COMMONWEALTH OF PENNSYLVANIA	**: IN THE COURT OF COMMON PLEAS**
vs.	**: CHESTER COUNTY, PENNSYLVANIA**
GEORGE TORSILIERI	**: NO. 15-CR-0001570-2016**
	: CRIMINAL ACTION—LAW

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OPINION

On June 16, 2020 the Honorable Supreme Court of Pennsylvania directed this Court to analyze whether SORNA's irrebuttable presumption that all sex offenders pose a high risk of reoffending sexually is constitutional and to analyze whether Act 29 of SORNA, which is the version in place at this time as well as the time when the trial court issued its Opinion on direct appeal, although not at the time the Defendant committed and was tried and sentenced for the underlying crimes, constitutes criminal punishment by examining five (5) of the seven (7) factors set forth in *Kennedy v. Mendoza-Martinez*, 83 S.Ct. 554 (U.S. D.C./Cal. 1963) governing that determination.[1]

The factual and procedural history of this litigation, as well as the standard of review and applicable law, have been addressed in great detail in the Opinion *Sur* Rule 1925(a) issued by the Honorable Anthony A. Sarcione on August 30, 2018 and the Honorable Pennsylvania Supreme Court's Opinion issued on June 16, 2020 remanding the

[1] The Pennsylvania Supreme Court determined that the last two *Mendoza-Martinez* factors had no bearing on the question of whether SORNA was punitive and therefore did not require that we examine them.

case to the undersigned for the purposes described above. Consequently, we will not reiterate all of the factual, procedural, and legal principles again here but simply refer the reader to those two (2) documents for an understanding of the manner of this case's evolution and the legal standards governing the issues to be considered at present.

Our first task is to evaluate the constitutionality of SORNA's irrebuttable presumption that all sex offenders, regardless of their personal characteristics and circumstances, have a high risk of reoffending sexually. The presumption is found at 42 Pa. C.S.A. § 9799.11(a)(4), entitled "Legislative findings, declaration of policy and scope", which provides, "Sexual offenders pose a high risk of committing additional sexual offenses and protection of the public from this type of offender is a paramount governmental interest." 42 Pa. C.S.A. § 9799.11(a)(4).

Whether an irrebuttable presumption is constitutional involves a three-part test. An irrebuttable presumption is unconstitutional where (a) it encroaches on an interest protected by the due process clause; (2) the presumption is not universally true; and (3) reasonable alternative means exist for ascertaining the presumed fact. *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth. 2015). Our analysis of these three factors leads us to conclude that SORNA's irrebuttable presumption does not pass constitutional muster.

Article I, Section 1 of the Pennsylvania Constitution provides, in pertinent part, "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Pa. Const., Art. I, § 1; *Pennsylvania Bar Association v. Commonwealth*, 607

A.2d 850 (Pa. Cmwlth. 1992)(*quoting* Pa. Const., Art. I, § 1). The right to reputation is a fundamental right guaranteed under the Pennsylvania Constitution, entitled to the protection of due process. *Pennsylvania Bar Association v. Commonwealth*, 607 A.2d 850 (Pa. Cmwlth. 1992). *See also Taylor v. Pennsylvania State Police of Commonwealth*, 132 A.3d 590 (Pa. Cmwlth. 2016)(a person's reputation is among the fundamental rights that cannot be abridged without compliance with the State constitutional standards of due process). The existence of government records containing information that might subject a party to negative stigmatization is a threat to that party's reputation. *In re R.M.*, 2015 WL 7587203 (Pa. Super. 2015)(*citing Pennsylvania Bar Association v. Commonwealth*, 607 A.2d 850, 853 (Pa. Cmwlth. 1992)(*citing Wolfe v. Beal*, 384 A.2d 1187, 1189 (Pa. 1978))). The Federal Constitution does not recognize reputation, standing alone, as a fundamental constitutional right. *In re J.B.*, 107 A.3d 1 (Pa. 2014).

SORNA's irrebuttable presumption concerning sex offenders' heightened future dangerousness as a cohort indisputably encroaches upon a person's fundamental right to reputation under Article I, Section 1 of the Pennsylvania Constitution. SORNA's irrebuttable presumption unduly stigmatizes persons convicted of committing sexual offenses, a class of crimes that covers a wide spectrum of conduct, and does so without any consideration of individual characteristics and circumstances. A person convicted of a sex offense subject to SORNA will likely experience difficulty in finding housing, employment/education, and establishing pro-social relationships with others, three (3) factors described by experts as the "most important" factors contributing to an offender's successful re-entry into society and maintenance of a law-abiding lifestyle. (6/29/21, Ex. D-7; Affid. of Professor Elizabeth J. Letourneau, Ph.D., at 10, para. 13 (*citing* research by

the National Institute of Justice)). The Commonwealth suggests that offenders would experience these stigmas anyway by virtue of their public record convictions for sex offenses alone. The Commonwealth also suggests that every offender, whether guilty of committing a sexual offense or some other type of offense, experiences the same stigmas as a result of their convictions. However, non-sexual offenders are not placed on a public registry or subject to public notification about almost every aspect of their personal lives, even if their offense were a serious violent crime. We do not place murderers on a registry, nor do we place offenders such as those convicted of Aggravated Assault or other violent crimes on a registry, regardless of how many times or how egregiously they offend. No matter what their propensity for violence may be, we do not label them or publish to the world that they are at "high risk" of committing additional violent offenses. The special stigma associated with the registry requirement is the express accusation in the legislative findings that everyone convicted of a sexual offense presents a "high risk" of sexually reoffending. This strongly implies that even though one has been convicted and served his or her sentence, one remains a serious threat to society. Virtually all aspects of his or her personal life must be reported to the State and much of it publicized to the entire world, who can access this information without knowing or caring about any specific offender in particular. It is this designation, this "scarlet letter" of "high risk", that distinguishes the heightened stigma sexual offenders experience, and hence their greater marginalization, from that stigma merely associated with the fact of conviction that would otherwise be present in the absence of a registry and from that which is arguably experienced by non-sexually offending populations. *See In re J.B.*, 107 A.3d 1, 16 (Pa. 2014)("[T]he common view of registered sex offenders is that they are particularly dangerous and more likely to

reoffend than other criminals."). The public declaration based on the faulty premise that all sexual offenders are dangerous high-risk recidivists compounds the isolation and ostracism experienced by this demographic and sorely diminishes their chances of productively reintegrating into society.

