New Trial under Rule 720 will be denied.

Motion for a New Sentencing Hearing

Defendant next argues that Due Process requires that the Court hold a new sentencing hearing and order

the preparation of new reports from the Pennsylvania Sexual Offenders Assessment Board and the Monroe County Probation Department because both reports referred to evidence pertaining to the 2001 arrests that should not have been considered at sentencing under New York law. In the alternative, Defendant argues that the Court should modify Defendant's sentence because five of the six offenses Defendant was found guilty of should merge for the purposes of sentencing, as they each involve identical conduct of "inappropriate sexual conduct," which was proven by the same act, notwithstanding the fact that they are stated in different words.

In addressing Defendant's Motion for a New Sentencing Hearing, for the reasons stated on the record at time of hearing on Defendant's post-sentencing motion, and for the reasons stated above, we find that the records of Defendant's prior arrests in 2001 were still a part of the record at time of sentencing, having been properly admitted at trial. As such, it was appropriate at the time of sentencing for the Monroe County Probation Department as well as Ms. Brust of the Pennsylvania Sexual Offenders Assessment Board to rely upon all evidence lawfully admitted at time of trial. Moreover, regardless of whether evidence of Defendant's prior arrests were admitted, said records were not the sole basis for this Court's decision, as other facts of record exist to support the sentence imposed by this Court.

As to Defendant's Motion for Modification of Sentence, Defendant argues that the five offenses that should merge are; (1) unlawful contact with a minor, indecent exposure; (2) indecent exposure; (3) unlawful contact with a minor, open lewdness; (4)

unlawful contact with a minor, dissemination obscene or sexually explicit materials or performances; and (5) criminal attempt to commit the offense of corruption of a minor. We disagree.

42 Pa. C.S. § 9765, Merger of Sentences, provides in relevant part as follows:

> No crimes shall merge for sentencing purposes unless the crimes arise from a single criminal act and all of the statutory elements of one offense are included in the statutory elements of the other offense. Where crimes merge for sentencing purposes, the court may sentence the defendant only on the higher graded offense.

42 Pa. C.S. § 9765. The three offenses pertaining to Unlawful Contact with a Minor of which Defendant was convicted are as follows:

> 18 Pa. C.S.A. § 6318. Unlawful Contact with a Minor—
>
> (a) Offense defined.—A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:
>
> (1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses).
>
> (2) Open lewdness as defined in section 5901 (relating to open lewdness).

(4) Obscene and other sexual materials and performances as defined in section 5903 (relating to obscene and other sexual materials and performances).

18 Pa. C.S. § 6318.

Indecent exposure, as enumerated in Chapter 31 (relating to sexual offenses) requires a person who commits indecent exposure to expose his or her genitals in any public place or in any place where there are present other persons under circumstances in which he or she knows or should know that this conduct is likely to offend, affront or alarm. 18 Pa. C.S. § 3127. On the other hand, the offense of open lewdness requires that a person commit any lewd act which he knows is likely to be observed by others who would be affronted or alarmed. Moreover, the offense of obscene and other sexual materials and performances prohibits any person who knows the obscene character of the materials or performances involved to display any explicit sexual materials where minors, as a part of the general public or otherwise, are or will probably be exposed to view all or any part of such materials. 18 Pa. C.S. § 5903(a)(1). Although Defendant's convictions for Unlawful Contact with a Minor arose from the same set of facts, based upon the different statutory requirements, and the fact that not all of the statutory elements of one offense are included in the statutory elements of the other offenses, these offenses do not merge for purposes of sentencing.

Furthermore, Defendant was convicted of both Criminal Attempt to Commit the Act of Corruption of Minors, Criminal Use of a Communication Facility, and indecent Exposure. As these offenses contain various elements not coinciding with each other or.

The offenses explained above, we find it superfluous to address whether they merge for purposes of sentencing. Moreover, regardless of whether or not the above offenses merged for purposes of sentencing, this Court ordered concurrent sentences for Counts 1, 2 and 3 relating to Unlawful Contact with a Minor–Indecent Exposure, Unlawful Contact with a Minor–Open Lewdness, and Unlawful Contact with a Minor–Obscene and other Sexual Materials and Performances. As such, Defendant's argument with respect to Counts 1, 2 and 3 is moot. Defendant's motion will be denied.

Sufficiency of the Evidence Claim and Weight of the Evidence

Defendant cursorily alleges in his Motion that there was insufficient evidence to support the charges against Defendant and that the verdict was contrary to the weight of the evidence. However, at no time during hearing on Defendant's post-sentence motions, or in any of Defendant's elaborate briefs did Defendant argue his position with respect to his sufficiency of the evidence or weight of the evidence claims. As such, we are unable to fully address his arguments at this time. However, in the interest of judicial economy, we will address his claims generally as they apply to the Rules of Criminal Procedure.

A defendant may challenge the sufficiency of the evidence to sustain a conviction of one or more of the offenses charged in a motion for judgment of acquittal made after sentence is imposed pursuant to Pa. R. Crim. P. § 720(B). Pa. R. Crim. P. § 606. A defendant shall also raise a claim that the verdict was against the weight of the evidence in a motion for a new trial in a post-sentence motion. Pa. R. Crim. P. § 607.

However, Pa. R. Crim. P. § 720 provides in relevant part as follows:

> (B) Optional Post-Sentence Motion.
>
> (1) Generally.
>
> (a) The defendant in a court case shall have the right to make a post-sentence motion. All requests for relief from the trial court shall be stated with specificity and particularity, and shall be consolidated in the post-sentence motion, which may include:
>
> (i) a motion challenging the validity of a plea of guilty or *nolo contendere*, or the denial of a motion to withdraw a plea of guilty or *nolo contendere*;
>
> (ii) a motion for judgment of acquittal;
>
> (iii) a motion in arrest of judgment;
>
> (iv) a motion for a new trial; and/or
>
> (v) a motion to modify sentence.
>
> (b) The defendant may file a supplemental post-sentence motion in the judge's discretion as long as the decision on the supplemental motion can be made in compliance with the time limits of paragraph (B)(3).
>
> (c) Issues raised before or during trial shall be deemed preserved for appeal whether or not the defendant elects to file a post-sentence motion on those issues.

Pa. R. Crim. P. § 720(B)(1)(a)–(c). The Comments to the Rule provide that "[u]nder paragraph (B)(1)(a), the grounds for the post-sentence motion should be

stated with particularity. Motions alleging insufficient evidence, for example, must specify in what way the evidence was insufficient, and motions alleging that the verdict was against the weight of the evidence must specify why the verdict was against the weight of the evidence." *See* Comment to Pa. R. Crim. P. § 720. "Because the post-sentence motion is optional, the failure to raise an issue with sufficient particularity in the post-sentence motion will not constitute a waiver of the issue on appeal as long as the issue was preserved before or during trial." *See* Pa. R. Crim. P. § 720(B)(1)(c).

Here, Defendant fails to state with particularity in what way the evidence was insufficient, or why the verdict was against the weight of the evidence, with the exception of the argument that the evidence of Defendant's prior offenses should be found inadmissible. Inasmuch as we have addressed this issue above, we are constrained to deny Defendant's motions at this stage. However, in the interest of judicial economy, and in viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, we find that there is more than ample evidence to support Defendant's convictions for all of the charges of which he was found guilty, including Unlawful Contact with a Minor–Indecent Exposure, Indecent Exposure, Unlawful Contact with a Minor–Open Lewdness, Unlawful Contact with a Minor–Dissemination of Obscene or Sexually Explicit Materials or Performances, Criminal Attempt–Corruption of a Minor, and Criminal Use of a Communication Facility.

When reviewing a sufficiency of the evidence claim, our appellate courts apply the following standard:

> [v]iewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt. In applying the above test, we may not weigh the evidence and substitute our judgment for the fact-finder. In addition, we note that the facts and circumstances established by the Commonwealth need not preclude every possibility of innocence. Any doubts regarding a defendant's guilt may be resolved by the fact-finder unless the evidence is so weak and inconclusive that as a matter of law no probability of fact may be drawn from the combined circumstances. The Commonwealth may sustain its burden of proving every element of the crime beyond a reasonable doubt by means of wholly circumstantial evidence. Moreover, in applying the above test, the entire record must be evaluated and all evidence actually received must be considered.

Commonwealth v. Hutchinson, 947 A.2d 800, 805-06 (Pa. Super. 2008) (emphasis and citations omitted). The credibility of witnesses and the weight to be afforded the evidence produced are matters within the province of the trier of fact; the fact finder is free to believe all, some, or none of the evidence. *Commonwealth v. Smith*, 502 Pa. 600, 467 A.2d 1120, 1122 (1983). With respect to the weight of the evidence argument, our Appellate Courts have explained:

> the weight of the evidence is exclusively for the finder of fact who is free to believe all,

> part, or none of the evidence and to determine the credibility of the witnesses. An appellate court cannot substitute its judgment for that of the finder of fact. Thus, we may only reverse the lower court's verdict if it is so contrary to the evidence as to shock one's sense of justice.

Commonwealth v. Moreno, 14 A.3d 133, 135 (Pa. Super. 2011) (quotation omitted).

Viewing the evidence in the light most favorable to the Commonwealth as the verdict winner, we find that it was well within the province of the jury to conclude that there is sufficient evidence to enable them to find every element of each of the crimes of which Defendant was convicted beyond a reasonable doubt. The facts ascertained at trial established that Detective, purporting to be a 15-year-old minor female, engaged in conversations of a sexual nature with Defendant over the Internet. Defendant displayed his penis over a web camera and began to masturbate so that Detective could witness. Defendant was advised several times that Detective was a "15-year-old female" yet continued to engage in the act of masturbation over the Internet.

After reviewing the record in considerable detail and taking into consideration the testimony of all the witnesses, the Defendant's statements, and the direct and circumstantial evidence presented at trial, we believe it was well within the province of the jury to conclude that Defendant was guilty of the crimes charged. As the fact-finder, the weight and credibility determinations were exclusively for the jury to make, and there was more than ample evidence to support the verdict, even without the evidence or records of

Defendant's prior New York offenses. We do not find the verdict so contrary to the evidence as to shock one's sense of justice. Defendant's motion to vacate his convictions due to a lack of sufficiency of the evidence and because the weight of the evidence did not support the jury's verdict will be denied.

Bail Pending Appeal

Finally, Defendant requests that he be granted bail pending appeal if the Court does not vacate his convictions and provide him a new trial. Defendant argues that there are conditions of release that can be fashioned in response to the Court's stated concerns placed on the record during hearing on Defendant's post-sentence motions in regards to releasing Defendant on bail pending his appeal. Specifically, Defendant suggests, for example, computer monitoring software that blocks websites and monitors internet activity, as well as continued treatment with Dr. Hamill who will verify Defendant's participation with the Probation Department on a weekly basis, and Defendant surrendering his passport. Moreover, Defendant expressed at the time of hearing that his wife would be willing to closely monitor his actions. We disagree, and for reasons placed on the record by this Court at time of hearing on Defendant's post-sentencing motions, and the law as provided in Pa. R. Crim. P. §§ 521 and 523 regarding bail after a finding of guilt and release criteria, respectively, we stand by our position and will not address this matter further.

Accordingly, we enter the following Order.

ORDER OF THE COURT OF COMMON PLEAS OF MONROE COUNTY 43RD JUDICIAL DISTRICT (MARCH 20, 2012)

COURT OF COMMON PLEAS OF MONROE COUNTY FORTY-THIRD JUDICIAL DISTRICT COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v.

WILLIAM SCOTT RITTER, JR.,

Defendant.

No. 2238 Criminal 2009

Before: Jennifer Harlacher SIBUM, Judge.

And Now, this 20th day of March 2012, Defendant's Rule 720 post-Sentencing Motion for a New Trial or, in the Alternative, Resentencing, is DENIED. Defendant's Motion for Bail Pending Appeal is DENIED.

Defendant is advised that he has thirty (30) days from the date of this Order within which to file an Appeal with the Superior Court of Pennsylvania. Defendant is further advised that he has the right to assistance of counsel in the preparation of the appeal and, if he is indigent, to appeal *in forma pauperis* and to have counsel appointed to represent him free of charge. *See* Pa. R. Crim. P. § 720(B)(4).

By the Court:

/s/ Jennifer Harlacher Sibum
Judge

ORDER OF THE COURT OF COMMON PLEAS OF MONROE COUNTY 43RD JUDICIAL DISTRICT ON MOTION IN LIMINE (DECEMBER 16, 2010)

COURT OF COMMON PLEAS OF MONROE COUNTY FORTY-THIRD JUDICIAL DISTRICT COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v.

WILLIAM SCOTT RITTER, JR.,

Defendant.

No. 2238 Criminal 2009

Before: Jennifer Harlacher SIBUM, Judge.

OPINION

Defendant, William Scott Ritter, Jr., has been charged by Criminal Complaint with three separate counts of Unlawful Contact with a Minor, 18 Pa. C.S. § 6318(a)(1), (2), (4); Criminal Use of Communication Facility, 18 Pa. C.S. § 7512(a); Possessing Instruments of Crime, 18 Pa. C.S. § 907(a); Indecent Exposure, 18 Pa. C.S. § 3127(a); five individual counts of Criminal Attempt to commit the crimes of Unlawful Contact with a Minor, Obscene and Other Sexual Materials and Performances, Corruption of Minors, Criminal Use of a Communications Facility, and Indecent Exposure,

18 Pa. C.S. § 901(a); and five individual counts of Criminal Solicitation to commit the crimes of Unlawful Contact with a Minor, Obscene and Other Sexual Materials and Performances, Corruption of Minors, Criminal Use of a Communications Facility, and Indecent Exposure, 18 Pa. C.S. § 902(a).

The charges stem from an Internet investigation by the Barrett Township Police Department. As part of the investigation, Detective Ryan Venneman ("Detective") of the Barrett Township Police Department was conducting undercover operations and investigating the crime of internet sexual exploitation of children via the computer. While conducting the investigation, Detective purported to be a 15-year-old minor female named "Emily". Detective was then contacted by an individual identified as "delmarm4fun," a 44-year-old male from Albany, New York. The conversation was initiated by "delmarm4fun" in a Yahoo Instant Messenger chat room.

During the conversation, "delmarm4fun" was advised that "Emily" was a 15-year-old female from the Poconos, Pennsylvania. The conversation was sexual in nature, during which "delmarm4fun" requested "Emily" to give him another picture so he could continue to "react". Shortly after, he provided the purported 15 year old a link to his web camera. The camera displayed a male's face and upper body area. "Delmarm4fun" later adjusted the camera to focus on his penis area and began to masturbate. "Emily" asked him if he had a phone number where "she" could call him. "Delmarm4fun" provided a cell phone number of 518-365-6530.

"Delmarm4fun" continued to masturbate on web cam and again asked "Emily's" age he was advised a second time that she was 15 years old. He stated he

didn't realize that she was 15 and turned off his web camera. He then stated he did not want to get in trouble and said "I was fantasizing about fucking you," "Emily" replied "I guess u turned it off np". "Delmarm4fun" responded by asking "Emily" if she wanted "to see it finish". He again sent to "Emily" a link to his web camera which showed him masturbating and then ejaculating.

Detective then called the Nextel wireless phone number provided by "delmarm4fun" and advised the individual that he was a Police Officer with the Barrett Township Police Department. During the conversation, "delmarm4fun" provided his personal information as William Scott Ritter Jr. of Delmar, New York ("Defendant"). Detective obtained several photographs of Defendant and compared them to the web camera video obtained while "delmarm4fun" was masturbating on camera. Detective determined that the photos and video were of the same person.

On April 22, 2009, Detective secured a Court Order for Nextel Wireless to provide subscriber information for the wireless number of 518-365-6530. On October 13, 2009, Detective received the subscriber information confirming the wireless number was assigned to William Ritter of Delmar, NY at the time of the incident on February 7, 2009. Defendant was later charged with the above stated crimes.

Defendant waived his right to a preliminary hearing and to a formal arraignment in anticipation of entering into a negotiated plea to one count of Unlawful Contact with a Minor, 18 Pa. C.S. § 6318(a)(4), a felony of the third degree. The Commonwealth filed a Criminal Information on January 11, 2010 charging Defendant with a single count of Unlawful Contact

with a Minor. Defendant filed an Omnibus Pretrial Motion and a Motion for Discovery on January 14, 2010. Both motions were withdrawn on February 3, 2010. Defendant thereafter did not enter a plea of guilty to the Unlawful Contact charge.

On June 15, 2010, the Commonwealth filed a Notice of Prior Bad Acts pursuant to Pa.R.E. § 404 as well as a Motion *In Limine* seeking to allow testimony of Defendant's prior bad acts at trial. Specifically, the Commonwealth sought to admit at trial evidence of charges filed in New York State against Defendant for offenses similar to those at issue before this Court. A hearing on the Commonwealth's Motion was scheduled for June 28, 2010 and thereafter continued generally at the request of counsel for the Commonwealth with the concurrence of Defendant to be resisted for hearing upon application of either counsel.

On June 16, 2010, the Commonwealth filed a Motion for Leave to Amend the Criminal Information arguing that the Commonwealth should be permitted to amend the Criminal Information to include all counts charged in the Criminal Complaint. The Commonwealth argued that it filed the one-count Information in reliance on the earlier plea agreement reached with Defendant in which Defendant agreed to waive his preliminary hearing and plead guilty to the Unlawful Contact with a Minor charge in exchange for the Commonwealth withdrawing the remaining charges alleged in the Criminal Complaint. In reliance on this agreement, the Commonwealth filed a Criminal Information with one count of 18 Pa. C.S. § 6318(a)(4) with the understanding that if the case was not resolved with a guilty plea, all the charges would be reinstated. The Commonwealth's Motion was granted and an

Amended Criminal Information was filed charging Defendant with Unlawful Contact with a Minor (sexual offenses), 18 Pa. C.S. § 6318(a)(1); Unlawful Contact with a Minor (open lewdness), 18 Pa. C.S. § 6318(a)(2), Unlawful Contact with a Minor (obscene and other sexual materials and performances), 18 Pa. C.S. § 6318(a)(4); Criminal Attempt to Commit Obscene and Other Sexual Materials and Performances, 18 Pa. C.S. § 901; Criminal Attempt to Commit Corruption of Minors, 18 Pa. C.S. § 901; and Criminal Use of a Communication Facility, 18 Pa. C.S. § 7512.

On August 10, 2010, Defendant filed a Motion for Dismissal/Change of Venue as well as a Motion *In Limine* to exclude evidence regarding past allegations of misconduct pursuant to Pa.R.E. § 404. The Commonwealth filed a second Motion *In Limine* on August 27, 2010 seeking to preclude the defense experts' testimony as to: (1) proper undercover procedures in conducting online chat investigations; (2) the results of a forensic review of the Defendant's household computers; and (3) the ability of consenting participants in adult internet chat rooms to fantasize and assume that other adult participants are doing likewise. A hearing on all motions, including the Commonwealth's first Motion *In Limine*, was held on August 31, 2010.

At hearing, counsel for both parties represented to the Court that the Commonwealth had obtained records of Defendant's New York arrests which were sealed by a court of that state in 2001. The records in question were admitted as Commonwealth's Exhibits 1 through 11, and placed under seal pending a decision by this Court on the parties' respective Motions *In Limine*. The Commonwealth's Exhibits are comprised of the following documents:

1. Criminal Complaint filed in the present case;
2. Transcript of chat log dated February 7, 2009;
3. Wikipedia computer print outs re: Defendant
4. January 14, 2010 letter from Monroe County Assistant District Attorney Michael Rakaczewski to Albany County, New York District Attorney P. David Soares requesting New York Investigator's name and file re: Defendant;
5. February 8, 2010 letter from Robert G. Muller, Senior Criminal Investigator, Albany County, New York District Attorney's Office to Monroe County ADA Rakaczewski forwarding Defendant's criminal file;
6. April 23, 2010 letter from Defense Counsel to Monroe County District Attorney David Christine re: New York records of Defendant;
7. June 2, 2010 letter from Monroe County ADA Rakaczewski to Albany County, New York Chief Assistant District Attorney David M. Rossi returning records;
8. June 2, 2010 letter from Monroe County ADA Rakaczewski to Albany County, New York Chief Assistant District Attorney David M. Rossi enclosing proposed Motion to unseal records;
9. June 29, 2010 Order of the Albany County Court, Stephen W. Herrick, Judge, unsealing criminal records of Defendant;
10. New York State arrest records for Defendant;

11. August 24, 2010 letter from Defense counsel Gary Kohlman, Esquire to Monroe County ADA Rakaczewski re: Defense experts.

The Commonwealth further represented to the Court that the Commonwealth came into possession of Defendant's New York records as a result of an internet "Google" search Assistant District Attorney Rakaczewski performed on Defendant's name. The "Google" search revealed the Wikipedia computer results set forth in Commonwealth Exhibit #3. As a result of the internet search results, Attorney Rakaczewski sent a letter to Attorney Soares of the District Attorney's Office in Albany County, New York, advising Attorney Soares that the Monroe County District Attorney's Office was "prosecuting [Defendant] in similar charges to his arrest in Albany County in 2001" and requesting that Attorney Soares' Office "provide [ADA Rakaczewski] with the name of the officer or detective who investigated these cases, as well as copies of your documents." [*See* Exhibit 4.] Attorney Soares' Office responded by sending copies of their entire file as well as the contact information for the Investigator on the case. [*See* Exhibit 5.] The discovery received contained police reports concerning alleged criminal incidents involving Defendant that took place in 2001 in New York State. [*See* Exhibit 6.]

