In the Superior Court of Pennsylvania

No. 166 MDA 2008

COMMONWEALTH OF PENNSYLVANIA

v.

ADAM WAYNE CHAMPAGNE,
Appellant.

BRIEF FOR APPELLANT

On Appeal from the Judgment of the
Court of Common Pleas of Lebanon County, Pennsylvania,
Criminal Division, No. CP–38–CR–249–2007

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I. STATEMENT OF JURISDICTION

On December 19, 2007, the Court of Common Pleas of Lebanon County, Pennsylvania imposed a criminal sentence on defendant–appellant Adam Champagne. R.581a. The trial court's written sentencing order, dated December 19, 2007, was docketed by the Court of Common Pleas on December 26, 2007. *See* Exhibit C hereto;

On January 16, 2008, Mr. Champagne filed a timely notice of appeal from the judgment of conviction and sentence. R.22a. This Court possesses appellate jurisdiction pursuant to Pennsylvania Rule of Criminal Procedure 720(A)(3) and Pennsylvania Rule of Appellate Procedure 301(a)(2).

II. STATEMENT OF THE SCOPE AND STANDARDS OF REVIEW

The first question presented on appeal challenges the admission of the videotaped testimony of alleged victim M.H. in violation of defendant's Confrontation Clause rights, because M.H. failed to complete her direct testimony and thus was entirely unavailable for cross–examination. This Court has recognized that the abuse of discretion standard governs a challenge to the admission of evidence and that a trial court abuses its discretion when the decision to admit evidence is based on an error of law. *See Commonwealth* v. *Levanduski*, 907 A.2d 3, 13–14 (Pa. Super. Ct. 2006) (en banc).

The second question presented challenges the trial court's failure to credit defendant with the full amount of time served before he obtained release on bail in

connection with the charges leading to the convictions at issue here. As the trial court's Rule 1925(a) opinion recognizes, in footnote 15 on page 52, this issue presents a question of law. As a result, this Court exercises plenary review and owes no deference to the trial court's legal conclusions. *See Commonwealth* v. *Kyle*, 582 Pa. 624, 632, 874 A.2d 12, 17 (2005).

The third and final question presented challenges the sufficiency of the evidence to support the trial court's finding that the Commonwealth established by clear and convincing evidence that defendant should be classified as a "sexually violent predator" under the current version of Pennsylvania's Megan's Law. This issue raises a question of law that is subject to *de novo* review on appeal. *See Commonwealth* v. *Meals*, 590 Pa. 110, 119, 912 A.2d 213, 218 (2006). The standard of review is whether the evidence relevant to the trial court's Megan's Law determination, when viewed in a light favorable to the prosecution, constitutes clear and convincing evidence in support of the trial court's finding. *See Commonwealth* v. *W.H.M., Jr.*, 932 A.2d 155, 164 (Pa. Super. Ct. 2007).

III. TEXT OF THE ORDERS IN QUESTION

The trial court's sentencing order dated December 19, 2007 states, in pertinent part:

> This sentence shall be effective today. The Defendant shall be accorded credit for any time heretofore served solely on this action number. That determination to be made by the Pa Bureau of Corrections.

Order attached hereto as Exhibit C at page 1.

The trial court's Megan's Law order dated December 19, 2007 states:

> AND NOW, To wit, this 19th day of December, 2007, after hearing, and in consideration of the testimony and evidence presented upon the issue of designation of this Defendant as a sexually–violent predator, the Court determines by clear and convincing evidence that the Defendant, Adam Wayne Champagne, is a sexually–violent predator as that term is defined by law.

Order attached hereto as Exhibit D.

IV. STATEMENT OF THE QUESTIONS PRESENTED

1. Is defendant entitled to a new trial because the trial court violated defendant's rights under the Confrontation Clause by admitting the videotaped testimony of alleged victim M.H., who failed to complete her direct examination and thus was entirely unavailable for cross–examination, because the prosecution is unable to show that the admission of that testimony was harmless beyond a reasonable doubt?

The trial court rejected defendant's objection to playing M.H.'s videotaped direct examination to the jury, R.266a, notwithstanding that defendant did not receive any opportunity to cross–examine M.H.

2. Did the trial court err when, in violation of 42 Pa. Cons. Stat. Ann. §9760(1), the trial court failed to give defendant full credit for all time served while awaiting release on bail in connection with the charges that are at issue in this appeal?

The trial court, in its Rule 1925(a) opinion at pages 51–52, recognizes that the trial court's sentencing order did not properly credit defendant for all time served, in violation of §9760(1).

3. Does sufficient evidence support the trial court's finding, purportedly by clear and convincing evidence, that defendant should be classified as a "sexually violent predator" under Pennsylvania's Megan's Law?

The trial court found that defendant should be classified as a "sexually violent predator." *See* Order attached hereto as Exhibit D

V. STATEMENT OF THE CASE

A. Relevant Factual History

On the evening of Monday, July 3, 2006, at an apartment complex located in Myerstown, Lebanon County, Pennsylvania, a sleepover occurred at the apartment where defendant–appellant Adam Champagne resided with his wife and two daughters. R.273a. Mr. Champagne was the only adult at home for most of that evening. With him in the apartment were his daughter Catherine, who would soon turn four years of age, and his daughter Elizabeth, who was just seven months old. R.409a–10a.

Also over at the apartment that evening were an eight–year–old girl who shall be referred to by the initials H.B., and H.B.'s two younger sisters. R.410a. The sixth and final child at the apartment that evening was a six–year–old girl who shall be referred to by the initials M.H. R.410a. The accounts and testimony of H.B. and M.H. about what happened at the Champagne apartment on the evening of July 3, 2006, after the other four even younger girls went to sleep in that apartment, resulted in fourteen criminal charges being filed against Adam Champagne. Following a jury trial at which Mr. Champagne was convicted on thirteen of those fourteen counts, the Court of Common Pleas of Lebanon County imposed an aggregate sentence of fourteen to thirty years' of imprisonment and found Mr. Champagne to be a sexually violent predator under Pennsylvania's version of the so–called Megan's Law. Mr. Champagne was twenty–four years of age at the time of the alleged offenses, and he had no prior criminal record.

On Tuesday, July 4, 2006, after Adam Champagne had prepared breakfast for all six of the children who slept over at his apartment the night before, H.B. and M.H. went outside and played with some of the other children before they walked home to their respective neighboring apartments in the same apartment complex at approximately 9 a.m. R.161a, 368a. A bit later that morning, while riding in a car with her family on the way to a relative's luncheon picnic and pool party, H.B. became upset and asked to speak with her mother. R.162a. After they arrived at the relative's house, H.B. told her mother that Mr. Champagne had disrobed in front of H.B. and M.H. while those two girls were watching a movie downstairs after the other four children had been put to bed. R.370a. H.B. further told her mother that Mr. Champagne asked both girls to disrobe but that H.B. had not done so, while M.H. did disrobe. H.B. also told her mother that she later saw M.H., while undressed, jumping on Mr. Champagne while the two of them were on Mr. Champagne's bed in his upstairs bedroom. R.370a.

H.B.'s mother called the Myerstown Borough Police Department on July 4, 2006, and the next day, on July 5, 2006, a police officer and representative from the Victim Witness Program met with H.B. and her mother. R.372a. According to the police officer's contemporaneous written report of the interview, H.B. told the police officer on July 5th that Mr. Champagne had asked both H.B. and M.H. to disrobe in the living room, and H.B. refused but M.H. did disrobe. R.332a. H.B. then told the police officer that when she went upstairs later to use the bathroom, she saw M.H. and Mr. Champagne naked in bed together, with M.H. on top of Mr. Champagne.

