IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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| COMMONWEALTH OF PENNSYLVANIA, | : | |
| | : | |
| vs. | : | NO. 412-2008 |
| | : | |
| GREGORY PACKER, | : | |
| Defendant | : | 1925(a) OPINION |

***Date: December 21, 2009***

***OPINION IN SUPPORT OF THE ORDERS OF JULY 29, 2008; NOVEMBER 13, 2008; NOVEMBER 17, 2008; NOVEMBER 18, 2008; AND MAY 13, 2009 IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE***

Defendant Gregory Packer, by a Notice of Appeal filed July 6, 2009, has appealed his conviction of involuntary deviate sexual intercourse with a child and indecent assault upon a child under the age of 13, the child being his 7 year old daughter, S.K. Mr. Packer was found guilty at a jury trial of perpetrating various sexual acts upon his daughter for purposes of sexual gratification, specifically, forcing her to perform oral intercourse upon him and rubbing his penis against and between her naked buttocks which he had first rubbed with lotion. During these acts he ejaculated into her mouth or on her back. At trial, S.K. was determined to be an unavailable witness due to her emotional distress caused by her sexual exploitation and resultant fear of her father. Nevertheless, the jury was presented with sufficient evidence upon which to find beyond a reasonable doubt that Mr. Packer had committed these acts of sexual abuse. The testimony of Rhonda McDonald, a Lycoming County Children and Youth Services caseworker, related S.K.'s graphic description given to Ms. McDonald of the sexual acts. These out-of-court statements were non-testimonial and credible. The statements S.K. gave to Ms. McDonald were confirmed by Mr. Packer's oral and handwritten confessions that

he had indeed committed these heinous acts. Following the jury's determination of guilt Mr. Packer was found by the Court to be a sexually violent predator and sentenced in the standard range to serve a prison term having a minimum term of 15 years 3 months and a maximum term of 47 years.

## I. FACTS

The nature of Mr. Packer's sexual assault on his daughter was initially established through testimony received by this Court at a pre-trial hearing, held November 13, 2008. This hearing was held to determine whether or not Defendant's daughter, S.K., was able to testify as a witness and, if so, in what manner and, if not, to determine to what extent her out of court statements would be admissible as evidence against Mr. Packer at his trial. Mr. Packer's jury trial was subsequently held November 17, 2008 and November 18, 2008. The consistent testimony in both of these proceedings established that Mr. Packer repeatedly used his 7 year old daughter, S.K. for his sexual gratification by forcing her to give him fellatio until he ejaculated in her mouth, or by rubbing his penis in between her buttocks until he ejaculated on her back. A summary of that testimony and the nature of the investigation followed.

The acts of sexual abuse first came to the attention of others when S.K. had disclosed them to a school friend whose parents were apparently told by that child. Those parents then alerted school authorities and the school authorities contacted Rhonda McDonald, a caseworker for Lycoming County Children and Youth Services. Ms. McDonald went to the Jersey Shore Elementary School on February 26, 2008, the same day she had been contacted by the school to conduct an interview of S.K. for the purposes, as stated in her words at the pre-trial hearing on November 13, 2008,

> "I needed to speak to the child, determine whether or not the allegations were true, and then to assure her safety. If – if the allegations that were made to the agency as far as allegations of sexual abuse, if the child did, in fact, say that those things were true to me, then I would have to assure that she was not going back to her Father's custody.----Law enforcement had not been contacted at that point….(the interview) it lasted 40, 45 minutes."

N.T., 11/13/08, p.4.

During this interview Ms. McDonald first established a rapport with S.K., and after ascertaining that S.K. was willing to discuss with her the things that S.K. had discussed with her friend, S.K. gave a statement "about what her dad had done to her a week ago." ***Id.*** at 5. S.K. then told Ms. McDonald the specifics of her father's sexual abuse:

> "A Yes, she explained that there were occasions when her father would place her on the couch, he would then take baby lotion, and she described the baby lotion as being pink, and that he got it from the bathroom. He would place it on her buttocks, which she pointed to and called that her bottom. She then said that her father would put his bad spot on her buttocks and rub it.
>
> The child was asked if she could tell me what her father's bad spot looked like, she described it as an object, what you steer with, a steering object you use with a car, but then said it was what you – let me quote you – quote her for a second here. She said it was like a steering thing that you pull back to go into reverse or drive.
>
> She explained that there were times when her father would then place his bad spot in her mouth, and at that point she had – she was physically showing me with her finger and her other hand that the mouth would go up and down on her father's bad spot, which from her description to me I inferred as her father's penis.
>
> She then said that her father would push her head, and actually she was telling me that she actually took her hand behind her head and used it to show me that her father used a pushing action to push her head down onto his penis, and that he would force it at times to the point where it hurt her mouth and that she would want to stop but he would not allow her. That she described that she would need to throw up because of the white stuff in her mouth, and when this behavior concluded, that she would need to take another shower. And I asked her why she would need to take a shower, she said because of the

white stuff on her, and I asked her if she meant the lotion, she said no, the white stuff that came from her father's bad spot.

Q Was she supplying these answers to you?

A Yes….

Q And did she ever say – were you able to determine when the last instance of this conduct would have taken place before she was reciting this to you?

A She actually said that the last occasion was, it would have been – I don't have a calendar in front of me, but I believe I interviewed her on a Tuesday and she said the last incident would have been the weekend, not the weekend prior to that Tuesday, but the weekend before that. And she knew that because of her half-sister coming to visit. So she knew it happened the weekend before her sister came to visit.

Q And what was her assessment as far as any kind of credibility on the part of her?

A I found the child to be credible. I felt that the descriptions that she gave me for the age of the child were – I did not feel were something that she was just going to be able to come up with without actually experiencing it.

***Id.*** 6-8.

The nature of this interview and statement was repeated for the jury by Ms. McDonald at trial. (See, N.T., 11/17/08, pp. 31-73 & 11/18/08, pp. 16-25). Ms. McDonald's testimony relating S.K.'s statement to her formed the primary basis of Mr. Packer's conviction.

Ms. McDonald was compelled by law to perform this interview of S.K. upon receiving the complaint from the school authorities and in turn is mandated under the Child Protective Services Law to report the complaint to law enforcement if she makes a determination that in her belief the allegations are true upon the initial interview. N.T., 11/13/08, p. 4; 23 Pa.C.S. § 6311, 6313, 6368. Other than the state mandated law enforcement notification form called a CY104, Ms. McDonald is not required to provide notes or other details to law enforcement unless subsequently required to do so by the Court. ***Id.*** at 9, 10. Ms. McDonald had not told S.K. that she was going to get in trouble or that the perpetrator was going to get in trouble

based upon her statements. ***Id.*** at 11. Ms. McDonald did discuss with S.K. that if she was not able to go home with her dad where would she want to go as Ms. McDonald needed to determine if it was necessary to remove her from her father's care. ***Id.*** at 11. The purpose of Ms. McDonald's investigation was to assure the safety and well being of S.K. and also to determine whether or not child abuse under the law occurred. ***Id.*** at 14. Although that investigation was required to be reported to the State Police because of Ms. McDonald's belief in the truthfulness of S.K.'s statement, it was not intended as a crime investigation, which is to determine whether or not a crime was committed. ***Id.*** at 14.