After receipt and review of the records from New York State, ADA Rakaczewski sent copies of the records to counsel for Defendant. Thereafter, on April 23, 2010, defense counsel wrote to the Monroe County District Attorney advising that the Defendant's New York records were subject to a New York sealing and expungement order requiring that the records be sealed and/or destroyed. [*See* Exhibit 6.] The letter further

stated that the Commonwealth's possession of the records was "illegal," demanded that the Commonwealth "turn-over" all copies of the records, "divulge" how the Commonwealth came into possession of same, and meet with defense counsel to discuss defense counsel's views on "where this case should go at this point." [*Id.*]

In response, the Commonwealth returned the original documents received to the Albany Chief Assistant District Attorney. [*See* Exhibit 7.] The Commonwealth also provided the Chief ADA in Albany with a Motion to be filed in the New York State Supreme Court for Albany County requesting to have the records unsealed ex parte pursuant to New York State Criminal Procedure Law § 160.50(1)(D). [*See* Exhibit 8.] The Office of the Albany County District Attorney filed the ex parte motion on behalf of the Barrett Township Police Department and the Monroe County District Attorney's Office. [*See* Exhibit 9.] By Order dated June 29, 2010, the Honorable Stephen W. Herrick of the State of New York, Albany County Court, ordered that the Albany County District Attorney's Office, as well as the Colonie Police Department and the Colonie Town Court make their file pertaining to Defendant available to the Monroe County District Attorney's Office and the Barrett Township Police Department. [*Id.*]

After the hearing, both parties were given the opportunity to file briefs. Both parties have since filed briefs to all motions and we are now prepared to render our decision in this matter.

DISCUSSION

1. Motion to Dismiss for Egregious Misconduct and Motions *In Limine* re: Prior Bad Acts

Defendant filed a Motion to Dismiss seeking to have all the charges dismissed on grounds that the Commonwealth committed egregious misconduct by obtaining, *ex parte*, Defendant's sealed New York criminal records. Defendant argues that the Commonwealth's egregious misconduct is in violation of Defendant's constitutional and statutory rights and will cause Defendant to suffer prejudice if the charges are not dismissed. Defendant also filed a Motion to Exclude Evidence of Prior Bad Acts, arguing that inclusion of Defendant's prior actions would prejudice Defendant. The Commonwealth filed a Motion seeking to admit such evidence as being more probative than prejudicial. We will begin by determining whether the criminal records were properly obtained, and if so, whether they are admissible at time of trial.

New York statute, N.Y. Crim. Proc. Law § 160.50 (McKinney 2004), pertaining to the sealing and subsequent unsealing of criminal records, provides in relevant part as follows:

> § 160.50 Order upon termination of criminal action in favor of the accused,
>
> (1) Upon the termination of a criminal action or proceeding against a person in favor of such person, as defined in subdivision three of this section, unless the district attorney upon motion with not less than five days notice to such person or his or her attorney demonstrates to the satisfaction of the court that

the interests of justice require otherwise, or the court on its own motion with not less than five days notice to such person or his or her attorney determines that the interest of justice require otherwise and states the reasons for such determination on the record, the record of such action or proceeding shall be sealed and the clerk of the court wherein such criminal action or proceeding was terminated shall immediately notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcement agencies that the action has been terminated in favor of the accused, and unless the court has directed otherwise, that the record of such action or proceeding shall be sealed. Upon receipt of notification of such termination and sealing:

(b) any police department or law enforcement agency, including the division of criminal justice services, which transmitted or otherwise forwarded to any agency of the United States or of any other state or of any other jurisdiction outside the state of New York copies of any such photographs, photographic plates or proofs, palmprints and fingerprints, including those relating to actions or proceedings which were dismissed pursuant to section 170.56 or 210.46 of this chapter, shall forthwith formally request in writing that all such copies be destroyed or returned to the police

department or law enforcement agency which transmitted or forwarded them, and, if returned, such department or agency shall, at its discretion, either destroy or return them as provided herein . . . ;

(c) all official records and papers, including judgments and orders of a court but not including published court decisions or opinions or records and briefs on appeal, relating to the arrest or prosecution, including all duplicates and copies thereof, on file with the division of criminal justice services, any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency;

(d) such records shall be made available to the person accused or to such person's designated agent, and shall be made available to (i) a prosecutor in any proceeding in which the accused has moved for an order pursuant to section 170.56 or 210.46 of this chapter, or (ii) a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it. . . .

N.Y. Crim. Proc. Law § 160.50 (McKinney 2004) (emphasis added).

Under New York State Law, once a criminal action is terminated in favor of a person, "all official records

and papers, including judgments and orders of a court . . . relating to the arrest or prosecution, including all duplicates and copies thereof, on file with . . . any court, police agency, or prosecutor's office shall be sealed and not made available to any person or public or private agency. . . . " § 160.50(1)(c). However a defendant's interest in preventing the disclosure of official records and papers in a terminated proceeding is not absolute. *Matter of Tony Harper v. Angiolillo*, 680 N.E.2d 602, 605 (N.Y. 1997). Such records may be unsealed in a limited number of circumstances, including being unsealed and provided to a law enforcement agency upon *ex parte* motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires the records be made available. § 160.50(1)(d)(ii).

In order to obtain records under section 160.50 (1)(d)(ii), a request must "set forth facts indicating that other avenues of investigation ha[ve] been exhausted or thwarted or that it [is] probable that the record[s] contain information that [is] both relevant to the investigation and not otherwise available by conventional investigative means." *Matter of Dondi*, 472 N.E.2d 281, 285 (N.Y. 1984). Section 160.50(1)(d)(ii) permits a law enforcement agency to move *ex parte* for an order unsealing records upon a proper showing. Here, the Albany Court has deemed the *ex parte* Motion appropriate in as much as they have granted the unsealing of the records, and we will not disrupt their findings.

Upon a plain reading of the New York statute, a thorough review of the facts of this case, and the actions taken by both the Monroe County District Attorney's Office as well as the Albany County District

Attorney's Office, we find that the Commonwealth has not acted with bad motive or committed egregious misconduct in seeking the unsealing of Defendant's records. In presenting the Motion to the Albany District Attorney's Office, the Commonwealth presented all the facts of the case, disclosed that charges were filed against Defendant in Monroe County, and disclosed that the Commonwealth was seeking information to assist in the prosecution of Defendant. The Albany District Attorney's Office was made fully aware of the on-going prosecution in Monroe County prior to it filing the *ex parte* motion on behalf of the Commonwealth, as was the Albany County Court prior to the issuance of its Order unsealing Defendant's records.

We will not usurp the power and decision of a New York Court with respect to the interpretation of a New York Statute. As such, we will not overturn a New York Court's decision with respect to its own law, especially when the court, as is the case in this matter, was accurately apprized as to the factual basis for the motion and order in question. To the extent Defendant argues that the Albany County and Monroe County DA's Offices' requests for unsealing the records were improperly granted, he must challenge the propriety of the New York Court's decision in the New York Court System. We will give full faith and credit to the Albany County Court's June 29, 2010 Order.

Having determined that the criminal records were properly obtained, we must now consider whether the evidence and records of Defendant's prior bad acts are admissible at time of trial. Pennsylvania Rule of Evidence § 404(b) provides as follows:

(a) Other Crimes, wrongs, or acts.

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.
>
> (2) Evidence of other crimes, wrongs, or acts may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.
>
> (3) Evidence of other crimes, wrongs, or acts proffered under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.
>
> (4) In criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Pa.R.E. 404(b). Generally, evidence of prior bad acts is not admissible solely to demonstrate a criminal defendant's propensity to commit crimes. *Commonwealth v. Russell*, 938 A.2d 1082, 1092 (Pa. Super. 2007). However, such evidence may be admissible "where it is relevant for some other legitimate purpose and not utilized solely to blacken the defendant's character." *Id.* It is well-established that reference to prior criminal activity may be introduced where the evidence is relevant to demonstrate motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *Id.* How-

ever, determining that the evidence is relevant does not end our inquiry. Evidence, even if relevant, may be excluded if its probative value is outweighed by its potential for prejudice. Pa.R.E. § 404(b)(3).

Resolution of the present case first turns on whether Defendant's prior convictions have a legitimate purpose under Rule 404(b) and are not simply being used to demonstrate Defendant's propensity to commit crimes. In this case, Defendants prior actions are substantially similar to the present charges. All three incidents involved female minors who disclosed their ages to Defendant as being under 18 years of age. Each situation further involved communication over the internet with three individual undercover police officers and Defendant's desire to masturbate in the presence of a minor while she watched him.

Defendant's prior bad acts demonstrate intent on the part of Defendant and negate any defense of mistake or accident. The information reflected in the chat logs entered into evidence at the August 31, 2010 hearing relays that Defendant questioned each "minor" about their age. Upon learning that each female was under the age of 18, Defendant continued to engage in sexual conversation, attempting to get the girls to watch him masturbate either in person or via web camera. Defendant's past episodes in communicating with female minors via the internet, both executed in a similar manner to this incident, confirms his intent to engage in this similar behavior a third time. Furthermore, Defendant's prior bad acts can be offered as proof of absence of mistake or accident. Each minor female directly told Defendant her age and that she was under 18 years old. The facts as presented demonstrate that any argument that Defendant did not

believe the victim was a minor and never intended to expose himself to a minor by entering an "adult" chat room is not overwhelmingly persuasive and is rebutted by the evidence since Defendant has engaged in this behavior twice before.

Defendant's prior bad acts also demonstrate Defendant's knowledge. His prior conduct, in which he engaged in this type of behavior on two prior occasions and was caught by police officers performing the sting operations, is evidence that Defendant knew his conduct with a minor was in violation of the law. The evidence also tends to show that Defendant knew that minors utilized the "adult" chat rooms occasioned by Defendant. As such, evidence of Defendant's prior arrests is admissible.

Having determined that evidence of Defendant's prior bad acts is admissible for various evidentiary bases under Rule 404(b), we must also determine whether its probative value outweighs the potential for unfair prejudicial effect. Pa.R.E. § 404(b)(3); *Commonwealth v. Aikens*, 990 A.2d 1181, 1185 (Pa. Super. 2010) (holding "In determining whether evidence of other prior bad acts is admissible, the trial court is obliged to balance the probative value of such evidence against its prejudicial impact.") The Court should balance the relevancy and evidentiary need for the evidence of distinct crimes against the potential for undue prejudice. *Commonwealth v. O'Brien*, 836 A.2d 966, 972 (Pa. Super. 2003). This does not require a court to sanitize a trial to eliminate all unpleasant facts from the jury's consideration where those facts are relevant to the issues at hand and form part of the history and natural development of the events and offenses for which the defendant is

charged. *Commonwealth v. Page*, 965 A.2d 1212, 1220 (Pa. Super. 2009). Evidence will not be prohibited merely because it is harmful to the defendant. *Id.*

Our Superior Court has adopted the following factors to be considered in performing the probative value-prejudice balancing test:

> In deciding whether the danger of unfair prejudice and the like substantially outweighs the incremental probative value, a variety of matters must be considered, including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alterative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility.

Id.

Defendant argues that the allegations of Defendant's prior bad acts arose over nine years before the present charges and are so remote in time that their probative value does not outweigh their prejudicial effect on Defendant. However, the case cited by Defendant bolstering this argument is distinguishable from this case. Defendant cites to *Commonwealth v. Shively*, 424 A.2d 1257, 1259 (Pa. Super. 1984) to support his contention that Defendant's prior bad acts in New York State are too remote in time to be admissible. We disagree and find *Shively* distinguishable from the present case.

The *Shively* case involved the prosecution of defendant on rape and related charges that occurred

in 1975. At trial, the Commonwealth was permitted to present evidence of defendant's criminal record from a 1972 case in which he pled guilty to sodomy and which had facts similar to those of the rape trial case, defendant was incarcerated on the sodomy case on April 28, 1972 and served a three year sentence. The 1975 rape occurred six days after the defendant's release from incarceration on the sodomy charge. On appeal to the Supreme Court, the Commonwealth argued that the evidence of defendant's prior criminal conduct was admissible to establish defendant's identity by showing the similarity between the two incidents. Defendant, on the other hand, argued that the three-and-one-half-year gap between the two incidents made the original incident too remote to be of any use to the Commonwealth.

The Supreme Court, in a plurality decision, held that the time span was too great for the prior crime to be admissible to establish the identity of the perpetrator. The Court held that "use of prior criminal conduct to establish identity requires significant similarities between the two acts to show that it is more likely than not that the same individual committed both acts." *Id.* at 416, 424 A.2d 1259. The Court further held that even if evidence of prior criminal activity is admissible, said evidence will be rendered inadmissible if it is too remote. The Court further explained, in the limited context of identity, that:

> Remoteness . . . is but another factor to be considered in determining if the prior crime tends to show that the same person committed both crimes. The degree of similarity between the two incidents necessary to prove common

> identity of the perpetrator is thus inversely proportional to the time span between the two crimes. Even if the time span instantly is only seven months, we fail to perceive enough similarity between the two episodes to allow admission of the prior activity.

Shively is distinguishable because that case dealt with the admissibility of prior bad acts for the purpose of establishing a perpetrator's identity, while identity is not at issue in the case pending for us. We further note that *Shively* was a plurality decision, and therefore, find that *Shively* does not require us to hold Defendant's bad acts inadmissible for remoteness. However, since remoteness is not the only factor in determining whether evidence of Defendant's prior bad acts is more prejudicial than probative, we must consider the other factors as well.

Here, the two prior events were substantially similar to the present crime charged. Such similarities include Defendant engaging in sexual behavior by exposing himself to an undercover police officer posing to be a minor female. In all three incidents, Defendant was told that the minor female was under the age of 18. Despite this knowledge, Defendant continued to pursue each girl.

In light of the above rationale, we find that Defendant's criminal records were properly obtained from the New York Court System, and that his prior bad acts are more probative than prejudicial and are therefore admissible for the limited purpose of showing intent, knowledge, and absence of mistake or accident. At time of trial, the jury will be instructed accordingly.

We feel further compelled to address Defendant's remaining argument that his prior arrests never resulted in a conviction and therefore do not fall under the term "prior bad acts." Defendant specifically argues that he was not convicted of either prior act, and in one case, the New York authorities did not bring charges against him. Defendant, therefore, argues that evidence of these acts cannot be admitted into evidence. We disagree.

Pa.R.E. § 404 specifically references evidence of other "crimes, wrongs, or acts". It does not state that a defendant must have been charged or convicted of these other acts for them to be admissible, and we find no case law which provides so. Furthermore, this evidence is being used for the specific and limited purpose of illustrating Defendant's intent, knowledge and/or absence of mistake. Defendant may not have been convicted but he was arrested on two prior occasions for substantially similar activity. The evidence that the other crimes were committed may be weaker than evidence of a prior conviction but the burden will be on the prosecution to fill in the gaps and prove how the prior acts relate to Defendant's intent or knowledge. Such evidence is relevant to the issues involved in the pending criminal charges, and we will not disregard such evidence merely because Defendant was not officially charge or convicted.

2. Defendant's Motion for Change of Venue

Defendant seeks a change of venue in this matter asserting that there has been sustained, pervasive and sensational pretrial publicity in Monroe County that will prevent Defendant from receiving a fair and impartial trial. Defendant contends that local police

and prosecutors held a press conference and have issued press releases that revealed information related to Defendant's prior sealed criminal history and, since that time, the press coverage of Defendant's arrest has been inflammatory. Specifically, Defendant argues he has been referred to as a "pervert" and a "predator" and has been identified as the most "high-profile" suspect local officials' sex sting operation has yielded to date.

The Commonwealth, on the other hand, argues that the articles at issue in this case were factual and objective and were not sensational or inflammatory. Furthermore, the Commonwealth proffers that any issue of prejudicial media coverage can be adequately addressed during the *voir dire* process. Having considered the arguments of both parties, we are now ready to address Defendant's Motion for Change of Venue.

Pennsylvania Rule of Criminal Procedure § 584 provides, in relevant part, as follows:

> (A) All motions for change of venue or for change of venire shall be made to the court in which the case is currently pending. Venue or venire may be changed by that court when it is determined after hearing that a fair and impartial trial cannot otherwise be had in the county where the case is currently pending.

Pa. R. Crim. P. § 584(A). "A change of venue becomes necessary when the trial court determines that a fair and impartial jury cannot be selected in the county in which the crime occurred." *Commonwealth v. Weiss*, 776 Pad 958, 964 (Pa. 2001). Pretrial publicity results in prejudice where:

> (1) The publicity is sensational, inflammatory, and slanted toward conviction rather than factual and objective; (2) the publicity reveals the defendant's prior criminal record, or if it refers to confession, admissions or reenactments of the crime by the accused; and (3) the publicity is derived from police and prosecuting officer reports.

Id.; *see also Commonwealth v. Mulholland*, 702 A.2d 1027, 1036 (Pa. 1997).

These three factors must be applied to the instant matter. However, even if we find that "there has been inherently prejudicial publicity which has saturated the community, no change of venue is warranted if the passage of time has significantly dissipated the prejudicial effects of the publicity." *Commonwealth v. Pappas*, 845 A.2d 829 (Pa. Super. 2004). The critical factor is the recent and pervasive presence of inherently prejudicial publicity. *Commonwealth v. Casper*, 392 A.2d 287, 293 (Pa. 1978). Thus, if there has been a sufficient "cooling-off" period between the publicity and trial, if the community has not been saturated with the publicity, or if the publicity was not pervasive, a change of venue will not lie. *Id.* Furthermore, our Supreme Court has indicated that a determination made prior to trial that pretrial publicity has rendered a fair and impartial trial impossible is only guesswork; it is only at the *voir dire* stage that such a determination may be positively and definitively made. *Commonwealth v. Romeri*, 470 A.2d 498, 504 (Pa. 1983).

In the instant matter, Defendant has submitted the following documents for the Court's consideration:

1. Exhibit 1—copy of *Poconos area court blotter*, Pocono Record, December 23, 2009, *available online*
2. Exhibit 2—copy of *Pocono Thursday: sex sting, bank robber and earthquake*, Pocono Record, January 14, 2010, *available online*
3. Exhibit 3—copy of *Pocono Creepy Thursday Midday: More on sex sting, mischief on the Mountain*, Pocono Record, January 14, 2010, *available online*
4. Exhibit 4—copy of *Barrett, Monroe County officials discuss online sex sting that nabbed former U.N. weapons inspector (with press conference video)*, Pocono Record, January 14, 2010, *available online*
5. Exhibit 5—copy of Andrew Scott, *Sex sting in Poconos nets former chief U.N. weapons inspector*, Pocono Record, January 14, 2010, *available online*
6. Exhibit 6—copy of *Former U.N. inspector Facing Child Sex Charges*, WNEP-TV, January 14, 2010, *available online*
7. Exhibit 7—copy of *Pocono Friday: Cop who catches perverts, supervisors teeing off, power line moves ahead*, Pocono Record, January 15, 2010, *available online*
8. Exhibit 8—copy of Andrew Scott, *Small Pocono police force casts wide net in search of sexual predators*, Pocono Record, January 15, 2010, *available online*

9. Exhibit 9—copy of Adam McNaughton, *Ritter faces trial in Monroe County on Internet sex charge*, Pocono Record, January 15, 2010, *available online*

10. Exhibit 10—copy of Raegan Medgie, *Investigating Child Sex Predators*, WNEP-TV, January 18, 2010, *available online*

11. Exhibit 11—copy of *Highlights in Poconos news, Jan. 13-20*, Pocono Record, January 22, 2010, *available online*

12. Exhibit 12—copy of Editorial, *Protect kids from Internet predators, Jan. 13-20*, Pocono Record, February 26, 2010, *available online*

13. Exhibit 13—copy of *Pocono Wednesday: Quick freeze; school lawsuit and yes, another fugitive*, Pocono Record, March 31, 2010. *available online*

14. Exhibit 14—copy of Andrew Scott, *Man sentenced in Barrett sex offense case*, Pocono Record, March 31, 2010, *available online*

15. Exhibit 15—copy of *Pocono Monday: Slick roads; Water Gap Diner update; murder and sex offender trials*, Pocono Record, May 3, 2010, *available online*

16. Exhibit 16—copy of *Scott Ritter trial re-scheduled for July 7*, Pocono Record, May 3, 3010, *available online*

17. Exhibit 17—copy of David Kidwell (visual ed.), *Video: Press Conference; Officials discuss Scott Ritter online sex sting*, Pocono Record,

January 14, 2010, *available online* [also provided by DVD]

18. Exhibit 18—copy of *Video: Former U.N. Inspector Facing Child Sex Charges: A former United Nations inspector was caught last year in a sex sting*, WNEP television broadcast, January 14, 2010, *available online*

19. Exhibit 19—copy of *Video: Investigating Child Sex Predators: The Barrett Township Police Department in Monroe County is actively looking for child predators online*, WNEP television broadcast, January 18, 2010, *available online* [also provided by DVD]

20. Exhibit 20—Copy of *Tuesday: Helping fire victims; Scott Ritter sex trial update, Jon Gosselin in the Poconos*, Pocono Record, June 22, 2010, *available online*

21. Exhibit 21—copy of *Trial delayed for former U.N. chief facing sex charges*, Pocono Record, June 22, 2010, *available online*

22. Exhibit 22—copy of the Affidavit of Probable Cause as posted on the Pocono Record website

23. Exhibit 23—copy of the Criminal Court Docket as posted on the Pocono Record website

24. Exhibit 24—copy of the photo gallery of Scott Ritter as posted on the Pocono Record website

25. Exhibit 25—copy of the press release issued on November 17, 2009 by Chief Steven R.

Williams of the Barrett Township Police Department

26. Exhibit 26—copy of the letter regarding the return of Mr. Ritter's sealed records dated June 2, 2010 by Assistant District Attorney Michael T. Rakaczewski

We shall first address the copies of news articles that appeared in the Pocono Record during the months following Defendant's arrest on November 9, 2009. Defendant has submitted copies of 16 articles, the last of the articles having appeared on June 22, 2010, two months prior to the filing of Defendant's Motion for Change of Venue on August 10, 2010 and the August 31, 2010 hearing on the Motion. We have reviewed all of the articles and find that they are factual, objective accounts of the investigation, arrest and proceedings in this case. Moreover, it appears that only a small portion of the publicity contained in the articles has been derived from police and prosecuting officer reports. The main source of the information appears to have been obtained from court records that are available to the public. We find, therefore, that the articles are a factual and objective account of the investigation and/or updates of the continuation of scheduled hearing and trial dates. We do not believe the newspaper articles are sensational, inflammatory, or in any way slanted toward conviction of Defendant.

