
**IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DISTRICT**

**Superior Court Docket No.
852 WDA 2013**

In re: O.M.

BRIEF OF APPELLANT

Appeal from the Orders of the Honorable John J. Driscoll
Entered on April 12, 2013 and May 2, 2013 in the Court of Common Pleas of Westmoreland
County, Pennsylvania, Family Division, Juvenile Section at Docket No. JP-028637

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STATEMENT OF JURISDICTION

This is an appeal of a disposition order ordering sex offender registration pursuant to the Sex Offender Registration and Notification Act (“SORNA”), 42 Pa.C.S. § 9799.10, *et seq.* This Order was a final order, disposing of all claims. Therefore, an appeal may be taken as a matter of right. *See* Pa.R.A.P. 341(a) and (b). This court has subject matter jurisdiction of this appeal under 42 Pa.C.S. § 702.

ORDERS IN QUESTION

The Orders in question, dated April 12, 2013 and May 2, 2013, adjudicating O.M. delinquent and ordering sex offender registration pursuant to 42 Pa.C.S. § 9799.10 *et seq.*, are attached hereto as APPENDIX A. The trial court’s 1925 opinion dated June 11, 2013 is attached hereto as APPENDIX B.

SCOPE AND STANDARD OF REVIEW

The interpretation and application of a statute is a question of law that compels plenary review to determine whether the court committed an error of law. *Wilson v. Transport Ins. Co.*, 889 A.2d 563, 570 (Pa. Super. 2005). As with all questions of law, the appellate standard of review is *de novo* and the appellate scope of review is plenary. *In re Wilson*, 879 A.2d 199, 214 (Pa. Super. 2005). *See also In the Interest of F.C. III*, 966 A.2d 1131, 1136 (Pa. Super. 2009) citing *Commonwealth v. Ludwig*, 874 A.2d 623, 628 n. 5 (Pa. 2005); *Tomaskevitch v. Specialty Records Corp.*, 717 A.2d 30, 32 (Pa. Commw. Ct. 1998); *Phillips v. A-Best Prods. Co.*, 665 A.2d 1167, 1170 (Pa. 1995). This Court has an obligation to make an independent examination of the entire record in determining whether a constitutional right has been violated, *Brown v.*

Philadelphia Tribune Co., 668 A.2d 159, 163 (Pa. Super. 1995). Where, as here, the essential findings of fact are conceded or are undisputed and the trial court's decision rests on an interpretation and application of the law rather than on the facts, this Court's review is broad.

Courts have an important responsibility to protect citizens' rights and they are the final arbiters of whether a statute passes constitutional muster. While deference to legislation is appropriate so long as it is functioning within constitutional constraints, "it would be a serious dereliction on [the part of a court] to deliberately ignore a clear constitutional violation."

Common Cause/Pennsylvania v. Commonwealth, 710 A.2d 108, 117 (Pa. Commw. Ct. 1998).

Where the facts are agreed upon and the question presented is whether or not a violation of a mandatory constitutional provision has occurred, judicial intervention is warranted. *Id.* In short, it "is a traditional and inherent power of the Courts to decide all questions of Constitutionality..."

Stander v. Kelly, 250 A.2d 474, 478 (Pa. 1969).

QUESTIONS INVOLVED¹

1. Whether juvenile sex offender registration under 42 Pa.C.S. § 9799.10 *et seq.* imposes stigma and restrictions that impede a juvenile's reputation rights protected by the Pennsylvania constitution.

Suggested Answer: Yes.

2. Whether mandatory sex offender registration under 42 Pa.C.S. § 9799.10 *et seq.* creates an irrebuttable presumption that juveniles adjudicated delinquent of certain enumerated offenses require lifetime registration based solely on their adjudication when they were a juvenile, regardless of their rehabilitation following treatment, likelihood of recidivism, natural maturation and desistance over time, or need to be placed on a registry.

Suggested Answer: Yes.

3. Whether juvenile sex offender registration under 42 Pa.C.S. § 9799.10 *et seq.* violates the Pennsylvania and United States constitutional bans on the infliction of cruel and unusual punishment.

Suggested Answer: Yes.

4. Whether juvenile sex offender registration under 42 Pa.C.S. § 9799.10 *et seq.* violates the Pennsylvania Juvenile Act because it runs counter to the rehabilitative purpose of the juvenile court.

Suggested Answer: Yes.

¹ Appellant raised additional arguments in his 1925b Statement, but only alleges these four questions in his Brief.

STATEMENT OF THE CASE

Procedural History

O.M. is a 17-year-old who appeals from an order of juvenile delinquency that requires him to register as a sex offender for life. Although O.M. initially entered an admission on the charges, he withdrew his admission upon learning that his adjudication would require registration as a sex offender. (Tr. 4-6, Jan. 18, 2013). After a trial, O.M. was adjudicated delinquent of rape, sexual assault, and two counts of indecent assault based on an act of consensual sex. *Id.* at 106-107. On January 31, 2013, the trial court entered O.M.'s disposition and ordered him detained pending placement in Adelphoi Village Hilltop Home. *Id.* The trial court further ordered O.M. to comply with all of the requirements of Pennsylvania's Sex Offender Registration and Notification Act, 42 Pa.C.S. § 9799.10. ("SORNA") including registration as a sex offender. (Tr. 74-76, Jan. 31, 2013).

On February 11, 2013, within ten days of the trial court's entry of O.M.'s disposition, O.M. filed a timely Post-Dispositional Motion asking that the court permit in-home placement and treatment and that the court strike down SORNA's registration requirement as illegal and unconstitutional and therefore delete the requirement from the disposition order. Subsequently, new counsel was appointed for O.M., and he filed a consolidated Amended Post-Dispositional Motion and Motion for Reconsideration on April 3, 2013 that re-articulated the unconstitutionality of SORNA as applied to O.M.

By Memorandum and Order dated April 12, 2013 the trial court affirmed its findings and disposition, but struck the requirement that O.M. register as a sex offender. At that time, the trial court believed that imposing the registration requirement was premature because SORNA did not mandate registration until O.M. was released from placement. For this reason, the trial court

stated: “It appears to the undersigned that substantial issues have been raised regarding the applicability and constitutionality of this Juvenile’s SORNA registration requirement . . . consideration and argument of SORNA issues is premature, and will be considered upon review of his placement.” In fact, SORNA provides that a juvenile offender must register at the time he is adjudicated delinquent. 42 Pa.C.S. § 9799.19(h). In light of the discrepancy between the court’s April 12, 2013 Order and the SORNA statute, O.M. filed a motion for clarification of the trial court’s interpretation of SORNA’s registration requirement.

On May 2, 2013, the trial issued its final Memorandum and Order requiring O.M. to register pursuant to SORNA, but described “grave concerns as to the constitutionality of SORNA.” Trial Court’s May 2, 2013 Order. The court stated that it “believes the requirement is unconstitutional as to this juvenile.” *Id.* The trial court further stated that “[m]ost of these concerns are encapsulated in the reasons and contentions set forth in the juvenile’s post-dispositional motion previously filed.” *Id.* at note 1. According to the lower court:

The statute’s equation (that one act of consensual intercourse by a seventeen-year-old with a twelve-year-old, requires registration for a lifetime) is irrational, for it ‘automatically’ requires registration. The ‘automatic’ triggering of the registration requirements is the irrational and devastating, though subtle, violation of this juvenile’s right to due process of law. . . . The facts of this matter do not prove (or suggest) that the juvenile is possessed of qualities of deviancy, has or is likely to commit acts of forcible sex, or is in any way a threat to the safety of others. In fact, it appears that actual sex offender evaluations have determined the juvenile to be an excellent candidate for complete rehabilitation.

Trial Court’s May 2, 2013 Order, note 2.

Thereafter, on May 10, 2013, O.M. filed a timely notice of appeal requesting that this Court reverse the trial court’s April 12, 2013 Order as clarified on May 2, 2013. On June 4, 2013, as per the trial court’s request, O.M. filed a timely concise statement of matters complained of on appeal.

Factual History

O.M.'s adjudication of delinquency arose out of an incident between O.M. and a friend of his sister's, A.W. (Tr. 12-15, Jan. 18, 2013; Tr. 28, Jan. 31, 2013). In October 2012, O.M. and A.W. began exchanging messages on Facebook. *Id.* at 30-35. Via Facebook messaging, the two agreed to have sex at his house. *Id.* at 16-23. A.W. asked a friend to drive her to O.M.'s home where they engaged in sexual intercourse. *Id.* A month later, A.W.'s mother read her Facebook messages and confronted A.W. who confessed to having sex with O.M.; her mother initiated charges against him. *Id.* at 26. Upon questioning by the police, O.M. admitted to having sex with A.W. and was detained at the Westmoreland County Juvenile Detention Center, where he stayed for two months pending his adjudication hearing. *Id.* at 33-34.

After the adjudicatory hearing, O.M. was evaluated and found to be an excellent candidate for rehabilitation. Trial Court's May 2, 2013 Order, note 2. For this reason, the trial court stressed O.M.'s capacity for rehabilitation and his frustration with the mandatory registration requirement attendant to O.M.'s adjudication. (Tr. 113, Jan. 18, 2013; Tr. 69-72, Jan. 31, 2013). The trial court explained, "[O.M.] does not strike me as somebody who needs to be subject to a lifetime of registration as a sex offender" based on the facts of the case, his remorse, and lack of mental health or criminal history. (Tr. 65, 69, Jan. 31, 2013). Despite the trial court's reasoning that SORNA should not apply in O.M.'s case, O.M. was required to complete his initial registration with the Pennsylvania State Police solely on the basis of his adjudication. (Trial Court's May 2 Order, 1).