R.332a–33a. H.B. also told the police officer that at some point that night Mr. Champagne took off his clothes in front of H.B. and M.H. so that he was only wearing his underpants. R.345a–46a. H.B. also told the police officer, according to his report, that H.B. and M.H. slept downstairs in the living room that night. R.344a–45a.

M.H., the younger of the two girls, did not say anything to her mother about any improper acts by Mr. Champagne at the sleepover, although her mother claims that M.H. was acting more upset than usual after returning home on the morning of July 4th. R.302a–03a. On July 5, 2006, H.B.'s mother spoke to M.H.'s mother about what H.B. said had happened during the sleepover. R.303a–04a. M.H.'s mother testified at trial that she at some point thereafter asked M.H. if Mr. Champagne had hurt her, and that M.H. had answered "yes." R.313a–14a. M.H.'s mother also testified that she asked M.H. where Mr. Champagne had hurt her, and that M.H. in response pointed toward the area between her legs. R.314a.

M.H., M.H's mother, H.B., and H.B.'s mother thereafter all went to the police station on July 5th. R.305a. The police officer heading up the investigation suggested to M.H.'s mother that M.H. should be examined at a hospital. M.H.'s mother then took M.H. to the Good Samaritan Hospital, but M.H. was too upset and uncooperative for any examination to occur. R.306a–07a. M.H.'s mother next went to Harrisburg Hospital, where a cursory physical examination of M.H.'s body occurred, including a ten–second examination of the of M.H.'s unclothed genital

region, which revealed nothing unusual or indicative of any sexual assault or penetration. R.308a–09a, 358a, 362a–65a.

On July 10, 2006, the police officer heading the investigation had a second interview with H.B. R.335a. At this interview, H.B. said that she saw M.H. jumping up and down on the defendant in bed while M.H. was wearing no clothes. R.336a. H.B. also told the police officer on July 10th that she had observed a metal piercing on Mr. Champagne's penis after he had disrobed. R.336a. The evidence at trial demonstrates that M.H.'s mother had known of Mr. Champagne's penile piercing before the sleepover on July 3, 2006. R.318a–19a.

The defendant was arrested and taken into custody on July 13, 2006. R.294a. At the time of his arrest, defendant advised the police officer processing his booking that he had a penile piercing. R.295a. Defendant removed the piercing and gave it to the officer. R.295a–96a.

On July 31, 2006, a child abuse investigator met with M.H. at her home. R.282a–83a. Also present were M.H.'s mother and H.B. R.283a. M.H. did not discuss what had occurred at Mr. Champagne's apartment with the investigator that day. R.284a. However, H.B. did have a discussion with the investigator during which H.B. for the first time stated that while she and M.H. were taking a bath at Mr. Champagne's apartment on the night of July 3, 2006, Mr. Champagne came into the bathroom while the girls were naked in the tub, told the girls to spread their legs, and removed his penis from his pants and asked the girls to touch it.

R.285a–86a. H.B., however, did not state to the investigator on July 31, 2006 that Mr. Champagne had touched either girl's vagina while they were in the tub.

On August 15, 2006, the child abuse investigator who had spoken with H.B. approximately two weeks earlier reported the details of that conversation to the police officer in charge of the investigation. R.336a–37a. That was the first time that the police officer had been made aware of the events that allegedly had occurred in the bathroom. The police officer thereafter spoke again with H.B., and that was the first time that H.B. claimed that the defendant after coming into the bathroom while the girls were naked in the tub had placed his finger between the legs of H.B. and M.H. and had touched their vaginas. R.337a, 350a.

Adam Champagne testified in his own defense at trial. He testified that, on the night of July 3, 2006, he put his seven–month–old daughter to sleep at approximately 9 p.m. R.411a. He also testified that after having a snack, his daughter Catherine and H.B.'s two younger sisters went to bed in Catherine's bedroom at approximately 10 p.m. R.411a–12a. Mr. Champagne further testified that H.B. and M.H. remained downstairs watching television and fell asleep in front of the TV. R.412a. He testified that he was using his computer until about midnight, when his wife arrived at the apartment. R.412a. Mr. and Mrs. Champagne then engaged in sexual activity in their bedroom, Mrs. Champagne thereafter returned to her parents home, where she was then residing, and Mr. Champagne fell asleep alone in his own bed. R.412a, 414a. Mr. Champagne denied having had any improper or sexual contact with H.B. or M.H. R.414a–16a.

Mr. and Mrs. Champagne were living separately on July 3, 2006 because it had become known that Mr. Champagne had previously had a one–night–stand with M.H.'s mother. R.413a. Later, after the charges in question were made public, Mr. and Mrs. Champagne reconciled, and they again lived together as a family after Mr. Champagne was released on bond and up until the time Mr. Champagne was taken into custody following the imposition of sentence in this case.

The Court of Common Pleas of Lebanon County, in advance of trial, entered an order over defendant's objection that authorized both M.H. and H.B. to testify via alternative methods. *See* Exhibit B hereto. More specifically, the testimony of M.H. and H.B. was videotaped in the presiding judge's chambers on Friday of the week before the beginning of the trial of this case. R.126a–72a. Counsel for the prosecution and the defense were also present in chambers, together with the witness, the judge, a support person for the child, the court stenographer, and a video technician. The defendant was seated in the courtroom and observed the testimony, in real time, over a television monitor while the children's testimony was being videotaped for later playback to the jury.

M.H. was called to testify first. The attorney for the prosecution asked M.H. if Adam Champagne was a good boy or a bad boy, and M.H. answered "bad." R.133a. The attorney for the prosecution next asked if Adam Champagne had done something bad to M.H., and M.H. answered "yes." R.133a. M.H. also testified that the bad thing that Mr. Champagne had done to her occurred inside of his apartment, in the presence of H.B., and that M.H. and the other children were at

Mr. Champagne's apartment that evening for a sleepover with Mr. Champagne's daughters. R.133a–34a. M.H. was thereafter unable or unwilling to give any further testimony, and thus no cross–examination of M.H. occurred. R.135a.

H.B., by contrast, was able to complete her testimony via alternative method. H.B. gave the following testimony under oath. She stated that after Adam Champagne had put the other four girls to sleep, he entered the downstairs room where H.B. and M.H. were watching the movie "Narnia" on television, displayed his penis, and asked both girls to undress, but neither of the girls agreed to undress. R.137a–39a. H.B. further testified that Mr. Champagne then asked the girls to touch his penis, that H.B. did not touch it, and that H.B. did not remember whether M.H. touched it. R.140a. Both girls then asked to go home, but Mr. Champagne said that it was too late, although H.B. testified that she saw it was still light outside. R.141a.

Later that evening, according to H.B.'s videotaped testimony, H.B. and M.H. asked Adam Champagne if they could take a bath, and he agreed that they could do so. R.151a. After H.B. and M.H. had begun to take a bath and were standing in the tub looking for shampoo, H.B. testified that Mr. Champagne entered the bathroom and asked both girls to place one foot on the side of the tub, and he thereafter used his finger to touch their vaginas and may have placed his finger into each girl's vagina. R.142a–43a. When that happened, each girl turned away immediately and sat down. R.157a. H.B. further testified that Mr. Champagne told the two girls that

they could not tell anyone about what happened "because he would be in jail for 15 or 16 years." R.144a.

In this under–oath version of H.B.'s account, H.B. no longer claimed that Mr. Champagne exposed his penis to the girls while they were in the tub, and H.B. no longer claimed that she saw M.H. naked in bed with Mr. Champagne or jumping up and down naked on Mr. Champagne while both were in bed. R.135a–72a. Rather, according to H.B.'s testimony under oath, after their bath concluded, both M.H. and H.B. went into Mr. Champagne's bedroom wearing their pajamas, the girls asked to call home so that they could leave Mr. Champagne's apartment, and, after Mr. Champagne refused to allow them to call home, the girls fell asleep until they awoke for breakfast the next morning. R.159a–60a.