Defendant has also provided the Court with copies of three television broadcasts including a video of a press conference where officials and the prosecuting attorney briefly commented on the case. Upon review of the television broadcasts, we note that two of the broadcasts, including the press conference, were aired

on January 14, 2010 and the other broadcast was aired on January 18, 2010, almost seven months prior to the filing of Defendant's Motion.

As to the press conference, the Monroe County ADA spoke generally about the Affidavit of Probable Cause and the charges filed against Defendant which are all of public record. Furthermore, the ADA commented that the police are being proactive in performing these investigations and trying to avoid having actual minors victimized by predators. Although the ADA uses the term "predator," we do not find this generalized characterization to be inherently prejudicial to Defendant. Defendant will have an opportunity to rebut any reference to his character at time of trial. The ADA also states that the Commonwealth fully intends on going forward with the charges and that it is not appropriate for Defendant to plead to ARD because he does not meet the qualifications of the ARD program because he allegedly is not a first time offender. While we recognize that the press conference does briefly insinuate that Defendant has a prior criminal record, it does not provide any further information than that. We do not believe that this reference will interfere with impaneling a fair and impartial jury.

Upon review of the WNEP television broadcasts, the videos provide only limited information on the case. The video entitled "Former U.N. Inspector Facing Child Sex Charges . . . " emphasizes Defendant's history as a former U.N. Weapons Inspector while the video entitled "Investigating Child Sex Predators . . . " focuses on the Barrett Township Police Department's efforts and investigations in arresting "suspected child predators" over the internet. In both videos, Defend-

ant's case is referred to as "high profile". Even if true, this statement has no effect on whether Defendant receives a fair trial. An unfair trial turns upon whether the publicity was so extensive and pervasive that the community must be deemed to have been saturated by it. Such language is not inflammatory nor does it slant towards a conviction.

As stated above, we recognize that the pretrial publicity in this case does briefly refer to Defendant's prior criminal record, yet we do not believe that the references will interfere with impaneling a fair and impartial jury. We will be a minimum of six months and in some cases more than a year removed from the writing of these articles and the broadcasting of these videos by the time this case goes to trial, thus allowing a sufficient "cooling off' period.

For purposes of argument, even if we were to determine that some of the items contained in the articles or broadcasts were "inherently prejudicial," our inquiry would not end there. We would next have to determine whether such publicity had been so extensive, so sustained and so pervasive that the community would be deemed saturated by such publicity. *Commonwealth v. Rucci*, 670 A.2d 1129, 1141 (Pa. 1996). We conclude that the pretrial publicity in This Instance case was not so extensive, sustained, and pervasive that the community must be deemed to have been saturated by it.

Moreover, "even if there had been inherently prejudicial publicity which has saturated the community, no change of venue is warranted if the passage of time has significantly dissipated the prejudicial effects of the publicity." *Commonwealth v. Chambers*, 685 A.2d 96, 103 (Pa. 1996) (citations omitted). Consequent-

ly, the effect from any prejudice would be diminished when the passage of time between the pretrial publicity and the time of trial would provide a sufficient "cooling off" period to ameliorate the resultant effects of any prejudicial publicity. *Commonwealth v. Counterman*, 719 A.2d 284 (Pa. 1998). In the case at bar, the last media coverage/article provided by Defendant occurred on June 22, 2010.[1] Defendant's trial will not commence until, at earliest, March 2011.

In *Counterman*, the Pennsylvania Supreme Court found that a seven month delay between the complained of pretrial publicity and defendant's trial was a sufficient "cooling off' period. *Id.* at 294. A seven month "cooling off" period was also held to be sufficient in *Commonwealth v. Beasley*, 678 Pad 773, 778 (Pa. 1996). Similarly in *Commonwealth v. Leighow*, 605 A.2d 405. 408 (Pa. Super. 1992), our Superior Court held that a seven month delay between the inherently prejudicial media reports and jury selection was a sufficient period of time for the prejudice to dissipate.

We conclude that an adequate "cooling off' period will have occurred to overcome any presumption of prejudice by the time this case goes to trial. We further note that counsel for Defendant will have the opportunity to *voir dire* prospective jurors on the issue of pretrial publicity when the trial commences. At such time, members of the jury panel who have read or learned about this case can be adequately screened on an individual *voir dire* basis at time of jury selection. Accordingly, Defendant's Motion for Change of Venus will be denied. If during the process of *voir dire* it is

---

[1] Defendant has not submitted any articles or transcripts from any broadcasts after the filing of its Motion on August 10, 2010.

determined that the jury pool may be tainted, Defendant may then renew its Motion for Change of Venue.

3. Commonwealth's Motion to Exclude Expert Testimony

The Commonwealth has objected to the proposed testimony of two expert witnesses who the defense intends to call at trial: (1) Marcus Lawson, a specialist in Internet crimes and computer forensics examination procedures and (2) Dr. Richard M. Hamill, a clinical psychologist for sexual offenders. The Commonwealth objects on several grounds including Marcus Lawson's ability to opine on the proper undercover police procedures in conducting online chat investigations and his forensic examination of Defendant's home computers.[2] The Commonwealth further objects to Dr. Richard Hamill's proposed testimony on Defendant's ability to fantasize in adult chat rooms. We will begin with an overview of expert testimony and then address each of the Commonwealth's objections in turn.

The Pennsylvania Supreme Court has defined an expert witness as one "who possesses knowledge not within ordinary reach of understanding, and who,

---

[2] Defendant's counsel, through a letter dated August 24, 2010, also advised the Commonwealth of its intention to have Mr. Lawson testify as to details about Yahoo chatrooms, *i.e.* what they are, how they are created, how they work, etc. The Commonwealth does not object to Mr. Lawson generally testifying about what they are, how they are created, how users acquire profiles, how chatrooms are accessed by the users once they have profiles, and the terms of the yahoo Service Agreement. Mr. Lawson will be allowed to testify to such information with any limitations as provided in this opinion and order.

because of this knowledge, is specially qualified to address a particular subject." *Bergman v. United Servs. Auto. Assn*, 742 A.2d 1101, 1105 (Pa. Super. 1999) *citing Steele v. Shepperd*, 192 A.2d 397 (Pa. 1963). If a witness possesses neither experience nor education in the subject matter under investigation, the witness should be found not to qualify as an expert. *Dierolf v. Slade*, 581 A.2d 649, 651 (Pa. Super. 1990). The decision to allow a witness to testify as an expert rests within the sound discretion of the trial court. *Bergman*, 742 A.2d at 1105. Rule 702 of the Pennsylvania Rules of Evidence governs the admissibility of expert witnesses. Rule 702 provides:

> If scientific, technical or other specialized knowledge beyond that possessed by a layperson will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

Pa.R.E. § 702. To be competent, expert testimony must be stated with reasonable certainty. *Peerless Dyeing Co. v. Industrial Risk Insurers*, 573 A.2d 541, 547 (Pa. Super. 1990). Although an expert need not testify with absolute certainty or rule out all possible causes of a condition, his testimony must at least express the requisite degree of professional certainty. *Eaddy v. Hamaty*, 694 A.2d 639, 642 (Pa. Super. 1997). "An expert fails this standard of certainty if he testified that the alleged cause "possibly," or "could have" led to the result, that it "could very properly account" for the result, or even that it was "very highly probable" that it caused the result." *Id.*

a. Undercover Police Procedures

The Commonwealth objects to the Defense presenting testimony from proposed expert Marcus Lawson concerning Detective's failure to abide by certain national standards while conducting his investigation. In his report, Mr. Lawson discusses the implementation of the Internet Crimes Against Children Task Force Program (ICAC) which "helps state and local law enforcement agencies develop responses to cyber enticement and child pornography cases." [Lawson's Report. pg. 10.] The ICAC contains protocol for conducting undercover ICC investigations, however, such protocol does not apply to law enforcement agencies, such as Barrett Township Police Department, who are not ICAC members. Furthermore, this Court is not aware of any mandatory protocol that must be followed by a police department such as the Barrett Township Police Department when conducting an online investigation such as the one at issue in this case. Absent such a requirement, it is irrelevant whether Detective followed or did not follow any of ICAC's rules, regulations, protocol, or procedures. Defendant falls to cite any authority that requires all law enforcement agencies across the country, specifically including Barrett Township Police Department, to follow ICAC protocol. In the absence of any such authority, this testimony has no relevance. Detective may testify as to the procedures he utilized to undergo this investigation; however, Mr. Lawson will not be allowed to testify as to Detective's failure to adhere to ICAC rules or protocols or its impact upon Defendant's case.

b. Forensic Review of Defendant's Home Computers

The Commonwealth objects to Defendant calling Mr. Lawson to testify about his forensic examination of Defendant's personal computers as it pertains to whether there was any evidence that Defendant had previously interacted with minors online or whether he had viewed child pornography online. The Commonwealth does not object to the actual forensic review or the methodology utilized; however, the Commonwealth argues that Lawson goes further than that assessment in his report. Specifically, the Commonwealth avers that Lawson opines that because of his forensic examination, and the absence of child pornography or any other chats with minors, Defendant has no predisposition to engage in illegal behavior with minors.

Defendant was not charged with possession of child pornography. He is charged with trying to engage in sexual exploitation with a minor. Whether there is or is not evidence of child pornography on Defendant's home computers is irrelevant to the charges facing Defendant. It is also irrelevant whether Defendant had, in the past, interacted in appropriate manners with other minors online. Accordingly, Defendant may present expert testimony regarding the forensic review of Defendant's computer, including the methodology used to do so. Defendant, however, will be prohibited from presenting any evidence of whether he had child pornography on his computer or had viewed same on line.

c. Ability to Fantasize in Adult Chat Rooms

The Commonwealth proffers that Defendant intends to call Dr. Richard Hamill to testify as to the

ability of consenting participants in adult internet chatrooms to fantasize and assume that other adult participants are doing likewise. The Defendant, however, responds that the Commonwealth mischaracterizes Dr. Hamill's testimony: "He will not testify about the ability of adults to fantasize, but instead about whether—in his clinical experience and medical training—there is a correlation between engaging in fantasy-based conversation online with other adults and an interest in minors." [Defendant's brief, pg. 10.] Therefore, Defendant argues that it cannot be presumed that Dr. Hamill's testimony in this regard is within the knowledge of a lay juror.

Similar to our analysis above, Defendant is not charged with a criminal offense arising from having online chats of a sexual nature with other adults. He is charged with trying to engage in sexual exploitation with a minor. Whether there is or is not a correlation between engaging in fantasy-based conversation online with other adults and an interest in minors is irrelevant to this case. It is also irrelevant whether Defendant had, on other occasions, engaged in online chats of a sexual or fantasy nature with other consenting adults. The Commonwealth's motion will be granted as to this proposed testimony.

Accordingly, we enter the following Order.

ORDER OF THE COURT OF COMMON PLEAS OF MONROE COUNTY (DECEMBER 16, 2010)

COURT OF COMMON PLEAS OF MONROE COUNTY FORTY-THIRD JUDICIAL DISTRICT COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v.

WILLIAM SCOTT RITTER, JR.,

Defendant.

No. 2238 Criminal 2009

Before: Jennifer Harlacher SIBUM, Judge.

AND NOW, this 16th day of December, 2010, after consideration of the parties' Motions *In Limine*, it is ORDERED as follows:

1. Defendant's Motion to Dismiss is DENIED.
2. The Commonwealth's Motion to Allow Evidence of Prior Bad Acts is GRANTED. Defendant's Motion to Exclude Prior Bad Acts is DENIED.
3. Defendant's Motion for Change of Venue is DENIED.

4. The Commonwealth's Motion to Exclude Expert Testimony as to Undercover Police Procedures is GRANTED.

5. The Commonwealth's Motion to Exclude Expert Testimony as to Forensic Review of Defendant's Computers is DENIED with the limitation that no evidence of whether Defendant had child pornography on his computer is to be allowed.

6. The Commonwealth's Motion to Exclude Expert Testimony regarding the correlation between engaging in fantasy-based conversation online with other adults and an interest in minors is GRANTED.

7. The Commonwealth's Exhibits #1-11 are hereby ORDERED unsealed.

By the Court:

/s/ Jennifer Harlacher Sibum
Judge

NOTICE OF THE COURT OF COMMON PLEAS OF MONROE COUNTY 43RD JUDICIAL DISTRICT OF INTENT TO DISMISS PCRA PETITION (SEPTEMBER 15, 2016)

COURT OF COMMON PLEAS OF MONROE COUNTY FORTY-THIRD JUDICIAL DISTRICT COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v.

WILLIAM SCOTT RITTER, JR.,

Defendant.

No. 2238 Crim 2009

Before: Stephen M. HIGGINS, Judge.

This matter comes before the Court on remand regarding Petitioner William Scott Ritter, Jr.'s (hereinafter "Petitioner") Motion for Post Conviction Collateral Relief Pursuant to 42 Pa. C.S. § 9545 of the Post Conviction Relief Act ("PCRA"). Petitioner alleges that his conviction resulted from numerous and obvious errors of law and he moves for a new trial, or in the alternative, for this Court to Order a new 42 Pa. C.S. § 9795.4 hearing based upon an assessment of the Pennsylvania Sexual Offender Assessment Board ("SVP") that is free of the taint of unlawfully obtained evidence. The factual and procedural history is as follows:

The charges stem from an internet investigation conducted by the Barrett Township Police Department. As part of the investigation, Detective Ryan Venneman ("Detective") of the Barrett Township Police Department was conducting undercover operations and investigating the crime of internet sexual exploitation of children via the computer. In the course of the investigation, Detective purported to be a 15-year-old minor female named "Emily." Detective was then contacted by an individual identified as "delmarm4fun," a 44-year-old male from Albany, New York. The conversation was initiated by "delmarm4fun" in a Yahoo Instant Messenger chat room.

During the conversation, "delmarm4fun" was advised that "Emily" was a 15-year-old female from the Poconos, Pennsylvania. The conversation was sexual in nature, during which "delmarm4fun" requested "Emily" give him another picture so he could continue to "react". Shortly after, he provided the purported 15 year old a link to his web camera. The camera displayed a male's face and upper body area. "Delmarm4fun" later adjusted the camera to focus on his penis area and began to masturbate. "Emily" asked him if he had a phone number where "she" could call him. "Delmarm-4fun" provided a cell phone number of 518-365-6530.

"Delmarm4fun" continued to masturbate on web cam and again asked "Emily's" age. He was advised a second time that she was 15 years old. He stated he didn't realize that she was 15 and turned off his web camera. He then stated he did not want to get in trouble and said "I was fantasizing about fucking you." "Emily" replied "I guess u turned it off np". "Delmarm4fun" responded by asking "Emily" if she wanted "to see it finish." He again sent to "Emily" a link to his web

camera which showed him masturbating and then ejaculating.

Detective then called the Nextel wireless phone number provided by "delmarm4fun" and advised the individual that he was a Police Officer with the Barrett Township Police Department. During the conversation, "delmarm4fun" provided his personal information as William Scott Ritter Jr. of Delmar, New York ("Petitioner"). Detective obtained several photographs of Petitioner and compared them to the web camera video obtained while "delmarm4fun" was masturbating on camera. Detective determined that the photos and video were of the same person.

On April 22, 2009, Detective secured a Court Order for Nextel Wireless to provide subscriber information for the wireless number of 518-365-6530. On October 13, 2009, Detective received the subscriber information confirming the wireless number was assigned to William Ritter of Delmar, NY at the time of the incident on February 7, 2009. Petitioner was charged with Unlawful Contact with a Minor–Indecent Exposure and related charges. On June 15, 2010, the Commonwealth filed a Notice of Prior Bad Acts pursuant to Pa. R.E. § 404 ("Notice") as well as a Motion in *Limine* ("Motion") seeking to allow testimony of Petitioner's prior bad acts at trial.[1]

---

[1] The Commonwealth made an internet search on Petitioner's name which resulted in locating similar charges for Petitioner in Albany County, NY. The Commonwealth requested copies of documents which were provided but subject to a New York sealing and expungement order. The Commonwealth returned the documents and provided the Chief ADA in Albany with a Motion to have the records unsealed. An order unsealing the records was issued by the Honorable Stephen W. Herrick on

After a hearing on the Notice and Motion, as well as Petitioner's Motion to Dismiss and another Motion *in Limine* filed by the Commonwealth on August 27, 2010, the Court issued an Opinion and Order granting the Commonwealth's Motions to Allow Evidence of Prior Bad Acts, Exclude Expert Testimony as to Undercover Police Procedures, and Exclude Expert Testimony regarding fantasy based conversation, in all other respects the remaining Motions of the Commonwealth and Petitioner, including Motion to Dismiss, were denied. A jury trial commenced on April 12, 2011, and a verdict was reached on April 14, 2011. Petitioner was convicted of Unlawful Contact with a Minor (Sexual Offenses)[2]; Unlawful Contact with a Minor (Open Lewdness)[3]; Unlawful Contact with a Minor (Obscene or Sexually Explicit Materials or Performances)[4]; Corruption of Minors[5]; Criminal Use of a Communications Facility;[6] and Indecent Exposure[7].

June 29, 2010. After a hearing on their admissibility, these records were admitted into evidence at the trial held on April 12, 2011. After conviction, Petitioner challenged the June 29, 2010, order unsealing the Albany records. The Third Department of the Appellate Division of the New York Supreme Court, by order dated October 20, 2011; ("New York Appellate Court order") vacated the Albany County Court's order of June 29, 2010, and determined that the Pennsylvania authorities did not seek the sealed records for permissible purposes in accordance with the New York sealing statute.

[2] 18 Pa. C.S.A. § 6318(a)(1)

[3] 18 Pa. C.S.A. § 6318(a)(2)

[4] 18 Pa. C.S.A. § 6318(a)(4)

[5] 18 Pa. C.S.A. § 6301(a)(1)

[6] 18 Pa. C.S.A. § 7512(a)

Petitioner filed a Motion for Extraordinary Relief which was heard on October 26, 2011, the same date for Petitioner's sentencing and SVP hearing. At the hearing, Petitioner orally withdrew his written Motion for Extraordinary Relief and renewed the same orally in open court pursuant to Pa. R. Crim. P 704(B), which was denied and the hearing for SVP and sentencing proceeded. Petitioner was determined to be a sexually violent predator under Megan's Law, 42 Pa. C.S.A. §§ 9792 (statutory definitions) and 9795.4 (hearing procedures)[8]. Petitioner was ordered to comply with the registration requirements set forth in § 9795.2 and he was sentenced to undergo a total aggregate period of incarceration at a State Correctional Institution of not less than 18 months and not to exceed 66 months.

