OAH 71-1100-36689

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF CORRECTIONS

In the Matter of the Risk Level Determination of Colten C. Camacho	**ORDER ON MOTIONS FOR SUMMARY DISPOSITION**

This matter came before Administrative Law Judge Jessica A. Palmer-Denig for a motion hearing on March 26, 2020, upon the parties' cross motions for summary disposition. The record on the motions closed on that date.

Noah Cashman, Assistant Attorney General, represents the End-of-Confinement Review Committee (ECRC). Jill Oleisky, Oleisky & Oleisky, P.A., represents Colten C. Camacho (Petitioner).

Based on the record and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

1. Petitioner's Motion for Summary Disposition is **DENIED.**

2. The ECRC's Motion for Summary Disposition is **GRANTED**.

3. Petitioner's appeal is **DISMISSED**.

4. Petitioner's assignment of Risk Level 3 is **AFFIRMED**.

Dated: June 1, 2020

JESSICA A. PALMER-DENIG
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 244.052, subd. 6(c) (2018), this Order is the final decision in this case. Any person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63-.69 (2018).

MEMORANDUM

I. Introduction

Petitioner was assigned a Risk Level 3 by the ECRC under the Minnesota Community Notification Act (Act),[1] and appealed its determination. Both parties filed motions for summary disposition. The ECRC contends that no error exists in its determination, as a matter of law, and that Petitioner's risk level assignment should be affirmed. Petitioner contends that the ECRC erred and that he should be assigned a Risk Level 2. The Administrative Law Judge determines that no material disputes of fact exist, and that the ECRC is entitled to judgment as a matter of law. Therefore, the Administrative Law Judge denies Petitioner's motion, grants the ECRC's motion, and affirms Petitioner's assignment of Risk Level 3.

II. Minnesota Community Notification Act

Under Minnesota law, individuals convicted of certain criminal offenses are considered "predatory offenders," who are subject to a community notification process through which law enforcement agencies in the area where the offender resides, expects to reside, is employed, or is regularly found, disclose information "relevant and necessary to protect the public and to counteract the offender's dangerousness."[2] The extent of the disclosure must relate "to the level of danger posed by the offender, to the offender's pattern of offending behavior, and to the need of community members for information to enhance their individual and collective safety."[3]

The Act establishes a tiered system of three risk levels to which predatory offenders are assigned.[4] Each risk level correlates to a different degree of community notification.[5] If an offender is assigned Risk Level 1, notification of the offender's residence may be given to local law enforcement agencies as well as victims and witnesses related to the offender's criminal history.[6] Risk Level 2 permits additional notice to individuals and groups, such as schools and daycares, likely to be victimized by the offender.[7] Risk Level 3 permits notice to be given to any member of the community whom the offender is likely to encounter unless law enforcement determines public safety might be compromised or more limited disclosure is necessary to protect the identity of the offender's victim(s).[8]

Every predatory offender confined in a Minnesota state correctional or treatment facility must be evaluated by the ECRC at the facility prior to release.[9] In connection with

[1] Minn. Stat. § 244.052 (2018).
[2] *Id.*, subds. 1(5), 4(a); *see also* Minn. Stat. § 243.166, subd. 1b (2018).
[3] Minn. Stat. §, 244.052, subd. 4(a).
[4] *See id.*, subd. 4(b).
[5] *See id.*
[6] *Id.*, subd. 4(b)(1).
[7] *Id.*, subd. 4(b)(2).
[8] *Id.*, subd. 4(b)(3).
[9] *Id.*, subd. 3.

that evaluation, the ECRC assesses the public risk posed by the offender and determines the risk level to be assigned.[10]

In doing so, the ECRC must consider six statutory risk factors.[11] The risk factors are: (1) the seriousness of the offense should the offender reoffend; (2) the offender's prior offense history; (3) the offender's characteristics; (4) the availability of community supports to the offender; (5) whether the offender has indicated or credible evidence in the record indicates that he will reoffend if released to the community; and (6) whether the offender demonstrates a physical condition that minimizes the risk of re-offense.[12] This list is not exclusive and other factors may be considered.[13]

In addition, each offender is scored using a risk assessment tool, and the score produced translates into a presumptive risk level.[14] The ECRC has discretion to deviate from the presumptive risk level by applying mitigating factors that can lead to a downward departure, or special concerns that may result in an upward departure.[15]

After considering the offender's score on the risk assessment tool, any mitigating factors or special concerns, and the statutory risk factors, the ECRC assigns the offender a final risk level. The ECRC then must prepare a report that "specifies the risk level to which the offender has been assigned and the reasons underlying the committee's risk assessment decision."[16]

A predatory offender assigned Risk Level 2 or Risk Level 3 may seek administrative review of the ECRC's determination.[17] In such a review, the Administrative Law Judge considers whether the ECRC's risk assessment determination was erroneous and, based on this decision, shall either uphold or modify the review committee's determination."[18] The decision of the Administrative Law Judge is final and subject to appellate judicial review.[19]

A risk level assignment applies for a minimum of ten years.[20] During that time, the level of notice corresponding to the assigned risk level must be given every time the

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[10] *Id.*
[11] *Id.*, subd. 3(g).
[12] *Id.*
[13] *Id.*
[14] *Id.*, subd. 2.
[15] MINNESOTA DEPARTMENT OF CORRECTIONS POLICY NO. 205.220 (Apr. 16, 2013, rev. Apr. 28, 2020); *see also In re the Risk Level Determination of R.B.P.*, 640 N.W.2d 351, 356 (Minn. Ct. App. 2002). At the time Petitioner underwent assessment by the ECRC, the policy publicly provided by the Department of Corrections (DOC) was related to the Minnesota Sex Offender Screening Tool (Mn-SOST)-3.1.2, rather than the MnSOST-4, which was used to score Petitioner. Petitioner does not challenge the ECRC's use of the MnSOST-4 in assessing his level of risk. *See* Statement of Petitioner's Counsel, Motion Hearing Digital Recording (Mar. 26, 2020) (on file with the Minn. Office Admin. Hearings).
[16] Minn. Stat. § 244.052, subd. 3(f).
[17] *Id.*, subd. 6(a).
[18] *Id.*, subd. 6(c).
[19] Minn. Stat. §§ 14.63, 244.052, subd. 6(c).
[20] Minn. Stat. § 244.052, subd. 4(f); *see also* Minn. Stat. § 243.166, subd. 6(a) (2018).