Not only does this label ruin the chances for sex offenders to successfully rehabilitate under Pennsylvania law, rehabilitation being another indisputable aim of penal legislation and an equally compelling interest and policy of the Commonwealth, *see Fross v. County of Allegheny*, 20 A.3d 1193 (Pa. 2011), *aff'd*, 438 Fed. Appx. 99 (3rd Cir. Pa. 2011)(purpose of Sentencing and Parole Codes includes the rehabilitation, reintegration, and diversion from prison of appropriate offenders); *Secretary of Revenue v. John's Vending Corp.*, 309 A.2d 358 (Pa. 1973)(it is a deeply ingrained public policy of this State to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders), it catches within its overbroad suffocating net persons whose crimes may have no sexual component to them whatsoever, crimes such as the offense of Unlawful Restraint (18 Pa. C.S. § 2902(b)), which is a Tier I offense and subject to fifteen (15) years of registration and public infamy,[2] *see* 42 Pa. C.S.A. §§ 9799.14(b)(1), 9799.15(a)(1); the offense of False Imprisonment (18 Pa. C.S. § 2903(b)), *see* 42 Pa. C.S. §§ 9799.14(b)(2), 9799.15(a)(1); the offense of Interference with Custody of Children (18 Pa. C.S. § 2904),[3]

[2] This Honorable reviewing Court noted that SORNA's inclusion of "relatively minor offenses within its net" was "troubling" and "actually cast doubt" on the stated non-punitive legislative intent of the statute. *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), *cert. denied, Pennsylvania v. Muniz*, 138 S.Ct. 925 (U.S. Pa. 2018), *abrogated on other grounds by Commonwealth v. Santana*, 266 A.3d 528 (Pa. 2021), *superseded by statute on other grounds, Commonwealth v. Lacombe*, 234 A.3d 602 (Pa. 2020), *superseded by statute on other grounds, In re H.R.*, 227 A.3d 316 (Pa. 2020).

[3] Even though Act 29 removes parents, guardians, and other "lawful custodian[s]" from the ambit of the registry, the offense itself still does not require that the offender commit a sexual crime in order to be convicted.

see 42 Pa. C.S. §§ 9799.14(b)(3), 9799.15(a)(1); and the offense of Kidnapping (18 Pa. C.S. § 2901(a.1))(a Tier III, Lifetime Registration offense), *see* 42 Pa. C.S. §§ 9799.14(d)(1), 9799.15(a)(3), characterizing these offenders and subjecting them to global public shaming as incorrigible sexual recidivists regardless of the circumstances of their crime and the fact that these crimes do not require sexual offending for culpability. For all of the above reasons, we find that SORNA's irrebuttable presumption that all sex offenders pose a high risk of reoffending sexually encroaches on an interest protected by the Due Process Clause, namely, the constitutional right to reputation in Pennsylvania.

Moving onto the second prong of the test for the constitutionality of irrebuttable presumptions, whether the presumption is universally true, the evidence presented to this Court demonstrates that it is not. Of the two experts retained by the defense to opine on the issue (the third, James J. Prescott, J.D., Ph.D., was retained to discuss the efficacy of SORNA's registration and notification provisions on sexual recidivism), Dr. R. Karl Hanson (6/28/21, Ex. D-2, at 6, para. 10; Declaration of R. Karl Hanson at 6, para. 10) asserted that research has shown that 80% to 85% of sexual offenders do not reoffend sexually and Dr. Letourneau asserted that "methodologically rigorous research studies" indicate that 80% to 95% of sex offenders will not reoffend sexually. (6/29/21, Ex. D-7 at 7, para. 9 [Affid. of Prof. Elizabeth J. Letourneau, Ph.D., at 7, para. 9). Further, both Dr. Letourneau and Dr. Prescott cited to New York research showing that 95% of all sexual offenses are committed by first-time offenders not recidivists. (6/29/21, Ex. D-7 at 2-3, para. d [Affid. of Prof. Elizabeth J. Letourneau, Ph.D., at 2-3, para. d; 6/29/21; 6/29/21, Ex. D-9, Appx. A, at 15).

In response to the defense experts, the Commonwealth presented the expert report and testimony of Dr. Richard McCleary, Ph.D. (*See* 6/30/21, Ex. C-9). Dr. McCleary's report in large part attacked the methodology of all of the research showing a low rate of sexual reoffending by sex offenders or otherwise showing the inefficacy of SORNA's registration and notification requirements. In other words, Dr. McCleary opined that all research yielding an outcome different from that of the Commonwealth's position was fatally methodologically flawed and unreliable. Dr. McCleary's blanket denunciation of all research contrary to the Commonwealth's position in this case, in our opinion, materially detracts from his credibility. The research discussed by Drs. Hanson, Letourneau, and Prescott was conducted by well-respected experts in the field, including, but not limited to, Drs. Hanson, Letourneau, and Prescott's own research. As Dr. Hanson noted, "There is no study that is perfect. Studies are not like that. . . . Almost all studies can be improved in particular ways." (Remand Hearing Transcript, 6/28/21, N.T. 32). This is why studies are peer-reviewed and subject to the efforts of other researchers to replicate their results. As all studies have flaws that can be improved upon by further research, Dr. McCleary's criticism of the science opposing the Commonwealth's position can be applied with equal fervor to the studies cited by the Commonwealth in support of its position, suggesting *de facto* that we can rely on none of the scholarship in this area of the law, a proposition that is inimical to both common sense and the obligations of the judiciary. We are not persuaded by Dr. McCleary's opinion that the pitfalls endemic to the human component of science render all of the research critical of SORNA unreliable and untrustworthy.