As required by law, Ms. McDonald did contact the State Police, specifically Trooper Barnhart later that day or the following day to advise Trooper Barnhart of the nature of the interview. Subsequently, their investigation was concurrent at certain times with Trooper Barnhart and Ms. McDonald being present at the same interviews.

Mr. Packer was confronted by Trooper Barnhart and Ms. McDonald with S.K.'s accusations in a joint interview on February 29, 2008, at the Children and Youth Services building. (See N.T., 11/18/08, pp. 16-17. At that time, Mr. Packer, in verbally responding to an inquiry as to why S.K. might make the accusations, initially denied sexually assaulting S.K., however, he acknowledged that he had showered with his daughter and his daughter may have seen him masturbate in front of a television program. Later in the discussion, Mr. Packer admitted the alleged sexual contact between he and his daughter did occur. He also gave a handwritten acknowledgement of this sexual activity, Commonwealth's Exhibit No. 2. On the written form, he was asked some specific questions to which he answered "yes." Those

answers amounted to his admission of all the elements of the crimes of which he was convicted. Specifically, the written questions and responses included the following:

- Has your naked, hard penis touched your daughter [S.K.]'s butt? *Yes*
- Did you move your penis against her butt? *Yes*
- Before that contact, did you put lotion on ~~her~~ your penis? *Yes*
- Did you put your erect penis between her legs near where she pees? *Yes*
- Did you tell her that she has a "bad spot" like you do? *Yes*
- Did you make her put your erect penis in her mouth? *Yes*
- Did white stuff come out of your penis after it touched her butt or her mouth? *Yes*
- Did you clean your penis off with a towel after you ejaculated from sexual contact with [S.K.]? *Yes*
- How many times did your naked penis (erect) touch [S.K]'s butt crack? *More than a couple*
- How many times did your naked erect penis go inside her mouth? *2 or 3*
- Did the sexual contact happen while you both lived in Robinson PA? *Yes*
- How old was [S.K.] when you started having sexual contact with her? *6*
- When did the last sexual contact between you and [S.K.] occur? *Couple of weeks ago*
- Would you rub your [naked] erect penis against your daughter [S.K.] until you ejaculated? *Yes*
- Did your erect penis rub between [S.K.]'s butt crack? *Yes*

Commonwealth's Exhibit # 2.

S.K., who previously had been living primarily with her father for a number of years, subsequently went to live with her mother on or about March 31, 2008. (See, N.T., 11/13/08, pp. 13-15.) On November 13, 2008, S.K.'s mother made a 2 ½ to 3 hour trip from her home to Lycoming County Courthouse for the purpose of S.K. being interviewed by Melissa Rosenkilde, Assistant District Attorney, (now Melissa Kalaus) and also for the purpose of giving testimony before this Court for us to determine to what extent S.K. was available as a witness and as to the type of testimony examination which should be used in the trial.

At this hearing, however, S.K. did not appear. As explained during the hearing by her mother's testimony, S.K. was severely afraid and in emotional distress to the extent that she was not even able to appear in the courtroom or *in camera* with this Court. S.K.'s mother's testimony at that proceeding established that S.K. had resumed frequent and consistent bed wetting. Initially she had been bed wetting in the first two weeks she had been living with her mother, but it had stopped. As S.K. learned that a trial was going to occur and that she would have to repeat her statements recounting her abuse, the bed wetting resumed. In the days preceding the pre-trial hearing on November 13, 2008, S.K. had become ill and upset indicating her head hurt; was crying a lot; had tingling arms; and, frequently would cling to her mother. S.K. also was telling her mother that she was scared of testifying, particularly that "daddy" would yell at her. S.K. also was indicating that she would be embarrassed to have to state to others what had happened. This, then current, state of S.K.'s emotions was contrasted by S.K.'s mother with S.K.'s behavior after she had started to live with mother at the end of March. S.K., her mother explained, within a couple of weeks of starting to live with mother, had started to act as a normal young girl, being happy, willing to play and go outside and spend the night away from mother with friends or family. S.K.'s mother's testimony established, however, that, as the trial days had approached, S.K. was quite different and was no longer happy or willing to spend time away from her mother. On travelling to the Courthouse, November 13th, for the pre-trial hearing as to availability, S.K. had requested her mother to sit with her in the backseat.

S.K.'s mother's testimony also established that on that very day in the District Attorney's Office, S.K. was non-communicative with the Assistant District Attorney, Ms.

Rosenkilde, and was sad and upset and simply would sit on her mother's lap for an extended period of time, in excess of an hour. S.K. had acted embarrassed and afraid to talk in the privacy of the Assistant District Attorney's Office. S.K.'s mother was certain that S.K. could not and would not communicate with a jury or, at that point, this judge, nor would she even talk to her mother about the incident again, S.K was then only expressing being afraid of "daddy" yelling at her. This Court accepted mother's testimony as true. No contrary evidence was introduced.

As S.K. was not even able to discuss the events with the female Assistant District Attorney who was to try the case nor make a meaningful appearance before the Court at this pre-trial hearing on November 13, 2008, a Friday, three days before the scheduled trial, we concluded that to force S.K. to do so would be detrimental to her well-being and further determined that the emotional stability of S.K. was in such a state that she was unavailable as a witness, having applied the standards and procedures of 42 Pa.C.S. § 5985.1. A brief statement of our findings and reasoning was made on the record and is attached to the order we made on November 13, 2008 (filed November 17, 2008).

## II. PROCEDURAL HISTORY

The procedural history of this case, which follows, is routine and is noted here only to establish the timelines of various events and to verify that Mr. Packer was afforded the appropriate due process safeguards.

Charges were filed against Mr. Packer on March 12, 2008, followed by formal information filed on April 4, 2008, accusing him of: Count 1 Involuntary Deviate Sexual Intercourse with a Child, 18 Pa.C.S. § 3123(b), Felony 1; Count 2 Aggravated Indecent Assault

of a Child, 18 Pa.C.S. § 3125(b), Felony 1; and Count 3 Indecent Assault, 18 Pa.C.S. § 3126(a)(7), Felony 3. A preliminary hearing was held on March 5, 2008 at which all charges were held for court. An information was filed by the Commonwealth on April 4, 2008.