After his adjudication, O.M. was placed at Adelphoi Village's Hill Top Home in Blair County. (Tr. 74-76 Jan. 31, 2013). At Adelphoi, O.M. has completed eight months of a sex offender treatment program. (30 DAY TREATMENT UPDATE ON O.M., 2, 4, Oct. 5, 2103,

[hereinafter “TREATMENT UPDATE”]). He also earned his high school diploma last May and earned satisfactory marks in all of his classes. (RESIDENTIAL INTERDISCIPLINARY TREATMENT PLAN/INDIVIDUAL SERVICE PLAN, 5, Aug. 5, 2013, [hereinafter “TREATMENT PLAN”]). After O.M. is released from Adelphoi, he plans to move home with his mother and to attend college. (TREATMENT UPDATE, 5). SORNA’s registration requirement will likely complicate this goal. O.M. and his family are concerned about O.M.’s ability to comply with SORNA’s onerous registration and reporting requirements. (TREATMENT UPDATE, 5). While there are four Approved Registration/Verification sites in Westmoreland County, none is within five miles of O.M.’s mother’s home and none is accessible by public transportation. *See* Megan’s Law Website: Approved Registration/Verification Sites at <http://www.pameganslaw.state.pa.us/VerificationSites.aspx>. The Greensburg State Police Department, located at 100 North Westmoreland Avenue is 6.2 miles from his mother’s home and the Westmoreland County Sheriff’s Department, located at 2 North Main Street is 5.2 miles from his mother’s home. *Id.* O.M. does not have a driver’s license or a car, so his mother would have to drive him to register and report. O.M.’s mother is the sole caretaker of O.M.’s four younger sisters, one of whom requires constant medical care. (TREATMENT PLAN, 4)

Before O.M. was placed he played AAU basketball and wishes to continue playing basketball in college. *See* (Tr. Jan. 31, 57). While in placement, O.M. missed opportunities to engage in recruitment activities with these schools, but he is hopeful that he can re-engage with these programs when he is released. However, O.M. will remain limited in his ability to play basketball at these schools because of the registration consequences attendant to travel outside the Commonwealth. *See* Section IIB2, *infra*.

SUMMARY OF ARGUMENT

Pennsylvania has never required children adjudicated delinquent in this Commonwealth to register as sex offenders. Under SORNA, Pennsylvania now requires a “juvenile offender” to register as a sex offender.² The registration term is for life. 42 Pa.C.S. § 9799.15.³ The instant case raises novel and weighty questions before this Court regarding the constitutionality of SORNA as applied to children. Mandatory, lifelong registration with attendant onerous reporting requirements flies in the face of the constitutional and other legal protections afforded children since the United States Supreme Court decision in *In re Gault* and the line of cases that followed.

Science confirms that children are different from adults and the law reflects these differences. The research holds true for children who engage in sexual offenses and sets the stage for the legal analysis of O.M.’s arguments. First, registration impedes a child’s fundamental reputation rights protected by the Pennsylvania constitution. The initial registration and onerous reporting requirements lead to public disclosure of the child’s status on the registry and communicates falsehoods about their future dangerousness. Second, registration, based solely on an adjudication of delinquency, flies in the face of the well-established irrebuttable presumption doctrine. Because the registration obligation is not preceded by any individual determination of its need or effectiveness, and is presumed necessary merely because of an adjudication of delinquency, it does not provide adequate process to individuals such as O.M. Third, registration, a punishment flowing directly and automatically from the adjudication of

² A “juvenile offender” is defined, in relevant part, as a child, fourteen or older at the time of offense, who was adjudicated delinquent for rape, involuntary deviate sexual intercourse, aggravated indecent assault, or the attempt, solicitation or conspiracy to commit one of these offenses. 42 Pa.C.S. § 9799.12.

³ SORNA provides: “A juvenile offender who was adjudicated delinquent in this Commonwealth . . . shall register for the life of the individual.” 42 Pa.C.S. § 9799.15(a)(4). A “juvenile offender” may petition for removal in twenty-five years if he or she “successfully completed court-ordered supervision without revocation,” had no conviction for a second degree misdemeanor or higher and successfully completed a court-recognized treatment program. 42 Pa.C.S. § 9799.17.

guilt, is excessive in violation of the Pennsylvania and United States constitutional bans on cruel and unusual punishment. And finally, registration contravenes the rehabilitative purpose of Pennsylvania's Juvenile Act. Pennsylvania has long treated children differently from adults and shielded them from the consequences of their adjudications. With balanced attention to the community's safety and the child's accountability, the Commonwealth has consistently stressed rehabilitation so that children may become productive members of society. Registration as a sex offender clearly impedes that goal.

The Adam Walsh Child Protection and Safety Act provides that state courts have the authority to evaluate the constitutionality of their individual registration schemes. 42 U.S.C. § 16925. Upon determination that the scheme is in violation of constitutional law, it must be stricken without jeopardizing the state's federal financial benefits. 42 U.S.C. § 16925. There is a "presumption that the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth." *Ludwig*, 874 A.2d at 623. A statute is only invalidated if it clearly, palpably, and plainly violates constitutional rights. *Id.* Imposing mandatory, lifetime sex offender registration on children such as O.M., adjudicated delinquent of certain sexual offenses, clearly, palpably, and plainly violates both the Pennsylvania and United States constitutions.

ARGUMENT

I. CHILDREN, INCLUDING JUVENILE SEX OFFENDERS, ARE DEVELOPMENTALLY DIFFERENT FROM THEIR ADULT COUNTERPARTS.

O.M. challenges the constitutionality of SORNA as applied to juveniles on four grounds. While each of these claims is distinct, they share a legal foundation because O.M.'s claims apply to children specifically. Kids are different. *Roper v. Simmons*, 543 U.S. 551 (2005); *Graham v. Florida*, 130 S.Ct. 2011 (2010); *J.D.B. v North Carolina*, 131 S.Ct. 2394 (2011); *Miller v. Alabama*, 132 S.Ct. 2455 (2012). This is “more than a chronological fact” but a fact established by scientific research. *Miller*, 132 S.Ct. at 2467 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115 (1982)). See also *J.D.B. v. N. Carolina*, 131 S. Ct. 2394, 2403 (2011); *Gall v. United States*, 552 U.S. 38, 58 (2007); *Roper*, 543 U.S. at 551, 569; *Johnson v. Texas*, 509 U.S. 350, 367 (1993). Rooted in neuroscience and research in adolescent development, the law has universally accepted that children's behavioral and neurological development affect their impetuosity, recklessness, immature decision-making, and capacity for rehabilitation. *Roper*, 543 U.S. at 569-70; *Graham*, 130 S.Ct. at 2026-2028. This research has been used in cases related to culpability and sentencing, *Roper*, 543 U.S. at 555; *Graham* 130 S.Ct. at 2017; *Miller*, 132 S.Ct. at 2460, as well as in analyzing police interrogations of children for *Miranda* purposes. *J.D.B.*, 131 S.Ct. at 2398. Similarly research on adolescent sexual offending demonstrates a difference in children and their adult counterparts. The research cited in *Roper*, *Graham* and *Miller* establishes that children—even children who commit the most heinous crimes, including murder—can change and reform as they grow up. So too can children who offend sexually.

A. Children Who Offend Sexually Are Not Unlike Other Juvenile Offenders.

The belief that “sex offenders are a very unique type of criminal” is not supported with respect to juvenile offenders. Elizabeth Letourneau & Michael Miner, *Juvenile Sex Offenders: A*

Case Against the Legal and Clinical Status Quo, 17 SEXUAL ABUSE: J. RES. & TREATMENT 293, 296 (2005)[hereinafter “Letourneau, *Against the Status Quo*”]; see also *Id.* at 299 (citing Michelle Ford & Jean Linney, *Comparative Analysis of Juvenile Sex Offenders, Violent Nonsexual Offenders, and Status Offenders*, 10 J. INTERPERSONAL VIOLENCE 56-70 (1995)). Research studies demonstrate that juvenile sexual offenders are no different from non-sexual juvenile offenders; sexual offenses in juveniles are a result of delinquency in general not specifically sexual in origin. Letourneau, *Against the Status Quo* at 293, 296. Many demographic studies find no differences in personality and psychosocial circumstances between juvenile sex offenders and non-sex offenders. Furthermore, youth patterns of re-offending are similar with non-sexual offenses predominating. *Id.* at 297 (citing Michael Caldwell, *What We Do Not Know About Juvenile Sexual Re-offense Risk*, 7 CHILD MALTREATMENT 291-302 (2002) [hereinafter “Caldwell, *Reoffense Risk 2002*”]; Franklin Zimring, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING (2004)). Research studies have found no statistically significant difference between the sexual recidivism rates of children who committed sexual offenses and children who committed nonsexual violent offenses. See Zimring, *Early Sex Offending and Late Sex Offending* at 534; Michael Caldwell, *Sexual Offense Adjudication & Sexual Recidivism among Juvenile Offenders*. 19 SEXUAL ABUSE: J. RES. & TREATMENT, 107-113 (2007) available at http://www.njjn.org/uploads/digital-library/resource_557.pdf [hereinafter “Caldwell, *Recidivism Study 2007*”] (finding “the risk of sexual recidivism was statistically equal for youth treated in a residential facility for either sexual or nonsexual delinquent offenses.”). *Id.* Both sexually and non-sexually delinquent youth are far more likely to re-offend with *nonsexual crimes* than with sexual crimes. See also Letourneau, *Against the Status Quo* at 313, 331.