The Commonwealth's main opposition to the defense experts' opinions regarding sexual offenders' low rate of sexual recidivism is the "dark figure" of sexual crimes. The "dark figure" of sexual offending refers to the difference between the number of sexual offenses that occur but are never reported and those that are known to the authorities. (Remand Hearing Transcript, 6/28/21, N.T. 96). The Commonwealth argues that if the "dark figure" of sexual recidivism is considered, the amount of reoffending by sexual offenders is much higher than that which is observed and leaves the defense's conclusions regarding the low rate of recidivism among sexual offenders unacceptably downwardly skewed.

Both parties discussed a report by researchers Nicholas Scurich and Richard S. John entitled *The Dark Figure of Sexual Recidivism*, in which Scurich and John tried to develop a statistical model to determine the magnitude of the underreporting of sex offenses. In attempting to create this model, Scurich and John presumed that recidivism risk is a constant that does not change over time. In his expert report and testimony, Dr. Hanson demonstrated that this assumption is not supported by the data. (*See* 6/28/21, Ex D-2). Dr. Prescott echoed Dr. Hanson's assertion. (*See* Remand Hearing Transcript, 6/29/21, N.T. 216). Dr. Prescott testified that Scurich and John used a set of hypotheticals based on only four (4) studies and made assumptions with respect to the values of the variables used to measure the data from these four (4) studies, thereby allowing differing results based upon the assumptions employed. (Remand Hearing Transcript, 6/29/21, N.T. 203-06). As Dr. Hanson testified,

> There are no findings in that study. It is a statistical model based on certain assumptions. If you follow those assumptions, you get that result. I do not agree with the

> assumptions. They [sic] are two fundamental areas of disagreement.
>
> Their model assumes recidivism risk is a constant that does not change over time. This assumption is not supported by the data. Recidivism does change over time.
>
> They also assume that most individuals who do reoffend do so rarely, once in a while. They also have no category for no recidivism. So they don't create a category of people who do not reoffend, so to speak.
>
> So if you look at the undetected rates, think about three groups. So going forward—you can have three behaviors:
>
> One, you cannot reoffend. That's one. You can just not reoffend and you wouldn't influence the recidivism statistics because you are not reoffending.
>
> If you offend a lot, if you do it again and again and again, even if the detection rate for offense is low eventually you will get caught. You will just keep going. If you offend once in a while, like once every 5 years or once every 10 years or just once, you may or may not get caught. And it's that group that is moving that undetected figure.
>
> So if that group of low rate offenders is large, most of them, then you will get numbers like the ones Scurich and John have. If that group is small, you will get numbers that are very close to the observed number.
>
> We don't know how big that is. It could be middle, small, or big. And because we don't know that number we do know that the observed rates underestimate the true rates, but we don't know how much. We don't know by how much.
>
> . . .
>
> Scurich and John make an implication. They do not directly state it and they do not support in that their assumptions are correct, but they make the implication that the recidivism rates are very, very high. That would not be generally accepted in the professional community, scientific community.

(Remand Hearing Transcript, 6/28/21, N.T. 98-99).

There is a "dark figure" of unreported offenses applicable to all crimes. (Remand Hearing Transcript, 6/28/21, N.T. 96). The scope of that "dark figure" as it concerns sexual crimes is speculative. There is no hard data demonstrating the rate of unreported sexual offenses. There is no hard data demonstrating that the rate of unreported sexual offenses is significantly higher than that regarding unreported crimes in general. As Dr. Hanson testified, we simply do not know; the data is not there and therefore measurements cannot be made with any certainty. Finally, we do not invade the liberties of citizens based on crimes for which there is no proof. Similarly, we do not restrain people's liberties based on future conduct that has not yet occurred. SORNA, as written, does both of these things.

The bottom line, as the defense experts have demonstrated, is that 80% to 95% of all sex offenders will not reoffend. Consequently, we find that SORNA's irrebuttable presumption that all sex offenders pose a high risk of sexual recidivism is not universally true. Thus, SORNA violates the second prong of the test for determining the constitutional validity of an irrebuttable presumption.[4]

Moving onto the third prong of the test for determining the constitutional validity of an irrebuttable presumption, namely, whether reasonable alternatives exist for

[4] In a different context, in *Commonwealth, Department of Transportation, Bureau of Driver Licensing v. Clayton*, 684 A.2d 1060 (Pa. 1996), the Pennsylvania Supreme Court determined that a regulation that provided for the suspension of one's operating privileges for a period of one year based on a single epileptic episode without affording the licensee the opportunity to present medical evidence to prove his or her competency to drive violated due process because it utilized an unconstitutional irrebuttable presumption that one epileptic seizure rendered all persons unsafe to operate a motor vehicle for one year. The Court thus determined that applying the presumption to epileptics as a cohort was improper because the symptoms of epilepsy varied among people. *Id.* Similarly to *Clayton, supra*, one's risk of reoffending is not the same as another's because every person is an individual with individual characteristics and circumstances that affect their probability of committing another crime. Accordingly, the presumption of future dangerousness should not be applied to sex offenders as a cohort, because the individual members of the cohort do not share the same propensity for recidivism.

