COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO	**:**	
Plaintiff	**:**	**CASE NO. 2007 CR 00990**
vs.	**:**	**Judge McBride**
PHILLIP HALL MCDONALD	**:**	**DECISION/ENTRY**
Defendant	**:**	

Jason Nagel, assistant prosecuting attorney for the State of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Christopher J. Feldhaus, assistant public defender for the defendant Phillip Hall McDonald, 10 South Third Street, Batavia, Ohio 45103.

This cause came before the court for an evidentiary hearing with respect to classification under Megan's Law on May 23, 2013. At the conclusion of that hearing, the court took the issues raised at the hearing under advisement.

Upon consideration of the record of the proceeding, the evidence presented for the court's consideration, the oral arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

On February 12, 2008, Phillip Hall McDonald entered pleas of no contest to the following charges: (1) three counts of illegal use of minor in nudity-oriented material or performance in violation of R.C. 2907.323(A)(1), felonies of the second degree; (2) one count of attempted illegal use of minor in nudity-oriented material or performance in violation of R.C. 2923.02(A)/R.C. 2907.323(A)(1), a felony of the third degree; (3) four counts of gross sexual imposition in violation of R.C. 2907.05(A)(5), felonies of the fourth degree; and (4) four counts of voyeurism in violation of R.C. 2907.08(D)(1), felonies of the fifth degree.[1]

The pre-sentence report prepared by the Probation Department contains the following short descriptions of the offenses:

> "Count[s] #1-3 [Illegal Use of Minor in Nudity-Oriented Material or Performance]: In between 2001 and 2007; Phillip McDonald took 3 photographs of two juveniles while they were sleeping and without the consent of the parents and these photographs depicted [M.T.] (Age 13), and [A.A.] (Age 13), in a state of undress.
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> Count #4 [Attempted Illegal Use of Minor in Nudity-Oriented Material or Performance]: In between 2001 and 2007; Phillip McDonald [a]ttempted to photograph [L.D.] (5/11/92) in a state of nudity while she was sleeping.
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> Count[s] #5-8 [Gross Sexual Imposition]: In between 2001 and 2007; Phillip McDonald had sexual contact with [A.A.], [M.T.], and [D.T.] (Age 17), by touching each of their breasts while they were asleep and could not resist or consent.
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> Count[s] #9-12 [Voyeurism]: In between 2001 and 2007; Phillip McDonald [p]ulled down the clothes and photographed minor females for the purpose of sexually gratifying himself while the victims were spending the night

[1] Written Plea of No Contest filed February 13, 2008.

> at his house, were asleep and unaware of the invasion of privacy."[2]

The defendant's discussion with the writer of the presentence report was summarized as follows:

> "The defendant verbally reported to this officer that he had two victims in this case. He reports one was his sister-in-law, [M.T.], and the other was her best friend, [A.A.]. The defendant reports the night of the offense the girls were spending the night at his home and he was drunk on Jagermeister shots. Mr. McDonald reports while [M.T] and [A.A.] were sleeping, he pulled their T-shirts down and took one picture of [A.A.'s] breasts, and two pictures of [M.T.'s] breasts. The defendant reports he never took pictures of his sister-in-law [D.T.]. The defendant reports she took naked pictures of herself and put them on her mother's computer. The defendant reports he erased the pictures of [D.T.], and he does not how the images were still on the computer. The defendant denies attempting to photograph [L.D.]. He reports prior to being married to his wife, [L.D.'s] mother had a crush on him, and he was not interested in her. His wife and [L.D.'s] mother are friends and he believes maybe this is [L.D.'s] mother's way of getting back at him for not dating her.
>
> Mr. McDonald reported to this officer that he was told by the police and the prosecutor that by lifting the victims shirts to photograph their breasts that he must have touched their breasts. He denies that he touched or fondled any of the victim's breasts. In addition, the defendant denied that he sexually gratified/ masturbated himself after photographing/viewing the minor female victims. The defendant denied being sexually attracted to children or minors and could not give this officer an explanation as to why he was taking pictures of minor females[']breasts."[3]

The court issued a written decision on March 20, 2008 finding that the statement of circumstances provided by the state was sufficient to support convictions on all of the above counts. On April 4, 2008, the defendant was sentenced to a total prison term of

[2] State's Exhibit 1 at pg. 3.
[3] Id.

nine years and eight months.[4] At that sentencing hearing, the defendant was classified as a Tier II sex offender under the Adam Walsh Act, the court informed him of his duties to register as a sex offender, and the defendant signed a form acknowledging that those rights had been explained to him.[5] The defendant then appealed his case to the Twelfth District Court of Appeals and that court affirmed the defendant's convictions.