H.B. further testified that the next morning, both she and M.H. ate the breakfast that Mr. Champagne had prepared for all of the children who had slept over, and that both H.B. and M.H. played for a while outside with the other children on the morning of July 4, 2006 before walking home to their own nearby apartments that morning. R.161a–62a.

B. Relevant Procedural History

Defendant–appellant Adam Champagne was arrested on July 13, 2006 and was released on bail on October 13, 2006. R.294a, 32a. The trial judge in this matter permitted Mr. Champagne to remain released on bail after having been convicted on thirteen of the fourteen criminal charges against him, and he was not taken back

into custody until the sentencing proceeding on December 19, 2007. Children and Youth Services of Lebanon County, Pennsylvania cleared Mr. Champagne to reside while on bail with his wife and two young daughters based on a finding that Mr. Champagne did not pose any risk of danger to his own young daughters.

On October 27, 2006, the trial court held a pretrial hearing to consider the prosecution's request that the alleged victims, H.B. and M.H., be permitted to testify by "alternative method" outside of the defendant's presence. R.54a–124a. Counsel for defendant, on behalf of Mr. Champagne, objected to and opposed the prosecution's request to have H.B. and/or M.H. testify by alternative method. R.120a. At the conclusion of that hearing, the trial court entered an order authorizing the testimony of H.B. and M.H. to be taken by "alternative method," over defendant's objection, through a procedure to be agreed on between counsel for the defense and counsel for the prosecution. *See* Exhibit B hereto.

Trial of this case was scheduled to begin during the week of June 4, 2007. On the preceding Friday, June 1, 2007, counsel for both parties convened in the chambers of the trial judge to videotape the testimony of M.H. and H.B. via alternative method. R.126a–73a. Mr. Champagne was seated in the courtroom while M.H. and H.B. were testifying in the judge's chambers, and Mr. Champagne was provided with a television monitor to enable him to view and hear the testimony as it was occurring.

M.H., then seven years old, was called to testify first. Her testimony proceeded as follows:

PROSECUTOR: [M.H.], can you tell me how old you are?

A. Seven.

PROSECUTOR: Can you lean into the microphone and say that one more time?

A. Seven.

PROSECUTOR: Do you think — how would you feel about holding the microphone? Would that be something you would be okay with doing?

A. (Shaking head in the negative.)

PROSCUTOR: [M.H.], is Adam a good boy or a bad boy?

A. Bad boy.

PROSECUTOR: Did Adam do something to you that was bad?

A. (Nodding head in the …) — yes.

PROSECUTOR: Can you tell me where you were at when this happened? Were you outside? Were you inside?

A. Inside.

PROSECUTOR: I'm sorry. I didn't hear you.

A. Inside.

PROSECUTOR: Where were you at inside? Do you remember?

A. (Nodding head in the affirmative.)

PROSECUTOR: You are nodding your head. You can't nod your head. Can you tell us where you were at?

A. Adam's house.

PROSECUTOR: Does Adam's house have a downstairs and an upstairs?

A. Yeah.

PROSECUTOR: Was anybody with you when Adam did something?

A. [H.B.].

PROSECUTOR: Who is [H.B.]? Can you tell the Judge who [H.B.] is? Do you know who [H.B.] is?

A. Yeah.

PROSECUTOR: Who is [H.B.]?

A. My friend.

PROSECUTOR: And why were you at Adam's house? Do you remember why you were at Adam's house? Let me ask you this: What were you doing at Adam's house?

A. Sleeping over there.

PROSECUTOR: Was anybody else sleeping over?

A. [H.B.] and her sisters.

DEFENSE COUNSEL: Your Honor, my client has indicated that he can't hear the witness.

PROSECUTOR: Beth, maybe it would be helpful if you would hold the microphone a little bit closer to [M.H.].

PROSECUTOR: [M.H.], can you tell the Judge what happened with Adam? [M.H.], can you tell the Judge what happened with Adam? [M.H.], did you see anything? Are you going to answer the questions? [M.H.], do we need to stop and take a break? Can you tell me how you are feeling? Okay, [M.H.]. I need you to tell me yes or no if you are going to be able to tell the Judge what happened with Adam.

A. (Shaking head in the negative.)

PROSECUTOR: May we take a short break?

THE COURT: Sure.

(Whereupon, off the record at 9:05 A.M.)

(Recess.)

(Whereupon, resuming proceeding at 9:10 A.M.)

PROSECUTOR: The Commonwealth would call [H.B.]

[testimony of H.B. follows]

R.133a–35a.

In contrast to M.H., who was unable to complete her direct testimony and thus was not subject to any cross–examination by counsel for defendant, H.B., then nine years of age, successfully completed all phases of her testimony by alternative method on Friday, June 1, 2007.

After conducting jury selection on Monday, June 4, 2007, the trial of this case began on Tuesday, June 5, 2007. The trial court began the day outside the presence of the jury to consider the extent to which the prosecution could rely on the so–called "tender years" exception to the hearsay rule, codified at 42 Pa. Cons. Stat. Ann. §5985.1, to introduce out–of–court statements that H.B. and M.H. had made about the events in question to others. R.179a–271a.

With regard to H.B., the trial court ruled that the prosecution could employ the "tender years" hearsay exception to introduce all of H.B.'s out–of–court statements about the events in question. R.262a–64a. Moreover, the trial court ruled that the introduction of such hearsay evidence did not violate Mr. Champagne's Confrontation Clause rights because H.B. had testified fully, albeit by alternative method, at trial and thus had been subject to cross–examination by defense counsel. R.264a.

With regard to M.H., by contrast, the trial court recognized that M.H. had not testified fully by alternative method and, in particular, had not undergone cross–examination by counsel for the defendant. As a result, the trial court ruled that it would not allow the prosecution to introduce "testimonial" out–of–court statements made by M.H. about the events in question. R.262a–63a. Thus, the only person the trial court permitted to testify regarding M.H.'s out–of–court statements about the events in question was M.H.'s mother, who was permitted to testify about what M.H. had said in response to questions the mother had posed to M.H.

Before the jury was brought into the courtroom to begin hearing evidence, counsel for Mr. Champagne objected to the prosecution's plan to show to the jury the videotaped testimony of M.H., who (as noted above) neither completed her direct testimony nor was subjected to cross–examination. R.264a. In response, the prosecution argued that the videotaped testimony of M.H. was relevant both to M.H.'s "demeanor" and "credibility." R.265a. The trial judge overruled the defendant's objection and permitted the prosecution to display M.H.'s testimony to the jury. R.266a.

Neither immediately before nor immediately after exhibiting the videotaped testimony to the jury did the trial judge provide any limiting instruction regarding M.H.'s testimony, which was not subject to cross–examination due to M.H.'s inability or refusal to complete her testimony by alternative method. Rather, before displaying the videotape to the jury, the trial judge instructed the jury as follows:

> THE COURT: So the jury is clear, this presentation now being given to you is the testimony of [M.H.] and [H.B.]. This was taken by the Court

> a day prior to today. You are being offered this video and you should consider this in the same fashion as you would were the young ladies to come in and testify in front of you in this proceeding.

R.277a–78a.

And immediately after the videotaped testimony had been played, the trial court instructed the jury as follows:

> THE COURT: Members of the jury, we're going to take a recess. I want to just enlighten you with regard to some of the things you saw during the videos.
>
> As I indicated that was taken several days ago. It was done in my chambers, which you saw there. The Defendant at the time was located in the courtroom which is why you heard from time to time take a recess to that the Defendant and counsel could confer. That was done by closed–circuit television. I think that's just helpful so you understand by way of explanation what it is that you just saw.
>
> We'll take a recess. We'll reconvene shortly.

R.278a.