On April 8, 2008, Attorney Christian Kalaus, Esquire, from the Lycoming County Public Defenders' Office, entered his appearance on behalf of Mr. Packer. An Omnibus Pre-Trial Motion was filed on behalf of Mr. Packer on May 7, 2008 requesting suppression of the statements Mr. Packer gave to police on February 29, 2008. After a hearing, in an order of July 29, 2008, the Honorable President Judge Kenneth D. Brown denied the motion, stating his findings and the reasons for denial on the record. See, N.T., 7/29/08, pp. 54-60.

On November 12, 2008, the Commonwealth filed a Motion to Admit Certain Statements, specifically the statements S.K. made to Children and Youth worker Rhonda McDonald describing her father's sexual conduct with her. The motion requested for the statements to be admitted, although being admittedly hearsay, pursuant to 42 Pa.C.S. § 5985.1. The statements were described in a notice attached to the motion. At a hearing on November 13, 2008, in addition to objecting that S.K. was unavailable as a witness, Mr. Packer's attorney argued that the admission of such statements would violate Mr. Packer's right of confrontation and would deny him due process under ***Crawford v. Washington,*** 541 U.S. 36 and its progeny.

As stated above, in an order of November 13, 2008, this Court determined S.K. was unavailable due to serious emotional distress she suffered from the to sexual attacks perpetrated against her by her father, Mr. Packer, which at the time severely impaired her ability to communicate about the subject matter at issue. A copy of our findings and reasoning as stated on the record, was transcribed and attached to that order when it was filed on November 17,

2008. The Court briefly deferred a decision on the ***Crawford*** issue. On November 14, 2008, this Court fully granted the Commonwealth's motion to admit S.K.'s statements determining the statements were not barred by ***Crawford v. Washington***, 541 U.S. 36, as they were non-testimonial in nature.

That same day, November 14, 2008, Mr. Packer filed a Motion to Recuse Judge Kieser and a Motion in Limine seeking to bar the introduction of any evidence of sexual acts upon the victim that occurred in Robinson, Pennsylvania asserting that all prior sexual acts occurring there fall outside this Court's jurisdiction. Prior to the commencement of trial on November 17, 2008, this Court denied Mr. Packer's motion for recusal and motion in limine with its reasons being set forth on the record. N.T., 11/17/08, pp. 120-124.

Mr. Packer was tried by a jury on November 17, 2008 and November 18, 2008, at which he was represented by Robert Cronin, Esquire. At the close of the Commonwealth's case, this Court granted Mr. Packer's motion for judgment of acquittal as to Count 2, Aggravated Indecent Assault of a child, because testimony was lacking as to penetration of the victim's vagina or buttocks. The motion as to Counts 1 and 3 was denied, the reasons for which were set forth on the record. On November 18, 2008, the jury found Mr. Packer guilty of Count 1, Involuntary Sexual Deviate Intercourse with a Child, and Count 3, Indecent Assault (Under 13 Years of Age), and further specifying under Count 3 that Mr. Packer committed a course of conduct of indecent assault by touching the victim's sexual or intimate parts with Mr. Packer's sexual or intimate parts, and vice versa.

At the time of entering the jury's verdict on November 18, 2008, the Court directed that a Pre-Sentence Investigation and an assessment by the Sexual Offender's Assessment Board be

performed to determine if Mr. Packer should be deemed a violent sexual predator. Subsequently, the Board issued an opinion which expressed that Mr. Packer was a sexually violent predator. In an order of February 18, 2009, pursuant to a conference between the Court and counsel held on that date, and upon motion of Mr. Packer, sentencing was continued for Mr. Packer to obtain an evaluator on his own behalf to contest the Board's finding.

On May 13, 2009, we held both Mr. Packer's sentencing hearing and an evidentiary hearing to determine whether Mr. Packer was a sexually violent predator. The Court, after hearing, found Mr. Packer to be a sexually violent predator subject to lifetime registration under Megan's Law, noting the reasons for such on the record. The Court then proceeded with sentencing. After giving consideration to the Pre Sentence Investigation; Mr. Packer's statements; his daughter, the victim's impact statement as expressed in a writing she filled out for the District Attorneys' Office; and, other factors, including the trial testimony, the Court sentenced Mr. Packer to confinement in a State Correctional Institution for a minimum term of 15 years and a maximum term of 40 years and to pay a fine in the amount of $10,000.00 under Count 1, Involuntary Deviate Sexual Assault of a Child, and to a minimum term of 3 months and a maximum term of 7 years under Count 3, Indecent Assault. The sentences were to be served consecutive to each other.

Mr. Packer filed a Post-Sentence Motion on May 22, 2009. After a conference with counsel on June 15, 2009 it was ascertained that the legal and factual basis for the issues raised in the post sentence motion remained the same as at the pre-trial and trial proceedings. Despite due diligence by Mr. Packer's attorney, no additional facts nor other legal citations or authority

could be presented. Mr. Packer's post-sentence motion was, therefore, denied by an order of that date based on the Court's prior considerations and rulings on the issues raised therein.

On June 26, 2009, Mr. Packer, through Mr. Cronin his trial counsel, filed a Notice of Appeal to the Superior Court. On July 6, 2009, this Court issued an order in compliance with Pennsylvania Rules of Appellate Procedure Rule 1925(b) directing Mr. Packer file a Concise Statement of Matters Complained of on Appeal within fourteen days of the order. Mr. Packer's Concise Statement of Matters Complained of on Appeal, filed on July 21, 2009, asserts that numerous errors were made in the rulings contained in the orders made on the dates listed above. Those errors, as described in Mr. Packer's Statement, are as follows:

a. Defendant avers the Court erred in Dismissing Defendant's Omnibus Pre-Trial Motion.
b. Defendant avers the Court erred in granting the Commonwealth's Motion in Limine.
c. Defendant avers the Court erred in denying Defendant's Motion in Limine.
d. Defendant avers the Court erred in denying Defendant's Motion to Recuse.
e. Defendant avers the evidence presented at trial, considered in the light most favorable to the Commonwealth as verdict-winner, was insufficient to sustain a conviction to all charges against Defendant.
f. Defendant avers that the cumulative effect of the errors denied him a fair adjudication of his guilt.
g. As the victim did not testify, Defendant avers that the evidence is against the weight of the evidence.
h. Defendant avers that the Court's sentence is excessive, and
i. Defendant avers the Court erred in holding that Defendant meets the criteria of a sexually violent predator.

We will discuss these assertions in the order presented.

## III. DISCUSSION

Contrary to his assertions of error, the pre-trial procedures in Mr. Packer's case, Mr. Packer's conviction by the jury on Count 1, Involuntary Deviate Sexual Intercourse and Count

3, Indecent Assault, Mr. Packer being found to be a sexually violent predator, and the sentence this Court imposed are without error.