offender changes residence.[21] An offender may seek a reassessment of the assigned risk level after three years have passed and may renew the request once every two years following subsequent denials.[22]

III. Petitioner's Background

Petitioner is a 24-year-old man.[23] He has been convicted of six predatory offenses for engaging in unlawful sexual conduct with teenaged girls. Additional charges against Petitioner, for sexual offenses and other crimes, have been dismissed. As of the time of the hearing in this matter, Petitioner also was the subject of pending charges.

A. Predatory Offense Convictions

In 2015, Petitioner had sexual intercourse several times with a 16-year-old girl, paying her each time.[24] In May 2016, law enforcement in New Ulm, Minnesota, received reports from reporters that a juvenile female had disclosed to them that she had been sexually exploited.[25] The police followed up with the victim, identified as JV, which stands for "juvenile victim," who reported that she had engaged in sex for money with Petitioner.[26] JV told police that she believed she first met Petitioner when she was in seventh grade, and she described him as a "creeper" and "weird," noting that he would buy her cigarettes.[27] JV believed that Petitioner was either a police officer or security officer.[28]

JV indicated that she had sexual intercourse with Petitioner to obtain money to provide to her boyfriend, who was being held in the Brown County Jail.[29] She also needed funds to pay someone to care for her boyfriend's dog and to buy dog food.[30] JV described having sex with Petitioner the first time at his residence, for which they agreed he would pay her $250.[31] She told him she needed to be drunk first, so he supplied her with four or five beers.[32] After consuming alcohol, JV took off her clothing and lay on Petitioner's bed.[33] Petitioner undressed, got on top of JV, and inserted his penis in her vagina for about one minute, and then ejaculated into her vagina.[34] Petitioner had not used a condom, so he drove her to a pharmacy, where he purchased a "Plan B pill," which he provided for JV to take.[35] On another occasion, Petitioner and JV engaged in sexual intercourse at his home, for which he agreed to give her a $50 phone card and $60 in

[21] *See* Minn. Stat. § 244.052, subd. 4(f).
[22] *Id*., subd. 3(i).
[23] Ex. 1 at 4 (ECRC Risk Assessment Report).
[24] Ex. 1 at 133-37 (Brown County Criminal Complaint).
[25] *Id.* at 135.
[26] *Id.*
[27] *Id.* at 136.
[28] *Id.* at 135.
[29] *Id.* at 136.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*

cash.[36] Finally, Petitioner and JV engaged in a third incident of sexual intercourse, for which he paid her $100.[37] Petitioner wanted to engage in oral and anal sex with JV, but JV refused to do so.[38] Once, Petitioner took JV to the Mall of America and purchased her clothing and food, after which he wanted to pull over his car and have sex with JV.[39] JV reported that she knew other girls who had also engaged in sexual encounters with Petitioner for money.[40]

Petitioner was charged with three counts of engaging in prostitution with a 16- to 17-year-old.[41] He was convicted of two counts and the third count was dismissed.[42] Petitioner was sentenced to serve 12 months and one day for one count, and 13 months for the other count.[43]

In late 2015 and early 2016, Petitioner engaged in sexual contact with another 16-year-old girl, also identified as JV.[44] In that case, JV reported that one sexual incident occurred when she was riding in Petitioner's car and Petitioner paid her $20 to allow him to fondle her breasts.[45] In another incident, JV and Petitioner were in his room at his residence and Petitioner paid JV $40 to allow him to place his penis between her breasts, resulting in Petitioner's ejaculation.[46] On two occasions, JV performed oral sex on Petitioner in his car, for which Petitioner paid JV $60.[47] In the first of these instances, Petitioner ejaculated into JV's mouth, but in the second incident, JV did not allow him to do so and Petitioner was "upset."[48]

The final incident occurred in Petitioner's garage.[49] JV had agreed to engage in sexual intercourse with Petitioner, but after she performed fellatio on Petitioner, she told him that she did not wish to have intercourse.[50] They walked over to Petitioner's vehicle, and Petitioner said he "wanted to see her ass."[51] JV leaned over on the car and Petitioner "slapped [her] ass a couple of times."[52] Petitioner then placed his arm over her forearm, putting pressure on her arm, and asked: "Are you gonna let me put it in?"[53] JV was scared because Petitioner was using force to hold her and she did not believe she had a choice.[54] Petitioner placed his penis in JV's vagina and when she told him to stop, he only paused

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[36] *Id.*
[37] *Id.* at 137.
[38] *Id.*
[39] *Id.*
[40] *Id.* at 135, 137.
[41] *Id* at 133-34.
[42] Ex. 1 at 38 (Order Warrant of Commitment).
[43] *Id.* at 39-40.
[44] Ex. 1 at 96 (Brown County Criminal Complaint), 35 (Order Warrant of Commitment).
[45] Ex. 1 at 98 (Brown County Criminal Complaint).
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*

and said: "Just let me cum."[55] Then Petitioner grabbed her hips and "went really hard," until he ejaculated into her vagina.[56] While he did so, JV bit the top of her shirt to keep herself from crying or screaming.[57] Petitioner did not use a condom.[58] That night Petitioner paid JV $60, and three weeks later, he paid her the remaining $20 he owed her for the sexual intercourse.[59]