The trial court returned to the subject of the videotaped testimony while instructing the jury on the law following the closing arguments of counsel. The trial court then told the jury as follows:

> Ladies and gentlemen, you saw the testimony of [H.B.] and [M.H.] That was taken last Friday, June 1st, of this year.
>
> You had an opportunity to review that video. There were previous legal proceedings involving these parties and the Court where I decided that I would permit these girls to testify in an alternative manner, here by closed–circuit television.
>
> You should treat the testimony of [H.B.] the same way that you treat any other testimony. You should not give it more or less weight simply because it was taken on a different day and by videotaped deposition.

> However, you should not treat the testimony of [M.H.] as substantive evidence because she was unable to relate for you, and, therefore, is of no value to you in that regard.
>
> However, you may when you determine the weight and the credibility that you will determine is appropriate for the statements which she allegedly made to other people.

R.482a.

The following fourteen charges were submitted to the jury for consideration. Counts One and Two charged Mr. Champagne with aggravated indecent assault on M.H. and H.B., respectively. Counts Three and Four charged Mr. Champagne with intimidation of a witness or victim with regard to M.H. and H.B., respectively. Count Five charged false imprisonment. Counts Six and Seven charged Mr. Champagne with indecent assault with regard to spanking the buttocks of M.H. and H.B., respectively. Counts Eight and Nine charged Mr. Champagne with indecent assault for having touched the vaginas of M.H. and H.B., respectively. Count Ten charged Mr. Champagne with indecent exposure. Counts Eleven and Twelve charged Mr. Champagne with corruption of minors with regard to M.H. and H.B., respectively. And Counts Thirteen and Fourteen charged Mr. Champagne with endangering the welfare of a child with regard to M.H. and H.B., respectively. R.493a.

The trial transcript reflects that the jury found Mr. Champagne guilty of thirteen of the fourteen offenses, all but Count Five, which was the charge of false imprisonment. R.494a. The trial court's docket sheet and the trial judge's sentencing order, however, state that Mr. Champagne was found guilty of Count

Five and was found not guilty of Count Six, which was the charge of indecent assault with regard to spanking the buttocks of M.H. *See* Exhibit C hereto.

The trial judge permitted Mr. Champagne to remain free on bail after the jury returned its verdict. On December 19, 2007, the trial court convened a Megan's Law Hearing and conducted sentencing. At the Megan's Law Hearing, both the prosecution and defense presented expert testimony in support of their positions. R.503a–65a. At the conclusion of the hearing, the trial court held that the prosecution had established by clear and convincing evidence that Mr. Champagne was a "sexually violent predator" who was subject to the Megan's Law reporting requirements. *See* Exhibit D hereto.

The trial court then proceeded to sentence Mr. Champagne to an aggregate term of fourteen to thirty years' of imprisonment. Mr. Champagne is currently serving that sentence as this appeal proceeds forward.

VI. SUMMARY OF THE ARGUMENT

The trial court committed reversible error in admitting, over the objection of defense counsel, the highly incriminating videotaped direct testimony by alternative method of alleged victim M.H., because M.H. failed to complete her direct testimony and thus was entirely unavailable for cross–examination by counsel for defendant. The admission of this videotaped testimony violated defendant's rights under the Confrontation Clause and the Due Process Clause and also violated the

requirements of the "Recorded testimony" statute codified at 42 Pa. Cons. Stat. Ann. §5984.1(a).

This record permits no conclusion other than that the admission of M.H.'s recorded testimony violated defendant's Confrontation Clause rights and the requirements of the "Recorded testimony" statute. Moreover, the limiting instruction that the trial court finally got around to delivering to the jury about M.H.'s recorded testimony during the jury charge at the close of the case was confusing, nonsensical, and inadequate to preclude the jury from improperly considering M.H.'s recorded testimony — which accused the defendant of having done something bad to her, while inside and in H.B.'s presence, during a sleepover at the defendant's home — as persuasive evidence of the defendant's guilt.

Because M.H.'s videotaped testimony should not have been shown to the jury at trial, a new trial is necessary unless the prosecution can meet the very heavy burden of showing that the admission of that videotaped testimony was harmless beyond a reasonable doubt. The prosecution cannot satisfy that burden on this record. The remaining evidence of defendant's guilt was far from uncontradicted. At trial, the defendant himself took the stand and testified under oath that he did not commit any of the offenses of which he has been convicted. There was no physical evidence of any of the crimes charged against the defendant. And the only other alleged victim, H.B., had provided numerous, conflicting accounts of the incident to both her mother and investigative authorities. As a result, this Court cannot conclude that, even in the absence of the improper admission of M.H.'s recorded

testimony, a rational juror would have had no choice but to convict defendant based on the remaining evidence. Accordingly, this Court must vacate Adam Champagne's convictions and remand for a new trial.

In the unlikely event that this Court does not order a new trial, it must at a minimum vacate the defendant's sentence and order the trial court to provide defendant with full credit for all time served while awaiting release on bail on these charges. The record shows that defendant was in custody for three months before he obtained bail, but the trial court's sentencing order only provides the defendant with about one month's credit against his lengthy sentence for time served. The trial court committed reversible legal error in failing to credit the defendant for all time served.

Finally, the trial court erred in holding that sufficient evidence exists to find, under the clear and convincing evidence standard, that defendant qualifies as a "sexually violent predator" under Pennsylvania's version of Megan's Law. As a result, this Court should either reverse the trial court's finding that classified Mr. Champagne as a "sexually violent predator" or should hold this issue under advisement (if relevant to the outcome of this appeal) pending the Pennsylvania Supreme Court's issuance of its ruling in *Commonwealth* v. *Eller*, a case now pending before Pennsylvania's highest court that will establish what evidence is necessary and sufficient to support such a finding.

VII. ARGUMENT

A. Defendant Is Entitled To A New Trial Because The Trial Court Committed Reversible Error In Admitting Into Evidence The Recorded Testimony Of Alleged Victim M.H.

After the trial court ruled, over defendant's objection, that H.B. and M.H. could testify via alternative method instead of testifying in the physical presence of the defendant, the prosecution and counsel for the defense entered into a stipulation providing that the testimony of H.B. and M.H. would be recorded in advance of trial in accordance with the 42 Pa. Cons. Stat. Ann. §5984.1. R.34a–35a.

In accordance with the parties' stipulation, the videotaped testimony of M.H. began in the trial judge's chambers on the morning of Friday, June 1, 2007. R.126a–73a. M.H. was placed under oath and began testifying in the presence of the judge, the prosecuting attorney, defense counsel, a court stenographer, an aide who was present to provide comfort to M.H., and a video technician. The defendant observed the testimony via a live video feed from the courtroom adjacent to the judge's chambers.

M.H. began her testimony by answering that the defendant was a "bad boy" in response to the prosecutor's question whether the defendant is a "good boy" or a "bad boy." R.133a. The prosecutor next asked M.H. "Did Adam do something to you that was bad?" R.133a. In response to that question, according to the transcript, M.H. nodded her head affirmatively and then answered "yes." R.133a.

The prosecutor next asked M.H. whether she was inside or outside when "this happened"? R.133a. In response to that question, M.H. answered "inside." R.133a.

M.H. further testified that H.B. was also present "when Adam did something." R.134a. M.H. also stated in her videotaped testimony that she was at Adam's house for the purpose of "[s]leeping over there" together with H.B. and H.B.'s sisters. R.134a.

At that point in her recorded testimony, however, M.H. failed to answer any other questions put to her by the prosecuting attorney, and thus M.H. was not made available to counsel for defendant for purposes of cross–examination. R.135a. As a result, the defendant was unable to conduct any cross–examination of M.H. whatsoever.