## ***There Were No Pre-Trial Errors***

### *A. Mr. Packer's admissions were not subject to suppression.*

Mr. Packer asserts that the Court erred in dismissing his Omnibus Pre-Trial Motion filed May 7, 2008, requesting suppression of the statement he gave to police on February 29, 2008. In this statement, Mr. Packer admitted to having sexual contact with his daughter at least twice. After a hearing on July 29, 2008, the Honorable President Judge Kenneth Brown found that the statement was not coerced and denied Mr. Packer's motion, stating his reasons for denial on the record. After consultation with Judge Brown, both Judge Brown and this Court rely upon Judge Brown's findings of facts, reasoning, and order directing that Mr. Packer's statement, his admission to police, was appropriately admissible. See, N.T., 7/29/08, pp. 54-60.

### *B. The Court did not commit error in granting the Commonwealth's Motion in Limine permitting the Commonwealth to introduce the statements made by the child victim to the Children and Youth Services caseworker under the Tender Years Act and denying the Defendant's motion to bar those statements as violation of the Confrontation Clause of the United States Constitution or Article 1 § 9 of the Pennsylvania Constitution.*

Mr. Packer asserts that this Court erred in granting the Commonwealth's Motion in Limine filed November 12, 2008, seeking to admit hearsay statements under the Tender Years Exception, 42 Pa.C.S. § 5985.1, that the victim told to Children and Youth worker Rhonda McDonald describing her father's sexual conduct with her. In order for such statements to be admissible through Ms. McDonald's testimony, the statements must not only pass muster under the Tender Years Act but also cannot offend the Confrontation Clause of the United

States Constitution nor Article 1 § 9 of the Pennsylvania Constitution. The victim's statements to Ms. McDonald are admissible as to both; thus, this Court granted the Commonwealth's Motion in Limine.

### *i. The Victim's Statement Falls Squarely Within Pennsylvania's Tender Years Exception and Admissible Hearsay.*

The Judicial Code provides for the "Tender Years Exception", in relevant part, as follows:

> (a)General Rule - An out-of-court statement made by a child victim or witness, who at the time the statement was made was 12 years of age or younger, describing physical abuse, indecent contact or any of the offenses enumerated in 18 Pa.C.S. Chs. 25 (relating to criminal homicide), 27 (relating to assault), 29 (relating to kidnapping), 31 (relating to sexual offenses), 35 (relating to burglary and other criminal intrusion) and 37 (relating to robbery), not otherwise admissible by statute or rule of evidence, is admissible in evidence in any criminal or civil proceeding if:
> (1) the court finds, in an in camera hearing, that the evidence is relevant and that the time, content and circumstances of the statement provide sufficient indicia of reliability; and
> (2) the child either
> (i) testifies at the proceeding; or
> (ii) is unavailable as a witness.
> (a.1) Emotional Distress - In order to make a finding under subsection (a)(2)(ii) that the child is unavailable as a witness, the court must determine, based on the evidence presented to it, that testimony by the child as a witness will result in the child suffering serious emotional distress that would substantially impair the child's ability to reasonably communicate. In making this determination, the court may do all of the following:
> (1) Observe and question the child, either inside or outside the courtroom.
> (2) Hear testimony of a parent or custodian or any other person, such as a person who has dealt with the child in a medical or therapeutic setting.

42 Pa.C.S. § 5985.1.

Due to the fragile nature of young victims of sexual abuse, the "Tender Years Exception" allows for the admission of a child's out-of-court statement. ***Commonwealth v. Bishop***, 742 A.2d 178, 184 (Pa. Super. 1999). The exception provides that a hearsay statement

may be admissible if it is relevant and reliable and made by a victim less than twelve years of age who is unavailable to communicate the statement due to emotional distress impairing such ability. The statement the victim made to Ms. McDonald detailing Mr. Packer's sexual contact with her, described in a notice attached to the Commonwealth's motion and testified to by Ms. McDonald at a pre-trial hearing on November 13, 2008, was not only relevant as the statement described Mr. Packer's sexual contact with his daughter, the victim, but extremely and intrinsically reliable in the graphic descriptions the allegations that the current criminal case against Mr. Packer is composed of, and in all other ways the statement to falls squarely within the Tender Year's Exception.

Before a proffered relevant statement can be admitted into evidence pursuant to the "Tender Years Exception," the trial court must assess the reliability of the statement and the availability of the child to testify. ***Fidler v. Cunningham-Small***, 871 A.2d 231, 235 (Pa. Super. 2005).

Any statement admitted under the "Tender Years Exception" "must possess sufficient indicia of reliability, as determined from the time, content, and circumstances of its making." ***Commonwealth v. Fink***, 791 A.2d 1235, 1248 (Pa. Super. 2002), citing ***Commonwealth v. Bean***, 677 A.2d 842, 844 (Pa. Super. 1996); see also, 42 Pa.C.S. § 5985.1. "There are several factors a court may consider in determining reliability for purposes of the Tender Years Act, including, but not limited to, the spontaneity and consistent repetition of the statement(s); the mental state of the declarant; the use of terminology unexpected of a child of similar age; and the lack of a motive to fabricate." ***Fidler***, 871 A.2d 235, citing ***Commonwealth v. Hunzer***, 868 A.2d 498, 510 (Pa. Super. 2005). "The main consideration for determining when hearsay

statements made by a child witness are sufficiently reliable is whether the child declarant was particularly likely to be telling the truth when the statement was made." ***Commonwealth v. Lyons***, 833 A.2d 245, 255 (Pa. Super. 2003).

In making her statement to Ms. McDonald, S.K. was particularly likely to be telling the truth. S.K. initially related the sexual assaults spontaneously to a classmate. Those statements were consistently repeated to the Children and Youth caseworker, Ms. McDonald. Ms. McDonald's interview was done without suggestions or prompting by Ms. McDonald and without any pretext for S.K. to fabricate her statements. The context of the first interview of S.K. by Ms. McDonald suggests that S.K. was not aware of the serious nature or the adverse impact the statements would have upon her father. Instead, the sexual abuse was stated by S.K. matter of factly and in detail. S.K.'s revelation of her father's sexual crimes against her was done freely and without motive. The terminology S.K. used was wholly unexpected of a child of similar age.

This Court cannot ascertain any motive at all for S.K. to now fabricate her statement, given her long time of satisfactory physical custody with her father. Mr. Packer had raised S.K. without interference from the victim's mother and there was no custody dispute between them. S.K. went to a babysitter's quite often, while Mr. Packer worked, and the babysitter reported that the victim was always excited to see her father when he returned to pick her up and that they had a very close relationship; due to Mr. Packer's work S.K. was babysat most week-days including overnights. N.T., 11/17/2008, p. 149, 151. Even after Mr. Packer's trial, when asked by the District Attorney to fill out a victim impact form, she did not want Mr.