Petitioner filed a Rule 720 Post-Sentencing Motion for a New Trial or, in the Alternative, Resentencing on November 7, 2011. A hearing was held on December 8, 2011, and the Court issued an Opinion and Order on March 20, 2012, denying Petitioner's Motion for a New Trial or, in the Alternative, Resentencing. Petitioner filed an appeal to the Pennsylvania Superior Court on March 26, 2012. On November 6, 2013, the Superior Court affirmed, in a non-precedential memorandum decision, Petitioner's judgment of sentence. Petitioner filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, which was denied

---

[7] 18 Pa. C.S.A. § 3127

[8] Revisions to Megan's Law that took effect on December 20, 2012 now provide for an assessment hearing and define criteria for Sexually Violent Predator status pursuant to 42 Pa. C.S.A. §§ 9799.24 (assessment) 9799.12 (definitions).

by Order dated May 21, 2014. On April 6, 2015, Petitioner filed the instant PCRA petition. The Commonwealth filed its Answer on June 9, 2015, and Defendant/Petitioner filed a Reply Brief on June 22, 2015. On January 14, 2016, we inadvertently filed an Opinion and Order without Notice of Intent to Dismiss Pursuant to Pa. R. Crim. P. 907 (1), and thereafter Petitioner filed an appeal. We filed our Pa. R.A.P 1925(a) statement requesting that the Pennsylvania Superior Court remand this matter. On July 12, 2016, the Superior Court issued an Order remanding the case back to this Court for further proceedings. On August 29, 2016, Petitioner filed a Motion for Conduct (sic) of an Evidentiary Hearing Pursuant to Pa. R. Crim. P. 121 (A) (2) (*Grazier*[9] Hearing). On September 1, 2016, Petitioner filed a Petition for the Conduct (sic) of an Evidentiary Hearing Pursuant to 42 Pa. C.S. § 9545 (D), (hereinafter referred to as "Petition"). On September 9, 2016, Petitioner waived his right to counsel following a hearing pursuant to Pa. R. Crim. P. 121 (A)(2) and *Commonwealth v. Grazier*, 713 A.2d 81 (1998). The parties' briefs have been previously submitted, and we are now prepared to dispose of this matter.

DISCUSSION

> To be eligible for relief . . . , the petitioner must plead and prove by a preponderance of the evidence all of the following:
>
> (1) That the petitioner has been convicted of a crime under the laws of this Commonwealth and is at the time relief is granted:

---

9 *Commonwealth v. Grazier*, 713 A.2d 81 (1998)

(i) currently serving a sentence of imprisonment, probation or parole for the crime;

(ii) awaiting execution of a sentence of death for the crime; or

(iii) serving a sentence which must expire before the person may commence serving the disputed sentence.

42 Pa. C.S.A. § 9543(a)(1).

We find that Defendant's Petition has been timely filed and meets the above relevant criteria for filing a PCRA Petition. Consequently, we have jurisdiction to hear the merits of the petition. *Commonwealth v. Robinson*, 837 A.2d 1157, 1161 (Pa. 2003).

In his PCRA petition, Petitioner challenges his "unconstitutional" conviction by claiming that the Court failed to recognize, under the Full Faith and Credit Clause of the United States Constitution and 28 U.S.C. § 1738, the primacy of the judgments of New York on matters of New York law, including issues of preclusion. Petitioner contends that when the Third Department of the Appellate Division of the New York Supreme Court ("New York Appellate Court") vacated the *ex parte* unsealing order issued by the Albany County Court, we erred by refusing to give full faith and credit to the New York Appellate Court order. Petitioner further argues that the New York Appellate Court order was not available during his post-conviction motions or on direct appeal.

Res Judicata and "Law of the Case"

Petitioner first argues that he is entitled to relief under PCRA since the New York Appellate Court

order was not available for his post-conviction proceeding and on direct appeal. We disagree. We find Petitioner's claim that the New York Appellate Court Order was not available for his post-sentence and direct appeal to be disingenuous. The issue of the New York Appellate Court order was specifically addressed in the Pennsylvania Superior Court opinion dated November 6, 2013. At the time of trial, the Albany County Court unsealing order was a valid order to which we gave "full faith and credit." Recognizing the order as valid, we could not usurp the power of the New York Court with respect to the interpretation of a New York statute.

Presently, Petitioner is requesting that we apply the New York Appellate Court order of October 10, 2011, as interpreted in the Albany County Court order of February 5, 2015, reversing the unsealing order, retroactively to this case. However, we are prohibited from doing under the doctrines of *res judicata* and "law of the case." "*Res judicata*, or claim preclusion, prohibits parties involved in prior, concluded litigation from subsequently asserting claims in a later action that were raised, or could have been raised, in the previous adjudication." *Wilkes ex rel. Mason v. Phoenix Home Life Mutual Insurance Company*, 587 Pa. 607, 902 A.2d 366, 376 (2006) (citation omitted). Our courts have held that "[w]here an action has reached a final conclusion, 'all other claims arising out of that same transaction or series of transactions are barred, even if it is based upon different theories or if seeking a different remedy.'" *Wilkes*, 587 Pa. at 610, 902 A.3d at 378 (citation omitted). Petitioner's action reached a final conclusion after the Pennsylvania Supreme Court denied his petition for allowance of appeal. We

will not retroactively apply the New York Appellate Court order in this matter where the action has reached its final conclusion.

The "law of the case" doctrine refers to the concept that "a court involved in the later phases of a litigated matter should not reopen questions decided by another judge of that same court or by a higher court in the earlier phases of the matter". *Commonwealth v. Starr*, 664 A.2d 1326, 1331 (1995) (citation omitted). Accordingly, we may not alter the resolution of a legal question previously decided by the trial and/or appellate courts in the matter. *Id.* Instantly, the question of the admissibility of the unsealed New York records has been previously determined by the trial court and Superior Court, and therefore we may not alter that decision here.

Regarding "newly-discovered evidence", Petitioner has the burden of establishing "newly-discovered" evidence which (1) was discovered after trial and could not have been obtained at or prior to trial through reasonable diligence; (2) is not cumulative; (3) is not being used solely to impeach credibility; and (4) would likely compel a different verdict. *Commonwealth v. Solano*, 129 A.3d 156, 1179-1180 (Pa. 2015) (citation omitted). After reviewing the above four factors, we find that Petitioner has failed to meet his burden. First, we agree that the order of the New York Appellate Court vacating the unsealing order of the Albany County Court could not have been obtained prior to trial through reasonable diligence. Second, we recognize that this evidence may be viewed as not cumulative. Third, we agree that this evidence is not being used for impeachment purposes. However, in regard to the final factor, we do not believe that this

evidence would likely compel a different verdict. After a review of the record, we find that the Commonwealth had presented a substantial amount of evidence to support the verdict. This evidence included a video showing Petitioner's face as well as him masturbating to who he thought was a 15-year old girl. The evidence also included credible testimony of Detective. The Superior Court opinion affirming the judgment of sentence recognized this overwhelming evidence of Petitioner's guilt. Accordingly, we do not believe that this "newly discovered" evidence or the preclusion thereof, would likely compel a different verdict. Petitioner, having failed to demonstrate that a different verdict would result, has not met his burden regarding this "newly discovered" evidence. Therefore, this issue is without merit.

In addition, Petitioner acknowledges that the matter of the New York Appellate Court's order was previously litigated. *See* Petition, filed September 1, 2016 at ¶ 3. We find that Petitioner cannot obtain PCRA review of a claim previously litigated on direct appeal, *Commonwealth v. Bond*, 572 Pa. 588, 819 A.2d 33 (2002), and this issue has been so litigated. Accordingly, Petitioner is not eligible for relief on this issue.

SVP Hearing

In the alternative, Petitioner seeks a "new 42 Pa. C.S.A. § 9795.4 hearing" based upon an assessment of the SVP that is free from the taint of unlawfully obtained evidence. Petitioner failed to raise this issue on appeal, even though he argued that he was entitled to a new SVP hearing in his Post-Sentence Motion filed on November 7, 2011. Petitioner now argues that the

February 6, 2015 order of the Albany County Court should be retroactively applied to this case which would entitle Petitioner to a new SVP hearing. We do not agree.

"Retroactive application is a matter of judicial discretion which must be exercised on a case by case basis." *Blackwell v. Com., State Ethics Comm'n*, 527 Pa. 172, 182, 589 A.2d 1094, 1099 (1991). In light of the question involving the retroactive application of the February 6, 2015 Albany County Court order, we adhere to the principle that, "a party whose case is pending on direct appeal is entitled to the benefit of changes in law which occurs before the judgment becomes final." *Id.*

First, the Albany County Court order dated February 5, 2015, was issued after Petitioner's judgment of sentence and SVP determination became final. Moreover, we believe that the effect on the administration of justice by the retroactive application of the Albany County Court order would have a chilling effect on not only this case but all cases. Once a final determination in this matter was made, retroactive application of a subsequent ruling by the New York Appellate Court, as interpreted by the Albany County Court on February 5, 2015, would create havoc by re-litigating Petitioner's final SVP determination. Simply stated, the judgment of sentence and SVP determination in this case is final. This finality precludes Petitioner from being entitled to the benefit of a misapplication of the law by retroactive application.

In addition, "[t]o be eligible for relief under the statute, a petitioner must plead and prove that 'the allegation of error has not been previously litigated or waived.'" *Commonwealth v. Oliver*, 128 A.3d 1275,

1281 (Pa. Super. 2015) [citing 42 Pa. C.S. § 9543(a)(3)]. "An issue is waived if [a petitioner] could have raised it but failed to do so before trial, at trial, . . . on appeal or in a prior state post[-]conviction proceeding." *Id* (quoting *Commonwealth v. Robinson*, 623 Pa. 345, 82 A.3d 998, 1005 (2013). An issue has been previously litigated if "the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." 42 Pa. C.S.A. § 9544(a)(2).

Instantly, Petitioner could have raised the issue of the use of the unsealed records at his SVP hearing during direct appeal but failed to do so.[10] Accordingly, this issue is waived and we find that Petitioner is not entitled relief.

Petition for Evidentiary Hearing

Finally, on September 1, 2016, Petitioner filed his Petition requesting an evidentiary hearing on his

---

10 On November 7, 2011 Defendant/Petitioner filed a Rule 720 Post-Sentencing Motion for a New Trial or, in the Alternative, Resentencing. On March 20, 2012, this Court issued an Opinion and Order in which we considered Petitioner's request for the preparation of new reports from the Pennsylvania Sexual Offender Assessment Board and the Monroe County Probation Department because both reports referred to the evidence pertaining to the 2001 arrest that should not have been considered at sentencing under New York law. We denied Petitioner's post-sentence motions and request for resentencing. On March 26, 2012, Petitioner filed an appeal to the Superior Court of Pennsylvania. On April 26, 2012, Petitioner filed his Concise Statement of Errors to be Complained of on Appeal. Petitioner did not raise the issue of the use of the unsealed records at his SVP hearing on direct appeal. Accordingly, we deem the issue waived pursuant to 42 Pa. C.S. § 9543(a)(3).

PCRA petition pursuant to 42 Pa. C.S. § 9545(d), which provides as follows:

> Where a petitioner requests an evidentiary hearing, the petition shall include a signed certification as to each intended witness stating the witness's name, address, date of birth and substance of testimony and shall include any documents material to that witness's testimony. Failure to substantially comply with the requirements of this paragraph shall render the proposed witness's testimony inadmissible.

Petitioner has complied with § 9545(d), however, we decline to conduct an evidentiary hearing in this matter. We are aware that a "PCRA court need not hold a hearing on every issue appellant raises, as a hearing is only required on 'genuine issues of material fact.'" *Commonwealth v. Albrecht*, 606 Pa. 64, 67, 994 A.2d 1091, 1093 (2010) (internal citations omitted). "If the PCRA court can determine from the record that no genuine issues of material fact exist, then a hearing is not necessary." *Commonwealth v. Barbosa*, 819 A.2d 81, 85 (Pa. Super. 2003) (citation omitted).

We have reviewed the Certification of Witness ("Certification") filed by Petitioner and we find that it does not contain genuine issues concerning any material fact. The Certification simply restates the facts that have already been submitted to the Court. Specifically, Petitioner would testify to the proceedings before the Albany County Court and that the records were unlawfully unsealed. We were made aware that the records were improvidently unsealed prior to sentencing.

Petitioner would also testify that if the New York records were not allowed to be used by Paula Brust of the Pennsylvania Sexual Offenders Board, Petitioner would not have been found to be a sexually violent predator. We are aware of this argument; however, there are no genuine issues of material fact to which Petitioner would testify. Finally, Petitioner would testify that the Pennsylvania Superior Court found that this Court did not err in allowing the admission of the Petitioner's records into evidence at the time of trial. All of this information has been previously presented to, and ruled upon by this Court and we find that no purpose would be served by any further proceeding.

In light of the foregoing, we enter the following order.

ORDER OF THE COURT OF COMMON PLEAS (SEPTEMBER 15, 2016)

COURT OF COMMON PLEAS OF MONROE COUNTY FORTY-THIRD JUDICIAL DISTRICT COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,

v.

WILLIAM SCOTT RITTER, JR.,

Defendant.

No. 2238 Crim 2009

Before: Stephen M. HIGGINS, Judge.

AND NOW, this 15th day of September 2016, upon consideration of Petitioner William Scott Ritter, Jr.'s PCRA Petition and his Petition for the Conduct (sic) of an Evidentiary Hearing Pursuant to 42 Pa. C.S. § 9545 (D), and it appearing that there are no genuine issues concerning any material fact and that Petitioner is not entitled to Post-Conviction Collateral Relief, and no purpose would be served by any other proceedings, in accordance with Pa. R. Crim. P. 907(1), NOTICE is hereby given to the parties that this Court intends to DISMISS Petitioner's PCRA Petition without hearing.

If either party objects to the dismissal of the PCRA without hearing, they shall respond to this Order and Notice within 20 days. The objecting party shall

file the written response with the Clerk of Courts of Monroe County and shall mail a copy thereof to the opposing party and the undersigned judge. Upon the receipt of the written response, or lack thereof, the Court will then determine whether to grant leave to file an amended petition, dismiss without hearing on Petitioner's PCRA or direct that the proceedings continue.

The Clerk of Courts of Monroe County shall serve a copy of this Order and this Notice of Intent to Dismiss upon Petitioner William Scott Ritter, Jr., and the Monroe County District Attorney's Office.

BY THE COURT:

/s/ Stephen M. Higgins
Judge

BENCH RULING OF THE COURT OF ALBANY COUNTY, NEW YORK, TRANSCRIPT (FEBRUARY 5, 2015)

STATE OF NEW YORK, COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK,

v.

WILLIAM RITTER,

Defendant.

Before: Hon. Peter A. LYNCH, County Court Judge.

[February 5, 2015 Transcript, p.2]

THE COURT: We're going to go on the record in the matter of the People of the State of New York against William Ritter. This matter is scheduled today for a hearing to determine Mr. Ritter's classification under the Sex Offender Registration Act.

Counsel, would you put your respective appearances on the record, please?

MS. McCANNEY: Jennifer McCanney for the People of the State of New York.

MR. MEANY: Joe Meany, alternate public defender's office for Mr. Ritter who is present to my right.

THE COURT: Okay. So as a preliminary matter, Mr. Ritter had filed pro se a motion in limine which

has subsequently been joined in by Mr. Meany after Mr. Meany's office was appointed to help him.

With respect to the defense claim that to the extent that any of the underlying documents proffered by the People to be considered in context of this proceeding that were disclosed in violation of a sealing order corresponding to matters in the town of Colonie in 2001 and which information was determined to have been unlawfully unsealed by decision of the Appellate Division on October 20th, 2011 in the case entitled In the Matter of the Albany County District Attorney's Office on Behalf of Barrett Township Police versus William T., and specifically the Appellate Division had found that to the extent that the Court below, Judge Herrick, had authorized the release of records corresponding to a matter that had been adjourned in contemplation of dismissal in the town of Colonie in 2001, that that unsealing order was unlawful and Judge Herrick's determination to unseal that record was reversed. So the defense has filed a motion seeking to preclude from the record of this proceeding any information that was the product of that unsealing. Does that, Mr. Meany, at least outline the general nature of your motion?

MR. MEANY: I'm with you so far, Judge, yes. Obviously it's a very nuanced issue but I think that frames it.

THE COURT: Okay. Now, you have, in your memorandum in support of the motion, you have also taken the position that in addition to striking from the record any of the information contained from

the 2001 Colonie case or cases that were the subject of the sealing order, you have written that the motion to preclude would include the diagnosis of paraphilia NOS referenced by the case summary and also by the Albany County district attorney's office in their application for an override based on mental abnormality. Now, directing your attention to the case summary at issue, the case summary does state, and I quote, "He met diagnostic criteria for paraphilia not otherwise specified, a mental abnormality which includes exhibitionism." And you, Mr. Meany, in your papers have taken the position that if I were to preclude or strike the information that was the product of the unsealing order, that the diagnosis of paraphilia would also be precluded.

MR. MEANY: Let me explain my chain of—

THE COURT: Let me ask you a pointed question. Is it your contention that the diagnosis of paraphilia is dependent upon the information that was released as a result of the unsealing order?

MR. MEANY: Absolutely it is. And I think there is ample—

THE COURT: Tell me your basis for that.

MR. MEANY: —support of that. Judge, what you have in the Board summary is a double hearsay which is permissible in some circumstances in this context.

THE COURT: Let me make this more clear. Let's assume for the sake of discussion I preclude any of the information contained from the 2001 Colonie cases which were the subject of the unsealing

order. You claim that but for that information, there would be no diagnosis of paraphilia. What is your basis for making that claim?

MR. MEANY: The diagnosis of paraphilia NOS, which we would intend to challenge in any event, but the diagnosis is contingent upon the existence of more than one alleged incident over a period of more than six months. So without the information leading to—without the Colonie information, the examiner in Pennsylvania who said not that there was a diagnosis, to be clear, she said that he met the diagnostic criteria which is—

THE COURT: I understand that.

MR. MEANY: —which is an enormous distinction in this case, but without that information at her disposal, she would never have been able to advance the opinion that he met the diagnostic criteria for paraphilia NOS. The only reason why he does meet that criteria is because they're relying on the fact that they received information that there was a prior—that there were prior incidents and that therefore there was what they call a pattern. We dispute that, but without the information from the Colonie file, she is not able to advance that and she states that, Judge.

THE COURT: Well, wait a minute. I'm looking right at it. She states that he meets the diagnostic criteria for paraphilia after she referenced the 700 online conversations distinct from the 2001 behavior and then the 2004 says he resumed the activity. We're talking about a diagnosis that talks about exhibitionism.

MR. MEANY: Let me be—first of all, I mean, to some extent we're getting away from your question but let me answer the point that you're raising.

THE COURT: I really want you to stay on the question.

MR. MEANY: Well, he doesn't have exhibitionism and he doesn't even meet the diagnostic criteria for that and that's not—what the Board is saying—it's really badly phrased by the Board. What it says is he has this paraphernalia which is something that includes, for example, exhibitionism. There is no allegation that he is an exhibitionist. That's not the nature of his offense. The diagnostic criteria for exhibitionism is exposing yourself to unsuspecting people and that's not—

THE COURT: So let's do this—

MR. MEANY: Can I—

THE COURT: Hold on, because I want a very narrow point here. I'm going to let you argue all the merits of the case. I'm just talking about the procedural motion in limine and to what extent, if any, if the motion is granted, what information would be precluded. Is it your contention that if I grant the motion in limine to preclude any reference to the 2001 Colonie cases which were the subject of the unsealing order and which were the subject of the Appellate Division decision finding that that information was unlawfully unsealed, that that preclusion would also preclude that part of the case summary which states that he met diagnostic criteria for paraphilia? Yes or no.

MR. MEANY: Yes.

THE COURT: Okay. And your basis for that is?

MR. MEANY: My basis for that is that the Board's summary is a chain of hearsay and what the Board is referencing in its summary is the report that was created by Miss Brust from the Pennsylvania Board of Sex Examiners.

THE COURT: Do you have that report?

MR. MEANY: We do.

THE COURT: And can you point out what portions of the Brust report reference the 2001 Colonie matters as being a basis for the diagnosis?

MR. MEANY: I'll use Miss McCanney's copy that's been marked, Judge. Miss Brust indicates that her evaluation procedures are, and then she indicates a list of material that she reviewed including criminal information and police complaint, Colonie, New York, Colonie New York arrest report, Colonie New York investigator's case notes, and that is the basis upon which she drew the conclusion that there had been a prior incident and that she then assigned, you know. So essentially that's how she became aware. Reviewing those documents is how she became aware of what she says are the facts related to that incident which she then, you know, credited and incorporated into her report and used as the basis for the conclusion that he met the diagnostic criteria because there had been another incident outside of a six—she comes to the conclusion that this is a pattern. We would obviously argue that it's, you know, at best isolated incidents but she, you know, she relied upon the contents of that file to

come to the conclusion as to what the facts of that incident were.

THE COURT: Okay.

MR. MEANY: Could I just say one other thing. She did speak to a detective who was related to that case but the evidence is that he relied upon the notes in speaking with her and that she would not have spoken with him if it were not for the disclosure within the body of the Colonie file.

THE COURT: Okay. Miss McCanney, in just reviewing the packet, the discovery packet that you provided, and of course we're going to get into the marking of exhibits once we get into the proceeding itself, but on this motion clearly the case summary references the findings of Brust with respect to the claim, at least in the case summary, that the defendant meets the criteria for paraphilia and it's fundamentally clear that not only does Brust, Paula Brust, lay out in her evaluation procedures the criminal information and complaint in Colonie, the arrest report, the investigator case notes, and also including quite a bit of text in the report about the 2001 Colonie incident, what is your position as to whether or not the Brust finding that Mr. Ritter met the criteria, diagnostic criteria, for paraphilia is dependent or not upon the 2001 information from the Colonie case?