The trial court committed reversible error in allowing the recorded testimony of M.H. to be shown to the jury over the timely objection of defendant's counsel. First, the recorded testimony was not properly subject to being exhibited to the jury, because the prerequisites of the governing statute, 42 Pa. Cons. Stat. Ann. §5984.1, had not been satisfied, given M.H.'s unavailability for cross–examination. Second, the fact that M.H. was unavailable for cross–examination violated defendant's rights under the Confrontation Clause and the Due Process Clause. A witness who gives sworn testimony under oath on direct examination accusing the defendant of committing the wrongdoing at issue in a criminal trial but who then makes herself unavailable for cross–examination cannot have her testimony on direct examination placed before the jury for its consideration without infringing on the defendant's Confrontation Clause and Due Process rights.

The trial judge failed to give the jury any cautionary or limiting instructions either immediately before or immediately after the recorded testimony of M.H. was played at trial. And the instruction that the trial judge eventually gave the jury with regard to its consideration of M.H.'s recorded testimony was confusing, nonsensical, and inadequate to preclude the jury from improperly considering M.H.'s recorded testimony — which accused the defendant of having done something bad to her, while inside and in H.B.'s presence, during a sleepover at the defendant's home — as persuasive evidence of the defendant's guilt.

Because the trial court erred and infringed the defendant's Confrontation Clause rights in allowing M.H.'s recorded testimony to be shown to the jury, the prosecution bears the burden of showing that the introduction of that evidence was harmless beyond a reasonable doubt in order for Mr. Champagne's convictions to survive appeal. The prosecution cannot sustain that burden, and therefore Mr. Champagne's convictions must be set aside and a new trial ordered.

1. The trial court violated the "Recorded testimony" statute in allowing M.H.'s testimony to be shown to the jury in the absence of cross–examination

The "Recorded testimony" statute, 42 Pa. Cons. Stat. Ann. §5984.1(a), provides in pertinent part that "[e]xamination and cross–examination of the child victim or child material witness shall proceed in the same manner as normally permitted." In other words, the statute expressly requires, for recorded testimony to be exhibited to a jury in a criminal trial in accordance with that statute's provisions,

that the child witness be subject not only to direct examination by the prosecution but also to cross–examination by counsel for the defendant.

Here, the trial judge was well aware, because he presided in person over the taking of the videotaped testimony of M.H., that counsel for the defendant was not provided with any opportunity to conduct cross–examination under oath of M.H. during the videotaped testimony, or for that manner at any other time. The inability or unwillingness of M.H. to complete her testimony by alternative method, and in particular M.H.'s unavailability for cross–examination, meant that the testimony did not qualify for exhibition to the jury pursuant to the statutory authorization found in 42 Pa. Cons. Stat. Ann. §5984.1. As a result, the trial court committed an error of law by allowing the prosecution to play M.H.'s recorded testimony to the jury at defendant's trial over defense counsel's timely objection.

In *Commonwealth* v. *Geiger*, 944 A.2d 85, 96 (Pa. Super. Ct. 2008), this Court recognized that the videotaped testimony statute requires, among other things, that "direct and cross–examination of the child witnesses proceeded in the same manner as normally permitted." Moreover, in rejecting the defendant's challenges to the legality of the videotaped testimony statute in *Geiger*, this Court relied heavily on the fact that, in *Geiger*, the defendant through his counsel had received and taken advantage of the opportunity to cross–examine the witness who was testifying via alternative method. Here, by contrast, defendant Adam Champagne was denied any opportunity to cross–examine alleged victim M.H., because M.H. refused to

complete her direct testimony and thus was entirely unavailable for cross–examination.

The trial court remarked in its Rule 1925(a) opinion that had the testimony of M.H. been taken by alternative method while the trial was underway and shown contemporaneously to the jury via a live video feed, then the jury would have seen exactly what happened as reflected on the recorded videotape. It is perhaps understandable that the trial court would try to divert this Court's attention from focusing on the error that the trial court has so obviously committed in allowing the jury to see the highly incriminating partial direct testimony of M.H. by focusing instead on a hypothetical "live testimony" alternative method scenario that did not happen. In other words, merely because the trial court can hypothesize some other scenario that may have prejudiced the defendant unfairly does not excuse the trial court's obvious error in failing to avoid the easily avoidable, unquestionably unfair prejudice to the defendant that was allowed to occur under the actual circumstances of this case. All that the trial court had to do to avoid reversible error at issue here was to direct the prosecution not to display to the jury the videotape of M.H.'s highly incriminating partial direct testimony.

Moreover, the contemporaneous alternative method statute, allowing for the live broadcasting of a child witness's testimony taken outside of the defendant's physical presence into the courtroom, likewise contains the requirement that "[e]xamination and cross–examination of the child victim or child material witness shall proceed in the same manner as normally permitted." 42 Pa. Cons. Stat. Ann.

§5985(a). Thus, had M.H. failed to make herself available for cross–examination during live testimony instead of on tape the week before trial, the trial judge under the contemporaneous alternative method statute would have either had to declare a mistrial or, at a minimum, prevent the jury from making any use of the testimony whatsoever. That did not occur here, as the judge gave the jury no limiting instruction when M.H.'s testimony was shown, and the instruction that the judge eventually gave in his charge to the jury was (as will be discussed in far greater detail below) confusing, nonsensical, and inadequate to preclude the jury from using M.H.'s testimony as evidence of the defendant's guilt.

Because M.H. failed to make herself available for cross–examination, her testimony was not subject to being displayed to the jury under the "Recorded testimony" statute, 42 Pa. Cons. Stat. Ann. §5984.1. Accordingly, the trial court committed reversible error in allowing the recorded testimony of M.H. to be shown to the jury.

2. Because the defendant was not provided with an opportunity to cross–examine M.H., the trial court violated defendant's Confrontation Clause and Due Process rights by showing M.H.'s recorded testimony to the jury

It is a fundamental principle of law that where a witness's prior testimony against the defendant was not subject to cross–examination by the defendant, the Confrontation Clause and the Due Process Clause prohibit admission of that

testimony against the defendant at trial. *See Pointer* v. *Texas*, 380 U.S. 400, 406–08 (1965) (reversing defendant's conviction due to a Confrontation Clause violation).

Indeed, in *Commonwealth* v. *Mangini*, 493 Pa. 203, 425 A.2d 734 (1981), the Supreme Court of Pennsylvania recognized that "the rule allowing prior testimony of an unavailable witness will not prevail where the prior testimony was not subject to full opportunity for cross–examination." *Id.* at 211, 425 A.2d at 738 (citing *Pointer* v. *Texas*).

Here, it is uncontradicted that counsel for the defendant received no opportunity to cross–examine M.H. Nevertheless, over the objection of defense counsel, R.264a, the trial court permitted the jury to see M.H.'s recorded direct testimony under oath in which M.H. testified: (1) that defendant was a "bad boy"; (2) that defendant did something to M.H. that was bad; (3) that M.H. was inside defendant's home with H.B. when defendant did that bad thing to M.H.; and (4) that M.H. was at defendant's home due to a sleepover that was taking place there. R.133a–34a.

This testimony by M.H., given under oath, was highly incriminating toward the defendant. The only other evidence introduced against the defendant consisted of the statements and testimony of H.B., who had provided a handful of various, conflicting accounts about what had transpired at defendant's apartment on the evening of July 3, 2006, and the hearsay testimony of M.H.'s mother, admitted under the "tender years" exception, who stated that M.H. had indicated while not under oath that the defendant had hurt her and had pointed toward between her

legs when asked where the defendant had hurt her. Of course, less than forty–eight hours after the alleged incident, M.H. had her unclothed pubic area viewed by a medical professional who observed no sign of trauma or injury to that, or any other, area of M.H.'s body.