Packer to go to jail and reported missing him. N.T., 5/13/2009, p. 58. See also Victim Impact Statement for Parents of Child Victims, Victim Impact Statement Just for Kids attached.

As S.K.'s statements to Ms. McDonald were relevant and reliable, S.K. must also be unavailable for the Tender Years Exception to apply. S.K. was unavailable under the Act. The definition of unavailability for purposes of the Tender Years Act is unlike standard definitions for the term in the context of hearsay. Instead, unavailability is narrowly defined in explicit terms within the Act, specifically that there is evidence that the giving of testimony by the child would cause the child to suffer "serious emotional distress" such that it would "substantially impair the child's ability to reasonably communicate." ***Fidler v. Cunningham-Small***, at 237. Though the Tender Years Act does not mandate the type of evidence upon which the court must rely, the Act does require that concrete evidence of serious emotional distress be presented. In the absence of expert witnesses, the trial court's in camera examination of the child is the better practice. ***Id***., 238.

In an order of November 13, 2008, this Court determined that the victim declarant was unavailable due to serious emotional distress she suffers from due to sexual attacks perpetrated against her by her father, Mr. Packer, which at the time severely impaired her ability to communicate at all about the subject matter at issue. We summarized the extent of S.K.'s emotional distress on the eve of trial which we first noted in the statement of record attached to our November 13, 2008 order. We continue to rely on the reasoning set forth in that statement and the emotional status of S.K. stated above.

### *ii. The Victim's Statement is Non-Testimonial and Admissible.*

S.K.'s statement to Children and Youth worker Ms. McDonald in the nurse's office of Jersey Shore Elementary School, was non-testimonial and is, thus, admissible against Mr. Packer through the testimony of Agency caseworker Ms. McDonald. Accordingly, this Court granted the Commonwealth's motion to admit these statements in an order of November 14, 2008 stating our finding that the statements were non-testimonial in nature and were not barred by ***Crawford v. Washington,*** 541 U.S. 36 (2004) interpreting the sixth Amendment to the United States Constitution, nor by Article I, section 9 of the Pennsylvania Constitution. It was clear to the Court that the primary, if not only purpose of Ms. McDonald's interview was to determine if an emergency situation truly existed which placed S.K.'s welfare in present danger and if so was it to an extent that necessitated S.K.'s removal from her home. Furthermore, S.K.'s initial statements were obtained in an informal setting and were not elicited for the purpose of a criminal prosecution of Mr. Packer. The following discussion elaborates upon the Court's on-record statement of its reasoning.

The Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." ***Pointer v. Texas***, 380 U.S. 400 (1965). Likewise, the Pennsylvania Constitution provides that in all criminal prosecutions the accused has a right to meet the witnesses against him "face to face." Pa. Const. Art. 1 § 9 (Purdon Supp.1992).

It is well settled that the "Confrontation Clause," as interpreted by ***Crawford v. Washington***, bars out-of-court statements that are testimonial in nature, unless the declarant is

unavailable and the defendant has had a prior opportunity to cross examine, regardless of whether such statements are deemed reliable by the trial court. ***Crawford v. Washington***, 541 U.S. 36 (2004). ***Crawford*** generally held that the *confrontation clause* of the *Sixth Amendment* barred the admission of testimonial statements of a witness who did not appear at a criminal trial, unless the witness was unavailable to testify and the defendant had had a prior opportunity for cross-examination.

In ***Crawford*** the Supreme Court specifically stated,

> We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed."

***Crawford***, at 68.

The Supreme Court in ***Davis v. Washington***, 547 U.S. 813 (2006) clarified the test to be applied by the courts when determining if an out-of-court statement by an unavailable declarant was 'testimonial." In ***Davis*** the defendant had been convicted of a criminal violation of a domestic protection from abuse order. The victim did not appear at trial. At trial, over the defendant's objection, a tape recording of the victim's 911 call which identified the defendant as her assailant was admitted. The specific statements admitted were those made by the victim, to the 911 operator in a call back to the victim, after the victim's initial call had been terminated. ***Davis*** upheld the defendant's conviction ruling the statements made by the victim in the 911 calls were not "testimonial." The Supreme Court, in ***Davis*** reasoned that a statement would not be testimonial if the objective facts indicate it was made when there was an ongoing emergency and the primary purpose in obtaining the statement through interrogation is to establish or prove

past events regardless that those facts might potentially be relevant to later criminal prosecution. In our case the objective facts clearly establish that S.K.'s statements to Ms. McDonald were made in such a context, that is, to determine if an emergency existed which warranted S.K.'s removal from her home to protect her from her father's sexual abuse.

The Supreme Court of Connecticut, in applying ***Davis***, has ruled that as the catalyst for the interview of the sexually-abused child was an investigation by the Department of Children and Families rather than of the police the child's statements to the abuse investigator were non-testimonial and not barred by ***Crawford***. ***State of Connecticut v. Arroyo***, 935 A.2d 975 (2007). As the ***Arroyo*** ruling was based on facts very analogous to the facts in our present case it supports our belief that our decision is in accordance with the ruling in ***Davis*** and the law of Pennsylvania.

At issue in ***Arroyo*** were statements made, by a child victim of sexual abuse, to a licensed clinical social worker and a forensic interviewer. ***Arroyo***, 935 A.2d at 981. The incident of sexual abuse against the child victim had first come to light on January 18, 2002 when the victim tested positive for Chlamydia. ***Id.***, 980. The first interview of the victim occurred later that month and was conducted by an investigator for the department of children and families. The same investigator who first interviewed the victim took the victim to a sexual abuse clinic that was located in a hospital in March of 2002 for an interview with the forensic interviewer. ***Ibid.*** The statements of the victim in this second interview were the subject of the defendant's complained of ***Crawford*** violation. ***Id***., 981. The third time that the victim was interviewed by the forensic interviewer, again taken to sexual abuse clinic by the same investigator for the department of children and families, the victim described three

separate occasions on which the defendant sexually abused her. ***Id***., 982. The victim did not identify the defendant as her attacker until May of 2002. ***Id***., 980.