Petitioner was charged with one count of criminal sexual conduct in the first degree and five counts of engaging in prostitution with an individual who is 16 to 17 years old.[60] Petitioner entered an *Alford* plea, resulting in a conviction for one count of engaging in prostitution with a 16- to 17-year-old victim.[61] He was sentenced to 15 months in prison for this offense.[62]

Three more convictions arise from an incident that occurred between November 2016 and January 2017, involving three juvenile females, identified as JV1, JV2, and JV3.[63] All three girls were 15- and 16-year-old high school students.[64] JV1 and JV2 had engaged in messaging with Petitioner via Snapchat, and arranged to meet Petitioner at a Walgreens parking lot in New Ulm, Minnesota.[65] JV3 had never had any contact with Petitioner before the incident; she met him for the first time the night the incident occurred.[66]

The three girls got into Petitioner's car, which was described as an "undercover cop car," because the rear doors did not open from the inside.[67] Initially, Petitioner drove them to his house to show them his dog.[68] When they got back into the car, Petitioner claimed he could smell marijuana on the victims, and he began to search them.[69] JV2 refused to let Petitioner touch her, so he handcuffed her to a seat in the car with a pair of handcuffs he took from the glovebox.[70] Petitioner kept the handcuff key and JV2 "was not able to free herself, and she was terrified."[71]

Petitioner drove the girls out of town on a gravel road to a gun range, which he told them was a place where "cops go to practice shooting."[72] The girls did not have cell phone

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[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 99.
[59] *Id.*
[60] *Id.* at 96-97.
[61] Ex. 1 at 49, 53 (Adult Felony Pre-Sentence Investigation).
[62] Ex. 1 at 36 (Order Warrant of Commitment).
[63] Ex. 1 at 118-19 (Brown County Criminal Complaint).
[64] *Id.* at 119-20.
[65] *Id.* at 119.).
[66] *Id.* at 123.
[67] *Id.* at 119-20.
[68] *Id.* at 119.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*

service in this location.[73] Petitioner removed a handgun from his glovebox and showed it to them, telling them he had bullets, and that they could shoot it.[74] JV2 and JV3 agreed to shoot the gun "because they believed if they didn't [Petitioner] would hold them hostage."[75] JV2 stated that "they shot the handgun so there would be less bullets."[76] When they finished shooting, Petitioner put the gun back in the glove compartment.[77]

When Petitioner and the three victims returned to his car, he joined JV2 and JV3 in the back seat.[78] Petitioner told JV2 and JV3 to perform oral sex on him.[79] When they refused, he offered them money and alcohol.[80] When they continued to refuse, Petitioner grabbed JV2 and JV3 by the head and forced them to alternate performing oral sex on him.[81] After approximately 10 minutes, Petitioner pulled JV1 by her ponytail from the front to the back of the car and forced her to perform oral sex on him as well.[82] Petitioner eventually ejaculated into JV2's mouth and forced her to swallow his semen.[83]

He offered each girl $200 to engage in vaginal intercourse, but they all refused.[84] Petitioner then made them remove their shirts and bras, fondled their breasts, and took photographs of them.[85] Afterwards, all of the victims cried as he drove them back to JV2's vehicle, and Petitioner warned them not to tell anyone or he would "get his gun out."[86] Petitioner eventually brought the victims back to the Walgreens parking lot.[87]JV2 later told an investigator that "it was the scariest event of her life."[88] Petitioner later tried to contact JV2 via social media.[89] JV2 was afraid because Petitioner knew where JV2 lived.[90] He also contacted JV1 and offered her money for nude photographs, offering her more money each time he contacted her, and also offered to pay her to have sex with Petitioner and his friends.[91]

JV1 and JV2 came forward with information about this incident when they saw Petitioner listed on a jail roster and learned the offense for which he had been arrested.[92] All three girls were interviewed by law enforcement.[93] In April 2017, Petitioner was

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[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.* at 119, 121.
[77] *Id.* at 121.
[78] *Id.* at 119-20.
[79] *Id.* at 120.
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.* at 120-21.
[84] *Id.* at 121.
[85] *Id.*
[86] *Id.* at 123.
[87] *Id.* at 121.
[88] *Id.*
[89] *Id.*
[90] *Id.* at 120.
[91] *Id.* at 120, 123.
[92] *Id.* at 119.
[93] *Id.* at 119-23.

charged in Brown County with three counts of first degree criminal sexual conduct, three counts of second degree criminal sexual conduct, and three counts of prostitution based upon an agreement to hire an individual who is 16-17 years old.[94] On February 12, 2019, Petitioner entered an *Alford* plea and was convicted of three charged counts of prostitution.[95] He was sentenced to 17, 19, and 21 months in prison for these three offenses, though one count would be dismissed if Petitioner complied with all terms of probation.[96]

The convictions in these three cases resulted from an agreement in which Petitioner pleaded guilty to six counts of prostitution offenses, and the other charges in these complaints, as well as other separate pending charges, were dismissed.[97] In a presentence investigation, an agent expressed concern that Petitioner had sought out vulnerable victims and used working as a security guard and his possession of firearms to exert power over them.[98] The agent was also concerned with the number of victims Petitioner had amassed.[99] Prior to being sentenced, Petitioner wrote that he had "poor judgement" and he "wish[ed] to take it all back," but he also admitted he made those statements to make himself appear in a better light to the court when he believed that he might be given a longer sentence.[100]

B. Dismissed Charges

Numerous charges brought against Petitioner have been dismissed.[101] The allegations contained in the criminal complaints related to these charges are described below.

In April 2017, police conducted a vehicle stop of Petitioner after receiving a report that he was holding a woman against her will in his car.[102] Police found a female victim in the car with him, and she was crying and shaken.[103] The victim reported that, in the past, she had sex with Petitioner for money, and that he also supplied her with alcohol and pills.[104] She stated Petitioner would "get her high and drunk and then have sex with her."[105] She and her brother had stolen cigarettes from Petitioner the year before; she said after that he threatened to kill her and her family and she knew that he had guns.[106] That evening, Petitioner contacted the victim and told her that he had pills and alcohol for

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[94] *Id.* at 116-18.
[95] Ex. 1 at 27-28 (Criminal Record Report), 31-33 (Amended Order Warrant of Commitment), 42-43 (Adult Felony Pre-Sentence Investigation).
[96] Ex. 1 at 31-33 (Amended Order Warrant of Commitment).
[97] *See* Ex. 1 at 43 (Adult Felony Pre-Sentence Investigation) (describing the terms of Petitioner's plea deal and dismissal of charges).
[98] *Id.* at 46.
[99] *Id.*
[100] *Id.*
[101] *See* Ex. 1 at 26-29 (Criminal Record Report), 43 (Adult Felony Pre-Sentence Investigation).
[102] Ex. 1 at 155-57 (Brown County Criminal Complaint).
[103] *Id.* at 157.
[104] *Id.* at 158.
[105] *Id.*
[106] *Id.*

her.[107] She went outside the home she shared with her husband to meet Petitioner.[108] At first she spoke with him through the window, but when he told her to get inside the car, she did so.[109] She told him that she wanted out of the car, but he refused to stop, telling her that he would give her alcohol and intended to have sex with her.[110] He took her phone and forced her to unlock it, after which he responded to messages sent to her.[111] He tried to touch her breast, and he had a handgun in the center console of the car.[112] He also grabbed her vagina and forced her to put her hand on his penis.[113] Petitioner stopped at Kwik Trip, and while he was inside, the victim sent messages to her husband and father, and her husband contacted the police.[114] She was afraid to leave the car and seek help because of Petitioner's past threats, and also because he forces her to send him nude pictures of herself, and she feared what he might do with the pictures.[115] The police noted that the zipper on Petitioner's pants was down, and they found a 9 millimeter handgun and alcohol in the car.[116] Petitioner was charged with second-degree criminal sexual conduct, fourth-degree criminal sexual conduct, fifth-degree criminal sexual conduct, and false imprisonment-intentional restraint.[117]

In April 2017, a juvenile female contacted New Ulm police to report that between 2013 and 2015, when the victim was 14 or 15 years old, she had sexual contact with Petitioner.[118] She indicated that Petitioner had identified himself as a police officer working for New Ulm, and that he drove a black Ford Crown Victoria.[119] She described an incident in which Petitioner took her to his home to show her his guns.[120] Petitioner drank beer and gave beer to the victim.[121] The two lay on Petitioner's bed looking at pictures on his phone, including a picture that was sexual in nature.[122] Petitioner told her they should look at more such photographs, and a short time later, Petitioner grabbed her breast and squeezed it hard enough to cause her pain and discomfort.[123] She told him to stop, but he continued to try to touch her breasts, and she feared she would be sexually assaulted.[124] She told him to take her home, but Petitioner said that he could not because he had had beer to drink.[125] Eventually he did drive her home.[126] Afterwards, she blocked him from contacting her via FaceBook and changed her phone number twice, but he

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[107] *Id.*
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.* at 156-58.
[115] *Id.* at 158.
[116] *Id.* at 159.
[117] *Id.* at 153-54.
[118] Ex. 1 at 105-06 (Brown County Criminal Complaint).
[119] *Id.* at 106.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Id.*

continued to find ways to contact her.[127] A friend sent her a picture that Petitioner had taken depicting a gun with the caption: "I'm sick of [victim's name]."[128] She believed he was obsessed with her, and she was afraid.[129] Petitioner was charged with one count of second-degree criminal sexual conduct causing personal injury with the use of force or coercion; one count of felony fourth-degree criminal sexual conduct, one count of gross misdemeanor fifth-degree criminal sexual conduct, and one count of felony stalking, for engaging in a pattern of stalking conduct.[130]

Between May and July 2018, Petitioner was alleged to have contacted various media outlets to spread misinformation about a peace officer, including false allegations that the peace officer was under investigation by the Bureau of Criminal Apprehension and the Board of Peace Officer Standards and Training, and that the law enforcement officer had hired a prostitute to perform a sex act.[131] It was also alleged that Petitioner once drove by the victim and stuck his head out of the window, yelling: "Does your fucking wife know about you blowing your load all over the hooker's tits from the hand job you got?"[132] The complaint notes that the victim was an investigator in many cases where Petitioner was charged with felonies in Blue Earth and Brown counties on allegations of criminal sexual conduct and solicitation of underage prostitutes.[133] In November 2018, Petitioner was charged in Brown County with one count of gross misdemeanor stalking of a peace officer.[134]

In June 2018, a 17-year-old girl reported to police in New Ulm that Petitioner contacted her via Shapchat and offered her $500 to engage in sexual activity.[135] Petitioner was barred from contacting the girl by a harassment restraining order issued to her mother.[136] In July 2018, Petitioner was charged with a prostitution offense for hiring or agreeing to hire a 16- to 17-year-old, and two counts of violations of a harassment restraining order.[137]

In February 2019, New Ulm police executed a search warrant at Petitioner's residence in response to a tip that Petitioner was attempting to purchase body armor, which the police believed Petitioner was barred from possessing due to his criminal charges.[138] In Petitioner's room, police found multiple military grade helmets, police style body armor, and military style body vest along with an air soft style long gun and magazines for a rifle.[139] Police found additional items in the basement, including in a room that had been Petitioner's, identifying more military grade helmets, shotgun ammunition,

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[127] *Id.*
[128] *Id.*
[129] *Id.*
[130] *Id.* at 104-05.
[131] Ex. 1 at 81-82 (Brown County Criminal Complaint).
[132] *Id.* at 82.
[133] *Id.*
[134] *Id.* at 81.
[135] Ex. 1 at 89 (Brown County Criminal Complaint).
[136] *Id.* at 90.
[137] *Id.* at 87-88.
[138] Ex. 1 at 75 (Brown County Criminal Complaint),
[139] *Id.*

one hand gun style bullet, and a tension style switchblade.[140] Petitioner was charged with two counts of gross misdemeanor felon-in-possession offenses, related to his possession of ammunition.[141]

C. Unresolved Charges

In April 2017, a female victim reported that she had sexual contact with Petitioner two years before, when she was 15 years old.[142] The victim reported that she contacted Petitioner between 10:30 p.m. and 11:00 p.m., to get a ride from Mankato to Albert Lea to meet with her boyfriend.[143] Petitioner agreed to drive her and picked her up at her home.[144] As Petitioner and the victim drove away from Mankato, Petitioner told the victim that "he needed 'road head' (oral sex) to continue to drive."[145] The victim performed oral sex on Petitioner while he drove.[146] Petitioner eventually pulled over to the side of the road and "masturbated to ejaculation."[147] Afterwards, Petitioner drove the victim to Albert Lea, where the victim met with her boyfriend and the Albert Lea Police Department.[148] The police department in Albert Lea confirmed that there was a call for service involving the victim and a witness on June 6, 2015.[149]

In May 2017, Petitioner was charged in Blue Earth County with one count of felony third-degree criminal sexual conduct, one count of engaging in prostitution, and one count of hiring a prostitute with a victim between the ages of 13 and 15 years old.[150] As of the date of the motion hearing in this case, these charges remained pending and a jury trial was scheduled to begin on April 29, 2020.[151] The record does not reflect whether the trial was held or the outcome of that matter.

IV. Procedural History

Petitioner was incarcerated at the Minnesota Correctional Facility in Faribault, Minnesota (MCF-Faribault), and was scheduled for release on April 13, 2020.[152] In preparation for Petitioner's release, Shelley Leutschaft, Ph.D., a licensed psychologist with the DOC, prepared a risk assessment recommendation for Petitioner.[153]

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[140] *Id.*
[141] *Id.* at 74.
[142] Ex. 1 at 111 (Blue Earth County Criminal Complaint).
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*
[150] *Id.* at 109-10.
[151] Ex. 1 at 186 (Register of Actions).
[152] *See* Ex. 1 at 4 (ECRC Risk Assessment Report).
[153] Ex. 1 at 11 (ECRC Risk Assessment Recommendation); *see also* Ex. 5 (Dr. Leutschaft's curriculum vitae).

In preparing the recommendation, Dr. Leutschaft scored Petitioner using the MnSOST-4.0.[154] According to the risk assessment tool, Petitioner's predicted probability of sexual recidivism is 3.83%, placing Petitioner in the presumptive Risk Level 2 category.[155] Petitioner's six predatory offense convictions, all felonies, factored into his score, and he was scored as having a stranger victim.[156]

Dr. Leutschaft also considered the statutory risk factors. In considering the potential dangerousness of reoffense, Dr. Leutschaft noted that Petitioner had used real or implied threats of violence against his victims, presenting himself as a law enforcement officer, searching them, and using handcuffs.[157] She stated that he did not have an opportunity to participate in sex offender treatment due to the short time he was incarcerated.[158] She further noted that he did not have any physical conditions that would reduce his risk of re-offense.[159]

Though she noted his MnSOST-4 score indicated a presumptive assignment to Risk Level 2, Dr. Leutschaft recommended that Petitioner be assigned Risk Level 3 based on application of three special concerns.[160] Dr. Leutschaft applied Special Concern 2 which may be used when an offender has a history of prior supervision failures, or engages in high risk grooming-type behaviors or other behaviors suggesting an increased potential to reoffend.[161] Dr. Leutschaft also applied Special Concern 4, which addresses predatory offense behavior such as stalking, abducting a victim, incapacitating a victim, or forcing a victim to engage in demeaning behaviors.[162] Finally, Dr. Leutschaft also applied Special Concern 5, which may be applied when the nature of an offender's victim pool suggests a need for broader public notification, such as when the offender has victims in multiple age ranges or stranger victims, or when the notification might be a significant deterrent factor in the offender's community.[163]

In applying these special concerns, Dr. Leutschaft referenced Petitioner's pattern of sexual offending, which included presenting himself as being in law enforcement, driving a police-like vehicle with rear doors that do not open from the inside, offending against minors, whom he befriended and contacted via social media platforms, and offering or paying victims money for sexual encounters.[164] Dr. Leutschaft also noted that

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[154] *See* Ex. 1 at 20 (MnSOST-4 scoring sheet).
[155] *See id.*; Ex. 2 at 4 (MnSOST-4 Coding Rules).
[156] Ex. 1 at 20 (Mn-SOST 4 Scoring Sheet).
[157] Ex. 1 at 14 (ECRC Risk Assessment Recommendation).
[158] *Id.* at 17.
[159] *Id.* at 18.
[160] *Id.* at 18-19.
[161] *Id.* at 19; Ex. 3 at 1 (Special Concerns for the MnSOST-4.0).
[162] Ex. 1 at 19 (ECRC Risk Assessment Recommendation); Ex. 3 at 1 (Special Concerns for the MnSOST-4.0).
[163] Ex. 1 at 19 (ECRC Risk Assessment Recommendation); Ex. 3 at 1 (Special Concerns for the MnSOST-4.0).
[164] Ex. 1 at 18 (ECRC Risk Assessment Recommendation).

victims reported that he showed victims guns or had firearms present during sexual assaults.[165]

The ECRC convened on January 13, 2020, to address Petitioner's risk level assignment.[166] Petitioner attended the meeting, with legal counsel participating, and was heard by the committee prior to their vote.[167] Petitioner disputed the accuracy of the ECRC recommendation, claiming that several of his alleged victims had recanted their statements, but that this information was not in the record.[168] Petitioner also stated that he entered *Alford* pleas and maintains his innocence.[169] Petitioner's attorney disputed the allegations regarding guns, stating that nothing in Petitioner's history indicated that he was violent with these guns.[170] The attorney argued that the guns and other weaponry found at Petitioner's home were military collections, some of which were owned by Petitioner's parents.[171] The attorney urged the ECRC to assign Petitioner to Risk Level 2.[172]

Petitioner asked questions about Special Concern 2, as it relates to a history of supervision failures.[173] Dr. Leutschaft clarified that Special Concern 2 does not apply only to offenders with supervision failures.[174] She explained that she applied it in Petitioner's case because victims reported that Petitioner presented himself as a security officer or law enforcement officer.[175] Dr. Leutschaft noted that, from the victims' perspective, Petitioner was in a position of authority and that the victims were to comply with Petitioner's requests.[176] Petitioner denied that he told people that he worked in law enforcement, but admitted that it was known in the community.[177] He stated that he worked for the City of Minneapolis as a patrol officer in the reserve division, as well as working as an armed security guard at the time of the incidents.[178]

In addition to the risk assessment recommendation and statements and arguments made on Petitioner's behalf, the ECRC considered two additional statements submitted to it. One statement was submitted by Senior Investigator Jeff Hohensee of the New Ulm Police Department.[179] Investigator Hohensee described his concerns regarding Petitioner, noting that Petitioner preyed on vulnerable juvenile victims.[180] He also represented that he was the victim of Petitioner's charged offense for stalking a peace

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[165] *Id.*
[166] *See* Ex. 1 at 4 (ECRC Risk Assessment Report).
[167] *See id.* at 4-5; Ex. 6 (ECRC audio recording). Petitioner's legal counsel appeared by telephone. Ex. 6 (ECRC audio recording).
[168] Ex. 6 (ECRC audio recording).
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] Ex. 1 at 7 (Letter from Senior Investigator Jeff Hohensee to ECRC).
[180] *Id.* at 7-9.

officer, which was dismissed, and that Petitioner had made false allegations against him and had engaged in threatening conduct toward Investigator Hohensee's family.[181] Investigator Hohensee expressed alarm about the number of weapons and amount of military paraphernalia Petitioner possessed, including some items suggesting an admiration for neo-Nazis.[182] Investigator Hohensee stated that:

> [Petitioner] has been a loner his whole life. He is a cop want-to-be as he drove old squad cars and worked security and auxiliary police jobs. [Petitioner] has been described by his victims as the creepy guy who would buy us cigarettes and booze when we were younger to get to know us. [Petitioner] has a love for guns and military paraphernalia more than any suspect I have ever encountered. This guy is a school shooter to be if there ever was one.[183]

The ECRC also received a statement from Nola Seidl, who is the agent who wrote the pre-sentence investigation related to Petitioner's convicted offenses.[184] She found it telling that Petitioner indicated regret for his offenses, but later admitted he made those statements to make himself appear more favorably to the court when he believed he would get a longer sentence.[185] She stated that Petitioner did not appear to feel remorse for his crimes and believed himself to be the victim.[186] She expressed concern that Petitioner's parents had attended a court date for one of Petitioner's victims, and while the proceeding was open to the public, she felt that this indicated "how deeply embedded [Petitioner's] family is with regards to continuing to traumatize the victims of this case and the lengths they will go to do this."[187]

The ECRC unanimously assigned Petitioner to Risk Level 3.[188] The ECRC prepared a report regarding the risk level assignment, indicating it had applied the three special concerns identified in the risk assessment recommendation, though it mislabeled the number for one of the special concerns.[189] Petitioner appealed his assignment of Risk Level 3.[190]

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[181] *Id.* at 8.
[182] *Id.* at 7.
[183] *Id.* at 9.
[184] Ex. 1 at 10 (Letter from Nola Seidl to ECRC).
[185] *Id.*
[186] *Id.*
[187] *Id.*
[188] Ex. 1 at 4 (ECRC Risk Assessment Report).
[189] In the ECRC Risk Assessment Report, this Special Concern is incorrectly identified as Special Concern 1, but the context of the meeting and the descriptive reference make clear that that Special Concern 2 was applied. *See* Ex. 1 at 19 (ECRC Risk Assessment Recommendation); Ex. 3 (Special Concerns for the MnSOST-4); Ex. 6 (ECRC audio recording).
[190] Ex. 1 at 1-3 (Notice of Appeal).

V. Summary Disposition Standard

Summary disposition is the administrative law equivalent of summary judgment.[191] A motion for summary disposition shall be granted when there is no genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law.[192] The Office of Administrative Hearings follows the summary judgment standards developed in Minnesota's district courts when considering motions for summary disposition in contested case matters.