To be sure, the trial judge did attempt to provide the jury with a limiting instruction pertaining to M.H.'s testimony, but that limiting instruction was unclear, nonsensical, and inadequate to preclude the jury from relying on M.H.'s videotaped testimony under oath as evidence on which to convict the defendant. The trial judge's instruction given during the charge to the jury at the conclusion of the case stated, in relevant part:

> However, you should not treat the testimony of [M.H.] as substantive evidence because she was unable to relate for you, and, therefore, is of no value to you in that regard.
>
> However, you may when you determine the weight and the credibility that you will determine is appropriate for the statements which she allegedly made to other people.

R.482a.

The first paragraph of the above–quoted instruction appears to advise the jury that the jury should not consider M.H.'s testimony as "substantive evidence" — a legal term–of–art that the trial court failed to define for the jury — because that testimony was of "no value" because M.H. "was unable to relate for you." Yet the jury very well may have concluded that M.H.'s testimony was of tremendous value, given the specific incriminating information against the defendant that the testimony in fact contained. If the jury concluded that M.H.'s testimony was directly

relevant and useful to the question of defendant's guilt or innocence, as it certainly was, then the trial judge's instruction would not have prevented the jury from considering that testimony from M.H.

The second paragraph of the instruction states that M.H.'s testimony could be used by the jury to evaluate the "weight" and "credibility" to give the statements of M.H. about which others had testified. Yet this instruction makes absolutely no sense. Certainly, the jury can and should evaluate the credibility of witnesses whose testimony the jury directly observes, but a jury cannot evaluate the credibility of a witness's *out–of–court statement* to a third–party, made at a time when the jury could not observe the declarant's demeanor, based on how the witness appears on the stand while testifying at trial. Indeed, the only out–of–court statement against defendant attributed to M.H. that any witness was permitted to testify about at defendant's trial was the statements of M.H.'s mother that M.H. had said, while at home one day, that defendant had hurt her and, when asked where, that M.H. pointed between her legs. M.H.'s statement during her recorded testimony that defendant had done something bad to her can only influence the weight and credibility that they jury should attribute to M.H.'s earlier out–of–court statement to her mother if the jury accepted M.H.'s statement under oath as truthful, substantive testimony establishing that the defendant had in fact done something bad to her.

In sum, the only way that the jury could use M.H.'s recorded testimony to evaluate the credibility of M.H.'s out–of–court statements about the events of the

night of July 3, 2006 was if the jury accepted M.H.'s recorded testimony, which was not subjected to cross–examination, as truthful, in direct violation of defendant's Confrontation Clause right afforded under both the United States and Pennsylvania Constitutions. Accordingly, it was impossible for the jury to use M.H.'s recorded testimony to evaluate M.H.'s credibility without first accepting or rejecting M.H.'s recorded testimony as substantive evidence, and therefore this Court should hold that the trial court's supposed "limiting instruction" was inadequate to preclude the jury from using M.H.'s testimony as evidence of the defendant's guilt.

It is important to remember that defense counsel had raised a timely objection to the prosecution's showing of M.H.'s videotaped direct testimony to the jury in the prosecution's case–in–chief. R.264a. In defense counsel's view, there was no conceivable limiting instruction that could cure the prejudice and Confrontation Clause violation that displaying M.H.'s recorded testimony would inflict on the defense. Unfortunately, the limiting instruction about M.H.'s recorded testimony that the trial court finally delivered to the jury as part of the trial court's jury instructions at the close of the case was not even as protective of defendant's right to a fair trial as the limiting instruction that the prosecution had suggested when counsel for the parties were debating whether the trial court should admit the video of M.H.'s recorded testimony.

At that time, counsel for the prosecution said to the trial judge:

> I think you can address [defense counsel's] concerns when you instruct the jury that based off of the fact with the law that you know, the content of her statements, they can't necessarily take into consideration.

> What the purpose of the short clip will be would be for credibility issues. I think you can address that in some type of instruction. The reality is that they can't take into consideration anything she says because there was no opportunity for cross examination.

R.266a. In these two quoted paragraphs, counsel for the prosecution attempted to communicate to the trial judge that the jury should be instructed that the jury cannot take into consideration the content of M.H.'s statements as evidence of defendant's guilt because defendant was denied his Confrontation Clause right of cross–examination. The trial court, however, failed to charge the jury that the jury could not take the content of M.H.'s videotaped testimony into consideration in connection with deciding whether defendant should be found guilty of committing the charged offenses.

Moreover, M.H.'s videotaped testimony was *the very first testimony* from *any witness* that the jury saw during defendant's trial. The emphasis that the prosecution thereby placed on M.H.'s videotaped testimony only served to exponentially multiply the unfair prejudice of the blatant error that the trial court committed in allowing M.H.'s partial direct testimony to be shown by the prosecution to the jury. And although M.H. did not elaborate in her videotaped testimony about what the "something bad" that defendant did to her consisted of, M.H.'s videotaped testimony was immediately followed by the videotaped testimony of H.B. R.133a–35a. In her videotaped testimony, H.B. readily provided the jury with the details of the "something bad" that the defendant allegedly had done to both H.B. and M.H. R.135a–72a.

Because M.H.'s recorded testimony was not subjected to cross–examination in violation of defendant's Confrontation Clause rights, because M.H.'s recorded testimony was highly incriminating toward defendant, and because the trial judge's purported limiting instruction was unclear, nonsensical, and inadequate to preclude the jury from relying on M.H.'s videotaped testimony under oath as evidence on which to convict the defendant, the trial court erred in allowing M.H.'s recorded testimony to be shown to the jury.

3. Defendant is entitled to a new trial, because the admission of M.H.'s recorded testimony was not harmless beyond a reasonable doubt

Because the admission into evidence, and display to the jury, of M.H.'s videotaped partial direct testimony violated both defendant's Confrontation Clause rights and the requirements of the "Recorded testimony" statute codified at 42 Pa. Cons. Stat. Ann. §5984.1, this Court must vacate defendant's convictions unless the prosecution can show that the error in admitting that evidence was harmless beyond a reasonable doubt. *See Lilly* v. *Virginia*, 527 U.S. 116, 139–40 (1999); *Commonwealth* v. *Laich*, 566 Pa. 19, 29–31, 777 A.2d 1057, 1062–64 (2001); *Commonwealth* v. *Levanduski*, 907 A.2d 3, 21 (Pa. Super. Ct. 2006) (en banc).

In *Laich*, the Supreme Court of Pennsylvania gave the following explanation of the burden that the prosecution bears in proving that an error was harmless beyond a reasonable doubt:

> It is well established that an error is harmless only if we are convinced beyond a reasonable doubt that there is no reasonable possibility that

> the error could have contributed to the verdict. The Commonwealth bears the burden of establishing the harmlessness of the error. This burden is satisfied when the Commonwealth is able to show that: (1) the error did not prejudice the defendant or the prejudice was de minimis; or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial affect of the error so insignificant by comparison that the error could not have contributed to the verdict.

Laich, 566 Pa. at 29, 777 A.2d at 1062–63 (internal citations omitted).

Pennsylvania's highest court engaged in its most detailed consideration of the "harmless beyond a reasonable doubt" standard in *Commonwealth* v. *Story*, 476 Pa. 391, 383 A.2d 155 (1978). There, the Supreme Court of Pennsylvania held:

> We adopt the standard that an error cannot be held harmless unless the appellate court determines that the error could not have contributed to the verdict. Whenever there is a reasonable possibility that an error might have contributed to the conviction, the error is not harmless.

Id. at 409, 383 A.2d at 164 (internal quotations omitted).