determining the presumed fact, it is beyond peradventure that the answer is in the affirmative. The defense Exhibits identify several risk assessment tools, including Dr. Hanson's Static-99 and Static-99R, that have been developed over the last few decades to identify individuals who have a greater likelihood of reoffending sexually than the general population of sex offenders and do so with greater accuracy than the Tier system promulgated under SORNA and the Adam Walsh Act. (6/28/21, Ex. D-2, Declaration of R. Karl Hanson; 6/29/21, Ex. D-7, Affid. of Professor Elizabeth J. Letourneau, Ph.D.; 6/29/21, Ex. D-9, Expert Report of James J. Prescott, J.D., Ph.D.). These reports, articles and studies also demonstrate that there are other more effective means available, such as specialized treatment programs and coordinated professional support systems, to accomplish the SORNA aim of reducing sexual recidivism.[5] (*Id.*). The experts suggest that by using the blanket label of dangerous sexual recidivist for all sex offenders, the State is diverting vital resources from treatment of the small percentage of this population who actually post a risk of sexual recidivism, where such resources are most needed and would be most effective in promoting the goals of public protection ad safety as well as rehabilitation.

We need not rely only upon Defendant's experts, however. In the case of *In re J.B.*, 107 A.3d 1 (Pa. 2014), the Pennsylvania Supreme Court found that the reasonable alternative of individualized risk assessment was available, and indeed in use in SORNA with respect to sexually violent predator assessments and assessments for committed

[5] This aim may be reasonably inferred from SORNA's stated purpose of protection of the community from sexual victimization. *See also Taylor v. Pennsylvania State Police*, 132 A.3d 590 (Pa. Cmwlth. 2016)("[A] primary purpose of SORNA is to inform and warn law enforcement and the public of the potential danger of those registered as sexual offenders.").

adjudicated juveniles, juveniles being a population whose character traits have been recognized as changeable and not fully ingrained (logically making the prediction of risk, we suggest, more difficult than that which can be expected with respect to adults, whose character traits, it has been noted, are supposedly more fixed), who are nearing their twentieth birthdays, to ascertain whether continued involuntary civil commitment is necessary. *In re J.B.*, 107 A.3d at 19. Indeed, Act 29, promulgated after *J.B., supra*, provides for an individualized risk assessment for adult sexual offenders, albeit only twenty-five (25) years after the deprivation, a period frequently, perhaps closer to always, representing the most productive years of one's life; this "opportunity" for exemption thus is illusory and offers no real relief to an offender. Still, this provision demonstrates that the Legislature recognizes that individualized risk assessments are available and viable for determining which sexual offenders pose a high risk of sexual recidivism for SORNA purposes.[6] It is no great leap from the application of alternative risk assessment tools to the populations and under the circumstances described above to conclude that the application of individualized risk assessments via a pre-deprivation hearing for all sexual offenders is not only possible, but is also actually available to the criminal justice system, and constitutes a reasonable, more effective alternative for identifying high-risk recidivists

[6] It is of no moment that all sexual offenders undergo a sexually violent predator assessment to determine whether they must register for life as SVP's even if their particular offense(s) does/do not call for lifetime registration; to the extent that these individualized assessments address the question of future dangerousness, unless an offender has a mental abnormality or personality disorder making him or her likely to engage in subsequent predatory sexual offenses, the question of future dangerousness has no impact on the average offender with respect to whether he or she must register and/or for how long. The bulk of the population of sexual offenders have no way to effectively contest pre-deprivation the assumption that they are high-risk dangerous recidivists and to have evidence to the contrary of this assumption impact the decision of whether and for how long they must register. The deprivation occurs and they have no opportunity for relief for at least twenty-five (25) years, based on an irrebuttable presumption that is not universally applicable. It is a due process violation.

and reducing sexual reoffending than the draconian public shaming/warning procedures, currently in place for all adult sexual offenders subject to Subchapter H regardless of risk.

SORNA's irrebuttable presumption that all sex offenders are high-risk dangerous recidivists does not survive scrutiny under the three-prong test for constitutionality set forth in *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth. 2015). The presumption negatively impacts one's right to reputation, which, as we noted above, is a fundamental right under the Pennsylvania Constitution. The presumed fact is not universally true, and there are indisputably reasonable and even more effective alternatives for accomplishing the aims of SORNA both to identify for safety purposes those offenders who do pose a risk to society and to reduce the amount of sexual reoffending generally. Finally, SORNA encompasses offenders whose crime(s) may lack any sexual component to them whatsoever and who, *ipso facto*, may be unlikely to commit an actual sexual offense at any time in the future, again making the irrebuttable presumption not universally applicable. For all of these reasons, we conclude that SORNA's registration and notification provisions, which directly derive from the application of its unconstitutional irrebuttable presumption to all sex offenders and even those whose offenses cannot be considered "sexual", are constitutionally infirm.

The Commonwealth has argued that the fact that the amendments to SORNA include an opportunity for some offenders to petition to the court to be removed from SORNA's registration and notification provisions after twenty-five (25) years means that SORNA's presumption as to future dangerousness is not irrebuttable. This is illusory. As we discussed above, a post-deprivation process that provides for a hearing concerning the deprivation of a fundamental right that occurs twenty-five (25) years after the injury is akin

to the provision of no process at all. Unlike juveniles, as to whom the Pennsylvania Superior Court has already acknowledged a twenty-five (25) year waiting period is meaningless, *see In re R.M.*, 2015 WL 7587203 (Pa. Super. 2015), adults will be effectively placed out of the job market, ostracized from pro-social resources, and stigmatized for the majority of their most productive years. The opportunity to be heard at a meaningful time and in a meaningful manner is recognized by the United States Supreme Court as a fundamental requirement of procedural due process. *Pennsylvania Bar Association v. Commonwealth*, 607 A.2d 850 (Pa. Cmwlth. 1992). SORNA does not provide it. Because SORNA's post-deprivation process is inadequate and illusory, we conclude that SORNA's presumption that all sex offenders are high-risk dangerous recidivists is, for all practical intents and purposes, properly characterized as irrebuttable in fact.