B. Sexual Recidivism Rates For Children Who Sexually Offend Are Exceptionally Low.

Numerous published studies evaluate the recidivism rates of youth who sexually offend. Michael Caldwell, et al., *Study Characteristics & Recidivism Base Rates in Juvenile Sex Offender Recidivism*, 54 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 197, 198 (2010) (citing to recidivism studies dating back to 1994) [hereinafter "Caldwell, *Recidivism Study 2010*"]. The findings are remarkably consistent across studies, across time, and across populations: sexual recidivism rates among youth are exceptionally low. *Id.*⁴ In summary, data has shown that very few adolescents who commit sexual crimes will become sexually deviant as adults. *Id.* at 197; *A Multi-State Recidivism Study Using Static-99R & Static-2002 Risk Scores & Tier Guidelines from the Adam Walsh Act*, NATIONAL INSTITUTE OF JUST. 24, 32 <https://www.ncjrs.gov/pdffiles1/nij/grants/240099.pdf> (last visited October 29, 2013) [hereinafter "*Multi-State Recidivism Study*"]. As a group, juvenile sex offenders have been found to pose a relatively low risk to sexually re-offend, particularly as they age into young adulthood. *Multi-State Recidivism Study* at 24.

A meta-study of over 63 studies and over 11,200 children "found an average sexual recidivism rate of 7.09% over an average 5 year follow-up." Caldwell, *Recidivism Study 2010* at

⁴ See also Michael Caldwell, *Sexual Offense Adjudication and Recidivism Among Juvenile Offenders*, 19 SEXUAL ABUSE: J. RES. AND TREATMENT 107-113 (2007), available at http://www.njjn.org/uploads/digitallibrary/resource_557.pdf; Michael Caldwell et. al., *An Examination of the Sex Offender Registration and Notification Act as Applied to Juveniles: Evaluating the Ability to Predict Sexual Recidivism*, 14 J. PSYCHOL., PUB. POL., AND LAW, 2, 89-114 (2008), available at <http://www.ncjfcj.org/sites/default/files/examinationofthesexoffender.pdf>; E.M. Driessen., *Characteristics of Youth Referred for Sexual Offenses*. Unpublished doctoral dissertation, University of Wisconsin-Milwaukee (2002), available at <http://ijo.sagepub.com/content/54/2/197.refs?patientinform-links=yes&legid=spijo;54/2/197>; Michael Hagan, et al., *Eight-year Comparative Analyses of Adolescent Rapists, Adolescent Child Molesters, Other Adolescent Delinquents, and the General Population*, 43 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 3, 314-324 (2011), available at <http://ijo.sagepub.com/content/45/3/314.refs>; Franklin Zimring, et al., *Investigating the Continuity of Sex Offending: Evidence from the Second Philadelphia Birth Cohort*, 26 JUSTICE Q, 59-76 (2009), available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1590&context=facpubs>; Franklin Zimring, et al., *Sexual delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?*, 6 CRIMINOLOGY & PUB. POL 3, 507-534 (2007), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1745-9133.2007.00451.x/abstract>.

197-98. When rare sexual recidivism events do occur, it is nearly always within the first few years following the original adjudication. *Id. at 205*. Even youth initially evaluated as ‘high risk’ are unlikely to reoffend, particularly if they remain free of offending within the relatively brief period of time following initial adjudication. Donna Vandiver, *A Prospective Analysis of Juvenile Male Sex Offenders: Characteristics and Recidivism Rates as Adults*. 21 J.

INTERPERSONAL VIOLENCE, 673-688 (2006). 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 (May 2013) [hereinafter “*Raised on the Registry*”] (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) [hereinafter “Hanson, *Meta-Analysis of Recidivism*”]).

Additionally, sexual recidivism cannot be predicted by offense. The extant research has not identified any stable, offense-based risk factors that reliably predict sexual recidivism in adolescents. Ashley Batastini, et al. *Federal Standards for Community Registration of Juvenile Sex Offenders: An Evaluation of Risk Prediction & Future Implications*, 17 PSYCHOL. PUB. POL’Y & L. 3, 451, 457-58 (2011) (describing the heterogeneous behaviors of child sex offenders). In a study that compared the sexual recidivism rates of children assigned to three groups according to the severity of their offense, there was no significant difference in the recidivism rates of juvenile offenders in the three groups. Franklin Zimring, et al., *Sexual Delinquency in Racine: Does Early Sex Offending Predict Later Sex Offending in Youth and Young Adulthood?* 6 CRIM. & PUBLIC POLICY, 507–534 (2007) available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1745-9133.2007.00451.x/abstract> [hereinafter

“Zimring, *Early Sex Offending and Late Sex Offending*”]; See also Caldwell, *Recidivism Study 2007* at 107-113 (reporting no significant difference in the rate of adult sexual offense charges between 249 juvenile sex offenders and 1,780 non-sex-offending delinquents over a 5-year follow-up).

Finally, the failure to register or accurately provide registration information is not a significant predictor of sexual recidivism. *Raised on the Registry*, at 86. In fact, failure to register is the most common offense leading to reincarceration for individuals on the registry; there is no link to re-offense. *Id.*

C. Children Who Offend Sexually Are Nothing Like Adult Sex Offenders.

The recidivism rate is lower for children than for adults because children are different. Multiple studies have confirmed that juveniles sexually offend for different reasons than adults. It is rare for juvenile sexual offenders’ motivations to be of the sexual nature as seen in adults. Juveniles tend to offend based on impulsivity and sexual curiosity, among other reasons. Caldwell, *Reoffense Risk 2002*; Judith Becker & Scotia Hicks, *Juvenile Sexual Offenders: Characteristics, Interventions, & Policy Issues*, 989 ANN. NY ACAD. SCI. 397, 399-400, 406 (2003); Caldwell, *Recidivism Study 2010* at 197-98. With maturation, a better understanding of sexuality, and decreased impulsivity, most of these behaviors stop, and only a small fraction will maintain sexually deviant behavior in adulthood. Caldwell, *Recidivism Study 2010* at 205.

As set forth above, the United States Supreme Court has produced a controlling body of law rooted in the science of adolescent development and diminished capacity. All of the extant research on adolescent sex offending, in particular, fully comports with the high Court’s precedent. Juveniles who commit sex offenses are unlikely to reoffend and have a deep capacity to mature and change—facts consistent with O.M.’s case, in which the lower court held that

“actual sex offender revaluations have determined the juvenile to be an excellent candidate for complete rehabilitation.” Trial Court’s May 2, 2013 Order, note 2. This reasoning supports O.M.’s claims.

II. REGISTRATION IMPOSES STIGMA AND RESTRICTIONS THAT IMPEDE PETITIONER’S REPUTATION RIGHTS EXPRESSLY PROTECTED BY THE PENNSYLVANIA CONSTITUTION.

In Pennsylvania, “preservation of an individual’s reputation is fundamental as it is recognized and protected by the Pennsylvania constitution.”⁵ Pa. Const. art. I, § 1. (“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.”). Reputation is a fundamental right that cannot be abridged without compliance with constitutional standards of due process and equal protection. *Balletta v. Spadoni*, 47 A.3d 183, 192 (Pa. Commw. Ct. 2012); *Simon v. Commonwealth*, 659 A.2d 631, 639 (Pa. Commw. Ct. 1995). Where laws infringe upon certain rights considered fundamental, courts apply a strict scrutiny test, which requires that it must be narrowly tailored to a compelling state interest. *Nixon v. Dep’t of Pub. Welfare*, 576 Pa. 385, 399-403 (Pa. 2003) (internal citations omitted). The Court must apply strict scrutiny when the Commonwealth communicates in some manner to defame or unjustly damage a person’s reputation. *See Spadoni*, 47 A.3d at 191-92 (recognizing that reputational damage in the constitutional context is established under the law of torts for defamation) (citing *Sprague v.*

⁵ The Pennsylvania Supreme Court has recognized that although the U.S. Supreme Court has held that reputation is not an interest by itself “to invoke the procedural protections of the 14th Amendment’s due process clause,” in Pennsylvania, reputation is “recognized and protected by our highest state law: our Constitution.” *R. v. Com., Dept. of Welfare*, 636 A.2d 142, 149 (Pa. 1994).

Walter, 543 A.2d 1078, 1084 (Pa. 1988)); *Nixon v. Dep't of Pub. Welfare*, 576 Pa. 385, 399-403 (Pa. 2003) (applying strict scrutiny to fundamental rights).

A person's reputation is harmed when he can show the defamatory character of the communication and the publication of the information by the defendant. *See* 42 Pa.C.S. § 8343. "Publication of defamatory matter is the intentional or negligent communication of such matter to one other than the person defamed." *Chicarella v. Passant*, 494 A.2d 1109, 1112 (Pa. Super. 1985) (Citations omitted). Labeling a child a registered sex offender stigmatizes a child by perpetuating myths and falsehoods regarding his perceived dangerousness.

A. The Sex Offender Label Is Defamatory In Character.

Placement on the sex offender registry leads to incorrect public assumptions that the individual is incapable of rehabilitation, likely to recidivate, is part of a homogenous class (i.e., all sex offenders are alike), and that he is a special kind of criminal. As set forth in Section I, *supra*, for child offenders, these myths are false. Juveniles who commit sex offenses are open to rehabilitation and are unlikely to recidivate. They are not a special kind of criminal, but rather are no different from other juvenile offenders who commit other delinquent acts.

Requiring a child to register as a sexual offender, however, perpetuates each of these myths and falsehoods, to the detriment of the juvenile's constitutionally-protected right to reputation. Marcus Galeste et al., *Sex Offender Myths in Print Media: Separating Fact from Fiction in U.S. Newspapers*, 13(2) Western Crim. Rev. 4-24 (2012). Galeste, et al. showed that in reviewing news articles regarding sexual offenses "[a] strong association was found between sex offender registration and/or community notification laws and sex offender myths. That is, when an article discussed sex offender registration/notification, sex offender myths were also present in the article." *Id.* at 15. The body of literature on the subject uniformly concludes that

registration and notification severely limit an individual's future employment, ability to keep a job, ability to find or retain housing, and can lead to depression, hopelessness, and fear for their own safety. Jill Levenson & Richard Tewksbury, *Collateral Damage: Family Members of registered Sex Offenders*, 34 Am. J. Crim. J., 54-58 (2009) (collecting and referencing studies reaching these conclusions). Indeed, some registrants "have experienced vigilante activities such as property damage, harassment, and even physical assault." *Id.* Among the 296 cases of youth offenders examined for the report *Raised on the Registry*, 154 (52 percent) of youth experienced violence or threats of violence against themselves or family members that they directly attributed to their registration. *Raised on the Registry* at 56. For example:

- *Isaac E. has been on the registry since he was 12 years old, after pleading guilty to a charge of "indecent liberties by forcible compulsion" for touching the chest of a girl. The victim of his offense, a female classmate, was also 12....My brother, who looks like me, was once harassed and nearly beaten to death by a drunk neighbor who thought he was me.*"
- *Bruce W. is the father of two sons placed on registry at ages 10 and 12 for the same offense committed against their younger sister, then age 8. He says that a man once held a shotgun to his 10-year-old son's head.*
- *Camilo F. was placed on the registry at age 14. He says strange cars started following him home from school. "One time a man from one of those cars yelled 'child molester' at me." Camilo said a week later several bullets were fired from a car driving by. "The bullets went through the living room window as my family and me watched TV.*

Id.

Reputational impairment is not limited to the facts disclosed, but what the public may reasonably understand the communication to mean, i.e., "the impression it would naturally engender, in the minds of the average persons among whom it is intended to circulate." *Thomas Merton Center v. Rockwell International Corp.*, 442 A.2d 213, 215 (Pa. 1981); *see also* Restatement (Second) of Torts § 563; *Birl v. Philadelphia Electric Co.*, 167 A.2d 472, 475 (Pa. 1960). Although adjudication records of the offenses for which SORNA is based are publicly available, 42 Pa.C.S. §§ 6307-08, a sex offender label is substantially more damaging to a child

than the public availability of a juvenile record. A lifetime label as a registered sex offender leads to consequences far greater than the availability of one's juvenile record alone. *See, e.g.,* Richard Tewksbury & Michael Lees, *Perceptions of Sex Offender Registration: Collateral Consequences and Community Experiences*, 26, *Sociological Spectrum*, 309, 330-32, (2006) (Registrants find "their status as a 'felon' was not as hard to overcome as their 'sex offender' label."); Jill S. Levenson et al., *Public Perceptions About Sex Offenders and Community Protection Policies*, *Analyses of Soc. Issues and Pub. Pol'y*, Vol. 7, No. 1, 1, 10-13 (2007) (generally discussing the public perception of registered sex offenders). Being placed on a sex offender registry sends a message to the public that the registered sex offender is likely to re-offend, is mentally ill and is dangerous. *See* Eric Janus, *Failure to Protect: America's Sexual Predator Laws and the Rise of the Preventative State*, Cornell Univ. Press (2006). *See also* Sarah W. Craun & Matthew Theriot, *Misperceptions of Sex Offender Perpetration: Considering the Impact of Sex Offender Registration*, 24 *J. of Interpersonal Violence*, 2057-2072 (2009) (finding that individuals who know a registered sex offender lives in their neighborhood are more likely to fear that a stranger will sexually abuse their child).

Other state Supreme Courts have recognized that disclosure of the sex offender label is far more damaging than disclosure of an adjudication for the crime. For example, Maine's Supreme Judicial Court explained:

All registrants, including those who have successfully rehabilitated, will naturally be viewed as potentially dangerous persons by their neighbors, co-workers, and the larger community. As one commentator has explained: '[W]hile registries do disseminate 'accurate information' otherwise available to the public, albeit in disaggregated form, the context in which the information is provided is far from neutral. The government's singling out of certain individuals, yet not others, combined with 'legislative findings' that those targeted pose particular risk, and sobriquets such as 'predatory sex offender,' 'sexually violent predator' or 'habitual sex offender,' contradict government neutrality. Even in jurisdictions that classify registrants in terms of risk, ... each level carries a corresponding degree of disclosure and opprobrium, and hence community disdain. To

conclude that registries only contain ‘accurate information’ is to thus misstate the government’s action; a wholly stigmatizing and unwelcome public status is being communicated, not mere neutral government-held information.’

State v. Letalien, 985 A.2d 4, 24 n.14 (2009) (quoting Wayne A. Logan, *Knowledge as Power: Criminal Registration and Community Notification Laws in America* 138 (Stanford Univ. Press 2009)).

B. The Sex Offender Label Will Be Disclosed To Third Parties.

Pennsylvania’s SORNA violates the constitutional right to reputation because requiring O.M. to register as a sex offender communicates defamatory falsehoods about O.M.’s future dangerousness—myths that go well beyond the fact of his juvenile adjudication. The “intentional or negligent” communication of this message will occur as a product of SORNA, for several reasons. *Chicarella*, 494 A.2d at 1112.

1. SORNA’s Vast And Onerous Registration Requirements Inevitably Lead To More Public Disclosure.

Information contained in the juvenile sex offender registry will be communicated to the general public because the law requires frequent and regular in-person reporting at an approved registration site. SORNA also requires the dissemination of registry information to an array of recipients. SORNA does nothing to restrict or prevent personal information from being released by law enforcement, courts, or private individuals outside of the State Police website. Moreover, the statute does nothing to prevent or prohibit an individual who knows information about a registered individual from sharing it widely. 42 Pa.C.S. § 9799.10 *et seq.*

The registration requirements under SORNA are longer and more detailed than earlier versions of Megan’s Law. Under SORNA, O.M. is required to register a long, detailed and personal list of information including all of the following: name, alias, nickname, “any designation or monikers used for self-identification in Internet communications or postings,” any

“[d]esignation used by the individual for purposes of routing or self-identification in Internet communications or postings,” any telephone number “including cell phone number, and any other designation used by the individual for purposes of routing or self-identification in telephonic communications,” social security number, the address of each “residence or intended residence . . . and the location at which the individual receives mail,”⁶ any “passport and documents establishing immigration status,” the name and address of current and future employers, the name and address of any part time job, defined as four or more days during any seven day period or fourteen or more days during any calendar year. 42 Pa.C.S. §§ 9799.12, 9799.16. SORNA states that if O.M. does not have “a fixed workplace,” he must register “general travel routes and general areas” where he works. 42 Pa.C.S. § 9799.16(b)(9). He must register any occupational and professional licensing information, the name and address of any school where he is or will be a student, any motor vehicle “including watercraft and aircraft” he owns or operates, including a description, license plate number, registration or other identification number and vehicle location, his driver’s license or identification card, birth date “and purported date of birth.” 42 Pa.C.S. § 9799.16. If O.M. will be away from his residence for seven days or more, he must appear in person and register the address, length of time and dates of the “temporary lodging,” 42 Pa.C.S. § 9799.16(b)(7).

According to the Pennsylvania State Police registration form SP4-218, O.M. was asked to register the following: “all locations where Vehicle 1 is parked” and whether the car is registered to an “acquaintance,” “member of household,” “relative that does not share residence,”

⁶ If the child does not have a residence for thirty consecutive days, he or she will be categorized as a “transient.” 42 Pa.C.S. §§ 9799.12, 9799.15(h)(2). While “transient,” the child must register in person at an approved registration site every month. 42 Pa.C.S. §§ 9799.15(h)(1), 9799.25, 9796(b)(2). The child must register his or her “temporary habitat or other temporary place of abode or dwelling, including, but not limited to, a homeless shelter or park” and list places where she or he “eats, frequents and engages in leisure activities and any planned destinations, including those outside this Commonwealth.” 42 Pa.C.S. § 9799.16(b)(6).

“personal,” “work,” etc. Sexual Offender Registration Notification Form SP4-218 at ¶ J, 9, *available at* http://www.portal.state.pa.us/portal/server.pt/community/pa_sexual_offender_management/20801/psp_status_update_12_17_2012/1352364 (last accessed October 29, 2013) [hereinafter “SP4-218”]. He was told that an occupational or professional license may include a “car dealer, barber, realtor,” *id.* at 11, ¶ 2(c)(9), and provided with explanation that “general travel route and general area” of work is where, “e.g., you have a delivery route.” *Id.* at 11, ¶ 2(b)(3). O.M. was asked to register his or her “room no.” at school, *id.* at ¶¶ H, I, 8, and the telephone number at work and his supervisor’s name. *Id.* at ¶¶ H, I, 8.

The registration form contains numerous unclear terms, including “any designation or monikers used for self-identification in Internet communications or postings,” any “[d]esignation used by the individual for purposes of routing or self-identification in Internet communications or postings,” and “any other designation used by the individual for purposes of routing or self-identification in telephonic communications.” 42 Pa.C.S. § 9799.16(b)(1-3). According to SP4-218, O.M. is required to register “ALL email addresses affiliated with the sexual offender” and “all identifiers affiliated with the sexual offender (e.g., Facebook, Twitter, Tagged, MySpace).” SP4-218 at ¶ K. He is also required to register “any other phone number (not associated with an address) the sexual offender can be reached at.” *Id.* at ¶ A(11). These are examples. O.M. could potentially be asked to register other designations, including: “routing” designations; logins for blogs or online newspapers that allow users to identify themselves and comment, online discussion groups, listserves or other online communities; or Internet commerce sites that allow users to register, rate or comment on products or services. *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1119 (D. Neb. 2012).

As a registered sex offender, O.M. must also provide physical and biological information. The registry will include a physical description. 42 Pa.C.S. § 9799.16(c)(1). This includes whether he wears glasses, height, weight, hair color, eye color, race, ethnicity, birth state/territory and birth country. SP4-218, at ¶ F. The registry will also include “the location(s) and description(s) of any scars on the sexual offender’s body” and location and description of tattoos, amputations, and “any marks” on the child’s body. SP4-218 at ¶ F(31-34). “Marks” may include “deformities,” a “mole,” “skin discoloration,” or “unknown.” *Id.* at ¶ 7.

Upon each verification, O.M. will be photographed on both his face and body. 42 Pa.C.S. §§ 9799.15(c)(4), 9799.39. The facial photograph is a “mugshot,” utilizing the same procedures as if the child were being arrested.⁷ Photograph Standards, available at http://www.portal.state.pa.us/portal/server.pt/community/pa_act_111_of_2011/20820/photograph_standards/1133435. [hereinafter “Photograph Standards”]. O.M. will also be photographed for “any scars, marks, tattoos or other unique features of the individual,” with no written exception for scars or marks in private areas. 42 Pa.C.S. § 9799.39. O.M. must also provide fingerprints and palm prints, which will be taken either electronically via “LiveScan” or in ink. 42 Pa.C.S. § 9799.16(c)(5).⁸ O.M. also must provide a DNA sample. 42 Pa.C.S. § 9799.16(c)(6).

The fact that SORNA requires O.M. to register extensive and detailed biographical information is significant, because as the breadth of registry information increases, so does the frequency with which O.M. must register. At a minimum, O.M. must report in person to the

⁷ For example, “[f]or subjects who normally wear eyeglasses, a frontal mugshot image should be captured of the subject without glasses.” Photograph Standards. “Subject illumination shall be accomplished using a minimum of three (3) point balanced illumination.” Photograph Standards.

⁸ Captain Scott Price, PSP Status Update 12/17/2012, available at http://www.portal.state.pa.us/portal/server.pt/community/pa_sexual_offender_management/20801/psp_status_update_12_17_2012/1352364; Pennsylvania Commission on Crime and Delinquency, Guidelines and Technology Standards for the Collection and Transmission of Booking Center Captured Offenders’ Identification Information, 42 Pa.B. 4585, Doc. No. 12-1340 (July 21, 2012).

Pennsylvania State Police to verify the registry information every ninety days, even if there have been no changes to his information. 42 Pa.C.S. § 9799.15(e). Each time, he will be asked to verify all of the above information and will be subject to a new photograph. 42 Pa.C.S. § 9799.15(e). There is no exception if he attends school, works full time, or both. *Id.* In fact, there is no exception for a natural disaster. 42 Pa.C.S. § 9799.25(e).

A child's verifications must take place at an "approved registration site" designated by the Pennsylvania State Police. 42 Pa. C. S. §§ 9799.12, 9799.32. It is O.M.'s obligation to find transportation to an approved registration site at least every ninety days for the rest of his life. The published list of approved registration sites does not include the hours of operation and does not state whether an appointment is necessary. Megan's Law Website: Approved Registration/Verification Sites at <http://www.pameganslaw.state.pa.us/VerificationSites.aspx>. It does not state how long the verification process, including waiting room times, is estimated to take. *Id.* It does not suggest public transportation routes. *Id.* There are no exceptions for missed registration due to transportation issues. 42 Pa.C.S. §§ 9799.12, 9799.32.

In small communities, or even in large communities where few approved registration sites are available, the simple act of reporting to the registration site raises suspicion and may inadvertently cause private registrants' information to become public. The law contains no prohibition on such disclosures. *See* 42 Pa.C.S. § 9799.18 (laying out the law's section on information sharing). People who deduce that the individual is on the registry are free to request the information from the State Police, make fliers, inform the public, and notify neighbors, employers, and anyone else without fear of penalty. In Texas, a youth required to register at age 10 was placed on a non-public registry. A few months later, the local newspaper published his name and address. *Raised on the Registry*, at 44.

In addition to appearing in person every ninety days for the rest of his or her life, O.M. must also report in person to register changes to his registry information whenever they occur. Within three business days of a change in any 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,” or occupational license, O.M. must appear in person at the registration site. 42 Pa.C.S. § 9799.15(g). O.M., a youth who is growing and developing, must also submit to a photograph whenever “there is a significant change in appearance.” *Id.* at (c)(4). If, for example, O.M. is able to obtain a driver’s license and a vehicle, he must appear to report any changes with regard to a vehicle “owned or operated,” (without exception for even a day’s use) including a change in where the vehicle is “parked.” SP4-218, at 11 ¶ 2(b)(6); 42 Pa.C.S. § 9799.15(g). If his residence limits him to on-street parking, every time he uses the car—including trips to the “approved registration site” itself—and re-parks in a new space, SORNA, on its face, requires yet another trip to the approved site. *Id.* Finally, if O.M. wishes to travel internationally, or is required to do so for his job or school, he must report in-person to 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).

Before SORNA, only judges, court staff, probation officers, attorneys, or other agents having a legitimate interest in the proceedings could access a juvenile’s record. 42 Pa.C.S. § 6308; Pa.R.J.C.P. 160A. In contrast, under SORNA a child must, for the rest of his life, disclose personal and often non-public details about his day-to-day living. *See United States v. Jones*, 132 S.Ct. 945, 956 (2012) (Sotomayor, J., concurring) (“[T]he Government’s unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse” and “chills associational and expressive freedoms.”).

O.M.'s registry information will also be disclosed automatically to primary sources and then released to secondary sources. Indeed, historically, no registry has ever been effectively kept private. KNOWLEDGE AS POWER at 229 (describing a history of privacy breaches in sex offender registries). The number of recipients who will receive O.M.'s sex offender registry information is extensive. Within three business days of registering, the Pennsylvania State Police must make O.M.'s registration information available to the jurisdictions in which the child resides, works or goes to school, a jurisdiction where he has terminated a residence, job or school, the United States Attorney General, the Department of Justice, the United States Marshals Service, the district attorney where the child resides, works or goes to school, the district attorney where the child terminates a residence, job or school, the chief law enforcement officer where the child resides, works or goes to school and the county office of probation and parole where the child resides, works or goes to school. 42 Pa.C.S. § 9799.18. When in placement, the registration information was shared with the director of the facility. 42 Pa.C.S. § 9799.19(h)(1)(ii)(3).

O.M.'s registry information will also be disseminated further. He will now 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. The child's "criminal history" registry information will be available for employment-related background checks under section 3 of the National Child Protection Act of 1993. 42 Pa.C.S. § 9799.18(e). The Pennsylvania registry will communicate with sex offender registries of the federal government and other jurisdictions. 42 Pa. C. S. § 9799.16(a). If O.M. intends to move or travel internationally, the Pennsylvania State Police will notify the United States Marshals Service, the Department of Justice and any jurisdiction

requiring registration. 42 Pa.C.S. § 9799.18(c-d). The Pennsylvania State Police will provide registry information to a federal public housing agency, upon request. 42 U.S.C.S. § 13663(b)(2). O.M.'s fingerprints and palm prints will be submitted to the Federal Bureau of Investigation Central Database and his DNA will be submitted into the combined DNA Index System (CODIS). 42 Pa. C. S. §§ 9799.16(c)(5) and (6). O.M.'s fingerprints and photographs, including photographs of "scars, marks, tattoos or other unique features" will be maintained "for general law enforcement purposes." 42 Pa.C.S. § 9799.39.

SORNA contains no prohibition on any official recipient's release of a juvenile offender's registry information. 42 Pa.C.S. § 9799.18. Thus, recipients, such as municipal governments or municipal police may release this information in the exercise of their discretionary authority. For example, a police officer may release information to a community if the officer believes it is necessary to protect the public interest, regardless of whether there is any true, identifiable reason. A police officer may also release this information upon request of a person who deduces or believes that a child is on the registry. Historically, when registries have been ostensibly private, the general police practice is to "treat these records in much the same manner as other police data... [with] disclosure of material vary[ing] from one police department to another. *Criminal Registration Ordinances: Police Control Over Potential Recidivists*, 103 U. PENN. L. REV, 60, 81 (1954).

If municipal authorities release a child registrant's information to even a few members of the public, it may be widely distributed, again without penalty. 42 Pa.C.S. § 9799.18. (*contrast with New Jersey Registration and Community Notification Act explained in Paul P. v. Farmer*,

92 F. Supp. 2d 410, 413 (D.N.J. 2000) (holding that the New Jersey Act’s prohibitions against disclosure made it a “reasonable method of distributing sex offender information”).⁹

O.M.’s status as a sex offender may also be released unintentionally as he attempts to fulfill his obligations. A child’s registration status may be disseminated to household members, including roommates, who see quarterly notices from the Pennsylvania State Police in the mail. 42 Pa.C.S. § 9799.25(c).¹⁰ A child’s status as a registered sex offender may be disseminated to members of the public, who see the child enter and exit the registration site, and to anyone whom the child asks for help with transportation. *See* 42 Pa.C.S. §§ 9799.15(e) and (g) (listing all of the occasions when a child must go in-person to the registration site); *See* <http://www.pameganslaw.state.pa.us/VerificationSites.aspx> (listing registration sites, all of which are public). The lack of any requirement that confidentiality be maintained despite so many opportunities for public disclosure presents obvious disclosure risk.¹¹

Similarly, educational environments present additional risk of disclosure, as registrants are obliged to report and provide information to campus security authorities, or otherwise face

⁹ For example, “prosecutors charged with delivering these notices are given explicit and detailed instructions regarding the appropriate methods of distribution”; “there are statutory penalties...against public officials who distribute Megan’s law improperly”; and recipients of the public must sign a receipt form and agree to “Rules of Conduct,” which include not disseminating the information. 92 F. Supp. 2d at 413.

¹⁰ Most children are not the first to sort the mail in their households. Even if others do not open the child’s mail, the envelopes will state that the letter is from “Headquarters, Pennsylvania State Police, M.L.S.”

¹¹ It is also possible that county probation departments may inadvertently leave a child’s status as a sex offender vulnerable to a data-breach through the use of email. Data-breach is a serious and recognized problem in Pennsylvania. *See* 73 P.S. § 2301, *et seq.* (“Breach of Personal Information Notification Act”). A letter from the Pennsylvania State Police states that if the county probation department is unable to register a child electronically via PA SORT, “the webcam should remain functional; allowing digital photographs to be taken. It is directed that these photographs should be transmitted by email along with a copy of the registration form to the Pennsylvania State Police, Megan’s Law Section as a jpeg file attachment to ra-pspmeganslawphoto@pa.gov.” Contingency Letter, Pennsylvania State Police, Megan’s Law Section, available at http://www.portal.state.pa.us/portal/server.pt/community/pa_sexual_offender_management/20801/psp_status_update_12_20_2012/1358131. There is no written requirement that the email be sent through an encrypted account or any additional safeguards for privacy. This is not an imagined risk; numerous examples exist of individuals or entities gaining unauthorized access to registry information and publicly disseminating such information, including via the Internet, with its expansive reach and indelible data storage capability. KNOWLEDGE AS POWER at 229.

expulsion or dismissal. *See, e.g.*, York College, “Sexual Misconduct and Reporting Procedures,” available at <http://www.ycp.edu/offices-and-services/campus-safety/reporting-crimes-&-other-emergencies/sexual-misconduct-policy-&-reporting-procedures/>. Campus security officials may then disseminate registry information, “consistent with the loosened privacy restrictions and authority of the federal Campus Sex Crimes Prevention Act of 2000.” *Id.*; *see also* 20 U.S.C.A. § 1232g(b)(7)(A) (permitting disclosure of registry information).

If the Pennsylvania State Police believe that a child has failed to fulfill the registration requirements, there are a number of ways the child’s registration status will be disseminated. The municipal police may call or go to the child’s residence, job or school to “locate and arrest” the child. 42 Pa.C.S. § 9799.22(a)(2). If the child is arrested, the charge of failure to comply with registration requirements, 18 Pa.C.S. § 4915.1, will appear on the child’s public record, even if the child is still a juvenile. 42 Pa.C.S. § 6307(b). If the child is an adult, the court docket will be posted and available to the general public on Unified Judicial System website at <http://ujportal.pacourts.us/>. This criminal history information will generally be available by request, such as for an employer or landlord background check. 18 Pa.C.S. § 9121. The availability of electronic criminal filings on the Internet will increase over the life of the child, as technology advances. *See, e.g.*, Amaris Elliott-Engle, FJD Starts Electronic-Filing Pilot Project for Criminal Cases, *The Legal Intelligencer* (Apr. 15, 2013).

Furthermore, social networking websites may contribute to public notification. In 2008, Congress passed the Keeping the Internet Devoid of Sexual Predators Act. 110 P.L. 400; 122 Stat. 4224. That law set up a system “that permits social networking websites to compare the information contained in the National Sex Offender Registry with the Internet identifiers of users of the social networking websites, and view only those Internet identifiers that match.” 42

U.S.C.A. § 16915b(a)(1). Social networking sites then may use the system to determine whether registered sexual offenders are using their sites. 42 U.S.C.A. § 16915b. While the law prohibits public disclosure, social networking sites are not penalized for disclosing the information except that they may lose the privilege of using the site. 42 U.S.C.A. § 16915b(c)(2).

Under Pennsylvania law, when a speaker is negligent, or worse, as to whether he communicates defamatory information, he cannot be shielded by his intent to keep the information private. *See* Restatement (Second) Torts § 599 (1976). SORNA's illusory "non-public" registry evinces not only a negligent statutory scheme, but a deliberate disregard for whether petitioner's information is shielded. *Id.* The damage done by the inevitable and foreseeable disclosure of petitioners as registered sex offenders falls squarely within the ambit of what the Pennsylvania Constitution protects.

2. Any Travel Outside The Commonwealth Can Lead To Public Disclosure.

As a Pennsylvanian, O.M. also risks infringement on his right to reputation if he travels outside the Commonwealth and is subject to other states' public registration schemes. When O.M. travels outside the Commonwealth, either for work, school, or personal travel, he risks the information about his status on the registry becoming public. Although the Commonwealth may intend to keep this information private, the registry itself communicates defamatory information to other states in which a registrant travels. Most states require a Pennsylvania registrant to register upon minimal contact with the state and will publicly disclose registry information, nullifying Pennsylvania's seemingly non-public juvenile registration.

The federal government maintains a searchable website independent of, but reliant on, each state's website. *See* National Sex Offender Public Website, *available at* <http://www.nsopw.gov>. Called the Dru Sjodin National Sex Offender Public Website, *see* 42

U.S.C.S. § 16920, the “Website shall include relevant information for each sex offender and other person listed on a jurisdiction’s Internet site.” § 16920(b). The website enables individuals to conduct a search for any offender nationwide. All 50 states, the District of Columbia, numerous territories and Indian tribes are included. *See* <http://www.nsopw.gov/en-us/Registry/Allregistries> (listing registries included). The website conducts searches in real time, *see*, National Sex Offender Website FAQs, *at* <http://www.nsopw.gov/en-us/Home/FAQ#answer-06>. As long as a juvenile offender is listed on any one jurisdiction’s website, he will be nationally searchable. Moreover, once information becomes public, it is linked to the Dru Sjodin National Sex Offender Website and numerous private sex offender notification websites. KNOWLEDGE AS POWER at 76-79. Essentially, once the information becomes publicly available, it will remain available. *Id.* at 229.

At least twenty-eight states include juvenile offenders on a public registry with little or no restrictions.¹² These states often include sweeping amounts of information, including internet identifiers. Eight more states publicly disclose information about juvenile registrants, but limit disclosure to certain offenders or groups.¹³ Only five states that register juvenile offenders

¹² *See* Ala. Code § 15-20A-08; Ariz. Rev. Stat. § 13-3827; Cal. Pen. Code §§ 290-045 to 046 (placing out of state working and student registrants on the website); Colo. Rev. Stat. § 16-22-112 (once over the age of 18); Del. Code. 11 § 4121(e); Fl. Stat. § 943.043; (2013); Ga. Code § 42-1-12(i) (2012); Haw. Rev. Stat. § 846E-3; 730 Ill. Comp. Stat. 152/115 and 152/21 (2013); Ind. Code § 11-8-8-7(j) (2013); Iowa Code § 692A.121 (2013); Kan. Stat. § 22-4909; Ky. Rev. Stat. § 17.580(3); La. R.S. 15:542.1.5; Miss. Code § 45-33-36; (b); Mo. Rev. Stat. §§ 211.425(1)–(3) (because PA juvenile offenders will likely be deemed to qualify as adult/serious offenders); Mont. Code § 46-23-508; Neb. Rev. Stat. § 29-4009 (2013); Nev. Rev. Stat. § 179D.475 (2012); N.M. Stat. § 29-11A-3 (2013); N.Y. Correct. Law § 168-p (special telephone database); N.D. Cent. Code, § 12.1-32-15(15) (2012); Or. Rev. Stat. § 181.592 (2012); S.C. Code § 23-3-490 (2012); S.D. Codified Laws §§ 22-24B-15, -21 (2012); Tex. Code Crim. Proc. art. § 62.005 (2013); Vt. Stat. tit. 13 § 5411(a) (2013); Va. Code § 9.1-913; Wash. Rev. Code § 4.24.550 (2012); W. Va. Code § 15-12-5 (2013). Utah and Ohio disclosure is not clear based upon current legal status.