The Supreme Court of Connecticut decided, paying special attention to the reasoning in ***Davis***, that the primary purpose of the statements made to the licensed clinical social worker and forensic interviewer in such circumstances as was present in ***Arroyo*** was non-testimonial in nature. ***Arroyo***, in applying ***Davis*** noted the following, with which we agree and adopt also as our reasoning applied to the facts of our case:

> In Davis, the court undertook to clarify one of the issues that it had left unresolved in Crawford, namely, the meaning of the term "testimonial"…In Davis, the statements at issue were the victim's statements made to a 911 dispatcher while the victim was being assaulted. During the telephone call, the victim had identified the defendant as her attacker… In deciding whether the statements in the two cases were testimonial or not, the court articulated the following rule: "Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."… Applying this test, the court concluded that the victim's statements in Davis were non-testimonial because they were made while the attack was ongoing. During the call, her "frantic answers were provided over the phone, in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe." Under such circumstances, the primary purpose of the victim's statements were to "enable police assistance to meet an ongoing emergency. [The victim] simply was not acting as a witness; she was not testifying. . . . No witness goes into court to proclaim an emergency and seek help."

***Arroyo***, at 994; citing ***Davis***. ***Arroyo*** further appropriately interpreted Davis with the following analysis:

> The court in ***Davis*** declined to resolve, however, "whether and when statements made to someone other than law enforcement personnel are 'testimonial.'" [***Davis***, 2274.] Nonetheless, the court's analysis makes clear that the determining factor resolving whether the subject statements

> are testimonial or nontestimonial is the primary purpose of the interrogation between the declarant and the witness whose testimony the state later seeks to introduce regarding the declarant's statements; that is, whether the interrogation is primarily intended to provide assistance to the declarant or to further investigation and preparation for prosecution. It is only the second purpose that implicates the confrontation clause. Put another way, statements taken by government actors who are not members of law enforcement are testimonial if the interview is the functional equivalent of police interrogation with the primary purpose of establishing or proving past events potentially relevant to later criminal prosecution. This is consistent with ***Crawford's*** identification of the "core class of testimonial statements" as including "ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially" and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial . . . ." [(Citation omitted; internal quotation marks omitted.) ***Crawford v. Washington***, 51-52.] Declarants who make statements, even regarding a possible crime, in order to obtain assistance, do not do so with the intent or expectation of assisting the state in building a case against a defendant, nor do the recipients of such statements act with such intent or expectation. As the court stated in Davis, when making statements in order to obtain emergency assistance, "[the victim] simply was not acting as a witness; she was not testifying. . . . No witness goes into court to proclaim an emergency and seek help." [(Citations omitted; internal quotation marks omitted.) ***Davis***, 2277.] Thus, in focusing on the primary purpose of the communication, ***Davis*** provides a practical way to resolve what ***Crawford*** had identified as the crucial issue in determining whether out-of-court statements are testimonial, namely, whether the circumstances would lead an objective witness reasonably to believe that the statements would later be used in a prosecution.

***Arroyo***, 996-997.

In reaching its decision the ***Arroyo*** court considered the Pennsylvania Superior Court case of ***In Re: SR***, 920 A.2d 1262 (Pa. Super. 2007) and distinguished it from the facts in ***Arroyo***.

At issue in ***In Re: SR***, was the "essential testimony" of a Philadelphia Children's Alliance forensic interview specialist, Jacqueline Block. ***Id.*** at 1263. The police contacted Ms. Block to conduct an interview for the police investigation after the child victim made allegations of sexual abuse to family members. ***Ibid***. Ms. Block interviewed the child "alone." ***Ibid***. A police officer, however, was watching the interview through one way glass, Ms. Block took a break to confer with the officer, and the interview followed the pattern of in court direct testimony with prepared questions. ***Ibid***., at 1263, 1264, 1267. Our Superior Court well reasoned that the statement to Ms. Block was "testimonial" in this circumstance, "carried out under the direction of the police department" for purposes of their investigation and potential prosecution, ruling the statements inadmissible. ***Id***., at 1263, 1269.

Our Superior Court held, however, that the statements made by the child to the child's mother were non-testimonial in nature and allowing the statements made to the mother to be admitted. ***Id.*** at 1262. In so doing the court ***In Re: S.R.*** recognized the primary purpose in obtaining an out-of-court statement was the distinguishing factor in determining the "testimonial" nature of such statements in ***Davis v. Washington***, 547 U.S. 843 (2006), ***State v. Ayer***, 917 A.2d 214 (N.H. 2006), and ***State v. Alvaraz***, 143 P.3d 668 (Ariz. 2006). Like the statement to mother by S.R., as in those cases the statements at issue which were admitted were obtained to "address an immediate situation and see what is going on" rather than "a step taken in a police investigation" (as in ***Davis'*** companion case ***Hammon v. Indiana***, 546 U.S. 1213 (2006)). ***Id.*** at 1267, 1268 citing ***Davis v. Washington*** (primary purpose of 911 call was to obtain immediate emergency assistance; caller's statement to 911 operator was therefore non-testimonial), ***State v. Ayer*** (primary purpose of officer's questioning of defendant's wife near

scene of shooting was to enable police to meet ongoing emergency; wife's statement to officer was therefore non-testimonial), ***State v. Alvaraz*** (victim's statement to police officer, made when officer found victim semi-conscious near site where victim's car was stolen and victim was beaten, was non-testimonial; primary purpose of officer's questioning was to meet ongoing emergency), and ***Hammon v. Indiana*** (a victim wife's statement to police telling them that her husband had beaten her shortly after the domestic dispute, but while safe with the police and her Husband detained, was "testimonial;" the emergency was no longer ongoing).

All of these cases together with the ruling of ***In Re: S.R.***, clearly establish that in making a determination as to if an out-of-court statement is "testimonial" the focus of the court is to be on the primary purpose of obtaining the statement.

The fact that S.K.'s statements made to the Agency caseworker, Ms. McDonald, might subsequently be utilized for police investigations or were even were compelled to be furnished to the police do not mean that the statements become testimonial. This Court found, as we noted above, that Ms. McDonald's primary purpose in obtaining statements from S.K. were to assure the child's safety and to allow Ms. McDonald and her agency to take steps to protect S.K. as might be appropriate. Ms. McDonald's testimony is very credible in this regard. The fact that that information the child gave also was information that described sexual conduct by her father, the defendant, does not operate to make the statements testimonial.

***C & D. The Court did not commit error in denying Defendant's Motion in Limine nor in denying Defendant's Motion to Recuse.***

November 14, 2009, the Public Defenders' Office, on behalf of Mr. Packer, filed a Motion to Recuse Judge Kieser, this Judge, and a Motion in Limine seeking to bar the introduction of any evidence of sexual acts upon the victim that occurred in Robinson,

Pennsylvania asserting that all prior sexual acts occurring there fall outside this Court's jurisdiction.