MS. McCANNEY: Your Honor, it's the People's position that the assessment by Miss Brust was not based solely upon the information that was received from unsealing those 2001 records.

THE COURT: Okay. That's true.

However, but if Brust relied at least in part on the 200 1 records, are you in a position to say that if the 2001 records were not available and if that information was precluded, that Brust still would have rendered the same finding?

MS. McCANNEY: Yes.

THE COURT: Tell me how.

MS. McCANNEY: Based upon the information she provides in her report that the defendant admitted to exhibition-like behavior with adult females as well separate and apart from the charges that he had pending in Colonie.

THE COURT: Well, the question is really distillable to this: I assume once we get into the merits of the case that you're going to be offering into evidence the documents attached to your discovery packet which would include the case summary which relied on the Brust report as well as the Brust report, is that correct?

MS. McCANNEY: That's correct, your Honor.

THE COURT: And if I were to strike all of the information from the Colonie case from this record based upon the Appellate Division of our Third Department finding that that information should not have been disclosed, how can you take the position that Brust would have made the same finding that Mr. Ritter met that diagnostic criteria for paraphilia?

MS. McCANNEY: I think because, your Honor, her decision was based not solely on the information from Colonie but from a thorough investigation of all incidents involving this perpetrator.

THE COURT: So is it your contention, then, that if I were to strike from the record any reference to the 2001 Colonie case, that the Brust finding would still be admissible but the striking of that information would go toward the weight of the Brust finding and not the admissibility of it?

MS. McCANNEY: Yes, your Honor.

MR. MEANY: Could I be heard on that question, Judge?

THE COURT: Yes.

MR. MEANY: Judge, first I would note that this question came up during the sentencing proceeding in Pennsylvania and Brust was asked by Mr. Ritter's counsel, this is page 89 of Brust's testimony with regard to the sentencing procedure in Pennsylvania—

THE COURT: Which I assume you have a complete transcript of that?

MR. MEANY: We do, Judge. I've shared it with—

THE COURT: Are you going to be putting that into evidence here?

MR. MEANY: I mean the part—we haven't done it yet but by stipulation the parties have agreed that the testimony from the proceedings in Pennsylvania is reliable hearsay.

THE COURT: Okay. Go ahead.

MR. MEANY: Again, at line six on questioning on this point the question was:

"And again the basis and the sole basis for the diagnosis of paraphilia is that in fact it has to be

recurrent over more than a six-month period, correct?

"ANSWER: Correct.

"QUESTION: That goes back to the New York situation. Let me ask you this: In terms if in fact—well, you've seen Dr. Hamill's report of course. He's going to testify in this case, correct?

"Correct.

"I'm just"—then there's some extraneous things but it seems that her answer with regard to that is the basis and the sole basis for the diagnosis of pedophilia is that it goes back to the New York situation and I would further say so Miss McCanney—

THE COURT: Pedophilia or paraphilia?

MR. MEANY: Paraphilia. There's been no indication from Brust—Brust also says that she does not diagnose him with exhibitionism. Exhibitionism is a separate type of behavior that involves exposing yourself to unsuspecting people.

THE COURT: Okay. So now let's get back to the procedural question at hand. The motion in limine to preclude and the scope of the information that you're seeking to preclude, can you succinctly summarize what portion of the discovery packet that you are seeking to preclude on your motion in limine?

MR. MEANY: Judge, I am seeking to preclude any reference within the Brust report to the Colonie, town of Colonie incidents, and I am seeking to preclude any opinion that she gives based upon

the existence of the Colonie incidents, information which it seems very clear to me is in a sense the fruit of the poisonous tree because it's directly in contravention of the Appellate Division's holding in the matter of William T. They specifically say that sex offender registration purposes are not a purpose for which it is acceptable to use this material.

I would further say, Judge, that the Court should grant that application and then the question would become, to the People, what reliable hearsay exists upon which to base the conclusion of paraphilia NOS. Without the information from the Colonie file, there is no conclusion that he has paraphilia NOS. Without that conclusion, there is nothing that even approaches—and we don't believe that's a clinical assessment to begin with—

THE COURT: Hold on a second. That's a merit determination. Your motion is to preclude any reference to the 2001 Colonie case and—

MR. MEANY: The opinion.

THE COURT: —any opinion based upon information derived from that case that Mr. Ritter meets the diagnostic criteria of paraphilia.

MR. MEANY: That's right, Judge. When you pare away the information that's gleaned from that file, it's clear that there is no other reliable hearsay that would go to the diagnostic criteria for paraphilia.

THE COURT: Okay. Now, Ms. McCanney, I would like you to address the specific motion in limine

in this case insofar as it relates to the 2001 Colonie cases and insofar as the defense has asserted that the scope of the preclusion motion is not only to the referenced facts of that 2001 case but also the opinion issued by Paula Brust that Mr. Ritter met the diagnostic criteria of paraphilia.

MS. McCANNEY: Your Honor, with regard to this hearing and reference to the 2001 cases in Colonie, the People do not intend on scoring for that prior conduct so in respect to the diagnosis of Paula Brust, it's the People's position that there is no clear indication that her diagnosis rests solely upon the fact that this defendant had those prior incidents in 2001 and—

THE COURT: How can you say she would render that same opinion if the 2001 information was not part of the report?

MS. McCANNEY: Based upon her report, your Honor, which I do intend on admitting into evidence in which admissions of the defendant are considered as well as his conduct in the present offense in which he is here to be scored upon along with his admissions of exhibition-like behavior with not only minors but adults as well.

THE COURT: Okay. Well, on the motion *in limine*, I certainly recognize the precedent of the Appellate Division's decision in the matter of Albany County versus William T. specifically finding that the information from the 2001 Colonie case was not lawfully unsealed. So it is the judgment of this Court that for purposes of this proceeding, any document proffered in evidence, any reference

to the 2001 Colonie case or cases as the situation occurs is precluded. So to the extent that any document is including reference to the 200 1 Colonie information, that information is precluded and will be struck from the document and will not be considered by the Court in rendering a determination of Mr. Ritter's classification. To that extent the motion is in all respects granted.

Now, to the extent that the defense is also seeking to preclude or strike the reference of Paula Brust that the defendant evinces or meets the criteria, diagnostic criteria, for paraphilia, the motion in limine is denied because from my view the defense arguments go toward the weight of the finding in view of the fact that the People are claiming that there is sufficient information in the report distinct from the 2001 Colonie cases to support that finding. However, this motion in limine to the extent that I'm denying it to preclude the reference to paraphilia is subject to my revisiting it after I've heard all the proof in this case and at this point it is denied without prejudice to be renewed upon the close of the evidence in this case.

Now, do both counsel understand the Court's ruling?

MS. McCANNEY: Yes, your Honor.

MR. MEANY: Let me, to be clear, Judge, my understanding is that there will be no evidence introduced that's derivative of the Colonie matter and that the People, should they continue to seek an override, would need to introduce something from the Brust report that—

THE COURT: Distinct from Colonie.

MR. MEANY: —that supports that finding. Okay.

THE COURT: Now, as a practical matter, before we get going with the introduction of exhibits, I think it's fundamentally clear that throughout the course of the case summary and the documents that will undoubtedly be marked and received in evidence, rather than having counsel mechanically go through the documents and physically strike them and redact them from the documents, clearly this is a nonjury proceeding, my view of it is that I've already ruled that the reference to the Colonie matter is struck. It will not be considered as part of the record of this proceeding. I certainly want to make sure that this Court adheres to the Appellate Division decision in the matter of William T. and it would be my intent that if you're going to offer the exhibits, then if they are otherwise acceptable, they would be susceptible to redaction in accord with this Court's decision. Miss McCanney, is that acceptable to you?

MS. McCANNEY: Yes, your Honor.

THE COURT: Mr. Meany.

MR. MEANY: I agree, Judge.

THE COURT: Okay. All right. Now, we're going to move on to the merits of the proceeding at this point. Okay.

Ms. McCanney, would you state the sex offense conviction which is the basis for today's rating procedure specifying the sentencing date, the section of law, as well as the risk assessment

instrument factors which you claim are deemed established because they were elements of the underlying sex offense?

MS. McCANNEY: Your Honor, the sex offense of conviction which is the basis of today's rating procedure is unlawful contact/communication with a minor, sexual offenses, in violation of Pennsylvania law 18 Section 6318 Sections(a)(1) unlawful contact/communication with a minor, obscene material or performance in violation of Pennsylvania law 18 Section 6318 Sections(a)(4); open lewdness in violation of Pennsylvania law 18 Section 6318 Sections(a)(2); attempted corrupttion of minors in violation of Pennsylvania law 18 Section 0901/6301 Sections(a)(1) and criminal use of communications facility in violation of Pennsylvania law 18 Section 7512 Section(a). The defendant's sentencing date was October 26, 2011. It's the People's contention, your Honor, that risk factor number five, age of victim, specifically 11 through 16 scoring a value of 20 points is deemed established by this conviction. However, I have further proof of that as well.

THE COURT: All right. We'll get to that. So it's your contention, then, that by virtue of his conviction of those underlying crimes, your position is that risk factor number five, age of victim, has been established as a matter of law and for which you seek an assessment of 20 points?

MS. McCANNEY: Correct, your Honor.

THE COURT: Okay. Now, for each of the risk factors for which the People are seeking a point assessment, identify the risk factor by name and

number, number of points that you are seeking to be assessed, the reasons therefor, and then immediately identify the document which contains what you claim constitutes reliable hearsay evidence and then immediately read the excerpts which the People argue support the particular risk factor point assessment.

MS. McCANNEY: Your Honor, the first risk factor the People are asking to score the defendant on is risk factor number five entitled age of victim, specifically 11 through 16, scoring 20 points. The document which contains what the People argue is reliable hearsay is the presentence investigation report from Monroe County. Directing the Court's attention to page 15 of the People's discovery packet under—

THE COURT: Are you going to have the discovery packet marked and received?

MS. McCANNEY: Yes. I'm sorry, your Honor.

THE COURT: Do you want to use this one?

MS. McCANNEY: Yes, thank you.

THE COURT: Do you have any objection?

MR. MEANY: No, Judge. I'd like to see the—

THE COURT: Why don't you have this marked.

MR. MEANY: I think I've taken mine apart anyway.

(People's Exhibit 2 marked for identification.)

THE COURT: You've had your discovery packet marked as People's Exhibit 2, is that correct?

MS. McCANNEY: Yes, your Honor.

THE COURT: Are you offering it at this time?

MS. McCANNEY: I am. Thank you.

THE COURT: Mr. Meany.

MR. MEANY: Subject to the previous ruling, no objection.

THE COURT: All right. Exhibit 2 is received subject to redaction in accord with my prior ruling here today.

(People's Exhibit 2 received.)

MS. McCANNEY: Understood. Thank you.

THE COURT: Okay. Go ahead.

MS. McCANNEY: All right. Thank you, your Honor. Directing your attention to page 15 of the discovery packet under the paragraph entitled Arresting Officer's Version taken from arrest warrant affidavit, second paragraph, while conducting the investigation, your affiant purported to be a 15-year-old minor female named Emily. Your affiant was then contacted by an individual who identified himself as Delmar Man For Fun. Delmar Man For Fun typed that he was a 44-year-old male from Albany, New York. The conversation was initiated by Delmar Man For Fun on a chat room on Yahoo instant messenger. During the conversation Delmar Man for Fun was advised that I was a 15-year-old female from the Poconos, Pennsylvania. The conversation was sexual in nature. During the conversation Delmar Man for Fun stated that he wanted me to give him another picture so he can continue to react. Shortly after, he provided the purported 15-year-old female a link to his web camera. Without

having to conclude that paragraph, the Court can continue to read that, I just ask that you go to the next paragraph in which it states he then continued to masturbate on the web cam and he asked how old I was. He was advised again that I was 15 years old. He said he didn't realize that I was 15 years old and turned off his web camera.

Based upon that, your Honor, the People feel it is appropriate to score the defendant for 20 points for age of victim.

THE COURT: Okay.

MS. McCANNEY: The next risk factor the People are requesting a score on, your Honor, is risk factor number seven, relationship with victim, stranger or established for purpose of victim identifying or professional relationship. The People are seeking a point assessment of 20 points. Again, the People, your Honor, are relying on the presentence investigation report from Monroe County and essentially, your Honor, the same information that the People read to this Court for the previous risk factor. This was an officer who was a stranger to this defendant posing as a 15-year-old child. Therefore the People contend it is appropriate to score 20 points for that risk factor

THE COURT: Okay.

MS. McCANNEY: Moving on, your Honor, to risk factor number eleven entitled Drug or Alcohol Abuse. Specifically the People are scoring 15 points for history of abuse. I would direct the Court's attention again to the presentence investigation report from Monroe County, page 23 of the discovery packet. Under the subparagraph

marked alcohol, third sentence, the defendant related that when he entered the United States Marines, his drinking did become a regular habit and he would drink to the point of intoxication at least twice a week and sometimes more. Mr. Ritter stated he did not feel his drinking was a problem until his wife pointed it out to him. The defendant related that after realizing he had a drinking problem, he knew he had to stop and gave up alcohol altogether in 2006. It's the People's position that this does support a history of abuse and therefore appropriately scores the defendant at 15 points.

The final risk factor, your Honor, the People are seeking a point assessment for is number twelve, acceptance of responsibility. It's the People's position that the defendant should be scored for ten points for this risk factor. Again the reliable hearsay we are relying on, your Honor, is the presentence investigation report. Direct the Court's attention to page 15 of the discovery packet, under the heading Defendant's Version, I am here today because I was convicted of five felony, three, and one misdemeanor one. These charges are related to sexual offenses against minors. These charges are related to a single incident which took place in an adult-only chat room between myself and what turned out to be an undercover police officer on 9 February 2009. At no time did I believe I was chatting with a minor but rather an adult over the age of 18. I pled innocent to these charges and am appealing the convictions. I'm aware of how serious this situation is and how serious these charges are. The

People contend that ten points for not accepting responsibility is appropriate to score this defendant. Those are all the points the People are seeking with regard to the risk assessment instrument, your Honor.

THE COURT: Okay. And so that's a preliminary score of 65.

MS. McCANNEY: That's correct, your Honor.

THE COURT: Okay. Now, clearly from your risk assessment instrument, which is part of People's Exhibit 2, you are seeking a presumptive override to a level three.

MS. McCANNEY: Yes.

THE COURT: Can you identify the reasons therefor and immediately identify the document which contains what the People claim constitutes reliable hearsay evidence and immediately read the excerpts which the People argue support the basis for the presumptive override.

MS. McCANNEY: Your Honor, if I may approach.

THE COURT: Yes.

(Discussion held off the record at the bench.)

THE COURT: Are you going to offer that?

MS. McCANNEY: I am. So let me give it to you.

THE COURT: Put it on the record.

MS. McCANNEY: That's why I came up.

THE COURT: Go ahead.

MS. McCANNEY: Your Honor, the People are offering at this time into evidence People's Exhibit 1. It is

the report by Paula Brust of the Sexual Offenders Assessment Board.

THE COURT: Mr. Meany.

MR. MEANY: Judge, I'm going to object. I'm going to object on the basis not just what we talked about before which is already established, but I'm going to object on the basis that the Brust report does not constitute a clinical assessment and I'm also going to—

THE COURT: The issue is whether or not it constitutes reliable hearsay for purposes of being admissible.

MR. MEANY: I guess my objection is to relevance, then, that it's not relevant at this point to the determination.

THE COURT: Your objection is relevance?

MR. MEANY: Yes.

THE COURT: The objection is overruled. Exhibit one is received subject to redaction in accord with the Court's prior decision.

(People's Exhibit 1 received into evidence.)

THE COURT: Can I have that.

MS. McCANNEY: Your Honor, directing the Court's attention to page eight under conclusions, as set forth by the Pennsylvania Supreme Court in Dangler, the terms mental abnormality and personality disorder are legislative construct that do not require proof of a standard of diagnosis that is commonly found and/or accepted in a mental health paradigm. Statutory criteria for the mental abnormality and personality disorder criterion

are: The defendant has a congenital or acquired condition which is the impetus to the sexual offending. Mr. Ritter does meet the diagnostic criteria for paraphilia NOS, not otherwise specified, which is a congenital and/or acquired condition. It is my opinion that his offending is motivated by this disorder.

Number two, the defendant suffers from a lifetime condition. Mr. Ritter does suffer from a lifetime condition. Although the paraphilias may wax and wane during one's lifetime, they are nevertheless considered to be lifetime disorders. The condition overrode the defendant's emotional/volitional control. Despite knowing the potential consequences of his behavior for himself, his victims, especially in light of the fact that he was questioned by police not only once but on two separate occasions two months apart prior to the—

MR. MEANY: Judge, I—

THE COURT: What?

MR. MEANY: That portion refers to the—

MS. McCANNEY: I'm sorry. I strike that. He is correct.

THE COURT: Well, the fact of the matter is that it's physically in the document but I'm disregarding it. It's being struck because it's violative of the Appellate Division decision.

MS. McCANNEY: Your Honor, in conclusion, without reading because the Court—we have been discussing this already, based upon this report, the defendant has been assessed to have an abnor-

mality that decreases his ability to control his impulsive sexual behavior and therefore the People do contend it is appropriate to apply override number four and score this defendant as a level three sex offender.

THE COURT: And you can clearly see from the Brust report that there are four criteria and at least one of the four criteria was dependent, entirely dependent, on the 2001 Colonie case?

MS. McCANNEY: Yes.

THE COURT: So would you not agree or would you agree that absent that criteria, then the statutory criteria for that abnormality cannot be accomplished given the fact that the Colonie information has been redacted?

MS. McCANNEY: Your Honor, the People would disagree with that. I think that from reading the overall entire assessment, it can be concluded that he does meet the diagnostic criteria for this mental abnormality separate and apart from the four factors that are designated by Pennsylvania.

THE COURT: But on the face of the document itself, on page eight Dr. Brust states that there are four statutory criteria for this classification and the third factor listed by Dr. Brust is entirely dependent upon the 2001 Colonie case. So I think on the face of the document itself the four criteria for that opinion have not been established.

MS. McCANNEY: Your Honor, directing your attention to page seven on her report.

THE COURT: All right.

MS. McCANNEY: Under characteristics of the defendant, if you go under any mental illness, mental disability or mental abnormality, Miss Brust states that after carefully reviewing available records, it is the opinion of the board member that Mr. Ritter does meet the diagnostic criteria for mental abnormality or personality disorder according to the Diagnostic and Statistics Manual, fourth edition. So separate and apart—so it's her opinion that he meets the criteria pursuant to the DSM-IV which is separate from the factors that are set forth in the conclusion.

THE COURT: But isn't it true right in the same paragraph Dr. Brust is basing that diagnosis under the DSM-IV on behaviors directed at non-consenting persons with the behavior since 2001 which is the Colonie case?

MS. McCANNEY: I understand that she does discuss that, your Honor, but if you continue on with the last sentence that starts on that last page, page seven, his paraphilia NOS also includes exhibitionism wherein he has exposed himself to his victims and wanted to have them watch him masturbate in addition to sending pictures of his naked penis. He admitted he did this with adult women as well. Mr. Ritter acted on his sexual urges and/or fantasies and then he goes onto the three intended minor victims. However, I think it's significant that the case that we are here about consisted of this defendant exposing himself masturbating in front of whom he believed to be a 15-year-old child and then admits that he has done this behavior with adult women as well

separate and apart from the two victims from the 2001 Colonie case.

THE COURT: Okay. Is there any other information or any other evidence that the People wish to offer at this time?

MS. McCANNEY: No, your Honor.

THE COURT: Okay. Now, Mr. Meany, do you acknowledge receipt at least ten days prior to today's proceedings the documents which the People have identified and read from?

MR. MEANY: I do, Judge.

THE COURT: And in fact you consented to the—well, the introduction of Exhibit 2 subject to redaction, true?

MR. MEANY: I have, Judge.

THE COURT: And do you wish to argue that any of the documents, other than the one that you consented to, do you wish to argue that any document identified by the People should not be received in evidence at this hearing other than what you've already argued?

MR. MEANY: Judge, maybe I'm speaking again on the point that you overruled me on but my position is that because of some of the very language that Miss McCanney quoted with regard to how the—what that document is, I believe it should not be admitted as a clinical assessment.

THE COURT: Again it goes to the weight, not the admissibility. Okay. Do you have any other objection on that point?

MR. MEANY: Not as to the reliable hearsay.

THE COURT: Then my ruling stands. I do find that the documents offered by the People do meet the statutory criteria of reliable hearsay, and as I've indicated, they are received in evidence subject to redaction of the information from the Colonie case which I've already ruled upon in this case.

Now, do the People rest?

MS. McCANNEY: We do, your Honor.

THE COURT: Does the defense wish to offer any evidence?