The Commonwealth has also suggested that because convicted offenders have had a trial, they have been given ample notice that they face being labeled as a dangerous recidivist. This argument ignores the fact that individuals are presumed innocent until they are found guilty by proof beyond a reasonable doubt. In certain sexual offense trials, facts can be murky and most often there are no independent eyewitnesses. The trial itself gives a criminal defendant no effective opportunity to contest future dangerousness; that is not at issue in the guilt determination phase. There exists no pre-deprivation procedure, but instead an automatic public proclamation that this person is now and forever (or its functional equivalent) to be the worst of the worst, a high risk dangerous and incorrigible likely recidivist sexual predator who must be relegated to the margins of society. The accused may sincerely and strongly embrace the notion of his or her innocence throughout the trial, which may yet result in an acquittal. If he or she is acquitted,

the skewed label is not applied, and the attendant reflexive consequences of that label will not be experienced. It is only once a guilty verdict as to a past offense or offenses is entered that the stigma of the State's flawed irrebuttable presumption comes into play, and there is no opportunity to avert its application or to meaningfully challenge its reactionary prejudice either during or after the trial. Neither prosecutors nor judges are able to forestall its application based on the facts of the case, the individual characteristics of the defendant, or for any reason.

For all of the foregoing reasons, we conclude that SORNA's irrebuttable presumption of future dangerousness is constitutionally infirm. Accordingly, the registration and notification provisions attendant to the presumption are fatally flawed, as they are directly premised on this unconstitutional presumption.

The second and last subject we were directed by the Pennsylvania Supreme Court to examine is whether SORNA's registration and notification requirements constitute criminal punishment notwithstanding the Legislature's stated purpose of enacting a non-punitive civil regulatory scheme. In order to accomplish this, we must, per the High Court, evaluate five (5) of the seven (7) *Mendoza-Martinez*[7] factors governing the determination as to whether SORNA's registration and notification requirements constitute punishment. The five (5) factors we must evaluate are (a) whether the requirements involve an affirmative disability or restraint; (b) whether they have been historically regarded as punishment; (c) whether their operation will promote the traditional aims of punishment—retribution and deterrence; (d) whether an alternative purpose to which they may be

[7] *Kennedy v. Mendoza-Martinez*, 83 S.Ct. 554 (U.S. D.C./Cal. 1963).

rationally connected is assignable for them; and (e) whether the requirements appear excessive in relation to the alternative purpose assigned.

We will proceed to analyze whether Act 29's registration and notification provisions involve an affirmative disability or restraint. We note that in *Commonwealth v. Lacombe*, 234 A.3d 602 (Pa. 2020), the Pennsylvania Supreme Court held that Subchapter I of SORNA did not impose any direct affirmative disability or restraint but only minor and indirect restraints and disabilities because the Subchapter only required non-SVP offenders to report in person annually to maintain an updated photograph, rather than quarterly; offenders were no longer required to appear in person to report changes to information; and the majority of offenders were only subject to a ten (10) year reporting requirement. Based on these changes in Subchapter I, the *Lacombe, supra* Court determined that analysis of this first factor weighed in favor of a finding that the registration and notification provisions of SORNA, as they relate to Subchapter I, were non-punitive. Ultimately, the Pennsylvania Supreme Court upheld the constitutionality of SORNA with respect to Subchapter I. *Id.* However, the requirements of Subchapter I are somewhat less onerous than those in Subchapter H. *Commonwealth v. Elliott*, 249 A.3d 1190 (Pa. Super. 2021), *appeal denied*, 263 A.3d 241 (Pa. 2021). Consequently, an analysis of whether the registration and notification requirements of Subchapter H impose an affirmative disability or restraint has not been foreclosed by *Lacombe, supra*. Neither has the question of whether Subchapter H of SORNA is constitutional.

We further note that in *Commonwealth v. Butler*, 226 A.3d 972 (Pa. 2020), the Pennsylvania Supreme Court found that the registration, notification and counseling requirements applicable to sexually violent predators involved an affirmative disability or

restraint and thus weighed in favor of a finding that SORNA constituted criminal punishment, because sexually violent predators were required to report to the Pennsylvania State Police quarterly and to report changes in their registration information. The Pennsylvania Supreme Court though ultimately held that the reporting, notification and counseling requirements with respect to sexually violent predators did not constitute punishment. *Id.* Although Subchapter H is more burdensome when compared to Subchapter I, as far as Subchapter H concerns offenders who do not qualify as sexually violent predators it is somewhat less burdensome in terms of registration and notification provisions than it is with respect to sexually violent predators, as non-SVP offenders need only report in person annually after three (3) years of quarterly in-person reporting if they meet certain conditions while SVPs must report in person four times per year for the rest of their lives, the reduction in the burden lessens but does not remove the punitive effect of registration and notification upon non-SVP offenders. Most notably, SVPs are provided with an effective pre-deprivation procedure before they are declared sexually violent predators who must register for life regardless of the title of their offense.

Subchapter H of Act 29 retains the obligation of Tier III registrants to appear in person before the Pennsylvania State Police quarterly each year for verification purposes as well as to appear in person to update his or her registration information whenever any changes are made, such as to residence, employment, vehicle owned, appearance, etc. 42 Pa. C.S.A. §§ 9799.15(e), (g); 9799.16(c)(4). Under the Act 29 amendments, the registrant's number of in-person appearances may be reduced to once per year after three (3) years of quarterly reporting if certain conditions are met. 42 Pa.