Just prior to the commencement of trial, on November 17, 2008, this Court denied Mr. Packer's motion for recusal and motion in limine with its reasons set forth on the record. We rely upon our findings, reasoning, and order made on the record directing denial of Mr. Packer's Motion in Limine wherein the Court found that the probative value of S.K.'s statements of prior sexual acts, going to S.K.'s credibility towards her assertions of sexual acts in Lycoming County, substantially outweighed the minimal prejudicial effect on Mr. Packer. N.T., 11/17/2008, pp. 8-9. Similarly, we rely upon our findings, reasoning, and order made on the record directing denial of Mr. Packer's Motion for Recusal wherein the Court found it had in no way prejudged the case nor, particularly, the prejudged the guilt of Mr. Packer. ***Id***., pp. 10-15.

***E, F, & G. The Evidence Was Sufficient to Justify Defendant's Conviction. The Victim Need Not Have Personally Testified for a Fair Adjudication of Guilt to have been Rendered. The Verdict Was Not Against the Weight of the Evidence***

Mr. Packer's own confession as to the heinous sexual abuse portrayed upon his daughter coupled with the statements of S.K., leaves Mr. Packer with no argument that the evidence was insufficient, that a fair adjudication of guilt was not rendered, nor that the verdict was against the weight of the evidence. We will first discuss the law guiding these issues, and then collectively, state our reasoning as to why the verdict of guilt should be sustained.

A claim challenging the sufficiency of the evidence is a question of law. ***Commonwealth v.Sullivan***, 820 A.2d 795, 805 (Pa. Super. 2003). When reviewing a challenge to the sufficiency of the evidence, the following standard of review is employed: "whether

viewing 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… 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. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced is free to believe all, part or none of the evidence. ***Commonwealth v. Gray***, 867 A.2d 560, 567 (Pa. Super. 2005) (quoting ***Commonwealth v. Nahavandian***, 849 A.2d 1221, 1229-30 (Pa. Super. 2004)). Direct and circumstantial evidence receive equal weight when assessing the sufficiency of the evidence. ***Commonwealth v. Grekis***, 601 A.2d 1275, 1280 (Pa. Super. 1992). Whether it is direct, circumstantial, or a combination of both, what is required of the evidence is that it, taken as a whole, links the accused to the crime beyond a reasonable doubt. ***Commonwealth v. Robinson***, 864 A.2d 460, 478 (Pa. 2004).

It is well settled that a weight of the evidence claim is primarily addressed to the discretion of the judge who actually presided at trial. ***Armbruster v. Horowitz***, 813 A.2d 698, 702 (2002). It is axiomatic that it is the function of the jury as the finder of fact to determine the credibility of the witnesses. ***Commonwealth v. Champney***, 832 A.2d 403, 408 (2003) (***citing Commonwealth v. Johnson***, 668 A.2d 97, 101 (1995)). A new trial should be granted only in truly extraordinary circumstances, *i.e.,* "when the

jury's verdict is *so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail.*" ***Armbruster***, 813 A.2d 703 (emphasis in original). Without specific evidence detailing an "extraordinary circumstance," a jury's finding of fact as to the credibility of witnesses must not be disturbed on appeal.

"The distinction between a determination of the weight of the evidence, which allows the trial court to make an independent assessment of the credibility of the prosecution's case, and a sufficiency determination, which confines the reviewing tribunal to accepting the evidence produced by the prosecution in the most favorable light, is well established." ***Commonwealth v. Vogel***, 461 A.2d 604, 609 (Pa. 1983) (citations omitted).[1] Vogel went on to define that "precise" distinction adopting that which was set forth by the 8th Circuit Court of Appeals:

> The court reviewing the sufficiency of the evidence, whether it be the trial or appellate court, must apply familiar principles. It is required to view the evidence in the light most favorable to the verdict, giving the prosecution the benefit of all inferences reasonably to be drawn in its favor from the evidence. The verdict may be based in whole or in part on circumstantial evidence. The evidence need not exclude every reasonable hypothesis except that of guilt…
> When a motion for new trial is made on the ground that the verdict is contrary to the weight of the evidence, the issues are far different… The district court need not view the evidence in the light most favorable to the verdict; it may weigh the evidence and in so doing evaluate for itself the credibility of the witnesses. If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination by another jury.

[1] ***Vogel*** was overturned for its definition of "sanity," but remains good law as to the reasoning implored above.

***Ibid***; quoting ***United States v. Lincoln***, 630 F.2d 1313, 1316, 1319 (8th Cir. 1980). "We have long recognized that an adverse ruling to the prosecution on the question of the weight of the evidence is remedied by the award of a new trial. In contrast, where there is an insufficiency of evidence determination, the only remedy is the discharge of the defendant for the crime or crimes charged. ***Vogel***, at 609.

Rendering a fair adjudication as to guilt is related to this distinction, that distinction being one of remedy:

> [W]e ordered a new trial because prejudicial hearsay had been admitted at the first trial and not because of the inadvertence or misconduct of the prosecutor. Were we to hold that reversal of a conviction on grounds other than intentional prosecutorial misconduct would bar reprosecution, it is doubtful that appellate courts would be as zealous as they should be in vindicating improprieties committed at the trial and pretrial stage. By successfully exercising his right to appeal, appellant's original conviction has, at his own behest, been nullified and the slate wiped clean. The erroneous admission of hearsay at trial, which was the basis for overturning the guilty verdict, and the mistaken belief that the physical examination results were nondiscoverable, have been corrected by providing appellant with another opportunity to obtain "*a fair adjudication of his guilt free from error*." ***Vogel***, supra 501 Pa. at 327, 461 A.2d at 611. At the same time we have accommodated "society's valid concern for ensuring that the guilty are punished." ***Id***.

***Commonwealth v. Green***, 536 A.2d 436, 438 (Pa. Super. Ct. 1988) (emphasis added).

The issue of guilt was resolved by the jury against Mr. Packer, and the verdict should not be disturbed. The jury weighed the credibility of Ms. McDonalds' testimony and did so in the face of the fact that S.K. did not testify. As discussed in section B of this opinion, Ms. McDonald's testimony as to S.K.'s statements to her was properly admissible. The jury found, and this Court agrees, that the evidence was sufficient to convict Mr. Packer. In fact that is why this Court found Mr. Packer to be a

sexually violent predator. N.T., May 13, 2009. pp. 36-39. As the Court agrees with the jury and because all evidence presented was properly admissible, the Court believes that there was sufficient evidence to sustain a conviction, the jury's verdict was not contrary to the weight of the evidence, and a fair adjudication of guilt was rendered.

***H & I. Mr. Packer's Sentence is not Excessive & He was Properly Determined to be a Sexually Violent Predator***

Mr. Packer's final contentions have to do with this Court's determinations at his hearing to determine whether he was a sexually violent predator and sentencing held May 13, 2009. Mr. Packer claims not only that his sentence is excessive, but also that this Court erred by finding him to be a sexually violent predator. Mr. Packer's contentions have no merit.