On April 9, 2012, McDonald filed a petition for declaratory judgment moving the court "to declare the Petitioner's rights, status and other legal relations under Chapter 2950 of the Ohio Revised Code, 2007 Am.Sub.S.B. 10 * * *, and under State v. Williams, No. 2009-0088, which was decided by the Court on July 13, 2011."[6] In a decision rendered on October 19, 2012, the court found that the defendant's classification as a Tier II sex offender was improper because the offenses were committed prior to the enactment of the Adam Walsh Act and ordered that the defendant be reclassified under Megan's Law.[7]

At the evidentiary hearing on this matter, the defendant presented the testimony of Robelyn Marlow, Ph.D., a psychologist with the Sex Offender Risk Reduction Center at the Madison Correctional Institution. Dr. Marlow performed a Static-99 evaluation of the defendant on April 23, 2008.[8] A Static-99 is an actuarial evaluation that attempts to assess the risk of recidivism for sex offenders. The defendant's score on the Static-99 was a 2, which placed him in the medium-low range for a risk to reoffend.[9] No

[4] Judgment Entry Sentencing Defendant to Prison filed April 4, 2008 and Amended Judgment Entry Sentencing Defendant to Prison filed May 21, 2008.
[5] Id. and Explanation of Duties to Register filed April 4, 2008.
[6] Petition for Declaratory Judgment by Phillip Hall McDonald.
[7] Decision/Entry, filed October 19, 2012, pg. 8.
[8] Defendant's Exhibit A.
[9] Id.

comprehensive assessment was done on the defendant because such assessments are generally only performed on inmates who score a 4 or higher on the Static-99.

Dr. Marlow noted during her testimony that she was unaware of the defendant's convictions for voyeurism when she completed the Static-99, and she noted that the facts underlying the voyeurism convictions may or may not have changed the defendant's Static-99 score. The court notes that it does not appear likely that the defendant's score would have changed, as the facts underlying the voyeurism convictions would not appear to warrant any additional points under the Static-99 risk factors.

The state also asked Dr. Marlow about a letter written by the defendant while he was housed in the Clermont County Jail in February 2013 to one of the victims in the present case, D.T..[10] The letter is sexually explicit in parts, although the letter does not mention the defendant wanting to have sex with D.T. in particular. The court would note that statements made in the first two pages of the letter suggest that there has been ongoing correspondence back and forth between the defendant and D.T., who was seventeen at the time the indictment was filed and is now no longer a minor. Dr. Marlow testified that, had this letter been written and discovered while the defendant was at Madison Correctional Institution, she would have spoken to the defendant about the situation to determine if a full assessment was warranted.

[10] State's Exhibit 2.

LEGAL ANALYSIS

The court noted in its previous decision issued in October 2012 that this case involved a plea of no contest and the indictment listed the dates of the offenses as "on or about 2001 through 2007[.]" As such, the court notified counsel that one issue that would need to be addressed at the classification hearing was which prior version of the sex offender law applied to the defendant. Neither counsel addressed this issue at the evidentiary hearing. The court finds that the most equitable solution to this issue is to use the version of Megan's Law that was in effect in 2007, which is the final year of the time span in the indictment and the year that the defendant was indicted.

A "sexual predator," as it is defined in relevant part to the case at bar, is a person who "has been convicted of or pleaded guilty to committing a sexually oriented offense that is not a registration-exempt sexually oriented offense and is likely to engage in the future in one or more sexually oriented offenses."[11]

The offenses of which the defendant was convicted (illegal use of minor in nudity-oriented material or performance, gross sexual imposition, and voyeurism), are sexually oriented offenses.[12]

Pursuant to former R.C. 2950.09(B)(1)(a) [eff. January 2, 2007]:

> "The judge who is to impose sentence on a person who is convicted of or pleads guilty to a sexually oriented offense that is not a registration-exempt sexually oriented offense shall conduct a hearing to determine whether the offender is a sexual predator if any of the following circumstances apply:
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> (i) Regardless of when the sexually oriented offense was committed, the offender is to be sentenced on or after

[11] R.C. 2950.01(E), eff. January 2, 2007.
[12] R.C. 2950.01(D)(1)(a); (D)(1)(b)(i); and (D)(1)(b)(iv), eff. January 2, 2007.

> January 1, 1997, for a sexually oriented offense that is not a registration-exempt sexually oriented offense and that is not a sexually violent offense."