The Supreme Court further explained in *Story* that "[i]f honest, fair minded jurors might very well have brought in not guilty verdicts, an error cannot be harmless on the basis of overwhelming evidence," *id.* at 413, 393 A.2d at 166, and that "[o]ur cases support the proposition that in deciding whether an error is harmless because there is properly admitted overwhelming evidence of guilt, the untainted evidence relied upon must be uncontradicted," *id.* The Supreme Court concluded by noting:

> The requirement that the 'overwhelming' evidence relied upon be uncontradicted follows from the principle that an error cannot be harmless if honest, fair minded jurors might very well have brought in

> not guilty verdicts. A jury has the duty to weigh the evidence and resolve conflicts therein. Unless the evidence is uncontradicted a fair minded juror may well choose to credit the defendant's, rather than the Commonwealth's evidence.

Id. at 415–16, 383 A.2d at 167 (citations and some quotations omitted).

In this case, the prosecution cannot satisfy its burden to prove that the admission of M.H.'s videotaped testimony, in violation of defendant's Confrontation Clause rights, was harmless beyond a reasonable doubt. To begin with, the evidence of defendant's guilt was far from uncontradicted, as the defendant himself took the stand and testified under oath that he did not commit any of the offenses of which he has been convicted.

Moreover, there was no physical evidence of any of the crimes charged against the defendant. A medical professional examined M.H.'s vaginal area within forty–eight hours of the alleged incident and observed nothing unusual nor any evidence of trauma or abuse. R.308a–09a, 358a, 362a–65a. Moreover, no medical examination of H.B.'s vaginal area occurred, suggesting that she too failed to exhibit any signs of trauma or abuse following the alleged events of the evening of July 3, 2006. R.383a–84a.

H.B. had provided her mother and investigative authorities with numerous, changing versions of the incident. The very first version had defendant disrobing only to the point where he was wearing just his underwear, followed by M.H. disrobing, and later seeing M.H. jumping naked on the defendant while those two were upstairs in bed. R.332a–33a, 345a–46a. In this first version, M.H. and H.B. went to sleep downstairs at the defendant's home. R.344a.

Some five or six days later, H.B. was telling authorities that the defendant completely disrobed before the two girls downstairs, and that H.B. observed a metallic piercing on defendant's penis. R.336a. It is undisputed that defendant's penile piercing was previously known to M.H.'s mother. R.318a–19a.

On July 31, 2006, nearly a month after the alleged incident, H.B. for the very first time claimed that the defendant had H.B. and M.H. take a bath, during which the defendant entered the bathroom uninvited while H.B. and M.H. were both naked. R.285a–86a. In this early version of the bathroom account, H.B. claimed that the defendant disrobed either to his underwear or completely to show his penis to the girls while they were in the bathtub. R.286a. While testifying under oath at trial via alternative method, H.B. did not claim that the defendant had, during the time that the girls were in the bathtub or were taking a bath, disrobed or displayed his penis to the girls. R.142a–44a. Rather, H.B. testified under oath that defendant had disrobed earlier, downstairs, before the girls went upstairs to take a bath. R.139a.

In her account of the events of that evening nearly one month later, H.B. also claimed for the very first time that the defendant had asked both girls to place one of their legs on the tub, but H.B. did not then claim that the defendant had touched the girls' vaginas. R.285a–86a. H.B. would not make that claim of improper touching for the first time until mid–August 2006, nearly one and a half months after the sleepover had occurred. R.337a, 350a. Even as of mid–August 2006, however, H.B. was still telling authorities that she and M.H. slept overnight downstairs, instead of in bed with the defendant in his upstairs bedroom. R.344a

By the time H.B. had finished her recorded testimony under oath on June 1, 2007, H.B. had furnished five distinct versions of what had occurred involving herself, M.H., and the defendant at the defendant's apartment on the evening of July 3, 2006. H.B.'s various statements, even when combined with M.H.'s mother's account of M.H.'s vague and unspecified statement, did not present the jury with overwhelming evidence necessitating defendant's conviction on the thirteen charges on which the jury found the defendant guilty.

As a result, this Court cannot conclude that the trial court's improper admission of M.H.'s recorded testimony was harmless beyond a reasonable doubt. The evidence pertaining to defendant's guilt was far from uncontradicted. The admission of M.H.'s testimony turned the trial from a "he said" versus "she said" dispute into a "he said" versus "they said" dispute. Moreover, because M.H. had not given prior contradictory accounts of the events of the night in question, as H.B. had given, M.H.'s confirmation under oath of the allegation that defendant had done something bad to M.H. while she was in H.B.'s presence would have given the jury far more reason to believe H.B. than the jury otherwise would have had based on H.B.'s contradictory accounts standing alone. As a result, this Court cannot conclude that, even in the absence of M.H.'s recorded testimony, a rational juror would have had no choice but to convict defendant based on the remaining evidence. Accordingly, this Court must vacate Adam Champagne's convictions and remand for a new trial.

B. The Trial Court's Sentencing Order Should Be Vacated To Allow The Trial Court To Award Defendant Credit Against His Sentence For All Time Previously Served In Connection With The Charges At Issue In This Case

If this Court agrees that defendant must receive a new trial because of the Confrontation Clause violation at issue in the first question presented on appeal, it will not be necessary for this Court to address the other two issues raised on appeal. However, in the unlikely event that this Court does not hold that defendant must receive a new trial, it will be necessary to address the remaining two issues addressed herein.

When imposing sentence on the defendant in this case, the trial court awarded credit against the sentence only for time served on the action number in which the prosecution secured the convictions that give rise to this appeal. *See* Rule 1925(a) opinion at 51. However, as the trial court's Rule 1925(a) opinion acknowledges, *see id.* at 51 n.14, the defendant was originally arrested on July 13, 2006 on charges arising from the allegations that H.B. and M.H. had made regarding the sleepover occurring on the night of July 3, 2006. The defendant remained in the Lebanon County Correctional Facility as a result of those charges until he obtained release on bail on October 13, 2006.

Although defendant was in custody for three months before obtaining release on bail, that entire three–month period of custody does not constitute "time served on this action number" (Rule 1925(a) opinion at 51) because the prosecution dismissed the original charges against the defendant and then immediately rearrested him (with no intervening release from custody) on replacement charges

that likewise stemmed from the allegations that H.B. and M.H. had made regarding the sleepover that occurred on the night of July 3, 2006.

The statute governing credit for time served in Pennsylvania is conveniently titled "Credit for time served." *See* 42 Pa. Cons. Stat. Ann. §9760. Subsection (1) of that statute addresses the precise situation at issue in this appeal:

> Credit against the maximum term and any minimum term shall be given to the defendant for all time spent in custody as a result of the criminal charge for which a prison sentence is imposed or as a result of the conduct on which such a charge is based. Credit shall include credit for time spent in custody prior to trial, during trial, pending sentence, and pending the resolution of an appeal.

42 Pa. Cons. Stat. Ann. §9760(1).

As the Supreme Court of Pennsylvania explained in *Commonwealth* v. *Kyle*, 582 Pa. 624, 874 A.2d 12 (2005):

> The easiest application of this statutory provision is when an individual is held in prison pending trial, or pending appeal, and faces a sentence of incarceration: in such a case, credit clearly would be awarded.

Id. at 632, 874 A.2d at 17. Similarly, in *Commonwealth* v. *Fowler*, 930 A.2d 586 (Pa. Super. Ct. 2007) (McCaffery, J.), this Court recognized that "The principle underlying [Section 9760] is that a defendant should be given credit for time spent in custody prior to sentencing for a particular offense." *Id.* at 595 (internal quotations omitted).

Regardless of whether the charges against defendant at the current action number were identical to the charges at the earlier action number or merely represented charges resulting from the same conduct as the charges at the earlier

action number, §9760(1) required the trial court to give defendant credit against his sentence for the entire three–month period of time served. The trial court's failure to apply §9760(1) in accordance with that statute's terms unlawfully denied to defendant two months' worth of time–served credit.