MR. MEANY: Could we have one moment, Judge.

(Pause)

MR. MEANY: Let me say this, Judge. What I would like to do is to speak as to the specific point assessments and especially as to the proffered override.

THE COURT: Okay. Well—

MR. MEANY: To the extent that—

THE COURT: —we're going to get to that in a minute. But I want to follow the protocol of the SORA proceeding.

MR. MEANY: No, at this point in time I'm not offering any exhibits.

THE COURT: Now, for the factors on the rating instrument which the People seek a point assessment, do you contend that the People have not established facts to support the point assessment by clear and convincing evidence?

MR. MEANY: I do, Judge.

THE COURT: Which ones?

MR. MEANY: Judge, I understand the case law with regard to factor five. I will merely note for the record that in fact there was never any actual child victim in this case; that it was at all times an agent provocateur from the police department who I believe was 28 years old.

THE COURT: Is that a relevant distinction?

MR. MEANY: Judge, I'm just saying it for the record.

THE COURT: All right.

MR. MEANY: I understand. And I would not contest factor seven. Obviously the facts speak for themselves. With regard to number eleven, I don't believe that they have established that there is a history of drug or alcohol abuse.

THE COURT: Doesn't the document referenced say that he did have that history, that he worked toward resolving in 2006?

MR. MEANY: Judge, here's what I would say. There is no indication that alcohol played a role in this offense.

THE COURT: But that's not the issue.

MR. MEANY: It is.

THE COURT: The issue is history.

MR. MEANY: The fact that on his own accord he decided to stop drinking in 2006, if you credit that statement that they're attributing to him, I don't believe that meets the standard for imposing points based upon this. I understand the theory is that alcohol is a disinhibiter, and so forth. The fact of the matter is that the Board of Sex Examiners references that in their case

summary and specifically says that they're not going to assess points for that reason. The fact of the matter is that Mr. Ritter was not deemed to have a drug or alcohol problem in state prison when he was in Pennsylvania. The fact of the matter is that if you credit that, he hasn't had a drink since 2006 which was more than three years prior to the offense that he was convicted for. So to state that that's a history of abuse, I mean if you said he had been arrested six times for drunk driving and then stopped drinking, maybe you would have an argument that he has a history. But the fact that, taking again this report at face value, the fact that he had a family discussion with his wife and decided that it would be better for them or him not to drink and then did that is not, I think, the type of fact pattern that calls for an imposition of points here. It doesn't seem to be in any way indicative of dynamic risk in terms of continuing—

THE COURT: I'm aware of the fact that the case summary—

MR. MEANY: —to offend.

THE COURT: —is consistent with your argument and the Board did not score on that factor. Okay. What else?

MR. MEANY: Judge, with regard to acceptance of responsibility, the only reason why Mr. Ritter is being scored points here is because he took his case to trial and prosecuted an appeal and gave statements consistent with that, I believe on advice of counsel when he was interviewed. The Court's familiar with the process of sex offenders

and parole and that sort of thing. Mr. Ritter did complete sex offender treatment in Pennsylvania. He would not have been allowed to graduate from that if he wasn't accepting of responsibility, and I will tell you that in fact he did admit the conduct that was involved in this case and he admitted that it was inappropriate. The dispute, you know, the fact—

THE COURT: Was that in the record here?

MR. MEANY: Judge, I can offer—I would offer his reports, and this is by stipulation with the People.

THE COURT: That's what I asked you, if you had any documents you wanted to put into evidence.

MR. MEANY: I wanted to wait to see if they were going to be relevant, Judge.

THE COURT: So you're arguing that he did take responsibility?

MR. MEANY: He did, Judge. He graduated from treatment. He never denied the incident. He has consistently worked to better himself. He was a mentor to other people within the class and—

THE COURT: You realize in the presentence report there's a reference to the defendant's statement in which he indicated he did not know it was a 15-year-old.

MR. MEANY: And I don't—I think that if he sat here today, he would probably reaffirm that, Judge. But what I am saying is that what he said was that he believed his behavior was inappropriate, that he was—that he had done damage to his family, that he wanted to improve, and I think

that that is consistent with acceptance of responsibility if not with—you know, his dispute is with the conviction, not with the conduct and not with the fact that it had a tremendously negative impact on his life and that it needed to be addressed. So I think that in fact I would say he has accepted responsibility.

THE COURT: On these points, are you done?

MR. MEANY: Yes. With regard to the specific . . .

THE COURT: Miss McCanney, do you wish to respond to the defense arguments with respect to the risk factors five, eleven and twelve that he disputes—

MS. McCANNEY: Well—

THE COURT: —other than what you've already said?

MS. McCANNEY: Just for five, your Honor. I think that the case law does dictate that he should be scored 20 points for that factor, the drug or alcohol abuse. I do understand Mr. Meany's argument. However, I think that based upon his own admissions the significance of his prior abuse is something to be considered by the Court, and even though he has abstained from alcohol, the defendant may not be abusing alcohol or drugs at the time of the instant offense in order to receive points for this category and I would ask the Court to take that into consideration. And factor number twelve, acceptance of responsibility, it's the People's position that ten points absolutely should be scored based upon his own admissions as outlined in the presentence investigation report, his minimizing his conduct and not taking

responsibility for his conduct. Therefore, it's the People's position that he should be scored for those points.

THE COURT: Okay. Based upon the record of today's proceedings, the Court does find that the People have established facts by clear and convincing evidence which support the assessment of the following number of points for the following risk factors:

Risk fact number five, victim age, 20 points. Risk factor number seven, relationship, stranger, 20 points. Risk factor number twelve, nonacceptance, 10 points, for a resulting preliminary score of 50 points. The Court does concur with the proposed rating that the Board had submitted dated 9/15/2014 which is part of the discovery packet, and the Court agrees with the Board that scoring the drug or alcohol abuse history or the document evidences where he had ceased abusing alcohol in 2006. I'm going to exercise my discretion and not score a point on that one. So we have a preliminary score of 50 points.

Now, with respect to the People's request for an override, I think it's fundamentally clear that the diagnosis both under the DSM-IV by Dr. Brust as well as Dr. Brust's opinion which was incorporated into the—

MR. MEANY: Judge, I don't want to be rude but I've let it go six times. She's not a doctor and I think that's relevant.

THE COURT: Okay.

MR. MEANY: I'm sorry. I apologize, Judge.

THE COURT: That's all right. Now I've lost my complete train of thought. Paula Brust. I'll refer to her as Paula Brust. I think that it's fundamentally clear that she's a board member of the Sexual Offenders Assessment Board, Paula Brust, and her report is in evidence as Exhibit 1. It's incorporated in the case summary which is part of the discovery packet which is in evidence as Exhibit 2 and I think it's fundamentally clear that the People have not met their burden to establish by clear and convincing evidence that but for the inclusion of the 2001 information from the town of Colonie case, that the findings would have been the same. And to the contrary, I think it's fundamentally clear that Paula Brust was relying in great part upon the history reported from the 2001 Colonie case which was the product of the unsealing order and, frankly, I think it's clear that my view of her report and her findings were that she was depending on that information. So there's no way from the proof in this case that the People have met their burden to establish, again, by clear and convincing evidence that the abnormality which you're relying upon to seek the override was actually met without the Colonie case information, so in that regard the People's request for an override is denied.

Now, we have a risk—well, let me ask you this: Are the People seeking a departure based upon the record of this case?

MS. McCANNEY: Yes, your Honor.

MR. MEANY: Judge, I would object to that. There's no notice of any seeking of a departure.

THE COURT: Well, there may not be any notice from the People in that regard in the risk assessment instrument that the People submitted because they did check off no, but the discovery packet that was proffered by the People does also include the risk assessment instrument prepared by the Board in which the Board did recommend a risk level departure to a level two.

MR. MEANY: Can I be heard?

THE COURT: Can I just finish what I am saying and you can have every opportunity.

And from the Court's view this document is in evidence. I am not, of course, bound by the People's risk assessment instrument nor am I bound by the Board's risk assessment instrument, but they're clearly part of this proceeding and so I am asking the People, are you seeking a departure; and if so, what are you basing your departure on? And I will hear you, Mr. Meany, when Miss McCanney is done.

MS. McCANNEY: Your Honor, the People are seeking a departure to at the minimum a level two based upon the scoring of this defendant by the Pennsylvania Board of Probation and Parole Sex Offender Assessments Board as a sexually violent predator. I understand that a great deal of that information, a great deal of that assessment is based upon information that was derived from the case from 2001, that the unsealing of that was overturned. However, your Honor, I think the totality of everything that's in evidence with regard to this defendant's risk of offending and our responsibility to the community to protect

them based upon all of the information that has been derived today, it's the People's position that it would be appropriate to score this defendant at the minimum as a level two per the Board's recommendation.

THE COURT: Mr. Meany, what is your position?

MR. MEANY: Judge, first of all, the departure that the Board is giving notice of is a downward departure. The departure that they're indicating is that they're crediting the clinical assessment and imposed the override and it's a departure from the override to reduce from a three, which is the presumptive level on an override, to reduce it down to a two based upon mitigation. So there is no notice anywhere of a—

THE COURT: Well, just a second. The Board was also adopting the abnormality for the override to a three but recommended a downward departure to a two based on mitigating circumstances.

MR. MEANY: That's exactly my point. No one is arguing that there are—that the fact that Pennsylvania designated him under their statutory framework as a sexually violent predator isn't dispositive of anything here. It's not a risk factor. It's just how they—it's their nomenclature and their, you know, taxonomy of how they organize their registration system. There's nothing anywhere that indicates any risk factor that's not captured by the scoring instrument.

THE COURT: Okay. Anything else on that point?

MR. MEANY: I suppose not, Judge. I mean the basis for—I'm not—I want to make sure I'm address-

ing what Miss McCanney is saying. Her basis is that Pennsylvania scored him in a manner—I mean there's no indication that that—that those things are related to our scoring instrument. That's why we have our own hearing. I would submit, Judge, that there is nothing anywhere that's not reflected within the scoring instrument here. The Court of Appeals has said that it's an unusual case where the scoring instrument wouldn't be accurate. I mean they do provide for these overrides and so forth, but they just don't apply here.

THE COURT: Okay. Well, once again, in reviewing the Board's case summary, notwithstanding the fact in the context of their having recommended the override and then a downward departure from three to two, they're also basing it on the three separate incidents which includes the town of Colonie case, and because of that, it's the judgment of this Court that the People have not established by clear and convincing evidence that they are entitled to an upward departure to a level two so the People's request for an upward departure to a level two is denied.

Now, are the People seeking a designation of the defendant as a sexually violent offender, predicate sex offender, a sexual predator, or none of the above?

MS. McCANNEY: None of the above, your Honor.

THE COURT: Okay. I agree. Okay. So it's the judgment of this Court that I find by clear and convincing evidence to support the conclusion that the defendant should be rated a level one. I'll sign

the orders and you can all get copies from the clerk of the court. That concludes this proceeding.

MR. MEANY: He needs to stay and get served with that, your Honor?

THE COURT: That is correct. Hold on a second, Mr. Ritter. Do you have the registration application form, Jen?

MS. McCANNEY: Do I?

THE COURT: Yes.

MS. McCANNEY: No.

THE COURT: Come on up.

(Discussion held off the record at the bench.)

THE COURT: We'll take a brief recess and, Mr. Ritter, I want you to review the registration form with your counsel.

(Pause)

THE COURT: We're going to go back on the record in the matter of William Ritter. Mr. Ritter, I have here the sex offender registration form. Is that your signature at the bottom of the form?

THE DEFENDANT: Yes, your Honor.

THE COURT: And did you review that document with Mr. Meany including not only the front part of the form that's filled out but also the rules and regulations governing your conduct under the Sex Offender Registration Act that appear on the back of the form?

THE DEFENDANT: Yes, your Honor.

THE COURT: And do you understand that information and agree to be bound by it?

THE DEFENDANT: With one question, your Honor.

THE COURT: Go ahead.

THE DEFENDANT: That is the date of registration. Is it effective today?

THE COURT: In New York it is effective today.

THE DEFENDANT: Yes, sir.

THE COURT: So now with that said, that concludes the matter. The clerk of the court will take the form apart and distribute the copies to the parties including Mr. Ritter and that concludes the matter. Good luck to you.

(Proceedings concluded.)

MEMORANDUM AND ORDER OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD JUDICIAL DEPARTMENT (OCTOBER 20, 2011)

STATE OF NEW YORK
SUPREME COURT, APPELLATE DIVISION
THIRD JUDICIAL DEPARTMENT

In the Matter of ALBANY COUNTY DISTRICT ATTORNEY'S OFFICE, on Behalf of BARRETT TOWNSHIP POLICE ET AL.,

Respondent,

v.

WILLIAM, T.,

Respondent.

No. 511959

Before: MERCURE, J.P., SPAIN, MALONE JR., KAVANAGH and McCARTHY, JJ.

Mercure, J.P.

Appeal from an order of the County Court of Albany County (Herrick, J.), entered January 6, 2011, which denied respondent's motion to vacate a prior order that unsealed the records of certain criminal proceedings.

Respondent, an adult male, communicated on-line with investigators posing as underage girls on two occasions in 2001. He was charged with endangering the welfare of a child after attempting to meet the "children" for the purpose of committing lewd acts in front of them. The ensuing case was adjourned in contemplation of dismissal, and ultimately dismissed, by the Colonie Town Court. As a result, the records of the case were sealed (*see* CPL 160.50[1] [c]; [3]).

In 2009, respondent faced criminal charges in Pennsylvania after he engaged in lewd conduct in front of a "web cam" viewed by a police investigator posing as an underage girl on-line. County Court granted petitioner's ex parte application, made on behalf of the prosecutor and police department involved in the Pennsylvania case, to unseal the records from the prior case for use in the pending criminal proceedings. Respondent now appeals from his unsuccessful motion to vacate that order.[1]

We reverse. The sealing requirement of CPL 160.50 "was designed to lessen the adverse consequences of unsuccessful criminal prosecutions by limiting access to official records and papers in criminal proceedings which terminate in favor of the Accused" (*Matter of Harper v. Angiolillo*, 89 NY2d 761, 766 [1997]; *accord Matter of Katherine B. v. Cataldo*, 5 NY3d 196, 202 [2005]). Those adverse consequences include potentially severe damage to an individual's reputation and employment prospects and, as such, there are only six narrow, precisely tailored exceptions "to the general proscription against releasing

---

[1] Following a jury trial at which some of the records were introduced into evidence, respondent was convicted of various offenses.

official records and papers once they are sealed" (*Matter of City of Elmira v. Doe*, 39 AD3d 942, 943 [2007], *aff'd* 11 NY3d 799 [2008]; *see Matter of Katherine B. v. Cataldo*, 5 NY3d at 202-203).

Here, petitioner relied upon an exception that permits a law enforcement agency to obtain the release of sealed records if "justice requires that such records be made available to it" (CPL 160.50[1] [d] [ii]). The Court of Appeals has clarified, however, that "[t]he statute's . . . primary focus is the unsealing of records for investigatory purposes" and, as such, the exception is analogous to other investigatory tools employed to uncover criminal conduct "prior to commencement of a criminal proceeding" (*Matter of Katherine B. v. Cataldo*, 5 NY3d at 205 [emphasis added]). Apart from a "singular circumstance" not present here, the exception does not apply to a prosecutor—such as the Pennsylvania district attorney prosecuting respondent's case—seeking sealed records "after commencement of a criminal proceeding" (*id.*; *see Matter of Akieba Mc.*, 72 AD3d 689, 690 [2010]; Preiser, 2005 Supp Practice Commentary, McKinney's Cons Laws of NY, Book 11A, CPL 160.50, 2011 Supp Pamphlet, at 125-126). A Pennsylvania police department also sought the records, but there is no indication that its "investigation" was in any way separate—at the time of the request—from the pending prosecution. Indeed, the only reasons given for seeking the records were for their admission at trial, as well as to assist in respondent's sentencing and evaluation for sex offender registration purposes.

In short, petitioner's application thus impermissibly invoked CPL 160.50(1)(d)(ii) for prosecutorial purposes, and respondent's motion to vacate should

have been granted. Petitioner's alternate argument for affirmance, to the extent it is properly before us, has been examined and found to be unavailing.

Spain, Malone Jr., Kavanagh and McCarthy, JJ., concur.

ORDERED that the order is reversed, on the law, without costs, motion granted, order dated June 29, 2010 vacated, and matter remitted to the County Court of Albany County for further proceedings not inconsistent with this Court's decision.

Enter:

/s/ Robert D. Mayberger
Clerk of the Court

ORDER OF THE COURT OF ALBANY COUNTY, NEW YORK, DENYING MOTION TO VACATE CONVICTION (DECEMBER 29, 2010)

STATE OF NEW YORK, COUNTY OF ALBANY

EX PARTE MOTION BY ALBANY COUNTY DISTRICT ATTORNEY'S OFFICE on Behalf of BARRET TOWNSHIP POLICE and MONROE COUNTY, PENNSYLVANIA DISTRICT ATTORNEY'S OFFICE,

Before: Hon. Stephen W. HERRICK, Judge.

HERRICK, J. Defendant moves to vacate this Court's order of June 29, 2010 granting the People's motion to unseal the records pertaining to a case involving the defendant in Colonie Town Court which was dismissed in April of 2002 having been Adjourned in Contemplation of Dismissal. The defendant is presently charged with a series of sex crimes in Monroe County, Pennsylvania.

The record reveals that once dismissed, the Colonie case was sealed, pursuant to statute. Criminal Procedure Law, section 160.50. Once sealed, records may be unsealed only in limited circumstances. Relevant here, the records may be released to " . . . a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires" . . . disclosure. Criminal

Procedure Law, section 160.50(1)(d)(ii); *People v. Cataldo,* 5 NY3d 196.

In the present matter, the People's motion to unseal the records included appended affidavits from Monroe County, Pennsylvania, Assistant District Attorney Michael Rakaczewski and Barret Township, Pennsylvania Police Department Detective Ryan Venneman. In his affidavit, Detective Venneman stated that, " . . . (i)n order to properly investigate this matter, and successfully prosecute the criminal case against . . . (Ritter) . . . in Pennsylvania, it is necessary to review the records and evidence being held by the Colonie Police Department and the Albany County District Attorney's Office."

Based upon the foregoing, defendant's, motion is denied, the Court holding that the request was properly made by law enforcement for investigative purposes.

The Court has considered defendant's remaining arguments and finds them to be without merit.

This memorandum constitutes both the decision and order of the Court.

/s/ Stephen W. Herrick
JCC

Dated: Albany, New York
December 29, 2010

ORDER OF THE COURT OF ALBANY COUNTY, NEW YORK TO UNSEAL RECORDS (JUNE 29, 2010)

STATE OF NEW YORK, COUNTY COURT
COUNTY OF ALBANY

EX PARTE MOTION BY ALBANY COUNTY DISTRICT ATTORNEY'S OFFICE on Behalf of BARRET TOWNSHIP POLICE and MONROE COUNTY, PENNSYLVANIA DISTRICT ATTORNEY'S OFFICE,

Before: Hon. Stephen W. HERRICK, Judge.

UPON the reading and filing the affirmation of David M. Rossi, assistant district attorney, and all attached papers, filed on the 28th day of June, 2010, in support of an ex parte motion made pursuant to criminal procedure law § 160.50(1)(d)(ii), it is hereby

ORDERED, That the Albany County district attorney's office make their file pertaining to the William Scott Ritter matter which was previously adjourned in contemplation of dismissal on April 3, 2002, available to Monroe county, Pennsylvania district attorney's office as well the Barrett township police department.

ORDERED, that the Colinie police department make their file pertaining to the William Scott Ritter matter which was previously adjourned in contemplation of dismissal on April 3, 2002, available to the

Monroe County, Pennsylvania district attorney's office as well as the Barrett township police department.

ORDERED, that the Colonie town Court make their file pertaining to the William Scott Ritter matter which was previously adjourned in contemplation of dismissal on April 3, 2002, available to the Monroe County, Pennsylvania district attorney's office as well as the Barrett township police department.

Enter:

/s/ Stephen W. Herrick
Judge

June 29, 2010
Albany, New York

RITTER MOTION IN LIMINE FILED IN THE COUNTY COURT OF ALBANY, NEW YORK (NOVEMBER 3, 2014)

STATE OF NEW YORK, COUNTY COURT
COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK,

v.

WILLIAM S. RITTER, JR.,

Defendant.

Index No. CA-751-14

Before: Hon. Peter A. LYNCH, Judge.