Former R.C. 2950.09(B)(3), eff. January 2, 2007, provided in relevant part as follows:

> "In making a determination * * * as to whether an offender or delinquent child is a sexual predator, the judge shall consider all relevant factors, including, but not limited to, all of the following:
>
> (a) The offender's or delinquent child's age;
>
> (b) The offender's or delinquent child's prior criminal or delinquency record regarding all offenses, including, but not limited to, all sexual offenses;
>
> (c) The age of the victim of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made;
>
> (d) Whether the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made involved multiple victims;
>
> (e) Whether the offender or delinquent child used drugs or alcohol to impair the victim of the sexually oriented offense or to prevent the victim from resisting;
>
> (f) If the offender or delinquent child previously has been convicted of or pleaded guilty to, or been adjudicated a delinquent child for committing an act that if committed by an adult would be, a criminal offense, whether the offender or delinquent child completed any sentence or dispositional order imposed for the prior offense or act and, if the prior offense or act was a sex offense or a sexually oriented offense, whether the offender or delinquent child participated in available programs for sexual offenders;
>
> (g) Any mental illness or mental disability of the offender or delinquent child;
>
> (h) The nature of the offender's or delinquent child's sexual conduct, sexual contact, or interaction in a sexual context

with the victim of the sexually oriented offense and whether the sexual conduct, sexual contact, or interaction in a sexual context was part of a demonstrated pattern of abuse;

(i) Whether the offender or delinquent child, during the commission of the sexually oriented offense for which sentence is to be imposed or the order of disposition is to be made, displayed cruelty or made one or more threats of cruelty;

(j) Any additional behavioral characteristics that contribute to the offender's or delinquent child's conduct."

A court is under no obligation to "tally up" the R.C. § 2950.09(B)(3) factors, pro and con, and determine which group is larger.[13] "An offender could conceivably be classified as a sexual predator based on only one or two factors from R.C. § 2950.09(B)[(3)]."[14] "Courts must consider the particular facts of each case and look at the 'totality of the circumstances' rather than engage in a rote mathematical computation to determine a criminal defendant's sexual offender status."[15]

" * * * [T]he court shall determine by clear and convincing evidence whether the subject offender * * * is a sexual predator."[16]

"The standard of 'clear and convincing evidence' is defined as 'that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.' "[17]

[13] *State v. Mollohan* (Aug. 19, 1999), 4th Dist. No. 98-CA-13, 1999 WL 671824, at *8.
[14] Id.
[15] Id.
[16] R.C. § 2950.09(B)(4), eff. January 2, 2007.
[17] *State v. Schiebel* (1990), 55 Ohio St.3d 71, 74, 564 N.E.2d 54, 60, quoting *Cross v. Ledford* (1954), 161 Ohio St. 469, 120 N.E.2d 118, paragraph three of the syllabus.

"Sexual predator determination hearings are civil in nature."[18] The Rules of Evidence do not strictly apply to sexual predator determination hearings.[19] "Though the Rules of Evidence are not strictly in force at sexual-predator hearings, evidence presented at these hearings must have some indicia of reliability."[20] "In order to be reliable, there must be some reasonable probability that the evidence is true."[21]

"Although certainly even one sexually oriented offense is reprehensible and does great damage to the life of the victim, R.C. Chapter 2950 is not meant to punish a defendant, but instead, 'to protect the safety and general welfare of the people of this state.' "[22] "Thus, if we were to adjudicate all sexual offenders as sexual predators, we run the risk of 'being flooded with a number of persons who may or may not deserve to be classified as high-risk individuals, with the consequence of diluting both the purpose behind and the credibility of the law."[23]

Applying the 2950.09(B)(3) factors in the case at bar, the defendant was 37 years old at the time of sentencing and is now 42 years old. He had only a minor criminal record prior to the convictions in this case: two convictions for no driver license in 1995, a conviction for passing bad checks in 1997, and a conviction for driving under suspension in 2002.[24] None of these prior convictions were for sexually oriented offenses and the defendant was never sentenced to a term of incarceration in jail or prison for any of these offenses.

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[18] *State v. Cook* (1998), 83 Ohio St.3d 404, 422, 700 N.E.2d 570, 585.
[19] Id. at 425.
[20] *State v. Hurst* (April 10, 2000), 7th Dist. No. 97-CO-60, 2000 WL 459681, *2, citing *State v. Lee*, 128 Ohio App.3d 710, 716 N.E.2d 751 (Ohio App. 1st Dist., 1998).
[21] *Our Place, Inc. v. Ohio Liquor Control Comm.* (1992), 63 Ohio St.3d 570, 571, 589 N.E.2d 1303, 1305.
[22] *State v. Lee* (Sept. 13, 2001), 8th Dist. No. 78899, 2001 WL 1110299, at *5.
[23] Id., quoting *State v. Thompson*, 140 Ohio App.3d 638, 647, 748 N.E.2d 1144, 1151 (Ohio App. 8th Dist., 1999).
[24] State's Exhibit 1 at pg. 4.