The trial court's Rule 1925(a) opinion correctly recognizes that "[a]n attack upon a court's failure to award credit for time served is an attack upon the legality of the sentence" and that "[i]ssues involving the legality of sentence cannot be waived." *See* Rule 1925(a) opinion at 52 n.15. In that footnote, the trial court concludes by noting, "Accordingly, Defendant's failure to notify the Court during sentencing of any time served relating to the charges on a different action number for which he did not receive credit at the time of sentencing did not result in the waiver of the claim." *See* Rule 1925(a) opinion at 52 n.15.

The trial court's Rule 1925(a) opinion appears to agree entirely with defendant's appellate argument on the time–served issue:

> It was our intention at sentencing, and remains our intention today, that the defendant should receive credit for any period of incarceration which he served as a result of these charges and for which no credit has been accorded to him on other charges. The factual data required for the determination and computation of that type of credit is not available to this Court and therefore we deemed it most efficient to leave that computation to the able hands of the Department of Corrections. If the Defendant was, at any time, incarcerated simultaneously for these charges and other charges, he is entitled to credit for that time either on the other charges or on these charges but certainly not on both. Again, that determination is best made and determined by the Department of Corrections.

Rule 1925(a) opinion at 52.

Yet, as the prosecution can and should confirm in its Brief for Appellee, the defendant was not arrested on any "other charges" that arose from something other than the events that gave rise to the convictions in the trial of this case, nor is defendant now facing trial on any "other charges," nor has defendant been convicted on any "other charges." As a result, defendant's time served must, and can only be, credited against these charges in this action number.

Defendant does not take issue with the trial court's assertion that the Department of Corrections is uniquely qualified to perform the calculation and crediting of time served. Unfortunately, however, the trial court's sentencing order expressly only affords the defendant credit for time served at the within action number, and thus that sentencing order as presently phrased precludes the Department of Corrections from performing the legally correct crediting of time served in defendant's favor. The Department of Corrections presumably has possession of the trial court's sentencing order, but the Department of Corrections does not have the trial court's Rule 1925(a) opinion clarifying that the defendant is entitled to credit for approximately two additional months of time served. That is why this Court should vacate the trial court's sentencing order with directions for the trial court to alter the sentencing order to provide the defendant with full credit for time served while in custody on the charges at issue in this case, whether those charges were filed at the current action number or an earlier action number.

C. Insufficient Evidence Exists To Support The Trial Court's Finding, By Clear And Convincing Evidence, That Defendant Qualifies As A "Sexually Violent Predator" Under Pennsylvania's Megan's Law

At the Megan's Law hearing that the trial court held to determine whether the prosecution could establish by clear and convincing evidence that the defendant should be classified as a "sexually violent predator," the prosecution called Nancy Einsel, M.S., as its expert witness, while the defense called Frank M. Dattilio, Ph.D., as its expert witness. R.503a–60a.

Both expert witnesses agreed that defendant's convictions established the "mental abnormality" prong of the "sexually violent predator" assessment. R.542a. But the two experts sharply disagreed over whether the defendant was likely to reoffend in the future, which is a predicate finding to classifying someone as a "sexually violent predator" under Pennsylvania's version of Megan's Law. R.543a–48a.

With only rare and infrequent exception, the cases in which this Court has affirmed a trial court's finding that a defendant convicted of qualifying offenses should be classified as a "sexually violent predator" involved defendants whose serious sexual abuse of children occurred over a substantial period of time and was especially cruel and heinous. This, of course, is not to suggest that any form of sexual offense against a child is excusable or proper, but, as this Court recognized in *Commonwealth* v. *Merolla*, 909 A.2d 337 (Pa. Super. Ct. 2006), "SVP status does not automatically apply to persons who commit sexual offenses against children." *Id.* at 344 (internal quotations omitted).

A review of a variety of recent rulings in which this Court and the Supreme Court of Pennsylvania have affirmed a trial court's finding that the defendant should be classified as a "sexually violent predator" reveals that those cases involved a much longer period of abuse, far more cruelty, and/or multiple victims on different occasions. *See Commonwealth* v. *W.H.M., Jr.*, 932 A.2d 155, 165 (Pa. Super. Ct. 2007) (involving a sexual relationship that continued for approximately four years and involved involuntarily restraining the victim using handcuffs and ligatures); *Commonwealth* v. *Geiter*, 929 A.2d 648, 652 (Pa. Super. Ct. 2007) (noting "multiple episodes of sexual abuse" occurring over a "lengthy period of time"); *Commonwealth* v. *Meals*, 590 Pa. 110, 127, 912 A.2d 213, 223 (2006) (noting that defendant's "multiple attacks on the younger child occurred more than nine months after his multiple attacks on the older child"); *Commonwealth* v. *Hitner*, 910 A.2d 721, 730 (Pa. Super. Ct. 2006) (noting that defendant had "burned the victims, he pulled out or shaved the hair on their heads, he threatened to kill them, and the victims were strangers"); *Commonwealth* v. *Leddington*, 908 A.2d 328, 336 (Pa. Super. Ct. 2006) (noting that the defendant "had been convicted of assaulting two young girls in a three year span").

In contrast with the truly distressing facts of those cases, involving serious repeat sexual offenders against children, the key facts of this case relating to "sexually violent predator" status share much in common with the relevant facts in *Commonwealth* v. *Merolla*, 909 A.2d at 344, where, as this Court explained, the defendant "indicates a low risk of recidivism; he did not exceed the means necessary

to commit the offense; and he did not display unusual cruelty during the commission of the crime."

Moreover, the Pennsylvania Supreme Court currently has pending before it a case presenting the question "[w]hether the Commonwealth expert offered sufficient testimony to support the trial court's finding that the Petitioner was a sexually violent predator?" *See Commonwealth* v. *Eller*, 595 Pa. 403, 938 A.2d 986 (2007). In the unlikely event that this Court does not order a new trial due to the trial court's reversible error in allowing defendant's Confrontation Clause rights to be infringed, this Court should consider, at a minimum, taking the issue of the sufficiency of the evidence on issue of the trial court's "sexually violent predator" finding under advisement pending the Supreme Court's announcement of its ruling in *Eller*.

For the reasons set forth above, this Court should either reverse the trial court's finding that defendant should be classified as a "sexually violent predator" or should hold its resolution of this issue (if relevant to the outcome of this appeal) pending the Pennsylvania Supreme Court's issuance of its ruling in *Commonwealth* v. *Eller*.

VIII. CONCLUSION

For all of the reasons set forth above, this Court should vacate Adam Champagne's convictions and remand for a new trial due to the Confrontation Clause violation that occurred when the trial court admitted into evidence the recorded testimony of M.H., which was not subjected to any cross–examination due to M.H.'s failure to complete her direct examination after she provided testimony under oath that was highly incriminating against the defendant. In the unlikely event that this Court does not order a new trial, this Court should at a minimum vacate defendant's sentence to require the trial court to give defendant full credit for all time served in connection with these charges. And the trial court's order finding defendant to be a "sexually violent predator" should be set aside due to insufficient evidence to support that finding under the clear and convincing standard.

Respectfully submitted,

Dated: July 28, 2008

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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two true and correct copies of the foregoing document upon the person and in the manner indicated below which service satisfies the requirements of Pa. R. App. P. 121:

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Additional Items of Record Attached to Brief for Appellant in Accordance with Pa. Rules of Appellate Procedure

Trial court's Rule 1925(a) opinion dated April 9, 2008 ..... Exhibit A

Trial court's Order dated March 21, 2007 allowing child witnesses to testify by alternative method ..... Exhibit B

Trial court's sentencing Order dated December 19, 2007 ..... Exhibit C

Trial court's Megan's Law Order dated December 19, 2007 ..... Exhibit D

Appellant's concise statement of matters complained of on appeal ..... Exhibit E