The function of the Administrative Law Judge on a motion for summary disposition, like a trial court's function on a motion for summary judgment, is not to decide issues of fact, but to determine whether genuine, material factual issues exist.[193] The Administrative Law Judge does not weigh the evidence; instead, the judge views the facts and evidence in a light most favorable to the non-moving party.[194]

The moving party has the initial burden to show the absence of any genuine issue regarding any material fact.[195] A fact is material if its resolution will affect the outcome of the case.[196] If the moving party meets the initial burden, the burden shifts to the responding party to prove the existence of any genuine issue of any material fact.[197] A genuine issue is not a "sham or frivolous" one,[198] and it cannot rely on mere allegations or denials.[199] Instead, a genuine issue requires presentation of specific facts demonstrating a need for resolution in a hearing or trial.[200] When parties file cross motions for summary disposition, they "tacitly agree that there exist no genuine issues of material fact."[201]

Summary disposition cannot be used as a substitute for a hearing or trial on the facts of a case.[202] Thus, summary disposition is only proper when no fact issues need to be resolved.[203]

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[191] *Pietsch v. Minn. Bd. of Chiropractic Exam'rs*, 683 N.W.2d 303, 306 (Minn. 2004); *see also* Minn. R. 1400.5500(K) (2019).
[192] *See Sauter v. Sauter*, 244 Minn. 482, 484, 70 N.W.2d 351, 353 (1955); *Louwagie v. Witco Chemical Corp.*, 378 N.W.2d 63, 66 (Minn. Ct. App. 1985).
[193] *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997).
[194] *See Ostendorf v. Kenyon*, 347 N.W.2d 834, 836 (Minn. Ct. App. 1984).
[195] *See Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).
[196] *O'Malley v. Ulland Bros.*, 549 N.W.2d 889, 892 (Minn. 1996).
[197] *See Thiele,* 425 N.W.2d at 583.
[198] *See Highland Chateau, Inc. v. Minn. Dep't of Pub. Welfare*, 356 N.W.2d 804, 808 (Minn. Ct. App. 1984), *review denied* (Minn. Feb. 6, 1985).
[199] *DLH*, 566 N.W.2d at 70.
[200] *See* Minn. R. Civ. P. 56.05.
[201] *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 610 (Minn. 2012) (quotation omitted).
[202] *See Sauter*, 244 Minn. at 485, 70 N.W.2d at 353.
[203] *See id*.

VI. Analysis

A. Preliminary Matters

Before turning to the merits of this matter, two preliminary issues must be addressed. First, the ECRC argues that Petitioner's motion cannot properly be considered a motion for summary disposition. A summary disposition motion must identify material facts not in dispute and show that the movant is entitled to judgment as a matter of law.[204] Petitioner's motion does not do those things; instead Petitioner disputes facts and contests the ECRC's exercise of discretion in weighing Petitioner's level of risk. As explained herein, the Administrative Law Judge determines that the ECRC did not err in assigning Petitioner to Risk Level 3, and there is no basis for a reassessment of Petitioner's risk level or assignment to a lower level. Even if Petitioner's motion does not qualify as a motion for summary disposition, and is more in the nature of a response to such a motion, the Administrative Law Judge has considered the arguments made by Petitioner in deciding the outcome of this case.

Second, the ECRC objects to consideration of a Psychosexual Evaluation, dated March 25, 2020, and filed with the Office of Administrative Hearings the same day, one day prior to the motion hearing. Petitioner's filing was untimely and the ECRC did not have an opportunity for a meaningful review of this filing prior to the hearing on the motions. Additionally, as the Administrative Law Judge determines that the ECRC did not err in assigning Petitioner's risk level, the Administrative Law Judge will not conduct a de novo review. Newly created documents and opinions expressed therein are not relevant to the ultimate determination of this matter. Therefore, the Administrative Law Judge has not considered the Psychosexual Evaluation in connection with these motions.

B. Arguments of the Parties

Petitioner challenges his risk level assignment on several grounds and argues that he should receive a reassignment to Risk Level 2. Petitioner asserts that he did not use force with, or harm, the victims, and that he did not use a weapon in the commission of any of his offenses. He also contends that the ECRC should not consider more serious charges that were dismissed. Petitioner maintains that he had no prior offenses other than traffic offenses. He contends that he has never received substance abuse or sex offender treatment, and that as to sex offender treatment, it was not ordered as a condition of his sentence and he was unable to participate in such treatment in prison. Petitioner asserts that he has strong support from his parents, with whom he planned to live upon his release, that he would be willing to attend any recommended therapeutic treatment in the community, and that he hoped to find stable employment. Petitioner notes he has not indicated he intends to reoffend, and he acknowledges that he has no physical conditions that would reduce his risk.

Petitioner further argues that the special concerns were not applied correctly, and that he should be assigned to his presumptive level. As to Special Concern 2, he contends he has no history of supervision failures and he disputes that he engaged in high risk,

[204] *See id.*

grooming-type behaviors. He also disputes that he engaged in predatory behaviors, as noted in Special Concern 4. Finally, related to Special Concern 5, he disagrees that the nature of his victim pool suggests a broader need for notification. Additionally, at the hearing on the parties' motions, Petitioner asserted that the MNSOST-4 was incorrectly scored because he did not have a stranger victim.

The ECRC contends that no error existed in the assignment of Petitioner to Risk Level 3. The ECRC argues that Petitioner was assigned to Risk Level 3 based upon the application of three special concerns, all of which it asserts were supported by the record. Therefore, the ECRC argues that Petitioner's risk level should be affirmed.

C. Risk Level 3 Is Supported by the Record and the ECRC Did Not Err

Under Minn. Stat. § 244.052, subd. 6(b), Petitioner must establish that the ECRC erred in assigning him to Risk Level 3, and the Administrative Law Judge may only modify Petitioner's risk level if he has successfully made a showing of error. In this case, Petitioner's arguments do not point to material facts in dispute that demonstrate error occurred. Instead, the ECRC has established that its decision is supported by the record and that it did not err.

Petitioner contends that he did not use a weapon or force, or threats of force, in committing his offenses. Petitioner's offense against JV1, JV2, and JV3, resulted in three of his predatory offense convictions. The victims in that incident reported that Petitioner had a gun in the car and, after he drove them to a remote area, they shot the gun because they feared he would hold them hostage if they did not, and to use up the bullets so that fewer would be available.[205] This evidence in the record supports the ECRC's concern that Petitioner had a gun present and at least implied a threat of force or harm in the commission of these three offenses.