There were four victims in the present case: (1) M.T., who was approximately 13 years of age; (2) A.A., who was also approximately 13 years of age; (3) L.D., who was born on May 11, 1992, and during the span of years in the indictment would have been nine to sixteen years of age; and (4) D.T., who was approximately seventeen years of age. As the precise dates of the offenses were never set forth and instead a six-year time span was indicated in the indictment, the court cannot determine exactly how old any of the victims were at the time the offenses were actually committed.

The defendant did not use drugs or alcohol to impair any of the victims. The defendant does not have any mental illness or mental disability.

The nature of the sexual contact between the defendant and the victims is set forth above and essentially consists of the defendant taking and attempting to take photographs of the victims' breasts while they were sleeping. The convictions for gross sexual imposition arose from the fact that the defendant pulled the victims' shirts up over their breasts while they were asleep to take the photographs and would have touched the victims in the process of doing so.

There was no demonstrated pattern of abuse in the present case. There is also no evidence that the defendant displayed cruelty during the commission of the offenses or made any threats of cruelty.

The court would note that, from the inception of this case to the present time, the defendant has shown very little remorse for his actions, as evidenced in part by his statement to the presentence investigator excerpted above. The letter to D.T., which contains sexually explicit language and discussion, is also a concern to the court. While the court recognizes that D.T. is no longer a minor, she was one of the GSI victims in

this case and the defendant has continued to contact her and included a graphic discussion of sex and sexual acts in the letter, although the discussion is not about the defendant having sex with D.T. herself. The presentence report indicates that D.T. is the defendant's sister-in-law.

The offenses in the case at bar were essentially offenses of opportunity and access. The defendant photographed, attempted to photograph, and/or touched the breasts of two of his minor female sisters-in-law (M.T. and D.T.) and their two friends (A.A. and L.D.) who were sleeping over at the house. The victims were asleep at the time of the offenses and the defendant knew that they were not in a state to resist or even be aware of his actions.

The question before the court is whether the state has demonstrated by clear and convincing evidence that the defendant is a sexual predator, which is a person who is likely to engage in the future in one or more sexually oriented offenses. The court finds that the state has met this burden.

The defendant had multiple minor victims in the present case. Furthermore, while he did not drug the victims or supply them with alcohol, he did commit these offenses when the victims were sleeping and unable to resist his actions.

The defendant has never fully accepted responsibility for his actions and it has always appeared to the court that he does not truly believe he did anything wrong. When the defendant is released from prison, and if he has any minor (or adult) females in his home, the court has no reason to believe that he will not commit the same type of offenses in the future. Two of the victims in the present case were the defendant's sisters-in-law and, while they were not related by blood, the defendant was willing to

overcome the taboo not only against engaging in sexual activity with a minor, but also the taboo against sexually victimizing one's own family members. In doing so, he victimized his minor sisters-in-law while they were spending the night in his home. Furthermore, the defendant has contacted one of those sisters-in-law (D.T.) via at least one letter, although the discussion in the letter suggests ongoing contact, and that letter graphically discusses sex and the defendant's desire to engage in sex when he is released from prison, with the defendant even noting "I don't guess it even matters who I f**k at this point, a stiff dick has no conscious (*sic*)."[25]

While the defendant's Static-99 score placed him in the medium-low range to reoffend, this actuarial tool is somewhat simplistic. Furthermore, Dr. Marlow, upon being made aware of the letter to D.T., stated that she would want to speak to the defendant about the letter to decide if a full assessment was now needed.

Based on the totality of the evidence before the court and the facts and circumstances of the case at bar, the court finds that the state has shown by clear and convincing evidence that the defendant is likely to engage in the future in one or more sexually oriented offenses. As such, the defendant shall be classified under Megan's Law as a sexual predator.

CONCLUSION

The defendant Phillip Hall McDonald shall be classified as a sexual predator. A hearing shall be held on Tuesday, June 18, 2013 at 8:30 a.m., at which time the court

[25] State's Exhibit 2.

will inform the defendant of his duties to register pursuant to his classification as a sexual predator.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 13th day of June 2013 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride