IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

In the Interest of J.B.	:	CP-67-JV-0000726-2010
In the Interest of L.A.D.	:	CP-67-JV-0000295-2011
In the Interest of D.E.	:	CP-67-JV-0000599-2008
In the Interest of K.O.H.	:	CP-67-JV-0000788-2010
In the Interest of A.M.	:	CP-67-JV-0000315-2011
In the Interest of J.T.	:	CP-67-JV-0000413-2012
In the Interest of D.T.	:	CP-67-JV-0000215-2010

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OPINION

This matter is before the Court on Petitioners' Motions for *nunc pro tunc* relief, challenging the constitutionality of Pennsylvania's Sexual Offender Registration and Notification Act ("SORNA") as it pertains to juveniles, both retroactively and prospectively. The Petitioners are juveniles who have previously been adjudicated delinquent for qualifying offenses prior to SORNA's enactment.

I. BACKGROUND

A. Case Histories of Petitioners

Petitioners were all adjudicated delinquent prior to December 20, 2012. They were not required to register as sex offenders in the Commonwealth at the time of their adjudications of delinquency, but because they remained under juvenile court supervision on SORNA's effective date, they were required to register retroactively as sex offenders pursuant to 42 Pa.C.S. §9799.10 *et seq.* All seven Petitioners filed timely motions for *nun pro tunc* relief on February 15, 2013. A hearing was held before the undersigned on September 30, 2013, at which time we heard oral argument from counsel for both

Petitioners and the Commonwealth. The additional resources presented to the Court are the stipulated facts and reports, the briefs submitted by the Petitioners and the Commonwealth, and the case flow charts.

The personal and procedural history of each Petitioner is discussed more extensively in Petitioners' Memorandum of Law in Support of Motions for Nunc Pro Tunc Relief ("Petitioners' Memorandum"), p. 4-22, incorporating the stipulations of fact. As is all too common with juvenile sex offenders, their lives too have been marred by tragedies, traumas, addictions, abuse, and personal victimization. Fortunately, as is also common with juvenile offenders, they have demonstrated a great capacity and willingness to rehabilitate and make better lives for themselves. We will briefly summarize their case histories and status herein:

1. J.B.

J.B. was adjudicated delinquent on November 30, 2010 after an admission to two counts of aggravated indecent assault for offenses involving his minor siblings when he was fifteen years old. (Dispositional Order, 11-30-10). After adjudication, he was placed at Diversified Treatment Alternatives and remained there for two years. (J.B. Juvenile Court Flow Chart). He successfully completed treatment and was transferred to Arborvale Manor. *Id.* He was later discharged from Arborvale Manor and committed to South Mountain Secure Treatment Facility in April 2013, and remains in placement there.

2. L.D.

L.D. was adjudicated delinquent on August 26, 2011 after an admission to one count of aggravated indecent assault for an act that occurred on January 15, 2011 when he was fourteen years old. (Transcript of Proceedings, August 26, 2011). The offense involved a minor relative. *Id.* L.D. was adjudicated delinquent and committed to the SOAR Program where he received outpatient sex offender counseling at Triad Treatment Specialists. (Case Update, June 1, 2012). After nearly a year of treatment at Triad, he was committed to the inpatient Northwestern Academy Safety, Empathy and Treatment Program in January, 2013, where he currently resides.

3. D.E.

D.E. admitted to one count of Involuntary Deviate Sexual Intercourse (IDSI) and was adjudicated delinquent on November 20, 2008. He was fifteen years old at the time of the offense. He was subsequently informally adjusted for an additional charge of IDSI filed on October 29, 2007. (Juvenile Court Flow Chart). In addition, D.E. admitted to a charge of theft by deception and access device fraud, both misdemeanors in the first degree, and was adjudicated delinquent of those offenses on June 10, 2008. *Id.*

D.E. was held at the York County Youth Detention Center from May 22, 2008 until June 27, 2008. He was placed at CACY Sex Offender and Fire Setters Program from June 27, 2008 until March 26, 2010. He was then placed at the NW Academy Open

Program from May 26, 2010 to June 21, 2010. He received treatment from Diversified Treatment Alternatives from June 21, 2010 to August 13, 2010. From August 25, 2010 until April 26, 2011 he was at the NW Academy SET Program. From April 26, 2011 to July 12, 2012 he was placed at the South Mountain Secure Treatment Facility. He was stepped down to Arborvale Manor from July 12, 2012 until August 11, 2012. He was then placed again at South Mountain from August 23, 2012 until shortly before his 21st birthday on April 18, 2013. (Placement History).

D.E. was referred to the Sexual Offenders Assessment Board (SOAB) for an evaluation to determine if he meets the criteria of a Sexually Violent Delinquent Child pursuant to Act 21. Although the initial review by the SOAB recommended involuntary commitment under 42 Pa.C.S.A. §6358 (Sexual Offender Assessment dated August 23, 2012), a January 9, 2013 addendum to the report that included consideration of additional records determined that he did not meet the Act 21 criteria and the SOAB did not recommend involuntary civil commitment. (Sexual Offender Assessment-Addendum, dated January 9, 2013).

4. K.H.

K.H. was adjudicated delinquent after an admission to one count of rape on January 5, 2011, for an offense that occurred in August 2010 when he was seventeen years old. (Transcript of Proceedings, January 5, 2011). After adjudication, he was placed at Northwestern Academy Safety, Empathy and Treatment Program and remained there for

one year. (NW Academy Release Summary, June 8, 2012). He successfully completed inpatient treatment and transitioned to the NHS Academy Community Preparation Program on January 4, 2012. From there he transitioned to Arborvale Manor. *Id.* While at the independent living facility, K.H. attended outpatient sex offender counseling, and was ultimately discharged from the program. (Arborvale Discharge Summary, November 28, 2012). K.H. was remanded to the Lancaster Youth Intervention Center. (Sexual Offender Assessment, December 28, 2012). He was able to secure his own apartment a few months later, and his probation was discharged on March 19, 2013.

5. A.M.

On July 18, 2011, A.M. was found guilty and adjudicated delinquent of aggravated indecent assault and indecent assault for an act that occurred on September 26, 2010, when he was sixteen years old. (Transcript of Proceedings, July 18, 2011). After adjudication, he was placed at Summit Academy's Drug and Alcohol Program, from which he was successfully discharged five months later. (Case Update, December 24, 2013). Upon his release, A.M. was ordered to attend outpatient sex offender treatment at Triad Treatment Specialists. *Id.* As a result of many probation violations, he was committed to the inpatient Northwestern Academy Safety, Empathy and Treatment Program, where he has resided since January 2013. (A.M. Juvenile Court Flow Chart).

6. J.T.

J.T. was adjudicated delinquent for two counts of involuntary deviate sexual intercourse and indecent assault after an admission, for an offense that occurred between April 1, 2011 and January 30, 2012 when he was between sixteen and seventeen years old. (Allegation Form, York County Juvenile Court, p. 1); (Juvenile Court Flow Chart). He was placed on probation with out-patient sex offender therapy on October 2, 2012. (Dispositional Hearing Transcript, October 2, 2012). Prior to his outpatient sex offender treatment, an "Estimate of Risk of Adolescent Sexual Offense Recidivism" (ERASOR) revealed that J.T.'s risk of re-offending was very low. (ERASOR dated September 19, 2012, p. 10). He was soon expected to finish outpatient sex offender treatment at the time Petitioners filed their Memorandum.

7. D.T.

On December 10, 2010, D.T. was found to have committed the delinquent act and adjudicated delinquent for two counts of involuntary deviate sexual intercourse and one count of attempted rape, for offenses that occurred when he was approximately fourteen years old. (Transcript of Proceedings, December 20, 2010). After adjudication, he was placed at Cornell Abraxas Youth Center (CAYC), where he remained for thirteen months. (Juvenile Court Flow Chart). Following his discharge from placement April 27, 2012, he stepped down to an independent living program. (York County Juvenile Probation Department Memorandum, July 31, 2012). However, he absconded from the

program on July 31, 2012, and is currently incarcerated at Western Correctional Institution in Cumberland, Maryland, serving a sentence for an unrelated, non-sexual crime.

While at CAYC, he successfully completed the inpatient sex offender treatment program. (Juvenile Court Flow Chart). The psychologist who administered D.T.'s initial Psychosexual Examination found that he "does not seem to fit neatly into any specific sex offense typology." (Comprehensive Psychosexual Evaluation, June 14, 2010).

B. Background of SORNA

The legislative history of SORNA in Pennsylvania, particularly as it pertains to juveniles, is *de minimus*. The law was passed pursuant to the requirements of the Federal Adam Walsh Act. *Pennsylvania Legislative Journal*, No. 83, p. 2552.[1] There appears to have been more discussion and debate with regard to the new provisions pertaining to transient or homeless adult sex offenders. *See Pennsylvania Legislative Journal*, No. 11, p. 186-188 (discussing how a homeless person could comply with the requirements, and the consequences of a two year jail sentence for non-compliance); *Id.*, No. 67, p. 1204-1204 ("Senate Bill No. 1183 will close Megan's Law loopholes and add provisions bringing transient sex offenders under the current provision of Megan's Law.")

[1] "Each State must enact a law which substantially complies with the Federal Adam Walsh Act. Failure to enact a statute which substantially complies with the Adam Walsh Act subjects the State to a financial penalty: 10 percent of the Byrne grant provided by the Department of Justice. For Pennsylvania, this is approximately $1.6 million."

In the Senate, there were a few concerns raised about the application of the law to juveniles. *See Pennsylvania Legislative Journal*, No. 74, p. 1373-1374.[2]

Despite this minimal history with regard to juveniles, the legislature passed SORNA, and implementation of the juvenile offender provisions began on December 20, 2012. *See* 42 Pa.C.S. § 9799.10 *et seq.* Section 9799.12 defines the term "juvenile offender", while Section 9799.13(8) requires juvenile offenders to register with the Pennsylvania State Police.[3] The Act establishes three tiers of sexual offenses, with Tier III offenses the most serious. This includes rape, involuntary deviate sexual intercourse, and aggravated indecent assault. 42 Pa.C.S. §9799.14 Petitioners have all admitted to or been found to have committed a delinquent act which qualifies as at least one Tier III offense, and were adjudicated delinquent prior to enactment of SORNA. Section 9799.15

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[2] Senator M.J. White: "I also note that there are mandatory minimum sentences in here for failure to register, which may very well be appropriate in certain cases, certainly cases with adult offenders, but I question how that really should apply to juveniles. I would prefer to have judges do that sentencing."

[3] "Juvenile offender" is defined by § 9799.12 as one of the following:
1) An individual who was 14 years of age or older at the time the individual committed an offense which, if committed by an adult, would be classified as an offense under 18 Pa.C.S. § 3121 (relating to rape), 3123 (relating to involuntary deviate sexual intercourse) or 3125 (relating to aggravated indecent assault) or an attempt, solicitation or conspiracy to commit an offense under 18 Pa.C.S. § 3121, 3123 or 3125 and either:
(i) is adjudicated delinquent for such offense on or after the effective date of this section; or
(ii) has been adjudicated delinquent for such offense and on the effective date of this section is subject to the jurisdiction of the court on the basis of that adjudication of delinquency, including commitment to an institution or facility set forth in section 6352(a)(3) (relating to a disposition of delinquent child).
(2) An individual who was 14 years of age or older at the time the individual committed an offense similar to an offense under 18 Pa.C.S. § 3121, 3123 or 3125 or an attempt, solicitation or conspiracy to commit an offense similar to an offense under 18 Pa.C.S. § 3121, 3123 or 3125 under the laws of the United States, another jurisdiction or a foreign country and was adjudicated delinquent for such an offense.
(3) An individual who, on or after the effective date of this paragraph, was required to register in a sexual offender registry in another jurisdiction or foreign country based upon an adjudication of delinquency.

establishes the period of registration. Lifetime registration is required for both Tier III offenders and juvenile offenders. 42 Pa.C.S. § 9799.15(a)(3) and (a)(4). Section 9799.15(e) requires periodic in-person appearances quarterly (every 90 days) for Tier III offenders, while Section 9799.15(g) requires an in person appearance within three business days upon any change of personal information[4]

[4] **(g) In-person appearance to update information.**--In addition to the periodic in-person appearance required in subsections (e), (f) and (h), an individual specified in section 9799.13 shall appear in person at an approved registration site within three business days to provide current information relating to:

(1) A change in name, including an alias.
(2) A commencement of residence, change in residence, termination of residence or failure to maintain a residence, thus making the individual a transient.
(3) Commencement of employment, a change in the location or entity in which the individual is employed or a termination of employment.
(4) Initial enrollment as a student, a change in enrollment as a student or termination as a student.
(5) An addition and a change in telephone number, including a cell phone number, or a termination of telephone number, including a cell phone number.
(6) An addition, a change in and termination of a motor vehicle owned or operated, including watercraft or aircraft. In order to fulfill the requirements of this paragraph, the individual must provide any license plate numbers and registration numbers and other identifiers and an addition to or change in the address of the place the vehicle is stored.
(7) A commencement of temporary lodging, a change in temporary lodging or a termination of temporary lodging. In order to fulfill the requirements of this paragraph, the individual must provide the specific length of time and the dates during which the individual will be temporarily lodged.
(8) An addition, change in or termination of e-mail address, instant message address or any other designations used in Internet communications or postings.
(9) An addition, change in or termination of information related to occupational and professional licensing, including type of license held and license number.

Section 9799.16 provides for establishment of the registry, and includes a list of information that an offender is required to provide for inclusion in the registry.[5] The

[5] **(b) Information provided by sexual offender.**--An individual specified in section 9799.13 (relating to applicability) shall provide the following information which shall be included in the registry:

(1) Primary or given name, including an alias used by the individual, nickname, pseudonym, ethnic or tribal name, regardless of the context used and any designations or monikers used for self-identification in Internet communications or postings.
(2) Designation used by the individual for purposes of routing or self-identification in Internet communications or postings.
(3) Telephone number, including cell phone number, and any other designation used by the individual for purposes of routing or self-identification in telephonic communications.
(4) Valid Social Security number issued to the individual by the Federal Government and purported Social Security number.
(5) Address of each residence or intended residence, whether or not the residence or intended residence is located within this Commonwealth and the location at which the individual receives mail, including a post office box. If the individual fails to maintain a residence and is therefore a transient, the individual shall provide information for the registry as set forth in paragraph (6).
(6) If the individual is a transient, the individual shall provide information about the transient's temporary habitat or other temporary place of abode or dwelling, including, but not limited to, a homeless shelter or park. In addition, the transient shall provide a list of places the transient eats, frequents and engages in leisure activities and any planned destinations, including those outside this Commonwealth. If the transient changes or adds to the places listed under this paragraph during a monthly period, the transient shall list these when registering as a transient during the next monthly period. In addition, the transient shall provide the place the transient receives mail, including a post office box. If the transient has been designated as a sexually violent predator, the transient shall state whether he is in compliance with section 9799.36 (relating to counseling of sexually violent predators). The duty to provide the information set forth in this paragraph shall apply until the transient establishes a residence. In the event a transient establishes a residence, the requirements of section 9799.15(e) (relating to period of registration) shall apply.
(7) Temporary lodging. In order to fulfill the requirements of this paragraph, the individual must provide the specific length of time and the dates during which the individual will be temporarily lodged.
(8) A passport and documents establishing immigration status, which shall be copied in a digitized format for inclusion in the registry.
(9) Name and address where the individual is employed or will be employed. In order to fulfill the requirements of this paragraph, if the individual is not employed in a fixed workplace, the individual shall provide information regarding general travel routes and general areas where the individual works.
(10) Information relating to occupational and professional licensing, including type of license held and the license number.
(11) Name and address where the individual is a student or will be a student.
(12) Information relating to motor vehicles owned or operated by the individual, including watercraft and aircraft. In order to fulfill the requirements of this paragraph, the individual shall provide a description of each motor vehicle, watercraft or aircraft. The individual shall provide a license plate number, registration

information that the offender must provide, as part of the initial registration as well as the periodic in-person updates, is extensive. The child's fingerprints and palm prints must be submitted to the Federal Bureau of Investigation Central Database, and the child's DNA must be submitted into the combined DNA Index System (CODIS). 42 Pa.C.S.A. §9799.16(c)(5) and (6).

Section 9799.17(a) allows for the termination of the registration requirement for juvenile offenders after at least twenty-five (25) years since the adjudication of delinquency, if certain other conditions have also been met. Section 9799.18 requires the state police to share registry information with certain government entities and law enforcement officials, and Section 9799.19(h) establishes the initial registration requirements for juvenile offenders. Section 9799.21 establishes a penalty for those who fail to comply with the initial registration and ongoing reporting requirements. An offender who is noncompliant can be prosecuted pursuant to 18 Pa.C.S. § 4915.1. Those who are required to register for twenty-five years to life (all Petitioners here), and who are found to have failed register or verify, have committed a felony in the second degree, which is accompanied by a mandatory minimum prison sentence of three years for a first

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number or other identification number and the address of the place where a vehicle is stored. In addition, the individual shall provide the individual's license to operate a motor vehicle or other identification card issued by the Commonwealth, another jurisdiction or a foreign country so that the Pennsylvania State Police can fulfill its responsibilities under subsection (c)(7).
(13) Actual date of birth and purported date of birth.
(14) Form signed by the individual acknowledging the individual's obligations under this subchapter provided in accordance with section 9799.23 (relating to court notification and classification requirements).

offense. 18 Pa.C.S. § 4915.1(c)(1); 42 Pa.C.S.A. §9718.4(a)(1)(iii). A second violation is a felony in the first degree and again accompanied by a longer mandatory minimum prison sentence of five years. 18 Pa.C.S. § 4915.1(c)(2); 42 Pa.C.S.A. §9718.4(a)(2)(i). Failure to provide accurate information carries a mandatory minimum sentence of five years for a first offense, and seven years for subsequent offenses. 42 Pa.C.S.A. §9718.4(a)(1)(iv), (a)(2)(ii).

The Act requires the Pennsylvania State Police to share information regarding adult sex offenders with the public via the internet. 42 Pa.C.S. §9799.28. This required public information sharing does not apply to juvenile offenders other than those deemed sexually violent pursuant to Act 21. 42 Pa.C.S.A. § 6401 *et. seq.* The third parties who are to receive the information provided by Petitioners, and all those classified as "juvenile offenders", is limited by the statute to those entities listed under Section 9799.18(a). This includes jurisdictions in which the child lives, works, or attends school, the district attorney in the counties where the child lives, works or attends school, the U.S. Attorney General, Department of Justice, and United States Marshals Service, and the chief law enforcement officer of the police department of the municipality in which the child lives, works, or attends school. 42 Pa.C.S. §9799.18(a). The child will also be included in the National Sex Offender Registry, the National Crime Information Center (NCIC) and any other database established by the Attorney General, Department of Justice, or United States Marshals Service. 42 Pa.C.S. §9799.18(a)(3). Although Section 9799.18 specifically identifies the individuals and entities with whom the Pennsylvania State

Police is required to share registry information, it does not include a specific prohibition on the further release or dissemination of the information by the recipients.

Pennsylvania juvenile offenders are also sex offenders under federal law. 42 U.S.C.S.§16911(8). Federal law sets the minimum requirements for interstate registration, and sex offenders as defined by federal law have a duty to register. *See* 42 U.S.C.S. §16901 *et seq.;* 42 U.S.C.S. §§16911-16913. A juvenile registrant who travels to another state and changes his "name, residence, employment, or student status" must "appear in person in at least 1 jurisdiction involved" to update his registration information or face up to 10 years in federal prison. 42 U.S.C.S. §16913 (registration requirements); 18 U.S.C.S. §2250 (establishing crime). Juvenile offenders who travel, vacation, or briefly stay in another state do not trigger the federal obligation, but federal requirements set a floor, not a ceiling, and they comprise the extent of a registrant's obligations in only five states. Petitioners' Memorandum at 48, n. 35. In forty-five states, Pennsylvania registrants are included as registerable sex offenders "under most circumstances". *Id.*, at 49, n.36 (noting the states' statutes and the different approaches to determine whether a juvenile offender is a registerable offender). Twenty-six states require Pennsylvania juveniles to register if they were required to register in the adjudicating state. *Id.*, n. 37. These various and differing requirements to register in other states can lead to public disclosure of a juvenile's registration. The provisions governing Pennsylvania's public internet website do not include "juvenile offenders". *See* 42 Pa.C.S.A. §9799.28. However, most states do include juvenile offenders in their

public notification schemes when registration is required by that state. Once public, that information is linked to the Dru Sjodin National Sex Offender Website and numerous private sex offender notification websites. Petitioners' Memorandum, Exhibit K, Affidavit of Wayne A. Logan, Esq., at ¶23 ("Logan").

C. The Juvenile Justice System in Pennsylvania and the Differences Between Juvenile Offenders and Their Adult Counterparts

Petitioners are correct in noting from the outset the purpose of juvenile courts, which were established to "provide guidance and rehabilitation for the child and protection for society, not to affix criminal responsibility, guilt, and punishment." *Kent v. U.S.*, 383 U.S. 541, 554(1966). Since the Commonwealth enacted its first Juvenile Court Act in 1901, followed by the Juvenile Court Act of 1972, along with various subsequent amendments including Act 33 in 1995, the overarching goal of Pennsylvania's Juvenile Court system has been to protect the public "by providing for the supervision, care, and rehabilitation of children who commit delinquent acts through a system of balanced and restorative justice." Petitioners' Memorandum at 1. These principles of balanced and restorative justice ("BARJ") were imbedded into the Juvenile Act by Act 33, and require juvenile offenders to remedy the harms that their offenses have caused victims and the community. In addition to remedial measures, there is a requirement of training in skill-building (i.e. competency development) for juvenile offenders along with eliminating negative behaviors. *Id.* at 2, n. 2. Our juvenile justice system is designed to meet the

goals of balanced and restorative justice with the greatest amount of anonymity and confidentiality as possible, with no more disruption to a child's life than is necessary to effectively intervene. This is why juvenile proceedings are usually private and the court records confidential, with broader rights to expungement of juvenile records. *Id.* at 1. "It is the law's policy 'to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.'" *Application of Gault*, 387 U.S. 1, 24 (1967)(quoting *Application of Gault*, 407 P.2d 760, 767(Ariz. 1965)(internal citations omitted). As stated most succinctly by counsel for Petitioners during oral argument, our Juvenile Court is a "Court of second chances". Transcript of Proceedings, September 30, 2013, at 46.

The reason that our juvenile justice system is designed in such a way is due to the many differences between children and adults, and between juvenile and adult offenders. Children are constitutionally different from adults for purposes of sentencing. *Miller v. Alabama*, 132 S.Ct. 2455, 2464 (2012). Because juveniles have diminished culpability and greater prospects for reform, "they are less deserving of the most severe punishments." *Id.*(quoting *Graham v. Florida*, 130 S.Ct. 2011, 2016 (2010).

There are three "significant gaps" between juveniles and adults. *Miller*, 132 S. Ct. at 2464. First, children have a "'lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. *Ibid.* (quoting *Roper v. Simmons*, 125 S.Ct. 1183, 1195). Second, children "are more vulnerable ... to negative influences and outside pressures," including from their family

and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Id.* Third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." *Id.*

Petitioners note the "significant body of research" that recognizes the ability of children to reform and change. Petitioner's Memorandum at 25-26, n. 13. Such research points to an "age-crime curve", in which criminal activity "'peak[s] sharply' in adolescence and 'drop[s] precipitously in young adulthood." *Id.*, n.14. [6] "[W]hile many criminals may share certain childhood traits, the great majority of juvenile offenders with those traits will not be criminal adults."[7]

The evidence with regard to juveniles' ability to reform and change is reflected by the additional research regarding recidivism rates for juvenile sex offenders. The belief that "sex offenders are a very unique type of criminal" is not supported with respect to juvenile offenders.[8] "Many demographic studies fail to identify differences in personality and psychosocial circumstances between juvenile sex offenders and non-sex offenders. Furthermore, their patterns of re-offense are similar with non-sexual offenses

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[6] Brief of the American Psychological Association, et al. as *Amicus Curiae* in Support of Petitioners, *Miller v. Alabama*, at 7-8, quoting Terrie Moffit, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychol. Rev. 674, 675 (1993); Brief of J. Layrence Aber et al. as *Amicus Curiae* in Support of Petitioners, *Miller v. Alabama* at 30.

[7] Brief of the American Psychological Association, et al. as *Amicus Curiae* in Support of Petitioners, *Miller v. Alabama* at 22, 24.

[8] Elizabeth Letourneau and Michael Miner, *Juvenile Sex Offenders: A Case Against the Legal and Clinical Status Quo*, 17 Sexual Abuse: A Journal of Research and Treatment 293, 296 (2005); *see also Sex Offenders* at 299 citing M. Ford & J. Linney, *Comparative Analysis of Juvenile Sex Offenders, Violent Nonsexual Offenders, and Status Offenders*, 10 Journal of Interpersonal Violence 56-70 (1995).

predominating." Stipulations Regarding Expert Witnesses, Exhibit C, Affidavit of Elena del Busto("del Busto"), M.D.,¶16.

"There are now more than 30 published studies evaluating the recidivism rates of youth who sexually reoffend. The findings are remarkably consistent across studies, across time, and across populations: sexual recidivism rates are low." *Id.*, Exhibit A, Affidavit of Elizabeth J. Letourneau, Ph.D.("Letourneau"), ¶A. "As a group, juvenile sex offenders have been found to pose a relatively low risk to sexually re-offend, particularly as they age into adulthood." *Id.*, Exhibit B, Affidavit of Michael F. Caldwell, Psy.D.("Caldwell"), ¶3(C). In what Dr. Caldwell describes as "the most extensive" research study to date, a meta-study of over sixty-three studies and over 11,200 children "found an average sexual recidivism rate of 7.09% over an average 5 year follow-up." *Id.* These rates are compared with a 13% recidivism rate for adults who commit sexual offenses. Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US* at 30 (citing R. Karl Hanson and Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. of Consulting & Clin. Psych. 348-62 (1998)).

The recidivism rates for children are lower than adults because "children are different". "Multiple studies have confirmed that juveniles sexually offend for different reasons than adults. It is rare for juvenile offenders' motivations to be of the sexual nature as seen in adults. Juveniles tend to offend based on impulsivity and sexual curiosity, to name a few." del Busto, ¶13 (internal citations omitted). "[W]ith maturation,

a better understanding of sexuality, and decreased impulsivity, most of these behaviors stop. Of the population of adolescents who experiment with sexual deviance, only a small fraction will maintain sexually deviant behavior in adulthood." *Id.* at ¶15.

The research regarding the effects of registration on juveniles both psychologically, and in terms of educational and employment prospects, is also compelling. "Policies that promote youths' concepts of themselves as lifetime sex offenders will likely interrupt the development of a positive self-identity. Letourneau at ¶D1, citing Letourneau, E.J., & Miner, M.H., *Juvenile sex offenders: A case against the legal and clinical status quo* in Sexual Abuse: A Journal of Research and Treatment, 17, 313-331(2005). "The result of such stigma on adolescent development only serves to worsen self-esteem, contribute to depression in some cases leading to suicide, and perpetuate criminal acts, etc." del Busto at ¶18. Among a group of 281 children registered on sex offender registries, nearly 20% indicated that they had attempted suicide. *Raised on the Registry* at 7, 51. In addition, most states have laws that expressly prohibit individuals on a registry from obtaining licenses for certain jobs, including jobs in the health care industry, education, and child development. *Id.* at 73. Many children adjudicated of sex offenses can also be expelled from public school. *Id.* at 71. Among 296 youth registrants nationwide, over 50% reported that they had been denied access to or experienced severe interruptions in their education due to registration. *Id.* at 72.

Based upon the foregoing, the Court finds that the Pennsylvania SORNA requirements for retroactive registration, periodic in-person appearances, verification, and

penalties for non-compliance impose a substantial burden on juvenile sex offenders. These provisions were enacted despite a minimal legislative history with regard to how they would impact juvenile offenders, or whether such provisions were necessary with regard to juveniles. In addition, the Court finds that juvenile sex offenders are different than their adult counterparts but not unlike other juvenile offenders, that the rate of recidivism of juvenile sex offenders is low, that they are likely have their registration status made public, and that they are likely to suffer various forms of irreparable harm as a result of being required to register, both in Pennsylvania and pursuant to various other state and federal laws.

II. DISCUSSION

A. *Ex Post Facto* Analysis

Pennsylvania courts assess both state and federal *ex post facto* claims under a two level inquiry established by the United States Supreme Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 169(1963); *Commonwealth v. Williams*, 832 A.2d 962, 971(Pa. 2003). The inquiry asks "whether the legislature's intent was to impose punishment, and, if not, whether the statutory scheme is nonetheless so punitive either in purpose or effect as to negate the legislature's non-punitive intent. *Commonwealth v. Lee*, 935 A.2d 865, 873 (Pa. 2007)(quoting *Williams*, 832 A.2d at 971)(additional citations omitted). If the intent is found to be civil and non-punitive, then the inquiry proceeds to the second level to determine whether the statute is so punitive in either purpose or effect as to negate a

legislature's civil intent. *Smith v. Doe*, 538 U.S. 84 (2003). *Mendoza-Martinez* established seven factors as guideposts for determining whether a statute imposes unconstitutional retroactive punishment. The factors are: 1) whether the sanction involves an affirmative disability or restraint; 2) whether it has historically been regarded as a punishment; 3) whether it comes into play only on a finding of scienter; 4) whether its operation will promote the traditional aims of punishment; 5) whether the behavior to which it applies is already a crime; 6) whether the rational purpose to which it may rationally be connected is assignable for it; and 7) whether it appears excessive in relation to the alternative purpose assigned. *Mendoza-Martinez*, 372 U.S. at 168-69. "Clearest proof" is required to establish that a law is punitive in effect. *Lee*, 935 A.2d at 876-77. This standard mandates that the "factors must weigh heavily in favor of a finding of punitive purposes or effect... to negate the General Assembly's intention that the act be deemed civil and remedial." *Id.* (citations omitted). However, the standard does not mandate that all the factors must weigh in favor of punishment. The Pennsylvania Supreme Court has noted that the seventh factor alone might be dispositive, or that a statute might be punitive when it is "so excessive relative to [its] remedial objective." *Lee*, 935 A.2d at 876 n.24.

Beginning with the first level inquiry pursuant to *Mendoza-Martinez*, the legislature's purpose and intent is stated as providing "a mechanism for the Commonwealth to increase its regulation of sexual offenders in a manner which is nonpunitive but offers an increased measure of protection to the citizens of the

Commonwealth." 42 Pa.C.S. §§ 9799.11. Despite this non-punitive intent, we are in agreement with Petitioners that SORNA is punitive in effect under the seven *Martinez-Mendoza* factors. First, it imposes an affirmative disability or restraint on juvenile offenders. A court must "inquire how the effects of the Act are felt by those subject to it." *Smith*, 538 U.S. at 99-100. Specifically, a court must determine whether the disability or restraint is major or minor, direct or indirect. "If the disability or restrain is minor and indirect, its effects are unlikely to be punitive." *Id.* As discussed above, the disabilities and restraints imposed by SORNA are major and direct. The required quarterly in-person appearances, the required appearances within three days for changes in personal circumstances, the comprehensive information that registrants' are required to provide, the additional federal requirements along with those of other states, together with the strict penalties for non-compliance, are anything but insignificant. We are also in agreement with Petitioners that the leading Pennsylvania and federal cases to consider whether Megan's Law imposes an affirmative disability or restraint are not dispositive of SORNA, especially as applied to children. Although the United States Supreme Court in *Smith* did not find that Alaska's sex offender law imposed an affirmative disability on adults, the law at issue did not cover juveniles, did not require in-person reporting, and otherwise disclosed adult convictions as part of the public record. *Smith*, 538 U.S. at 89-90; Alaska Stat. §§ 12.63.010 *et seq.* While the Pennsylvania Supreme Court found that Megan's Law II was only a minor restraint, the registration requirements were not as significant as SORNA, and applied only to adults after risk-assessment and an

opportunity to be heard. *Williams*, 832 A.2d at 973-75. Also, as discussed *supra*, SORNA imposes major secondary disabilities and restraints with regard to a child's psychological well-being, ability to travel or move, and ability to pursue educational and employment opportunities. In addition, juveniles and their families may become targets of violence and harassment. *See* Caldwell, ¶5(A). In one instance, a juvenile reported being threatened and harassed at school, and was eventually the victim of physical violence by members of his community. *Raised on the Registry* at 57. Registrants also have difficulty in obtaining or maintaining housing, due to restrictions on who they are permitted to live with, or restrictions such as the bar to federal housing. *Id.*, at 60; 42 U.S.C. §§13663(a).

The Commonwealth, in its Memorandum of Law Opposing Motions for Nunc Pro Tunc Relief ("Commonwealth's Memorandum"), argues that SORNA does not impose an affirmative disability or restraint, and cites to the case of *Commonwealth v. Mountain*, 711 A.2d 473, 477 (Pa. Super. 1998). We are in agreement with Petitioners that this case is not applicable. It did not involve an *ex post facto* challenge, concerned only the registration of adults, and analyzed the out-of-date Megan's Law I. 42 Pa.C.S. §9793. In addition, the registration period was for ten years with yearly verification, and the State Police had the duty to forward the information to local law enforcement where the registrant resides. 42 Pa. C.S. §§9795, 9796 (1998); *Mountain*, 711 A.2d at 478. The requirements for both juvenile and adult offenders under SORNA are clearly more onerous.

The Commonwealth also argues that this Court should not consider SORNA's "substantial, secondary disabilities and restraints." Commonwealth's Memorandum at 9, n. 2. We disagree, as this would run contrary to *Smith*, and the consideration of "how the effects of the Act are felt by those subject to it." *Smith*, 538 U.S. at 99-100. Although a disability or restraint is less likely to be punitive if the restraint is minor and indirect, it is for the court to determine a law's direct and indirect effects, whether they are major or minor, and whether they are closely connected to the law or more tangential. *Id.*, *see also E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir. 1997)(considering indirect effects). Other state Supreme Courts have considered indirect effects when applying the *Mendoza-Martinez* test and found them to constitute major disabilities. *See, e.g. Doe v. Dep't of Pub. Safety and Corr. Serv.*, 62 A.3d 123, 142-43 (Md. 2013); *Wallace v. State*, 905 N.E. 2d 371, 379-80 (Ind. 2009).

The second *Martinez-Mendoza* factor looks to whether the law at issue is similar to traditional forms of punishment. We would agree that the limitations and burdens imposed by SORNA are similar to probation in Pennsylvania. They both impose obligations to report followed by penalties for failure to comply, and both statutory schemes appear in the same sentencing code. The stated purposes are both similar, that being to protect the public or the safety and general welfare of the citizens. 42 Pa.C.S. §9912(a); 42 Pa.C.S. §9799.11(b)(1) and (2). There is also a similarity to the punishment of shaming. While the Pennsylvania Supreme Court in *Williams* recognized the similarities between shaming and notification of "sexually violent predator" status under

Megan's law, the court found that "the notification provisions of Megan's Law appear to be reasonably calculated to accomplish self-protection only, and not to impose additional opprobrium upon the offender unrelated to that goal." *Williams*, 832 A.2d at 976 (citations omitted). However, the *Williams* court was not required to consider how such provisions would affect juveniles, and the importance that Pennsylvania has placed on protecting the privacy of juveniles, as discussed *supra*. "There is a compelling interest in protecting minor children's privacy rights and the protection of a minor child's privacy is a key aspect of the Juvenile Act." *In re T.E.H.*, 928 A.2d 318, 323 (Pa. Super. 2007). "Pennsylvania's Juvenile Act demonstrates our legislature's compelling interest in safeguarding children involved in juvenile proceedings." *In re M.B.*, 819 A.2d 59, 65 (Pa. Super. 2003). We would also agree that SORNA's lifetime characterization of juveniles as criminals, along with the likely disclosure of their registration status to the public, is "a message and practice historically consistent with public shaming." Petitioner's Memorandum at 81.

The third factor of the *Mendoza-Martinez* test asks whether the requirements of the law only come into play upon a finding of *scienter*. Because the regulatory obligations of SORNA flow directly from a finding of criminal conduct, and the regulatory purpose is the reduction of future offending, *scienter* is a necessary part of the regulatory objective. We find that this prong of the *Mendoza-Martinez* test is satisfied.

The Commonwealth argues that SORNA is not triggered only after a finding of *scienter*, and in support thereof cites to the case of *Commonwealth v. Abraham*, 62 A.3d

343 (2012). *Abraham* held that counsel was not ineffective for failing to advise a defendant that he would forfeit his teacher's pension as a result of his conviction for a crime related to his public office. We agree with Petitioners that this case is not on point, because sex offender status is so "enmeshed" with and "intimately related to the criminal process" that counsel would be ineffective for failing to advise a child regarding SORNA.[9] *Padilla v. Kentucky*, 130 S.Ct. 1473, 1481-82 (2010); *see also United States v. Riley*, 72 M.J. 115 (C.A.A.F. 2013)("in the context of a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea"). We also agree that the loss of pension money after breaching an employment contract does not equate with the requirement of lifetime registration as a sex offender under threat of criminal prosecution. Petitioners' Reply to Commonwealth's Memorandum at 5.

With regard to the fourth *Mendoza-Martinez* factor, we find that SORNA promotes the traditional aims of punishment. First, we would agree that it punishes children by exacting retribution. As Petitioners point out, SORNA's retributive nature becomes apparent when compared to the Act 21 juvenile sexual offender involuntary civil commitment statute. The Pennsylvania Superior Court found that because Act 21 related directly to the "juvenile's *current* and continuing status as a person" in need of treatment and did "not affix culpability for prior criminal conduct" the law did not constitute retribution. *In re S.A.*, 925 A.2d 838, 842-44 (emphasis in original). The

[9] Petitioners correctly note that the issue of ineffective assistance of counsel is not before the Court. Petitioners' Reply to Commonwealth's Memorandum at 4.

requirements of SORNA, on the other hand, apply as a result of "prior criminal conduct" only, and the law punishes children adjudicated delinquent of a predicate offense regardless of the underlying facts or circumstances or the risks that they will reoffend. The lifetime registration requirements for all juvenile sex offenders appear particularly retributive in light of the research regarding juvenile recidivism discussed *supra*. "The extent research has not identified any stable, offense-based risk factors that reliably predict sexual recidivism in adolescents." Caldwell, at ¶3(D-G)(citing numerous studies).

The fifth *Mendoza-Martinez* factor asks whether the behavior to which the law applies is already a crime. We would agree that it is. SORNA does not apply to children who pose a threat, and may be arrested for predicate SORNA offenses, but are not adjudicated delinquent. As Petitioners argue, if the registration requirements were simply part of a civil, regulatory framework, one would expect that it would apply to children who committed sexual offenses but plea-bargained to non-SORNA charges, or those who are incompetent to proceed to trial. However, the registration requirements are applied only to those who are adjudicated delinquent of sexual offenses, undermining the stated purpose of public safety. The public safety purpose is further undermined due to the purported non-public nature of the registry for juveniles. 42 Pa.C.S. §9799.28(b). This is also a reason for our finding with regard to the sixth *Mendoza-Martinez* factor, that SORNA is not related to a non-punitive purpose. Along with SORNA's intent to keep the registration status of juvenile sex offenders from the public, despite the high

likelihood of public disclosure, the low rate of sexual offense recidivism for children also undermines the stated non-punitive intent of the law.

Finally, we look to the seventh *Mendoza-Martinez* factor, which is whether the statute appears excessive in relation to the alternative purpose assigned. As noted above in the *Lee* case, this factor alone is enough for the law to be considered punishment. *Lee*, 935 A.2d 865, n.24 (leaving open the possibility that "a show of sufficient excessiveness...might warrant a finding that those provisions are punitive."). Also, in *Williams*, the Pennsylvania Supreme Court observed that "if the Act's imprecision is likely to result in individuals being deemed sexually violent predators who in fact do not pose the type of risk to the community that the General Assembly sought to guard against, then the Act's provisions could be demonstrated to be excessive..." *Williams*, 832 A.2d at 983. We agree with Petitioners that this reasoning applies here. Juvenile offenders are required to register for life without a finding that they are likely to re-offend, and despite the low likelihood that they will re-offend. Petitioners also correctly point out that SORNA is excessive with regard to juveniles, in light of the fact that Pennsylvania already has Act 21, which provides for involuntary commitment of children adjudicated delinquent for sexual offenses who are approaching age twenty-one and continue to need sex offender treatment. Act 21 allows courts to civilly commit a person based upon a showing that the person has "serious difficulty in controlling sexually violent behavior that makes the person likely to engage in an act of sexual violence." 42 Pa.C.S. §6403(a)(3).

We also agree that the requirements of SORNA are excessive. The requirements are burdensome and particularly complicated for juveniles. Along with the required quarterly in-person appearances every year for life, a child must appear in-person within three business days of a change in any one of the following: name, residence, employment, school, telephone number, temporary lodging, e-mail address, instant message address, or any other designations used in internet communications or postings, and occupational license. 42 Pa.C.S. §9799.15(g). Changes with regard to a motor vehicle "owned or operated" by the child must also be reported, including "an addition to or change in the address of the place the vehicle is stored." 42 Pa.C.S. §9799.15(g)(6). If the child plans to travel internationally, he or she must report in-person to the Pennsylvania State Police "no less than 21 days in advance" and provide the dates of travel, destinations and temporary lodging. 42 Pa.C.S. §9799.15(i). Also, the child must submit to a photograph whenever "there is a significant change in appearance." *Id.* at (c)(4). It is unclear how a child who is still growing and developing would be expected to determine what constitutes such a "significant change", or how law enforcement would determine that a child had failed to comply with this requirement. Failure to comply with any and all of the registration and reporting requirements subjects the child to prosecution for a new crime. The Pennsylvania State Police are obligated by law to initiate arrest proceedings, and notify the United States Marshals Service and the municipal police. 42 Pa.C.S. §9799.25(b)(2-3); *see also* 42 Pa.C.S. §9799.22.

As discussed *supra*, the federal requirements along with those of other states that are triggered by registration in Pennsylvania only serve to increase the excessive nature of SORNA in relation to the non-punitive intent of the law.

The Commonwealth asserts that Petitioners' argument regarding excessiveness fails because they have not suggested "a less excessive" alternative to SORNA. Commonwealth's Memorandum at 13. We agree with Petitioners, that they are not required to set forth an alternative legislative scheme, and must only show that the law is not reasonably designed to fulfill its purported function. *See Williams*, at 832 A.2d 962, 98. Although Petitioners are not required to set forth an alternative, and the courts are likewise constrained, at a bare minimum the requirements are flawed by the lack of individual assessments including a right to be heard.

We also believe that it is useful to look to the recent findings of the York County Court of Common Pleas, and its *ex post facto* analysis of SORNA as it pertains to adult offenders. In three recent cases, our Court has found that the public notification of an adult offender's registration required by SORNA constituted additional punishment. *Commonwealth v. Martinez*, No. CP-67-CR-0001486-2010; *Commonwealth v. McGinnis*, No. CP-67-CR-0007283-2010; *Commonwealth v. Shower*, No. CP-67-CR-0006313-2005.[10] A distinction was made between the prior registration requirements of Megan's law, where there was no public notification, and SORNA. *Shower*, Opinion in Support of Order Pursuant to Rule 1925(a) of the Rules of Appellate Procedure at 5-7 (citing

[10] All three cases are currently on appeal before the Pennsylvania Superior Court, with Opinions in Support of Order Pursuant to R.A.P. 1925(a) filed by the Honorable Michael E. Bortner.

Commonwealth v. Fleming, 801 A.2d 1234, 1239 (Pa. Super. 2002); *Commonwealth v. Gajjney*, 733 A.2d 616, 620 (Pa. 1999)). Although SORNA on its face does not permit the public notification of a juvenile offender's registration status, the failure to set any explicit restrictions or penalties for dissemination to third parties makes public notification more likely. More significantly, the Court in *Martinez*, *McGinnis*, and *Shower* was not required to consider the many differences between children and adults, juvenile and adult sex offenders, and the special emphasis that our juvenile courts place on rehabilitation and confidentiality. *See* I.B and I.C, *supra*.

Based upon an analysis of the *Mendoza-Martinez* factors, this Court finds that the SORNA provisions pertaining to juveniles are punitive, and violate the *Ex Post Facto* Clauses of the Pennsylvania and United States Constitutions.

B. Collateral Consequences

The Commonwealth argues that the registration and reporting requirements should be

considered collateral consequences as opposed to punishment. As with the adult cases involving SORNA in York County, discussed above, the Commonwealth cites to the decision in *Commonwealth v. Leidig* in support of its position that the requirements are not punitive but are instead collateral consequences. 956 A.2d 399, 404 (Pa. 2008). A common example of a collateral consequence is that of a person who pleads guilty to driving under the influence, and whose license is collaterally suspended by the

Department of Motor Vehicles. However, the same distinction exists here as with our recent adult cases, in that Petitioners were adjudicated delinquent prior to the enactment of SORNA. Unlike an individual who is guilty of a DUI and who knows at the time of his plea that license suspension will be a consequence, and the defendant in *Leidig* who plead guilty to an offense for which the collateral consequence was already in existence at the time, the Petitioners could not have been aware of registration requirements that might come into existence at some future point. We find the requirements here are not collateral consequences.

C. Constitutional Bans on the Infliction of Cruel and Unusual Punishment

Petitioners claim that SORNA violates the Pennsylvania and United States constitutional bans on the infliction of cruel and unusual punishment. Pa. Const. Art. I. Sec 13; U.S. Const. Amend. VIII. The standard of review is based upon a consideration of proportionality of the punishment to the particular offense. Under proportionality review, "the Court implements the proportionality standard by certain categorical restrictions considering the nature of the offense and the characteristics of the offender." *Graham v. Florida*, 130 S.Ct. 2011, 2021-22 (2010). In *Graham*, the Court used a two step analysis: First, there is a consideration of whether a there is a national consensus against the sentencing practice at issue, and second, a court determines "in the exercise of its own independent judgment whether the punishment violates the Constitution." *Id.* at 2022. "The judicial exercise of independent judgment requires consideration of the

culpability of the offenders at issue in light of their crime and characteristics, along with the severity of the punishment in question...and whether the challenged sentencing practice serves legitimate penological goals." *Id.* at 2026. With regard to national consensus, as discussed *supra*, the requirements for juvenile registration vary across states, although most states do require some form of registration. However, simply counting the number of states that impose a sentence is not determinative. The Court in *Miller* pointed to the previous decision in *Graham*, where life-without-parole terms for juveniles committing non-homicide offenses were prohibited, despite the fact that 39 jurisdictions permitted that sentence. *Miller*, 132 S.Ct. at 2471-72.

The second part of the proportionality review is more important here, when considering punishments for juveniles and the significant differences between adult and juvenile offenders. An offender's age is relevant to the Eighth Amendment, and "'criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed.'" *Id.* at 2466 (quoting *Graham*, 130 S.Ct. at 2031). As previously discussed, juveniles are less culpable than adults and have a greater potential for rehabilitation. Juveniles' delinquent acts are "less likely to be evidence of 'irretrievably depraved character' than are the actions of adults." *Graham*, 130 S.Ct. at 2026 (quoting *Roper v. Simmons*, 543 U.S. 551, 570). A juvenile's potential for rehabilitation is "particularly relevant" when considering lifelong registration. *In re C.P.* 967 N.E. 2d 729, 741 (Ohio 2012).

The nature of the offenses must also be considered. The registration requirements apply to juveniles convicted of rape, involuntary deviate sexual intercourse, aggravated indecent assault, or an attempt, solicitation or conspiracy to commit any of these. 42 Pa.C.S. §9799.12. The Supreme Court in *Graham* noted that an offense such as rape, although "a very serious crime deserving serious punishment", was different from homicide crimes in a moral sense. The Ohio Supreme Court, declaring juvenile sex offender registration unconstitutional, stated that "a juvenile who did not kill or intend to kill has a 'twice diminished moral culpability' on account of his age and the nature of his crime". *In re C.P.*, 967 N.E. at 741. We agree with Petitioners, that although lifetime registration is not as severe a punishment as lifetime incarceration, it is particularly harsh for juveniles in light the greater portion of their lives that is subject to the registration requirements, and the detrimental effects that registration can have on all aspects of their lives and livelihood. Such lifetime registration is also contrary to the rehabilitative goals of our juvenile justice system, as a court of second chances. For a juvenile offender, "[i]t will be a constant cloud, a once-every-three-month reminder to himself and the world that he cannot escape the mistakes of his youth." *In re C.P.*, 967 N.E. at 741-42.

We turn next to the possible penological justifications for a juvenile sex offender registration requirement. "A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Graham*, 130 S.Ct. at 2028. Petitioners cite to the line of Supreme Court cases recognizing that the "distinctive attributes of youth" substantially negate any penological justifications for imposing harsh sentences

on juvenile offenders. Petitioners' Memorandum, p. 96 (quoting *Miller*, 132 S.Ct. at 2464-65). "[T]he case for retribution is not as strong with a minor as with an adult." *Graham*, 130 S.Ct. at 2029. As to a possible deterrent justification, "the same characteristics that render juveniles less culpable than adults"-their immaturity, recklessness, and impetuosity-make them less likely to consider potential punishment. *Graham*, 130 S.Ct. at 2028 (quoting *Roper*, 543 U.S. at 571). Finally, the possible incapacitation justification would involve a decision that a "juvenile offender will forever be a danger to society" and would require "mak[ing] a judgment that [he] is incorrigible"-but "incorrigibility is inconsistent with youth." *Graham*, 130 S.Ct. at 2029 (quoting *Workman v. Commonwealth*, 429 S.W. 2d 374, 378 (Ky.App. 1968).

Based upon proportionality review of SORNA as it applies to juvenile offenders, we find that it violates the United States and Pennsylvania Constitutions. We agree with Petitioners that it unconstitutionally forecloses a court's considerations of the many unique attributes of youth and juvenile offenders, the characteristics that the United States Supreme Court has deemed applicable to all juvenile offenders under 18, regardless of the specific crimes with which they are charged. *See Miller*, 132 S.Ct. at 2465, 2470 (Noting that "none of what [*Graham*] said about children-about their distinctive (and transitory) mental traits and environmental vulnerabilities-is crime specific..."). Due to the unique attributes of juvenile offenders, the Supreme Court has insisted that "a sentencer have the ability to consider the "mitigating qualities of youth". *Id.* at 2467. SORNA creates what the Supreme Court has described as a "one size fits

all" feature with regard to a certain group of juvenile offenders that is directly at odds with the Court's holding in the *Roper* line of cases, by prohibiting consideration of age as a factor while proscribing any "realistic opportunity" for the juvenile offender to demonstrate his or her rehabilitation. *Graham*, 130 S.Ct. at 2034. It is also the denial of a juvenile judge's "opportunity to consider factors related to the juvenile's overall level of culpability before imposing registration" that is one of our greatest concerns with regard to SORNA. Petitioner's Memorandum, p. 99.

D. Irrebuttable Presumption

Petitioner's claim that mandatory registration creates an irrebuttable presumption that children adjudicated of enumerated offenses require lifetime registration based solely on their juvenile adjudication, and regardless of the differences between juvenile and adult offenders discussed above. The Pennsylvania Supreme Court has found that irrebuttable presumptions violate due process when "the presumption is deemed not universally true and a reasonable alternative means of ascertaining that presumed fact are available." *Department of Transportation, Bureau of Driver Licensing v. Clayton*, 684 A.2d 1060, 1063 (Pa. 1996)(citing *Vlandis v. Kline*, 412 U.S. 441, 452 (1973)). In the case of *D.C. v. School District of Philadelphia*, the Commonwealth Court ruled unconstitutional a statute requiring, *inter alia*, Philadelphia youth returning from delinquent placement to be automatically placed in one of four alternative education settings. 879 A.2d 408 (Pa. Cmwlth. 2005). The court ruled that the statute created an

irrebuttable presumption that students convicted or adjudicated of specific underlying offenses could not be returned directly to a regular classroom, and instead should be assigned to alternative education settings. *Id.* at 420. The court stated that students subject to automatic exclusion were presumed unfit to return to a regular classroom "regardless of whether the student performed in an exemplary manner during juvenile placement or otherwise does not pose a threat to the regular classroom setting." *Id.* at 418. The court found that the legislation violated due process because it did not allow students to challenge whether or not there was a need to protect the regular classroom from disruption. *Id.* at 418.

Pennsylvania courts subject irrebuttable presumptions to a higher degree of scrutiny on procedural due process grounds without analysis of whether the interests are fundamental. *Clayton* and *D.C.*, *supra*. In both *Clayton* and *D.C.*, the affected parties had opportunities to challenge the underlying fact, but not the presumed fact upon which the regulatory scheme was founded. *Clayton* overturned a presumptive license revocation upon a driver's epileptic seizure, because the regulatory scheme in question provided for a hearing that allowed for consideration only of whether a driver had a seizure, not whether the individual was competent to drive. *Clayton*, 684 A.2d at 1065. We agree that the situation is similar for juveniles under SORNA, where they will have been adjudicated delinquent in a hearing complete with required due process safeguards, but will not have had an opportunity to challenge the statute's presumption that their adjudication means that they "pose a high risk of committing additional sexual offenses,"

or that their registration will "[offer] an increased measure of protection to the citizens of this Commonwealth." 42 Pa.C.S. §9799.11.

We find that SORNA is in violation of due process and unconstitutional for failing to provide children with an opportunity to challenge the registration requirements on an individual basis.

E. Right to Reputation

Unlike the United States Constitution, Article I, Section I of the Pennsylvania Constitution expressly protects a fundamental right of reputation. It is a fundamental right that cannot be abridged without compliance with state constitutional standards of due process and equal protection. *Balletta v. Spadoni*, 47 A.3d 183, 192 (Pa. Cmwlth. 2012). If a law infringes on certain fundamental rights, a strict scrutiny test is applied where the law is deemed constitutional if it is narrowly tailored to a compelling state interest. *Nixon v. Dep't of Public Welfare*, 576 Pa. 385, 399-403 (Pa. 2003)(internal citations omitted).

As discussed above, SORNA does not prevent third parties in receipt of a juvenile's information from releasing it. In addition, it does nothing to prohibit an individual who knows information about a registered juvenile from sharing it widely. 42 Pa.C.S. §9799.10 *et seq*.

The likelihood of disclosure of a juvenile's registration status in Pennsylvania is discussed in detail in the Affidavit of Professor Wayne A. Logan, *supra*. However, we

are in agreement with the Commonwealth on this claim, in that the "speculative and heretofore unproven dissemination of truthful information" with regard to Petitioners does not rise to the level of a substantive due process violation. Commonwealth's Memorandum at 18. At this stage, the Court is not prepared to say that registration in and of itself is defamatory, especially in the absence of evidence that Petitioners' registration status has in fact been disseminated to third parties other than those permitted by the law, or that anything other than truthful information was disseminated.

F. Conflict with the Pennsylvania Juvenile Act

Petitioner's last claim argues that SORNA contravenes the Pennsylvania Juvenile Act, which applies to "proceedings in which a child is alleged to be delinquent or dependent." 42 Pa.C.S. §6303(a)(1). A "child" is defined by the act as either an individual under the age of 18, or an individual under the age of 21 who committed an act of delinquency before reaching the age of 18. 42 Pa.C.S. §6302. The Superior Court has held that "[j]uvenile court jurisdiction terminates at 21, regardless of whether or not the appellants continue to pose a threat to society." *Commonwealth v. Zoller*, 498 A.2d 436, 440 (Pa. Super. 1985). We understand that, as the Commonwealth argues here, SORNA is not part of the Juvenile Act. Commonwealth's Memorandum at 14. However, we believe that SORNA is in conflict with the Juvenile Act, because not only is there no opportunity for a juvenile court to conduct an individual assessment at the time of sentencing, it has no authority to conduct further reviews or periodic assessments. While

the Commonwealth argues correctly that the Pennsylvania State Police administers and monitors SORNA compliance, they do not conduct periodic risk assessments. They have the authority to collect and disseminate information, and report noncompliance.

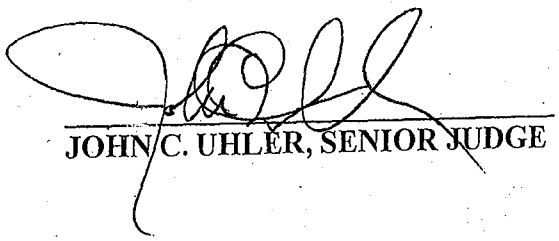
SORNA also contradicts the rehabilitative purposes of the Juvenile Act. Petitioners point to the support of the rehabilitative aims of the Juvenile Act by Pennsylvania courts. "[T]he purpose of juvenile proceedings is to seek treatment, reformation and rehabilitation of the youthful offender, not to punish." *Commonwealth v. S.M.*, 769 A.2d 542, 544 (Pa. Super. 2001)(internal quotations omitted). "[T]he rehabilitative purpose of the Juvenile Act is attained through accountability and the development of personal qualities that will enable the juvenile offender to become a responsible and productive member of the community." *In re B.T.C.*, 868 A.2d 1203. In ordering a disposition, the juvenile court "shall provide (as appropriate to the individual circumstances of the child's case) balanced attention to the protection of the community, imposition of accountability for offenses committed, and development of competencies to enable the child to become a responsible and productive member of the community." 42 Pa.C.S. §6352(a). A juvenile judge is required to consider the protection of the public interest, and fashion a sentence which is best suited to the child's treatment, supervision, rehabilitation, and welfare, under the individual circumstances of each child's case. *In re R.W.*, 855 A.2d 107 (Pa. Super. 2004). SORNA mandates imposition of a lifetime punishment that runs counter to the express rehabilitative purpose and individualized

approach of the Juvenile Act, and we find that SORNA is in conflict with the Juvenile Act, although this conflict in and of itself does not render SORNA unconstitutional.

III. CONCLUSION

Based upon the foregoing, this Court finds that 42 Pa.C.S. §9799.10 *et seq.* is unconstitutional as it applies to juvenile offenders, both retroactively and prospectively, and we issue the accompanying Order declassifying Petitioners as "juvenile offenders" and directing the Pennsylvania State Police to remove their names, photographs, and all other information from the sex offender registry.

BY THE COURT:



JOHN C. UHLER, SENIOR JUDGE