¹³ Idaho Code § 18-8404, 8410 (2013) (separate juvenile registry which may be disclosed or transferred to adult registry upon which disclosure occurs); Mass. Gen. Laws. ch. 6, § 178L (2012) (only those considered class 2 or 3 offenders); Minn. Stat. § 243.166, subd. 7a (if the juvenile is out of compliance or is now 16 or older); N.J. Stat. §§ 2C:7-13(e) (2013) (if offenders are deemed at least a moderate risk level); N.C. Gen. Stat. § 14-208.29 (available to school boards); Okl. Stat. tit. 57 § 581 et seq. (2012) (listing adult offenses? where juvenile registrants may be

exempt them from public notification.¹⁴ Some states include the information on a publicly available state maintained website. *See, e.g.*, Ala. Code § 15-20A-08; Ariz. Rev. Stat. § 13-3827(b). Other states set up a phone alert system to publicly disclose information. *See, e.g.*, Fl. Stat. § 943.043. Many states also require active notification to the community of juvenile offenders. “‘Active’ community notification might entail making juvenile registrant information available to schools and distributing it to individuals and community organizations.”

KNOWLEDGE AS POWER at 76-79. *See, e.g.*, Ga. Code Ann. § 42-1-12(j)(2) (permitting sheriffs to post the list of sexual offenders in any public building); Nev. Rev. Stat. Ann. § 179D.475(2)(a) (local police provides all information to school, religious organizations, youth organizations, public housing authorities, child welfare services, and volunteer organizations); W. Va. Code § 15-12-5 (2013) (including dissemination to religious and volunteer organizations).

Furthermore, Internet domains such as *Offendex* and *HomeFacts* provide information on both previous and current sex offenders, including people who are supposedly already removed from the public registry. These websites are accessible by the public and create the potential for public knowledge. Many private websites also mine state registries in efforts to disseminate information about and track registered sex offenders. One website, Family Watchdog, uploads public registries every 24 hours and then facilitates offender searches based on its own criteria. *See* <http://www.familywatchdog.us/faq.asp> (last visited April 15, 2013). The website states that it “can proactively notify you when a registered sexual predator moves within five miles of your given address. Family Watchdog also tracks offenders and sends notifications if the specified

transferred to the adult registry); R.I. Gen. Laws § 11-37.1-13 (2013) (if upon assessment the offender’s risk level is moderate to high); Wyo. Stat. §§ 7-19-303(c) (2012) (serious offenses).

¹⁴ Md. Code , Crim. Pro. § 11-704.1 (2012); Mich. Comp. Laws § 28.728(4)(b); N.H. rev. Stat. § 651-B:7; Tenn. Code §§ 40-39-206, 207(j) (unless second or subsequent offense); Wisconsin does not appear to require registration upon examination of any statute.

offender has had a change.” *Id.* If a juvenile offender has to register in a different state, websites such as this will notify the public, even if a state does not provide for active notification.

There are several other sites that provide similar services. *See, e.g.,* <http://www.homefacts.com/offenders.html>. One website called Felon Spy specifically states on its homepage: “Are you in danger? It’s your right to know.” <http://www.felonspy.com/>. Another site, Map Sex Offenders, uses its own search system to create a zoom-able map which pinpoints locations of sex offenders in 45 states. *See* <http://mapsexoffenders.com/aboutus.php>. The stated purpose of the site is to make national sex offender searches easier and less time consuming. *Id.* Of course, any juvenile offender listed on a state site will be uploaded by these sites and then searchable by the public. These sites are also under no obligation to remove information which may be inaccurate or taken down by the state.

Requiring O.M. to register as a sex offender on the basis of his juvenile adjudication alone communicates myths about his future dangerousness. These myths are empirically false as to juvenile sex offenders generally, and to O.M. in particular. *See* Section I, *supra*; *see also* Trial Court’s May 2, 2013 Order, note 2. SORNA itself intentionally and negligently communicates myths and falsehoods to the derogation of O.M.’s reputation. As such, the statute violates O.M.’s constitutional right to reputation, as protected by the Pennsylvania Constitution.

III. SORNA CREATES AN IRREBUTTABLE PRESUMPTION IN VIOLATION OF THE PENNSYLVANIA CONSTITUTION.

Mandatory registration creates an unconstitutional irrebuttable presumption that children adjudicated delinquent of the enumerated offenses pose a high risk of committing future sex offenses, regardless of their rehabilitation following treatment, likelihood of recidivism, natural maturation and desistance over time, or other specific need to be placed on a registry. 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)).¹⁵ If a presumption is found to implicate fundamental freedoms, procedural due process requires that people have a “meaningful” opportunity to challenge the “paramount factor” behind the regulatory scheme in question. *Clayton*, 684 A.2d at 1065. As established in Section II, *supra*, SORNA implicates a youth’s fundamental right to reputation.

The “paramount factor” at issue here is the General Assembly’s conclusion that “[s]exual 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. § 9799.11(a)(4). Therefore, in order for the irrebuttable presumption embodied in SORNA to pass constitutional muster, either it must be universally true that all “juvenile offenders” pose a high risk of committing additional sexual offenses or there must be no reasonable alternative means of ascertaining whether individual juvenile offenders pose such a risk.¹⁶ *See Clayton*, 684 A.2d at 1063; *Vlandis*, 412 U.S. at 452.

¹⁵ Courts are most likely to apply the irrebuttable presumption doctrine articulated in *Vlandis* when the presumption in question affects a suspect class or implicates fundamental freedoms. *See, e.g., Com., Dept. of Transp., Bureau of Traffic Safety v. Slater*, 75 Pa. Commw. 310, 321-332 (1983) (concluding that possession of Class 4 license is not a fundamental right and thus declining to apply irrebuttable presumption doctrine as articulated in *Vlandis et al*); *Malmed v. Thornburgh*, 621 F.2d 565, 575-576 (3d Cir. 1980) (irrebuttable presumption that state court judges must retire at age 70 did not involve suspect class or implicate fundamental interest, and thus was subject to rational basis test, not *Vlandis* analysis).

¹⁶ Although the U.S. Supreme Court ruled, in *Connecticut Dept. of Safety v. Doe*, that due process was not implicated when the Connecticut statute provided no hearing on the issue of future dangerousness prior to imposing notification provisions on convicted sex offenders, *Doe’s* reasoning is inapposite. *See* 538 U.S. 1 (2003). First, Petitioners in the instant case seek relief under Pennsylvania’s judicially created irrebuttable presumption doctrine. Second, notwithstanding the inapplicability of the decision on this motion, juveniles who act out sexually are very different from adult sex offenders and cannot be held to the same rules of law.

*Clayton*¹⁷ is particularly instructive. In overturning a presumptive license revocation upon a driver's epileptic seizure, the court noted that the regulatory scheme in question provided for a hearing that did not allow for consideration of the "paramount factor behind the instant regulations," i.e. competency to drive. *Clayton*, 684 A.2d at 1065. Although the driver could be heard on whether he had in fact suffered an epileptic seizure, he could not be heard on the issue of whether that fact rendered him incompetent to drive. As such, the court found that the regulation violated the due process requirement that a hearing be "meaningful" and "appropriate to the nature of the case." *Id.* at 351-353 (citing *Soja v. Pennsylvania State Police*, 500 Pa. 188, 194 (1982) for proposition that "the essential elements of due process are notice and opportunity to be heard and to defend in an orderly proceeding adapted to the nature of the case before a tribunal having jurisdiction of the cause;" *Fiore v. Commonwealth of Pennsylvania, Board of Finance and Revenue*, 632 A.2d 1111, 1114 (Pa. 1993) for notion that due process requires not just "any" hearing, but rather an "appropriate" hearing; and *Bell v. Burson*, 402 U.S. 535 (1971) for notion that "any hearing which eliminates consideration of [the paramount factor behind the instant regulations] is violative of procedural due process.")). *See also Pennsylvania v. Aziz*, 724 A.2d 371, 375 n.2 (Pa. Super. 1999) (noting the right to rebut the presumption asserted); *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (Due process and fundamental fairness includes a meaningful opportunity to be heard on the matter at issue at a "hearing appropriate to the nature of the case.") (internal citations omitted).

¹⁷ In *Clayton*, the issue was whether a regulation which provided for the revocation of one's operating privilege for a period of one year upon the occurrence of only a single epileptic seizure, without the licensee having an opportunity to present medical evidence in an effort to establish his or her competency to drive, created an irrebuttable presumption in violation of due process. The Pennsylvania Supreme Court noted the state's important interest in precluding unsafe drivers, and even potentially unsafe drivers, from driving on the state's highways. 546 Pa. at 353. However, it held that this interest did not outweigh a person's interest in retaining his or her license so as to justify the recall of that license without first affording the licensee due process—i.e., a hearing that considered whether the individual was competent to drive. *Id.*

Similarly, in *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. Commw. Ct. 2005). The court ruled 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 pointed out that students subject to the automatic exclusion were presumed unfit to return to the 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. As such, the legislation failed to provide students with an opportunity to “challenge on the central issue” at hand in the regulatory scheme, i.e. the need to protect the regular classroom environment against disruption, and thus violated due process. *Id.* at 418.