Petitioner maintains that he did not have a stranger victim and so the MnSOST-4 was not properly scored as to that item. Under the MnSOST-4 coding rules, the item related to stranger victims measures the increased risk of sexual recidivism posted by offenders who assault strangers.[206] This is scored for each charge or conviction where the victim knew the offender for fewer than 24 hours prior to the incident, where the victim had no real relationship with the offender, or the offender is not a friend, acquaintance, or family member of the victim.[207] JV3 reported that she first met Petitioner the night of the offense.[208] The record supports qualifying JV3 as a stranger victim and so the MnSOST-4 was properly coded.

As to Special Concern 2, Petitioner argues that he did not have supervision failures and did not engage in high-risk grooming behaviors. First, as noted by Dr. Leutschaft during the ECRC's meeting, this special concern does not apply just to instances of

[205] Ex. 1 at 119, 121 (Brown County Criminal Complaint).
[206] Ex. 2 at 16 (MnSOST-4.0 Coding Rules).
[207] *Id.*
[208] Ex. 1 at 123 (Brown County Criminal Complaint).

supervision failures.[209] Second, the record shows that Petitioner did engage in high-risk grooming behaviors. Petitioner offended against minors, using social media platforms to communicate with them. One victim reported that she met Petitioner when she was in the seventh grade and that he would buy her cigarettes.[210] In committing offenses against this victim, he supplied her with alcohol and gave her money in exchange for engaging in sexual activity with him.[211] He also took her to the Mall of America and purchased her clothing and food, after which he wanted to pull over his car and have sex with her.[212] He repeatedly paid another victim for sexual encounters.[213] During his offense against JV1, JV2, and JV3, he offered them money and alcohol in exchange for sexual intercourse.[214] These are high-risk grooming behaviors and Petitioner repeatedly used these grooming tactics to offend against minor victims. Special Concern 2 was properly applied.

Petitioner argues that he did not engage in predatory offense behavior, as indicated by the application of Special Concern 4. But this special concern is also supported by the record. In his offense against JV1, JV2, and JV 3, Petitioner drove the girls to a remote location where they did not have cell phone service, isolating them and depriving them of a chance to seek assistance.[215] Petitioner searched them, handcuffed one of them, had a gun present, and drove a vehicle with rear doors that did not open from the inside, trapping two of them in the backseat with him while he sexually assaulted them, and refused to take them back to Walgreens when they asked.[216] After he committed this offense, he contacted two of them, and repeatedly offered one of the victims money for nude pictures and a sexual encounter.[217] This is predatory offense behavior.

Petitioner contends that the nature of his victim pool does not suggest a need for broader public notification, as indicated under Special Concern 5. This special concern is also supported by the record. All of the victims of Petitioner's convicted offenses are minors, he either paid them or offered them money for sexual activity, he committed one offense against a victim who qualified as a stranger victim, and he acquired a substantial offense history against these victims in a relatively short period of time. This behavior suggests that broader community notification might be a significant deterrent or preventative factor given his pattern of acquiring victims.

Petitioner maintains the ECRC should not have considered charged offenses that were dismissed. The ECRC can consider charged offenses, even if no conviction for that offense resulted. The initial determination as to whether a person is a predatory offender

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[209] The ECRC contends that Petitioner did engage in supervision failures by violating conditions while his charges were pending. It is unnecessary to address this issue as there is ample other support for application of Special Concern 2.
[210] Ex. 1 at 136 (Brown County Criminal Complaint).
[211] *Id.*
[212] *Id.* at 137.
[213] Ex. 1 at 98-99 (Brown County Criminal Complaint).
[214] Ex. 1 at 121 (Brown County Criminal Complaint).
[215] *Id.* at 119.
[216] *Id.* at 119-23.
[217] *Id.* at 121, 123.

may be based upon a charged offense that arose out of the same set of circumstances as a convicted offense, even if the conviction is not for the predatory offense charge.[218] The MnSOST-4 also includes consideration of charged offenses for some of its scoring items.[219] In this case, however, the underlying record related to Petitioner's convicted offenses supports application of all three special concerns. Further, the ECRC could have assigned Petitioner to Risk Level 3 even if only one special concern applied.

Petitioner notes that he entered *Alford* pleas to his offenses. A defendant entering an *Alford* plea to criminal charges maintains his or her innocence while recognizing that there is evidence that would support a jury verdict of guilty.[220] The convictions resulting from Petitioner's plea clearly can be considered by the ECRC notwithstanding that Petitioner continued to maintain his innocence. The administrative review of the ECRC's decision is not a forum for an offender to re-litigate convicted offenses.

Though Petitioner disagrees with the ECRC's decision, he has not shown that there are disputes of fact or that the ECRC erred in application of the special concerns that raised his risk level from the presumptive Risk Level 2 to the assigned Risk Level 3. The ECRC, on the other hand, has established that its decision was supported by the record and there are no facts in dispute in this case that would require an evidentiary hearing.

VII. Conclusion

Petitioner did not raise a genuine issue of material fact related to the ECRC's risk level assignment or establish that he is entitled to a reduction in his risk level. Instead, the ECRC established that no material facts are at issue and that it is entitled to disposition in its favor as a matter of law. Therefore, the ECRC's Motion for Summary Disposition is **GRANTED** and Petitioner's motion is **DENIED**. Petitioner's appeal of his risk level determination is **DISMISSED**, and the ECRC's assignment of Risk Level 3 to Petitioner is **AFFIRMED**.

J. P. D.

[218] Minn. Stat. § 243.166, subd. 1b(a)(1).
[219] Ex. 2 at 5 (MnSOST-4 Coding Rules).
[220] *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970); *State v. Goulette*, 258 N.W.2d 758, 760-61 (Minn. 1977); *see also State v. Theis*, 742 N.W.2d 643, 647-48 (Minn. 2007) (discussing use of *Alford* plea and factual basis that must exist for a valid plea).