PLEASE TAKE NOTICE that I, William S. Ritter, Jr., representing myself *pro se* in this matter, affirms as follows under the penalty of perjury:

1. I am the defendant named in the above captioned case, and am fully familiar with the case and facts cited herein.

2. I am submitting this Motion *in Limine* in response to the "Notice Pursuant to Sex Offender Registration Act—Correction Law Section", dated September 22, 2014, which provides notice of a hearing scheduled for October 17, 2014, at which time a classification determination will be made, in accordance to Correction Law Section 168-k(2), as to my risk level and designation as a sex offender. This

hearing was adjourned after the presiding Judge, Stephen Herrick, recused himself from the matter, and subsequently rescheduled for November 10, 2014 before the Honorable Peter A. Lynch. As such, I submit the following arguments and attached exhibits in support of a motion to exclude as evidence in the aforementioned hearing scheduled for November 10, 2014 any reference to prior contact with New York law enforcement officials that took place back in April and June of 2001 that can be traced, directly or indirectly, to information contained in sealed files pertaining to these incidents that were improvidently unsealed by an order of this court which was subsequently vacated by a unanimous decision of the New York Supreme Court, Appellate Division, Third Judicial Department (hereafter cited as "New York Appellate Court"), or any other documents or information pertaining to the 2001 incidents otherwise sourced as hearsay.

3. The Case Summary prepared by the New York Board of Examiner's of Sex Offenders in support of this hearing (*see* Exhibit A (New York Board of Examiner's of Sex Offender's "Case Summary" (William Ritter), September 15, 2014)) makes repeated reference to, and draws assessments and conclusions from, information that could only have been obtained from impermissible and illegal access to sealed files pertaining to two encounters by Mr. Ritter with New York law enforcement that occurred in April and June of 2001.

4. Mr. Ritter was never tried or convicted of the charge that arose from the 2001 police contact (a Class-B misdemeanor), and the matter was disposed of by the Colonie Town Court, New York, resulting in

the charge being dismissed and all records relating to the charge sealed by court order in accordance with New York Criminal Procedure Law Section 160.50. New York Criminal Procedure Law Section 170.55, paragraph 8 states that upon dismissal, "the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution."

5. Pennsylvania prosecutors, through *ex parte* communication with an Albany County Judge, sought the unsealing of files related to the events of 2001 for use at trial and in Mr. Ritter's sentencing and evaluation as a sex offender. An unsealing order was issued, and these files were used extensively at trial, sentencing and subsequent evaluations and determinations regarding Mr. Ritter's status as a sex offender in the Commonwealth of Pennsylvania.

6. Mr. Ritter fought to have this unsealing order vacated prior to his going to trial. On October 22, 2011, prior to Mr. Ritter's conviction in Pennsylvania becoming final, the New York Appellate Court issued a unanimous decision that reversed the unsealing order, finding that "[the Pennsylvania prosecution's] application [to unseal Mr. Ritter's files] . . . impermissibly invoked [the New York unsealing statute] for prosecutorial purposes, and [Mr. Ritter's] motion to vacate", which was refused by the Albany County Court on December 29, 2010, "should have been granted." *See* Exhibit B (State of New York Supreme Court, Appellate Division, Third Judicial Department, "In the Matter of Albany County District Attorney's Office, on Behalf of Barrett Township Police, et al., vs. William T.", Order and Memorandum, October 20,

2011) at 3. It should be noted that had that had the motion to vacate been granted when originally submitted, as required by law, then this issue would be moot, since the files in question would never have been unsealed and used at the trial, sentencing and evaluation of Mr. Ritter in Pennsylvania.

7. The Appellate Court further stated that "[t]he only reasons given for seeking the records were for their admission at trial, as well as to assist in [Mr. Ritter's] sentencing and evaluation for sex offender registration purposes." *Id.* at 3. The New York Appellate Court, in its unanimous decision, clearly indicated that none of these reasons—including their use in support of any sex offender evaluation conducted for registration purposes, such as is the case in the present matter—justify the unsealing of the records in question. Indeed, the controlling case cited by the New York Appellate Court in its decision to vacate the improvident unsealing order issued by the Albany County Court, *Matter of Katherine B. v. Cataldo*, 5 NY3d 146, 202 (2005), specifically cites a general proscription against *ex parte* unsealing requests for use in sentencing recommendations. *Id.* at 204.

8. The records in question should

a). never have been unsealed;

b) never have been released to the Pennsylvania prosecution;

c) never have been utilized at trial of Mr. Ritter;

d) never have been made available to the Monroe County Probation and Parole Department for use in preparing a pre-sentence investigation, and

e) never have been made available to the Pennsylvania Sex Offender Assessment Board in any evaluation of Mr. Ritter.

By extension, they should never have been made available for use at this present proceeding—either in their original form, or as part of any record which incorporated information that otherwise would have been under seal and unavailable through other means by either the Albany County District Attorney's Office, or as part of the evaluation conducted by the New York Board of Examiners for Sex Offenders.

9. While the Commonwealth of Pennsylvania has shown a complete disregard for New York law, this court must adhere to both the letter and intent of New York law when it comes to the issue of Mr. Ritter's 2001 contact with law enforcement and respect the fact that the charges stemming from this contact were dismissed and all files relating to this matter sealed by a valid and binding court order. There is no question that the unsealing of Mr. Ritter's file was a violation of New York law, as would be, by extension, any continued use of information so derived by the Albany County Prosecutor's Office and the Board of Examiner's for Sex Offenders. The question of whether this evidence was properly obtained must be determined objectively, without reference to the state of mind of either the Albany County District Attorney's Office or the Board of Examiner's for Sex Offenders when the information came into their hands, and whether their possession of this evidence was objectively unlawful, without respect to the timing of that determination—a question that has been conclusively and emphatically answered in the affirmative by the New

York Appellate Court, and which must be recognized by this court.

10. In so far as any materials or information relating to these matters are before the court, they are there solely due to the dual indiscretions of a decision by the Albany County Court to unseal the files (which vacated as improvident by a unanimous ruling by the New York Appellate Court in its decision of October 22, 2011) and of the Pennsylvania Court System in failing to provide full faith and credit to the final judgment of the New York Appellate Court, and as such should be treated as fruit of the poisonous tree. To rule otherwise would render empty the mandate of the New York sealing statute, and would allow the recipients of this information—the Albany County District Attorney's Office and the New York Board of Examiner's of Sex Offenders—to accomplish extraterritorially what they could not otherwise in the State of New York.

11. The continued possession and use of information by the Albany County Prosecutor's Office and the Board of Examiner's for Sex Offenders that is sourced to, or derived from, these files violates Mr. Ritter's rights to due process under the 5th and 14th Amendments of the U.S. Constitution (*see Matter of Dondi*, 63 N.Y.2d 331, 339 (1984) ("There is no question that appellant suffered a violation of his right to due process by the improper access to the sealed files") and is viewed as a matter of federal law. Likewise, any ruling that permits the continued use and possession of such information by the Albany County Prosecutor's Office and the Board of Examiner's for Sex Offenders deprives Mr. Ritter of any meaningful right to appellate review of the *ex parte*

unsealing order, an egregious outcome given that the New York Appellate Court ultimately vindicated Mr. Ritter's view of the law and the *ex parte* order unsealing the files in question was vacated. This in and of itself constitutes a violation of due process under the 14th Amendment of the U.S. Constitution.

12. The Board of Examiner's of Sex Offenders further avers in its Case Summary that the issue of whether or not the files from 2001 were sealed or unsealed is moot. The Case Summary presented by the Board of Examiner's of Sex Offenders states that information pertaining to Mr. Ritter's 2001 encounters with law enforcement is "well documented in articles on timesunion.com and therefore falls within the public domain." (*See* Exhibit A, p.1) It should be noted that there is a general proscription in the State of New York against the use of newspaper articles and other published hearsay. *See Love v. Spector*, 215 AD2d 733, 627 NYS2d 87 (2d Dept 1995); *Pedro v. Burns*, 210 AD2d 782, 620 NYS2d 524 (3d Dept 1994); and *Bakery Salvage Corp. v. Maple Leaf Foods, Inc.*, 195 AD2d 954, 600 NYS2d 874 (4th Dept 1993). None of these documents meet the "statements in ancient documents" exception for the introduction of hearsay under FRE 803(16), since they are not at least 20 years in age. In any event, the Board fails to provide a single example by way of illustration from the alleged documentation trove it cites as being supportive of its findings. Void of any such specificity, it is impossible to ascertain the reliability of any information sourced from any article contained on times union.com or any other such source that may be used by the Board, as well as the basis of such knowledge. This reduces such information to being the equiv-

alent of anonymous information, and as such makes any information so sourced unreliable hearsay and inadmissible in these proceedings. See, for instance, *People v. Chase*, 650 N.E.2d 379 (N.Y. 1995); *People v. Parris*, 632 N.E.2d 352 (N.Y. 1993).

13. Even if such citations were provided (and none have been), there is nothing to indicate whether any of the statements or information attributed to the timesunion.com sources were made under oath or subject to cross-examination, and as such must be deemed by this court to be unreliable. There is no way of ascertaining whether or not any anonymous declarant quoted in these documents had the opportunity to perceive the event, had the memory necessary to recall the event, and the ability to accurately narrate the event. As such, any information so cited (and again, it is noted that the Board fails to specifically cite any information gleaned from the timesunion.com source to back up its assertions) must be deemed inadmissible in so far as it impacts negatively on the truth-seeking function of the trier of fact. Any anonymous or un-cited information contained in any documents used by the Board in preparing its assessment, especially as they pertain to information relating to Mr. Ritter's 2001 encounters with New York law enforcement, must be found to be inadmissible as unreliable hearsay.

WHEREFORE, a pre-hearing decision on this matter, pursuant to this Motion In Limine, is necessary as it will substantially influence Mr. Ritter's strategy at the determination hearing, including the use of *voir dire*, the content of any opening statement, any presentation of witnesses and experts on his behalf, and any questioning of witnesses put forward

by the prosecution, movant respectfully requests that an Order be granted excluding all evidence pertaining to Mr. Ritter's 2001 encounters with New York law enforcement, whether directly linked to the improvidently unsealed files, sourced as hearsay, or otherwise in the possession of the Albany County District Attorney's Office and the Board of Examiners of Sexual Offenders, at the determination hearing scheduled for November 10, 2014, and for such other and further relief the Court deems just and appropriate.

I was notified of the new hearing date on October 31, 2014. I have served this motion seven days prior to the hearing date.

/s/ William S. Ritter, Jr
Pro Se

Dated: November 3, 2014

COMMONWEALTH OF PENNSYLVANIA SUPPLEMENTAL BRIEF FILED IN THE COURT OF COMMON PLEAS OF MONROE COUNTY, 43RD DISTRICT OF PENNSYLVANIA (JUNE 2, 2010)

COURT OF COMMON PLEAS OF MONROE COUNTY FORTY-THIRD JUDICIAL DISTRICT COMMONWEALTH OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA

v.

WILLIAM SCOTT RITTER JR.

No. 2238 Criminal 2009

COMMONWEALTH'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS 404B MOTION

To the Honorable Judges of Said Court:

NOW COMES E. David Christine, Jr., District Attorney of Monroe County, Attorney for the Commonwealth, by and through Michael Rakaczewski, Assistant District Attorney, and files the following brief as follows:

I. Statement of Facts:

A criminal complaint was filed against this Defendant on October 16, 2009 charging him with several counts of Unlawful Contact with a Minor as a

result of his exposing himself over the Internet to an undercover police officer who had assumed the Identity of a minor. He had a preliminary arraignment on November 9, 2009 and his preliminary hearing on October 16, 2009, at which time he waived his charges to court The Defendant was formally arraigned at the Courthouse on January 11, 2010.

The Monroe County District Attorney's Office became aware of the Defendant's previous arrests by the Colonial Police Department in Albany, New York as the result of a simple "google" internet search.

The Internet articles also indicated that federal prosecutors in Albany had obtained possession of those same records, apparently after having them unsealed, and were investigating possible federal charges, although none appear to have been filed.

Based on this information, the Monroe County District Attorney's Office simply requested a copy of these documents from the Albany County District Attorney's Office, which they provided on or about February 8, 2010. They were then provided to the defendant in discovery, in accordance with Pa. R. Crim. P. Rule 573, and the applicable provisions of the Pennsylvania and U.S. Constitutions, on February 17, 2010.

The Monroe County District Attorney's Office was under the presumption that if the records were still sealed and the Albany County District Attorney's Office was prohibited from sharing those records, they would have simply not sent them. The Monroe County District Attorney's Office does not have direct access to those records and does not have a copy of any such sealing order. Subsequently, The Monroe

County District Attorney's Office was informed by defense counsel that those same records were still sealed. As a result, the Monroe County District Attorney's Office sent back the records to the Albany County District Attorney's Office. A petition to unseal the records was then filed by the Albany County District Attorney's Office in Albany County New York said petition was granted.

The Commonwealth filed a Notice of its intent to admit the prior bad acts in New York pursuant to Pa. R.E. Rule 404B. The Defendant Filed a motion *in limine* seeking their prosecution. The Defendant also recently filed a motion to vacate the unsealing order in New York. A copy of that motion with the attached unsealing order and ex parte motion by the Albany County New York District Attorney's Office is attached hereto as Exhibit "A".

The Defendant has indicated he was calling two experts to testify as follows:

A.) Marcus Lawson regarding:

1. Proper undercover procedures in conducting online chat investigations;
2. Yahoo chatrooms: What they are, how they are created, how users acquire profiles, how chatrooms are accessed by the users once they have profiles and the terms of the Yahoo Service Agreement, and
3. The results of a forensic review of Mr. Ritter's household computers.

B.) Doctor Richard Hamill regarding:

1. The ability of consenting participants in adult Internet chatrooms to fantasize and assume that other adult participants are doing likewise.

The Commonwealth filed a Motion *in Limine* seeking to prohibit this testimony.

II. Questions Presented:

A.) Was the New York order properly obtained?

Suggested Answer: Yes.

B.) Even without the New York records, is the evidence of the prior arrests admissible as prior bad acts?

Suggested Answer: Yes.

C.) Are the prior bad acts even more relevant based on the Defendant's defense of mistake, lack of motive and lack of intent, according to his own excerpts?

Suggested Answer: Yes.

III. Argument:

A.) The New York Order Was Properly Obtained

The Commonwealth seeks to Introduce evidence at the time of trial, of the Defendant's prior bad acts as follows: This Defendant actually had two run-ins with the police. The first was in April 2001 as the Defendant drove to a Colonie business to meet with what he thought was a 14-year old girl. He reportedly was questioned and released without a charge. Then two months later he was caught in the same kind of

online sex sting after he tried to lure what he thought was a 16-year old girl to Burger King.

These records were initially sealed but were unsealed by the Albany Court. The statute dealing with the sealing and subsequent unsealing of those records is as follows:

> § 160.50 Order upon termination of criminal action in favor of the accused.
>
> 1. Upon the termination of a criminal action or proceeding against a person in favor of such person, as defined in subdivision three of this section, unless the district attorney upon motion with not less than five days notice to such person or his or her attorney demonstrates to the satisfaction of the court that the interests of justice require otherwise, or the court on its own motion with not less than five days notice to such person or his or her attorney determines that the interests of justice require otherwise and states the reason for such determination on the record, the record of such action or proceeding shall be sealed and the clerk of the court wherein such criminal action or proceeding was terminated shall immediately notify the commissioner of the division of criminal justice services and the heads of all appropriate police departments and other law enforcement agencies that the action has been terminated in favor of the accused, and unless the court has directed otherwise, that the record of such action or proceeding shall be sealed. Upon receipt of notification of such termination and sealing:

[* * *]

(d) such records shall be made available to the person accused or to such person's designated agent, and shall be made available to (I) a prosecutor in any proceeding in which the accused has moved for an order pursuant to section 170.56 or 210.46 of this chapter, or (II) a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrates to the satisfaction of the court that justice requires that such records be made available to it, (emphasis added)., C.P.L. § 160.

Defendant claims that the Monroe County District Attorney's Office is not a "law enforcement agency" because a criminal prosecution had begun, and the office lacks standing. However, the request for the unsealing of the records was also made on behalf of the Barrett Township Police Department, through Detective Ryan Venneman who also signed and submitted an affidavit in support of this request. There is no question that the Barrett Township Police Department is a "law enforcement" agency. Further, the New York court order specifically references the Barret Township Police Department, and specifically authorizes the release of a copy of the records to them. Thus even if the Monroe County District Attorney's Office has no standing, the Barrett Township Police Department does, and their request and the subsequent court order granting it are valid.

"[A] former defendant's interest in preventing the disclosure of official records and papers in a favorably terminated proceeding is not absolute." *Matter of Tony Harper v. Angissolillo*, 89 N.Y.2d 761,

767, 658 N.Y.S.2d (1997). Such records may be unsealed in a limited number of circumstances. For instance, the records may be unsealed and provided to " . . . a law enforcement agency upon ex parte motion in any superior court, if such agency demonstrate to the satisfaction to the court that justice requires that such records be made available to it . . . " C.P.L. § 160.50(1)(d)(ii).

In order to obtain records under section 160.50(1)(d)(ii), a request must "set forth facts indicating that other avenues of investigation ha[ve] been exhausted or thwarted or that it [is] probable that the record[s] contain Information that [is] both relevant to the investigation and not otherwise available by conventional investigative means." *Matter of Dondi*, 63 N.Y.2d 331, 339, 482 N.Y.S.2d 431, 472 N.E.2d 281 (1984). Detailed facts are needed to support a showing that the information is not available by conventional investigative means. *New York State Police v. Charles Q.*, 192 A.D.2d 142, 145-46, 600 N.Y.S.2d 513 (3rd Dept. 1993). The moving papers should also reflect "the gravity or circumstances of the underlying investigation." *Matter of Dondi*, 63 N.Y.2d at 339. Furthermore, "[c]onvenience alone will not justify an unsealing." *Id.* The community has a strong interest in protecting itself against a potential future predator. *See People v. White*, 169 Misc.2d 89, 97 642 N.Y.S.2d 492 (Bronx Co. 1996) ("This court concludes that it must consider fairness to the community in protecting itself against a possible future predator as well as fairness to the defendant in determining whether to seal the record in the instant case.").

The caselaw and the statute itself allow for the unsealing if "justice requires" it. Society has a strong

interest in protecting itself against a potential future Predator. In the present case, the defendant has engaged in exactly the same behavior (*i.e.* trying to expose himself and masturbate in front of minors) on three separate occasions. The fact that he has resorted to the same behavior he has demonstrated in the past, goes directly to his potential as a threat and whether he is to be considered a future predator. The statute he is charged with in Pennsylvania is Unlawful Contact with a Minor. *See* 18 Pa. C.S.A. § 6318.[1]

---

[1] 18 Pa. C.S.A. § 6318

§ 6318. Unlawful contact with minor

(a) Offense defined.—A person commits an offense if he is intentionally in contact with a minor, or a law enforcement officer acting in the performance of his duties who has assumed the identity of a minor, for the purpose of engaging in an activity prohibited under any of the following, and either the person initiating the contact or the person being contacted is within this Commonwealth:

(1) Any of the offenses enumerated in Chapter 31 (relating to sexual offenses).

(2) Open lewdness as defined in section 5901 (relating to open lewdness).

(3) Prostitution as defined in section 5902 (relating to prostitution and related offenses).

(4) Obscene and other sexual materials and performances as defined in section 5903 (relating to obscene and other sexual materials and performances).

(5) Sexual abuse of children as defined in section 6312 (relating to sexual abuse of children).

(6) Sexual exploitation of children as defined in section 6320 (relating to sexual exploitation of children).

(b) Grading.—A violation of subsection (a) is:

(1) an offense of the same grade and degree as the most serious underlying offense in subsection (a) for which the defendant contacted the minor; or

(2) a felony of the third degree; whichever is greater.

(b.1) Concurrent jurisdiction to prosecute.—The Attorney General shall have concurrent prosecutorial jurisdiction with the district attorney for violations under this section and any crime arising out of the activity prohibited by this section when the person charged with a violation of this section contacts a minor through the use of a computer, computer system or computer network. No person charged with a violation of this section by the Attorney General shall have standing to challenge the authority of the Attorney General to prosecute the case, and, if any such challenge is made, the challenge shall be dismissed and no relief shall be available in the courts of this Commonwealth to the person making the challenge.

(c) Definitions.—As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Computer." An electronic, magnetic, optical, hydraulic, organic or other high-speed data processing device or system which performs logic, arithmetic or memory functions and includes all input, output, processing, storage, software or communication facilities which are connected or related to the device in a computer system or computer network.

Computer network." The interconnection of two or more computers through the usage of satellite, microwave, line or other communication medium.

"Computer system." A set of related, connected or unconnected computer equipment, devices and software.

"Contacts." Direct or indirect contact or communication by any means, method or device, including contact or communication in person or through an agent or

That statute is one of the prescribed statutes requiring sex offender registration under Megans Law. *See* 42 Pa. C.S.A. § 9795.1.[2] The Pennsylvania Legislature

---

agency, through any print medium, the mails, a common carrier or communication common carrier, any electronic communication system and any telecommunications, wire, computer or radio communications device or system.

"Minor." An individual under 18 years of age.

[2] 42 Pa. C.S.A. § 9795.1

§ 9795.1. Registration

(a) Ten-year registration.—The following individuals shall be required to register with the Pennsylvania State Police for a period of ten years:

(1) Individuals convicted of any of the following offenses:

18 Pa. C.S. 2901 (relating to kidnapping) where the victim is a minor.—

18 Pa. C.S. § 2910 (relating to luring a child info a motor vehicle or structure).

18 Pa. C.S. § 3124.2 (relating to institution sexual assault).

18 Pa. C.S. § 3126 (relating to indecent assault) where the offense on graded as a misdemeanor of the first degree or higher.