C.S.A. § 9799.25(a.1). If the registrant qualifies for the reduced in-person reporting, the remaining three (3) quarterly reports per year may be made telephonically. 42 Pa. C.S.A. § 9799.25(a.1). However, whether in-person or otherwise, a Tier III registrant must report to the Pennsylvania State Police and surrender a significant amount of personal information for the registry, much of which will be published on the Internet, for the rest of his or her life. Depending on the offense committed, the minimum amount of time a defendant must be on the registry, determined by the title of the offense and not any of the offender's personal characteristics or circumstances, is fifteen (15) years, as opposed to the ten (10) year maximum for most of the offenders under Subchapter I.

A Tier III offender, such as the Defendant *sub judice*, must report to the Pennsylvania State Police four (4) times per year for the rest of his or her life, whether in-person or telephonically. He or she will have to continue to verify his or her personal information and life circumstances with the Pennsylvania State Police every three (3) months and will have to update his or her registration information, whether in-person or telephonically during that period every time a change in his or her life circumstances occur, including residence, employment, education, vehicle used, and appearance. The onus under Act 29 is reduced, but the reduction is largely cosmetic. Registrants are on *de facto* probation for the entirety of their lives, with the regulation, control and sundering of privacy that such status entails. They cannot change addresses without reporting it to the police. They cannot begin school or switch schools without notifying the police. They cannot buy a new car without informing the police. They cannot change their appearance in any way without telling the police. Nor can they take a new job without reporting it to the police.

This data, along with the rest of the personal aspects of their lives, is disseminated to the world via the Internet, accessible to anyone by plugging a geographic area into the registry; no knowledge of the Defendant's name is necessary. The burden on all registrants is still oppressive, notwithstanding that, after three (3) years of compliance, the in-person aspect of the reporting requirements for Tier II and III offenders may be somewhat reduced if certain conditions are met. Similarly, as we discussed earlier, the post-deprivation procedure that requires registrants to wait twenty-five (25) years before the opportunity to ever contest the fact of future dangerousness that may be availed by some is illusory and akin to no post-deprivation process at all. Tier I offenders, who are required to register for fifteen (15) years, will never be able to challenge their status as high-risk dangerous offenders. Likewise, Tier II offenders who must register for twenty-five (25) years, will find this provision useless. For Tier III offenders, they will have to bear the added stigma of the label high-risk dangerous offender during the most productive years of their lives with no opportunity to avoid the prejudice that comes with this distinction and no opportunity to address it before the deprivation of their constitutional right to reputation for a time period that could easily extend beyond the maximum sentence for a given offense.

The Act 29 amendments to SORNA do not meaningfully reduce the palpable onus to any offender under Subchapter H and thus we find that the first factor of the *Mendoza-Martinez* inquiry imposes affirmative disabilities and restraints on offenders that weigh in favor of a finding that SORNA's registration and notification requirements are punitive in effect, despite the Legislature's intent to create with SORNA a non-punitive regulatory scheme to protect the public and reduce the number of sex offenses committed.

Turning to the second factor we have been directed to examine, whether the registration and notification policies of SORNA have historically been regarded as punishment. In *Lacombe*, *supra* the Pennsylvania Supreme Court held that the registration and notification provisions of SORNA have historically been regarded as punishment, a finding that the Court recognized weighs in favor of a determination that SORNA's registration and notification provisions are punitive, notwithstanding the Legislature's intent to effectuate a civil regulatory scheme. We are bound by this determination.[8]

Moving on to the third factor we are required to examine, specifically, whether the operation of SORNA's registration and notification provisions will promote the traditional aims of punishment—retribution and deterrence, we find that this factor weighs in favor of the conclusion that SORNA is punitive. Unlike Subchapter I in *Lacombe, supra*, where the Pennsylvania Supreme Court determined that deterrence was not affected by the registration and notification provisions of SORNA because the crimes for which the offenders had to register already occurred, i.e., Subchapter I looks backward instead of forward, Subchapter H of SORNA does have a deterrent effect because the registration and notification provisions of SORNA are not incurred until a crime has been committed. Persons who are considering whether to commit a sexual offense may be deterred from doing so by the obligations to register and the knowledge that one's personal information will be broadcast to the world via the Internet, thereby working a significant detriment to the individual's reputation and privacy by the resultant additional stigma associated with

[8] In addition, we note that the provisions of SORNA are located in the Crimes Code and there are serious criminal penalties associated with one's failure to comply. These facts support the conclusion that the second factor weighs in favor of a determination that SORNA is punitive.

being placed on the sex offender registry. Thus, while *Lacombe, supra* concluded that this factor was not entitled to much weight in the punitive analysis because it did not promote deterrence, the *Lacombe, supra* Court's reasoning and decision in this respect is distinguishable and therefore not controlling as to Subchapter H.

Retribution is promoted by the imposition of additional and in some cases lifelong burdens of registration and notification, resulting in the additional stigma of being considered a high-risk, dangerous, incorrigible sex offender of whom citizens must always be wary. Marking someone as a dangerous recidivist has the retributive effects of built-in public shaming and marginalization. They are comparable to a long probationary tail, an extended period of supervision and government control over one's personal life which is a component of criminal punishment and, like a sentence, carries a degree of retribution. The difference, of course, is that probationary tails have end dates for compliant offenders.

Thus, while *Lacombe*, *supra* determined that this factor was not entitled to much weight with respect to Subchapter I because the registration and notification provisions of Subchapter I did not provide a deterrent effect, we find that the registration and notification provisions of Subchapter H provide both retributive and deterrent effects that warrant a different conclusion from that espoused in *Lacombe, supra.* Based on our analysis of this third factor, we find that SORNA's registration and notification procedures do promote the twin aims of criminal punishment, that is, retribution and deterrence, and therefore weigh, in equal importance with the other factors we are required to consider, in favor of the conclusion that SORNA is punitive.

The fourth factor we are required to examine is whether an alternative purpose to which registration and notification provisions may be rationally connected is assignable for them. The Pennsylvania Supreme Court has determined, going back to *Muniz*, *supra*, that SORNA's registration and notification requirements are rationally connected to a purpose independent of public shaming and deterrence, namely, the purpose of promoting public safety and health. *See Lacombe*, *supra* (regarding Subchapter I); *Butler*, *supra* (regarding registration, notification and counseling provisions applicable to SVP's); *Muniz*, *supra* (regarding Subchapter H). The High Court concluded that this factor weighs in favor of a determination that SORNA's registration and notification requirements were non-punitive.

While there is unquestionably a valid purpose to SORNA that is unrelated to its punitive effects, the defense provided evidence indicating that the relationship between SORNA's registration and notification requirements and the public protection aspect of SORNA are not rationally related. Dr. Letourneau discussed multiple studies demonstrating that the registration and notification procedures of SORNA do not appreciably reduce the rate of recidivism, hinder rehabilitation by impairing housing, employment, and pro-social relationship prospects, divert community resources from the offenders who could most benefit, i.e., those who have a high likelihood of reoffending, are very costly to maintain, and result in the bargaining down of registrable offenses to non-registrable ones, all of which jeopardize the public safety and welfare purpose espoused by the Legislature. (6/29/21, Ex. D-7, Affid. of Professor Elizabeth J. Letourneau, Ph.D.). Dr. Prescott reinforced Dr. Letourneau's conclusions with research demonstrating that the

community notification procedures of SORNA do not aid the protection of the public because their detrimental effects, as enhanced by the denotation that registrants are all incorrigible, highly dangerous sexual recidivists, impair offenders' abilities to successfully reintegrate into society. (6/29/21, Ex. D-9, Expert Report of James J. Prescott, J.D., Ph.D.). Dr. Hanson, whose Declaration was largely directed towards the question of the recidivism rate of sexual offenders, reinforced the conclusions of Drs. Letourneau and Prescott in his opinion that SORNA's failure to discriminate between the risk levels of sex offenders wastes resources that could more effectively be applied to reduce the recidivism risk of offenders who are actually at high risk of committing subsequent sex offenses, imposes unnecessary burdens on individuals who are already unlikely to reoffend, and thereby impedes the public safety portion of the purposes of SORNA as set forth in the legislative preamble. (6/28/21, Ex. D-2, Declaration of R. Karl Hanson). While the Commonwealth's expert, as we mentioned earlier, criticized as incompetent the procedures by which all studies yielding conclusions contrary to the Commonwealth's position were conducted, particularly objecting to the defense's alleged use of "null findings", or results that do not carry statistical significance, to support its conclusions that registration and notification policies do not improve recidivism rates or public safety, the defense experts credibly explained that null findings are valid bases for interpretation when a researcher is looking to determine whether a particular study group is similar or different from another, particularly when multiple studies on the same subject repeatedly show the same null finding. (*See* Remand Hearing Transcript, 6/28/21, N.T. 196 [Testimony of Dr. Hanson; "Null findings make sense if you have a clear expectation of one group is supposed to be different than another group."]). As Dr. Letourneau testified in response to the question of

whether she agreed with Dr. McCleary's statement that no conclusions may be drawn from null findings,

> A. I disagree. As I said earlier, I would never rely on a single study or even two or three studies to form a strong opinion. All studies have their limitations. When you get to the body of research that now fails to find any impact of registration on sexual recidivism, I find that many of my—all of my peers that I'm aware of find that convincing. This is a policy that simply fails to achieve its meaning.
>
> Q. He says that it is more realistic and reasonable to attribute the null finding to a flawed and weak design. Do you agree with that statement and why?
>
> A. I disagree with that statement. The point of science is to build a body of evidence around a specific question. And if you have something that is supposed to reduce sexual recidivism and most of the research fails to find that it reduces sexual recidivism, then that is a body of evidence. It is not nothing, which I think is what Dr. McCleary is arguing.
>
> Again, if it was a single study or two or even a small handful that found null results, we might be able to argue, well, maybe a different kind of schema would have a different effect. But we've seen multiple studies from multiple states with different policies come up with the same finding, which is that it's not related to sexual recidivism.
>
> Q. And if you decided to now look more into this particular research, meaning the effectiveness of SORN laws, would you expect to find different results?
>
> A. I mean, you expect to find—in any body of research you expect to find a smattering of different results, but as the number of studies accrue and the number of publications accrue, you know, the best case scenario is you start to see a coherent message. And the message here is that this is a policy that does not result in reducing sexual recidivism.

(Remand Hearing Transcript, 6/29/21, N.T. 66-67). Dr. Prescott reinforced Drs. Hanson and Letourneau's opinions regarding the significance of null findings when asked to respond to Dr. McCleary's criticism on direct examination.

> Q. I wanted to ask you about his null finding critique. On page 37 he says that although the defendant's experts habitually interpret null findings as evidence—I'm sorry. I'll go slower, your Honor.
>
> Although the defendant's experts habitually interpret null findings as evidence that SORN laws do not work, their interpretations violate widely accepted methodological rules. What do you take that to mean?
>
> A. I mean, traditional statistical inference or hypothesis testing is trying to essentially determine whether an estimate of an effect or a relationship differs from zero. And sometimes the relationship is so close to zero that it's difficult to know whether or not it's zero or maybe just very close to zero. And in any particular study his point is well taken.
>
> And you can often find studies out there where people say it's not that I'm showing you evidence of no effect. It's that there is no evidence of any effect. If we're given the setup of this study I was able to test this and I cannot say whether or not there is an effect that is different from zero or not. That said, it is not the case that a null finding teaches us nothing.
>
> Q. What can it teach us?
>
> A. Well, you know, realize that when you have a null finding what you have is an estimate that's essentially pretty close to zero. And it's so close to zero that you can't rule out that it is zero. So in economics we oftentimes call this a tightly bound zero. We can't say it's zero but we can say statistically that it can't be far away from zero. And once you have multiple studies that consistently find that you start to have more and more statistical power, more and more observations, more and more attempts to see whether it's different from zero and never being able to find that it is not zero. Slowly with the accretion of evidence you can feel more and more confidant.

(Remand Hearing Transcript, 6/29/21, N.T. 194-96).

We find these testimonies concerning the utility of null findings credible and logical. If numerous studies on the same subject yield the conclusion that the comparison of the subject groups shows no difference between them, then it may reasonably be inferred that there is no measurable or statistically significant difference between them. As the defense experts testified, the confidence level increases with the accrual of more studies showing the same result.

Accordingly, based on the evidence of scientific and academic consensus presented, we find that SORN laws do not have the effect on recidivism and public safety anticipated by the Legislature, and that they are not rationally related to the purposes for which they were enacted. Thus the fourth factor we have been directed to analyze weighs in favor of a determination that SORNA is punitive.

The fifth and final factor this Court is required to consider is whether the requirements appear excessive in relation to the alternative purpose assigned. Our analysis of this factor yields the same conclusion reached with respect to the preceding four factors: SORNA's registration and notification requirements are excessive in relation to its non-punitive purpose of protecting public safety. SORNA's registration and notification policies are based on the title of the offense, not the personal characteristics and circumstances of the offender. They do not take into consideration the actual risk of any particular defendant to reoffend in the future. The title of the offense bears little relationship to the question of whether a person subject to registration will recidivate. (*See* 6/28/21, Ex. D-2, Declaration of R. Karl Hanson, at 12-13 ["Although there are clear differences in the moral seriousness of sexual crimes, the seriousness of the offense is

largely unrelated to the likelihood of recidivism."]). As we have discussed above, SORNA does not function as intended and is not effective at promoting public safety. It diverts resources away from offenders who could most benefit from them. Finally, SORNA catches in its net offenders who have committed crimes with no sexual component to them. It is unconstitutionally overbroad and excessive. For all of these reasons, we find that the fifth factor, whether SORNA is excessive in relation to its alternative, non-punitive purpose, weighs in favor of a finding in the affirmative and the conclusion that SORNA's registration and notification provisions are punitive in effect, overriding the Legislature's attempted creation of a civil regulatory scheme.

As all of the factors we have been asked to review weigh in favor of the conclusion that SORNA, as amended by Act 29, remains punitive, we find that SORNA is unconstitutional. Because SORNA constitutes punishment, it violates *Alleyne*[9] and *Apprendi;*[10] results in a criminal sentence in excess of the statutory maximums; offends Federal and State proscriptions against cruel and unusual punishment; and breaches the separation of powers doctrine, as discussed in Judge Sarcione's August 30, 2018 Opinion *Sur* Rule 1925(a).

Because we find that SORNA is unconstitutional as a legislative scheme in both its use of a constitutionally infirm irrebuttable presumption and the punitive effects of its registration and notification provisions, as well as in its application to this Defendant, who has a strong support structure, is educated, is working, is an excellent candidate for

[9] *Alleyne v. United States*, 133 S.Ct. 2151 (U.S. Va. 2013).
[10] *Apprendi v. New Jersey*, 120 S.Ct. 2348 (U.S. N.J. 2000).

rehabilitation, and is highly unlikely to reoffend, as we also discussed in Judge Sarcione's August 30, 2018 Opinion *Sur* Rule 1925(a), to the extent that it needs to be reiterated here, Defendant's Supplemental Post Sentence Moton Filed Nunc Pro Tunc, filed February 27, 2018, is, and/or remains, granted.[11]

[11] The Adam Walsh Child Protection and Safety Act provides that each State may evaluate the constitutionality of its State enactments and if it finds a provision unconstitutional, the provision can be stricken without the loss of Federal funds. *In re J.B.*, 107 A.3d 1 (Pa. 2014). The Act imposes general registry requirements but does not mandate enactment of any particular statutory scheme by a State. *Bill v. Noonan*, 2019 WL 2400676 (Pa. Cmwlth. 2019).

COMMONWEALTH OF PENNSYLVANIA	**: IN THE COURT OF COMMON PLEAS**
vs.	**: CHESTER COUNTY, PENNSYLVANIA**
GEORGE TORSILIERI	**: NO. 15-CR-0001570-2016**
	: CRIMINAL ACTION—LAW

Tracy S. Piatkowski, Esquire, Deputy Attorney General, Leslie S. Pike, Esquire, Assistant District Attorney, and Erin P. O'Brien, Esquire, Assistant District Attorney, for the Commonwealth
Aaron Marcus, Chief, Appeals Division, Defender Association of Philadelphia, Marni Snyder, Esquire, and Emily Mirsky, Esquire, Assistant Public Defender, Delaware County Public Defender's Office, for the Defendant

ORDER

AND NOW, this 22nd day of August 2022, in response to the June 16, 2020 directive of the Pennsylvania Supreme Court, after reviewing the record established June 28, 29, and 30 of 2021, and post-hearing submissions of the Commonwealth and the Defendant, it is hereby **ORDERED AND DECREED** that Defendant's Supplemental Post Sentence Motion Filed Nunc Pro Tunc, filed February 27, 2018, is and/or remains **GRANTED** on the grounds that SORNA is unconstitutional both facially and as applied to this Defendant on the bases that it employs an irrebuttable presumption that is not universally applicable and because its punitive nature offends *Alleyne* and *Apprendi*; results in a criminal sentence in excess of the statutory maximums; violates Federal and State proscriptions against cruel and unusual punishment; and breaches the separation of powers doctrine.

BY THE COURT:

Allison Bell Royer, J.