This Court at the hearing held to determine whether Mr. Bennett was a sexually violent predator gave due consideration to the information relied upon by the evaluator responsible for the opinion relied upon by the Board that Mr. Packer is a violent sexual predator. In addition to relying upon that opinion, this Court also had before it the facts of this case, his conduct of repeatedly sexually assaulting his daughter when she would exit the shower at their home. This Court allowed Mr. Bennett to pursue his own evaluation and evaluator, and even granted a continuance to affect this request. Mr. Bennett's own evaluator, licensed psychologist Robert Meacham, came to the same conclusion in his evaluation as the Board and so Mr. Packer resolved not to enter the evaluation performed by his chosen evaluator into evidence at the time of the hearing determining whether Mr. Packer was a sexually violent predator.

As stated by the expert at the May 13, 2009 hearing, and the finding made by this Court, the facts in this case, the sexual abuse perpetrated by Mr. Packer, meets both prongs of the test, the mental abnormality diagnosis criteria of pedophilia and predatory behavior. N.T.,

5/13/2009, pp. 3-22, 36-39. Mr. Packer, at least 30 times exceeding the course of six months, intercepted S.K. on her way out of the shower for the purpose of forcing her to perform oral intercourse upon him or rubbing his penis against and between her naked buttocks which he had first rubbed with lotion. ***Id***., 36-39. Mr. Packer was not only S.K.'s father, but also her primary custodian. Mr. Packer took advantage of this relationship in order facilitate his sexual victimization of S.K.; thus, the relationship was at least in part to facilitate or support victimization. Mr. Packer meets the mental abnormality diagnosis criteria of pedophilia and predatory behavior.

The Court then proceeded to sentencing. "Sentencing is a matter vested in the sound discretion of the sentencing judge, and a sentence will not be disturbed on appeal absent a manifest abuse of discretion." ***Commonwealth v. Robertson***, 874 A.2d 1200, 1212 (Pa. Super. 2005) (quoting ***Commonwealth v. Reyes*** 2004 PA Super 238, 853 A.2d 1052, 1055 (Pa. Super. 2004). "To prove an abuse of discretion, the defendant must establish, by reference to the record, that the sentencing court ignored or misapplied the law, exercised its judgment for reasons of partiality, prejudice, bias or ill will, or arrived at a manifestly unreasonable decision." ***Commonwealth v. Hyland***, 875 A.2d 1175, 1184 (Pa. Super. 2005) (citing ***Commonwealth v. Rodda***, 723 A.2d 212, 214 (Pa. Super. 1999)). There must be a substantial question as to the appropriateness of the sentence. ***Commonwealth v. Kimbrough***, 872 A.2d 1244, 1262 (Pa. Super. 2005); ***Commonwealth v. Tirado***, 870 A.2d 362, 365 (Pa. Super. 2005). A substantial question exists "only when the appellant advances a colorable argument that the sentencing judge's actions were either: (1) inconsistent with a specific provision of the

Sentencing Code; or (2) contrary to the fundamental norms which underlie the sentencing process." ***Hyland***, 1184.

The Superior Court has remarked that "the imposition of consecutive rather than concurrent sentences lies within the sound discretion of the sentencing court, and a challenge to the imposition of consecutive sentences simply does not raise a substantial question." ***Commonwealth v. Lloyd***, 878 A.2d 867, 873 (Pa. Super. 2005) (citing ***Commonwealth. v. Graham***, 661 A.2d 1367, 1373 (1995)). However, an earlier Superior Court decision suggests that, if the defendant's aggregate consecutive sentences result in a virtual life sentence, it may raise a substantial question whether the total sentence was "so manifestly excessive as to constitute too severe a punishment." ***Commonwealth v. Dodge***, 859 A.2d 771, 776 (Pa. Super. 2004). See also, ***Commonwealth v. Diaz***, 867 A.2d 1285, 1288 (Pa. Super. 2005). Suffice to say that the determination of whether a particular issue raises a substantial question is to be evaluated on a case-by-case basis. ***Hyland***, supra; ***Commonwealth v. Twitty***, 876 A.2d 433 (Pa. Super. 2005).

Ordinarily deference should be given to the trial court in determining what an appropriate sentence is as the trial court is better able to weigh the various considerations implicit in each case. ***Id***. 646. In determining whether a sentence is excessive, an appeals court ought not to replace the trial court's judgment with its own unless the trial court's sentence of a defendant demonstrates that the court below clearly abused its discretion. ***Id***. (citing ***Commonwealth v. O'Brien***, 422 A.2d 894 (Pa. Super. 1980); see also ***Commonwealth v. Franklin***, 446 A.2d 1313 (Pa. Super. 1982)).

Mr. Packer did receive a standard range sentence under each both counts. Mr. Packer has no prior record. Under Count One, involuntary deviate sexual intercourse with a child under the age of 13 which is a felony of the first degree, the offense gravity score is 14. The standard sentencing range is from six months to twenty years. For this crime, the mandatory minimum is ten years and statutory maximum is forty years. Under Count Three, indecent assault upon a child under the age of 13 which is a felony of the third degree, the offence gravity score is six. The standard sentencing range is from three to twelve months. For this crime, the maximum is seven years.

Mr. Packer argued at the sentencing hearing that because S.K. did not circle the "stay in jail" consequence in her children's victim impact statement, among other reasons, that he should sentenced only to the mandatory minimum. ***Id***. 40-41. As defense counsel aptly pointed out, nor did S.K. circle "get out of jail." ***Ibid***. S.K. did circle "stay away from me." S.K. Victim Impact Statement. This Court directly addressed Mr. Packer's defense to the crimes charged: "Her expressions and statements are too real to have been simply gained from the inappropriate watching of pornographic videos as you suggest, but,… would seem clear to me to have been statements of a child who has, in fact, experienced physical sexual assaults as she has described them." ***Id***. 57. In sentencing Mr. Packer to a minimum of 15 years and a maximum of 40 years under Count One and a minimum of 3 months and a maximum of 7 years under Count Three it was the courts intent that Mr. Packer be under supervision for the rest of his life, in addition to lifetime registry, and "to assure [S.K.] of [Mr. Packer's] incarceration though the time that she is a young adult, approximately 22 to 23[, s]o that she had the assurance of safety in that regard[, a]s well as protection from any others… that might be

subject to any type of encounters by [Mr. Packer], is as much as that also takes [Mr. Packer] to [an] age point in time where [he] will be approximately 60 years of age before being released."

## ***CONCLUSION***

As stated in the foregoing Opinion the Court recommends the conviction and judgment of sentence be affirmed.

BY THE COURT,

William S. Kieser, Senior Judge

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