18 Pa. C.S. § 4302 (relating to incest) where the victim is 12 years of age or older but under 18 years of age.

18 Pa. C.S. § 5902(b) (relating to prostitution and related offenses) where the actor promotes the prostitution of a minor.

18 Pa. C.S. § 5903(a)(3), (4), (5) or (6) (relating to obscene and other sexual materials and performances) where the victim is a minor.

18 Pa. C.S. § 6312 (relating to sexual abuse of children).

has declared the following with regard to the Registration of Sexual Offenders Act:

> It Is hereby declared to be the intention of the General Assembly to protect the safety and general welfare of the people of this Commonwealth by providing for registration and community notification regarding sexually violent predators who are about to be released from custody and will five in or near their neighborhood. It is further declared to be the policy of this Commonwealth to require the exchange of relevant information about sexually violent predators arming public agencies and officials and to authorize the release of necessary and relevant information about sexually violent predators to members of the general public as a means of assuring public protection and shall not be construed as punitive.

42 Pa. C.S.A. § 9791(b).

"The registration requirements of [the Registration of Sexual Offenders Act] do not serve to punish the offender but to help ensure the safety of the public." *Commonwealth v. Fleming*, 801 A.2d 1234, 1241 (Pa. Super. 2002). The legislature has also declared that "sexually violent predators pose a high risk of engaging in further offenses even after being released from incarceration or commitments and that protection of the public from this type of offender is a

---

18 Pa. C.S. § 6318 (relating to unlawful contact with minor).

18 Pa. C.S. § 6320 (relating to sexual exploitation of children).

paramount governmental interest." 42 Pa. C.S.A. § 9791(a)(2). A "sexually violent predator" is a person who has been convicted of a sexually violent offense and who is determined to be a sexually violent predator under Section 9794.4 (relating to assessments) due to a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses, 42 Pa. C.S.A. § 9792. In determining whether a defendant is a sexually violent predator, and therefore subject to the registration requirements, the trial court must consider certain factors during a hearing. Specifically, 42 Pa. C.S.A. § 9795.4 indicates, in relevant part, the following

> (b) Assessment.— . . . An assessment shall include, but not be limited to, an examination of the following:
>
> (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 of the individual.

(ii) Use of illegal drugs by the individual.

(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 filed as criteria reasonably related to the risk of reoffend.

(c) Release of information.—All state, County and local agencies, offices or entities in this Commonwealth shall corporate by providing copies of records and information as requested by the board in connection with the court-ordered assessment and the assessment request by the Pennsylvania Board of Probation and parole.

42 Pa. C.S.A. § 9795.4(b), (c)

42 Pa. C.S.A. § 9799.3 provides that the Board shall consist of psychiatrists, psychologists, and criminal justice experts, who are experts in the behavior and treatment of sexual offenders, that the Governor shall appoint the Board members, and that the support staff shall be provided by the Pennsylvania Board of Probation and Parole.

The Pennsylvania Legislature has also determined that individuals who have a predisposition to commit these kinds of offenses (which specifically include the charges against this Defendant) are so potentially dangerous, that the Commonwealth can seek to impose mandatory minimum based on prior convictions for offenses requiring Megan's Law registration. *See* 42 Pa. C.S.A. § 0718.2.[3] If the Defendant had been

---

[3] 42 Pa. C.S.A. § 9718.2

§ 9718.2. Sentences for sex offenders.

(a) Mandatory sentence.—

(1) Any person who is convicted in any court of this Commonwealth of an offense set forth in section 9795.1(a) or (b) (relating to registration) shall, if at the time of the commission of the current offense the person had previously been convicted of an offense set forth in section 9795.1(a) or (b) or an equivalent crime under the laws of this Commonwealth in effect at the time of the commission of that offense or an equivalent crime in another jurisdiction, be sentenced to a minimum sentence of at least 25 years of total confinement, notwithstanding any other provision of this title or other statute to the contrary. Upon such conviction, the court shall give the person oral and written notice of the penalties under paragraph (2) for a third conviction. Failure to provide such notice shall not render the offender ineligible to be sentenced under paragraph (2).

(2) Where the person had at the time of the commission of the current offense previously been convicted of two or more offenses arising from separate criminal transactions set forth in section 9795.1(a) or (b) or equivalent crimes under the laws of this Commonwealth in effect at the time of the commission of the offense or equivalent crimes in another jurisdiction, the person shall be sentenced to a term of life imprisonment, notwithstanding any other provision

of this title or other statute to the contrary. Proof that the offender received notice of or otherwise knew or should have known of the penalties under this paragraph shall not be required.

(b) Mandatory maximum.—An offender sentenced to a mandatory minimum sentence under this section shall be sentenced to a maximum sentence equal to twice the mandatory minimum sentence, notwithstanding 18 Pa. C.S. § 1103 (relating to sentence of imprisonment for felony) or any other provision of this title or other statute to the contrary.

(c) Proof of sentencing.—The provisions of this section shall not be an element of the crime, and notice thereof to the defendant shall not be required prior to conviction, but reasonable notice of the Commonwealth's intention to proceed under this section shall be provided after conviction and before sentencing. The applicability of this section shall be determined at sentencing. The sentencing court, prior to imposing sentence on an offender under subsection (a), shall have a complete record of the previous convictions of the offender, copies of which shall be furnished to the offender. If the offender or the attorney for the Commonwealth contests the accuracy of the record, the court shall schedule a hearing and direct the offender and the attorney for the Commonwealth to submit evidence regarding the previous convictions of the offender. The court shall then determine, by a preponderance of the evidence, the previous convictions of the offender and, if this section is applicable, shall impose sentence in accordance with this section. Should a previous conviction be vacated and an acquittal or final discharge entered subsequent to imposition of sentence under this section, the offender shall have the right to petition the sentencing court for reconsideration of sentence if this section would not have been applicable except for the conviction which was vacated.

(d) Authority of court in sentencing.—Notice of the application of this section shall be provided to the defendant before trial. If the notice is given, there shall be no authority in any court to impose on an offender to which this

convicted of the offenses in New York, the Commonwealth could have sought a 25 or lifetime mandatory minimum sentence if he were convicted in this case. The Charges are serious and the past offense history is relevant to an assessment of his potential danger to the community. Thus the interests of justice weight heavily in favor of the unsealing of the records.

The unsealing of the records is also necessary to the successful prosecution of the case as evidence of prior bad acts, as indicated below.

B.) Even Without the New York Records, the Evidence of the Pier Arrests Is Admissible as Prior Bad Acts

Although the records are relevant and necessary to the successful prosecution of the case as evidence of prior bad acts, and the suppression of them may substantial handicap the Commonwealth's case, the evidence of the Defendant's prior Incidents would

---

section is applicable any lesser sentence than provided for in subsections (a) and (b) or to place the offender on probation or to suspend sentence. Nothing in this section shall prevent the sentencing court from imposing a sentence greater than that provided in this section. Sentencing guidelines promulgated by the Pennsylvania Commission on Sentencing shall not supersede the mandatory sentences provided in this section.

(e) Appeal by Commonwealth.—If a sentencing court shall refuse to apply this section where applicable, the Commonwealth shall have the right to appellate review of the action of the sentencing court. The appellate court shall vacate the sentence and remand the case to the sentencing court for the imposition of a sentence in accordance with this section if it finds that the sentence was imposed in violation of this section.

still be admissible, if the Commonwealth were still able to go forward.

It is irrelevant if he was actually charged or the charges were dismissed after completing a probation period.

Rule of evidence permitting admission of evidence of prior bad acts for limited purposes is not limited to evidence of crimes that have been proven beyond a reasonable doubt in court; it encompasses both prior crimes and prior wrongs and acts, the latter of which, by their nature, often lack definitive proof. *Commonwealth v. Lockcuff*, 813 A.2d 857, Super. 2002, appeal denied 826 A.2d 638, 573 Pa. 689.

The New York statute applies only to official records. There is nothing in the statute nor the law that prohibits the detective involved in the New York arrests from testifying to what actually happened. CPL 160.50(1) authorizes the sealing of the record of an action against a defendant in instances in which the action was terminated favorably to the defendant and CPL 160.50(1)(c) applies the sealing requirement to "all official records and papers [with limited exceptions not relevant here] . . . on file with . . . prosecutor's office." Such sealed records shall "not be made available to any person or public or private agency." There is almost no guidance on the issue of what constitutes a record or document that is official. (*Hynes v. Karassik*, 63 AD2d 597, 598 [1st Dept 1978], *aff'd on other grounds* 47 NY2d 659[1979].) The only "records" mentioned in the Governor's Approval Memorandum are the defendant's fingerprints and photographs and his "arrest records." (Governor's Mem approving L 1976, ch 877, 1976 McKinney's Session Laws of NY, at 2451.) The memo says these

items are to be returned to the defendant. *People v. Roe*, 165 Misc.2d 554, 628 N.Y.S.2d 997.

There was no gag order and thus there is no prohibition from the detective involved in the case from testifying at trail.

C.) The Prior Bad Acts Are Even More Relevant Based on the Defendant's Defense of Mistake and Lack of Intent, According to His Own Experts.

Mr. Lawson opines that "the risk of targeting suspects who do not in fact intend to contact actual minors . . . is particularly high" and that anonymous internet chatting "by its very nature is a highly fantasy based endeavor." And that the "fantasy basis" is such that "people tend to not believe much of what is said".

The Defendant has already stated in his chats with Detective Venneman, once he was confronted with what he had done, that he believed this was all fantasy, in accordance with the proffered experts anticipated testimony. And if he testifies, it is expected he will testify to the same.

Mr. Lawson infers that Detective Veneman's intent is to "trick people" And is engaged in nothing more than "a hunt for arrest statistics"

He opines that the investigation was not long enough or in depth enough to determine if this defendant was a "valid target" let alone a "danger to children".

Mr. Lawson opines that "people who use adult chat rooms have an expectation that others in the

room will be adults over 18" and puts forth his opinion as fact that uses have this expectation. He also states that "anyone using yahoo chat services would necessarily expect that other users had gone through this registration process . . . "

Mr. Lawson states: "I do not believe that there was even close to sufficient interaction or time to convince Mr. Ritter that "Emily" was not an adult playing games . . . " Further, he concludes that there was not even "close to sufficient interaction or time to convince Mr. Ritter that "Emily" was not an adult playing games"

Mr. Lawson states: "I find it highly unlikely that actual 15 year old females would encourage a middle age man in his 40's to expose himself and masturbate on camera." He also states that a photo exchange would be "unlikely" for a real 15 year old female speaking with a 44 year old man, and more likely that of an adult. He further opines that type of behavior is far more indicative of the typical fantasy banter . . . ".

Mr. Lawson states that "[i]n my experience, the method employed by Officer Venneman tends to result in arrests of persons who have no interest in children but rather are caught up in the fantasy of the moment and believe they are engaged anonymously with another adult."

Mr. Lawson also performed a forensic review of the Defendant's computers. He opines that because of his forensic examination, and the absence of child pornography or any other chats with minors, the Defendant has no predisposition to engage in illegal behavior with minors.

Dr. Hamil's whole report deals with the defense that these chats were fantasy and the Defendant had no real criminal intent to contact actual minors, nor any motive to sexually abuse a real minor.

Pa. Rules of Evidence Rule 404, in relevant part provide:

> (b) Other Crimes or Wrongs, or acts.
>
> (1) Evidence of other Crimes, wrongs, or acts is not admissible to prove the character of person in order to show action in conformity therewith.
>
> (2) Evidence of other crimes, wrong, or acts may be admitted for other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence or mistake or accident.
>
> (3) Evidence of other crimes, wrongs, or acts preferred under subsection (b)(2) of this rule may be admitted in a criminal case only upon a showing that the probative value of the evidence outweighs its potential for prejudice.
>
> (4) in criminal cases, the prosecution shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. Pa. RE 404(b).

The records themselves and the surrounding circumstances are nearly identical to the instant case. All three involves minors, all three involve females, all three involve communications over the internet,

all three involved undercover police, and all three involved the Defendant's desire to masturbate in the presence of a minor while she watched him.

The prior bad acts demonstrate the Defendants motive. The Defendant may claim he had no motive to expose himself to a minor, but the Defendant's actions in all three cases demonstrate a sexually deviant pathway to offending and a sexual deviancy or particular sexual fetish, that being exhibitionism.

The prior bad acts show his intent to commit this offense, and negate any absence of mistake. The Defendant may claim he did not believe the victim was a minor and never intended to expose himself to a minor. However, the fact that he did so twice before would negate this defense.

The prior bad acts of the two incidents in New York are even more relevant and even more probative of the Defendant's intent, motive and absence of mistake based on both of his experts reports and anticipated testimony. Even if the prior bad acts were deemed inadmissible in the Commonwealth's case in chief, they would certainly be admissible upon rebuttal as they would be relevant and necessary to rebut the Defendant's claims of mistake, lack of criminal intent and lack of motive. Without a chance to rebut these claims, the jury would be given a skewered version of the facts and past history that would not be an accurate representation of what really happened. It would also severely handicap the Commonwealth's case by allowing the Defendant to present a defense that the Commonwealth could not rebut or refute, even though it had the evidence to do so.

IV. Conclusion

Based on the foregoing, the Commonwealth respectfully requests this Honorable Court to allow the evidence of prior bad acts at trial.

Respectfully Submitted,

Michael Rakaczewski, Esquire
I.D. No. 81290
Assistant District Attorney
Office of the District Attorney
Monroe County Courthouse
Stroudsburg, PA 18360
(570) 420-3470

AFFIDAVIT OF MICHAEL T. RAKACZEWSKI (JUNE 2, 2010)

STATE OF NEW YORK SUPREME COURT
COUNTY OF ALBANY

In The Matter of
Records Pertaining to WILLIAM R.

Index No.

Commonwealth of Pennsylvania
County of Monroe

I, Michael T. Rakaczewski, being duly sworn, do depose and state as follows:

1. That I am an Assistant District Attorney with the Office of the District Attorney, Monroe County, Pennsylvania. My duties include the prosecution of sexual offenders.

2. I have received training in the prosecution of cases involving the sexual exploitation of children and child pornography. I have also conducted and been involved in numerous prosecutions relating to the sexual exploitation of children.

3. That this affidavit is submitted in support of an *ex parte* motion by the Office of the Monroe County District Attorney, Monroe County, Pennsylvania requesting an Order from this Court (1) directing the unsealing of tiles maintained by the Colonie Police Department and the Albany County District Attor-

ney's Office relating to William R. and (2) making these files available to only the Office of the District Attorney, Monroe County, Stroudsburg, Pennsylvania for their use and prosecution.

4. I have read news stories pertaining to this matter, which are summarized as follows:

a. William R., an adult male, was investigated by the Colonie Police Department in April and June of 2001. He was eventually arrested for trying to lure a minor he met on the Internet to a Burger King.

b. William R. utilized the Internet to meet someone who he thought was a minor female. The individual he communicated with was actually an undercover investigator with the Colonie Police Department. William R. engaged in this conduct on two separate occasions, once in April of 2001 and once in June of 2001. William R.'s intent was to have the minor watch him as he masturbated.

c. William R. was charged with the crime of attempting to endanger the welfare of a child in Albany County. Subsequently, the matter was adjourned in contemplation of dismissal and all records have been sealed.

5. My office has been contacted by the Albany County District Attorney's Office. On May 26, 2010, my office was-informed that all records have been sealed and that they cannot provide any records or evidence unless and until an unsealing order has been obtained. Current and former members of the Colonie Police Department may refuse to discuss the

matter with me, citing the sealing order and possible civil consequences.

6. On October 16, 2009, a criminal complaint was filed in Monroe County Pennsylvania against William R., charging him with Unlawful Contact with a Minor (Felony-3) and related offenses. These charges arose out of his utilizing the internet on February 7, 2009, to meet someone he thought was a minor female. The individual he communicated with was actually an undercover investigator with the Barret Township Police Department, Monroe County Pennsylvania. During the course of this communication, William R. performed a lewd act upon himself, masturbating nude in front of a web cam.

7. The conduct of William R. in the past in New York, if true, may constitute evidence that is relevant and necessary for a successful prosecution of his pending case in Pennsylvania.

8. In order to properly investigate this matter, it is necessary to review the records and evidence being held by the Colonie Police Department and the Albany County District Attorney's Office.

9. Evidence, including the online communications between the undercover and William R. have presumably been preserved by the Colonie Police Department. William R.'s computers were also presumably seized and searched. In addition, William R. was presumably interviewed by members of the Colonie Police Department.

10. This evidence, and other physical evidence retained in this matter, cannot be obtained from any other source.

WHEREFORE, it is respectfully requested that this Court issue an Order (1) directing the unsealing of files maintained by the Colonie Police Department and the Albany County District Attorney's Office relating to William R. and (2) making these files available only to the Office of the District Attorney Monroe County, Stroudsburg, Pennsylvania.

/s/ Michael. T. Rakaczewski
Assistant District Attorney

Sworn to before me this
2nd day of June, 2010.

/s/ Colleen M. Mancuso
Commonwealth of Pennsylvania
Notary public
Stroudsburg Boro., Monroe County
My Commission Expires April 25, 2013

LETTER FROM W. GARY KOHLMAN TO MONROE COUNTY DISTRICT ATTORNEY (APRIL 23, 2010)

BREDHOFF & KAISER, P.L.L.C.
Attorneys & Counselors

805 Fifteenth Street, NW
Washington, D.C. 20005
(202) 842-2600
Facsimile: (203) 842-1888
www.bredhoff.com

Robert M. Weinberg
Jeffrey L. Gibbs
Julia Penny Clark
Jeffrey R. Freund
W. Gary Kohlman
Jeremiah A. Collins
Mindy Gilson
Bruce R. Lerner
Andrew D. Roth
John M. West
Douglas L. Greenfield
Roger Pollak
Anne Ronnel Mayerson
Leon Dayan
David K. Virk
Robert Alexander
Matthew Clash-Drexler

Joshua B. Shiffrin
Ramya Ravindran
Daniel A. Zibel
Douglas E. Callahan
Erin K. Pitts
Kimberly Sánchez Ocasio

Laurence Gold
Patricia Polach
Susan G. Labine
Sarah M. Fox
Kathleen Keller
Abigail V. Carter
Tsaryn J. Parroff
Of Counsel

Elliot Bredhoff
(1921-2004)
Henry Kaiser
(1912-1999)

April 23, 2010

David Christine, District Attorney
Monroe County District Attorney's Office
7th & Monroe Streets
Stroudsburg, PA 18360-2190

Re: *Commonwealth v. William Scott Ritter, Jr.*
CP-45-CR-0002238-2009

Dear Mr. Christine:

We write to you on behalf of William Scott Ritter, Jr., the accused in the above-captioned matter.

We are in receipt of discovery from Assistant District Attorney Michael T. Rackeczewski, which contains police reports concerning incidents in 2001 that took place in New York. These records were subject to a sealing and expungement court order requiring that they be sealed and/or destroyed. Only a court order would allow these records to be unsealed. Your office's possession of these records is in violation of New York Criminal Procedure § 160.50 and § 170.55. We find it deeply distressing that statutes designed to protect privacy interests have been so clearly trans-

gressed, perhaps by law enforcement agencies in two states. Therefore, we are requesting that you not only turn-over all copies of these records in your control and in the possession of law enforcement in your jurisdiction, but also divulge how your office came into possession of these records.

This is far more serious than simply a technical violation of a statute in another jurisdiction. We are convinced that Mr. Ritter has been treated differently than other similarly situated defendants. In fact, your office held a press conference with regard to Mr. Ritter's arrest, which gained international media attention. There were no press conferences regarding other defendants arrested in stings similar to the one involving Mr. Ritter. At the press conference, Mr. Rackeczewski mentioned that Mr. Ritter had previously been arrested for similar charges. These charges were not only expunged but sealed from public view.

It is clear that your office's illegal possession of the sealed records from New York has tainted your office's handling of this matter. In April 2009, Mr. Kohlman met with Mr. Rackeczewski and proffered several facts which counseled against the initiation of a criminal prosecution. To start with, it was noted that Mr. Ritter's lack of criminal intent is demonstrated by the fact that the encounter at issue occurred after Mr. Ritter entered an adult chat room, clearly showing lack of intent to have impermissible contact with a minor. Moreover, we proffered that (1) a forensic examination of all the computers in the Ritter household showed no evidence of child pornography; (2) a polygraph examination administered by a former FBI polygrapher determined that Mr. Ritter has had no inappropriate contact with minors, and

(3) a report from an experienced Clinical Psychologist concluded that Mr. Ritter presented no danger to minors.

At the meeting we offered Mr. Rackeczewski office total access to the three experts as well as the opportunity to do an examination of Mr. Ritter's computer. We heard nothing from your office until the public at large learned at a press conference that Mr. Ritter was being charged, a decision unmistakably decided based on the improper access to court sealed records.

Sincerely,

/s/ W. Gary Kohlman

/s/ Todd Henry