Pennsylvania courts subject irrebuttable presumptions to a higher degree of scrutiny on procedural due process grounds¹⁸ without analysis of whether the interests are fundamental. *Clayton*, 684 A.2d at 1064(citing *Bell*, noting that *Bell* “remains valid precedent, is directly on point in the instant matter and, indeed, is dispositive.”); *D.C.*, 879 A.2d at ***. In both *D.C.* and *Clayton*, the affected parties had opportunities to challenge the *underlying* fact, but not the *presumed* fact upon which the regulatory scheme was founded.¹⁹ Similarly, under SORNA, O.M.

¹⁸ The U.S. Supreme Court has held that in juvenile proceedings the applicable due process standard is “fundamental fairness.” *McKeiver v. Pennsylvania*, 403 U.S. 528, 543 (1971). To assure due process and fundamentally fair proceedings, children must be treated differently from adults. The New Jersey Supreme Court has noted that the concept of fundamental fairness “effectuates imperatives that government minimize arbitrary action” and thus when applied in the SORNA context, it necessitates procedural protections that ensure the classification and consequences are “tailored to his particular characteristics and are not the product of arbitrary action.” *Doe v. Poritz*, 662 A.2d 419, 422 (N.J. 1995).

¹⁹ In *D.C.*, the students had been subject to either the delinquency or criminal process and had been either adjudicated or convicted. In *Clayton*, the drivers had the right to a *de novo* hearing at which hearing they could present evidence to rebut the fact that they had had a seizure. However, neither process afforded the litigants the

was adjudicated delinquent in a hearing with required due process safeguards, but was not permitted an opportunity to challenge the statute's presumption that his adjudication means that he will "pose a high risk of committing additional sexual offenses," or that registration will "[offer] an increased measure of protection to the citizens of this Commonwealth." 42 Pa.C.S. § 9799.11.

As in *Clayton*, the Commonwealth has used its legitimate interest in promoting public safety to improperly conflate two unrelated facts. In *Clayton*, the Commonwealth conflated an epileptic seizure with incompetency to drive; here, it has conflated the adjudication of the underlying offense with future dangerousness. Though the state's interest in protecting communities from sex offenders is legitimate, it cannot render "inviolable" an unlawful, irrebuttable presumption. *See Clayton*, 684 A.2d at 1065. Indeed, because future dangerousness is the paramount factor behind the instant regulations, "any hearing which eliminates consideration of that very factor is violative of procedural due process." *Clayton*, 684 A.2d at 1065. *See also, In re. W.Z.*, 957 N.E.2d 367, 376-80 (Ohio Ct. App. 2011) (concluding that procedural due process demanded a hearing on whether the juvenile has been rehabilitated before he could be subject to registration and reporting requirements and stating that "without any other findings or support of the likelihood of recidivism, a child who commits a one-time mistake is automatically, irrebuttably, and permanently presumed to be beyond redemption or rehabilitation.").

Moreover, in finding that the students in *D.C.* lacked a "meaningful" opportunity to challenge their transfer to an alternative education setting, the Commonwealth Court specifically

opportunity to rebut the presumed fact at issue. The delinquency and criminal processes adjudicate questions of "guilt" or "innocence"; they are "not adapted to consideration of [the returning students' fitness to return to the regular classroom]." *D.C.* at 418. In *Clayton*, the *de novo* hearing was "meaningless" as it did not afford the Appellee the opportunity to present objections to the presumption of incompetency to drive. *Clayton* at 353.

noted that the determination of a returning student's fitness for the regular classroom "turns on factors that could not be known at the time of juvenile adjudication." 879 A.2d at 418. The same is true as to the relationship between a juvenile's adjudication for sexual offenses and the child's risk of committing additional sexual offenses. In fact, because his adjudication of delinquency requires a finding that O.M. has committed a delinquent act and is in need of treatment, supervision or rehabilitation, which can effectively be provided by the juvenile court system, it is inconsistent—and punitive—to presume that he has been adjudicated delinquent *and* undergone treatment and yet continues to pose a threat to his community. The right to a meaningful hearing that considers the central issue at hand is plainly violated by substituting the delinquency hearing for a determination on the need for lifetime sex offender registration. The adjudicatory hearing neither considers nor addresses whether the child poses a high risk of committing additional sexual offenses.

As described in Section IB, *supra*, juvenile rates of recidivism for sexual offenses are extremely low. Children who offend sexually have much lower rates of sexual recidivism than adults, who already have lower rates of recidivism than other categories of offenders. Caldwell, *Recidivism Study 2010* at 198. Studies have universally shown that juveniles are unlikely to recidivate and therefore pose little risk to the community. *Multi-State Recidivism Study* at 24. Because SORNA's mandatory registration scheme turns on assumptions that cannot be reliably known at the time of adjudication, it is further unconstitutional for failing to provide children with an opportunity to challenge the registration requirements on an individual basis.

SORNA's deficient due process is further exemplified when compared to the extensive process required for involuntary civil commitment under Pennsylvania's Act 21. 42 Pa.C.S. § 6403. Before civil commitment is permitted, the juvenile is first subject to an assessment by the

State Sexual Offenders Assessment Board (SOAB). 42 Pa.C.S. § 6403(b). If the Board finds a *prima facie* case for commitment, a petition is filed describing the reasons and a hearing is scheduled. *Id.* At the hearing, the juvenile is represented by counsel, presents expert testimony on his or her behalf, and cross-examines any witnesses against him or her. 42 Pa.C.S. § 6403(c). The court must find clear and convincing evidence that “the person has a mental abnormality or personality disorder which results in 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(d). The decision to involuntarily commit an individual is thus based on careful consideration of the unique needs and circumstances of the juvenile in question, and the deprivation of liberty is directly tied to the determination of future likelihood of offense. Moreover, commitment is initially for a period of one year, 42 Pa.C.S. § 6404(a) after which it is reviewed *annually* by the director of the inpatient facility, the SOAB, and finally by the court to determine if there is a continuing *need* for inpatient treatment based on the same determination of whether the individual is likely to reoffend. 42 Pa.C.S. § 6404(b). Although Appellant does not argue that lifetime registration is equivalent to indefinite commitment, the difference between the process required for each—when intended to further a similar public safety interest—is stark.

Finally, the presumption leads to a mandatory punishment, which is at odds with Eighth Amendment jurisprudence requiring distinct treatment of children. *See* Section IVC, *infra*. Under SORNA, the juvenile court judge is denied any opportunity to consider factors related to the juvenile’s overall level of culpability before imposing registration. SORNA runs afoul of the Supreme Court’s jurisprudence analyzing irrevocable penalties as applied to juveniles. *Id.*

IV. JUVENILE SORNA VIOLATES THE PENNSYLVANIA AND UNITED STATES CONSTITUTIONAL BANS ON THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENT.

Central to the Constitution’s prohibition against cruel and unusual punishment is the “precept of justice that punishment for crime should be graduated and proportioned to [the] offense.” *Id.* at 2463 quoting *Weems v. United States*, 217 U.S. 349, 367 (1910); *Jackson v. Hendrick*, 503 A.2d 400, 405 (Pa. 1986) (“Among unnecessary and wanton inflictions of pain are those that are totally without penological justification.” (internal citations omitted)). On its face, the Eighth Amendment applies only to punishment. Registration, when applied to children, can no longer be couched in the legal fiction of remedial or administrative aims.²⁰ The mandatory nature of its imposition, the nearly insurmountable registration obligations, the ever-increasing threat of incarceration, and the accompanying loss of jobs, housing, schooling and reputation all lead to the singular conclusion that the law is punitive. This Court should recognize what a growing number of states now hold, that sex offender registration is punishment. Furthermore, SORNA is unconstitutional as applied to children because it is a disproportionate punishment. Its mandatory nature further renders it unconstitutional for children. *See* Pa. Const. Art I. Sec 13;²¹ U.S. Const. Amend. VIII; *See also Miller*, 132 S. Ct. at 2455.

A. SORNA As Applied To Children Constitutes Punishment.

The Pennsylvania Supreme Court has determined that previous versions of Megan’s Law, applicable only to adults, were not punishment. *See Commonwealth v. Lee*, 935 A.2d 865 (Pa. 2007) (whether lifetime registration provisions for “sexually violent predators” in Megan’s Law II was punishment); *Commonwealth v. Williams*, 832 A.2d 962 (Pa. 2003) (whether “sexually violent predator” provisions of Megan’s Law II was punishment); *Commonwealth v. Gaffney*, 733 A.2d 616 (Pa. Super. 1999) (whether Megan’s Law I was punitive); *see also, Commonwealth v.*

²⁰ The declaration of policy within SORNA states that it “shall not be construed as punitive,” 42 Pa.C.S. § 9799.11(a)(2), but it simultaneously expanded every aspect of registration pushing the boundaries between punitive and remedial consequences.

²¹ Art I. Sec 13 of the Pennsylvania Constitution prohibits “cruel punishments.”

Fleming, 801 A.2d 1234 (Pa. Super. 2002) (whether Megan’s Law II was punitive). Because Pennsylvania has never before required children adjudicated delinquent in this Commonwealth to register as sex offenders, no court has yet considered whether lifetime sex offender registration of children is excessive or punitive. Moreover, prior case law applicable to adult registration requirements under Megan’s Law is unavailing on this question. SORNA is not Megan’s Law. SORNA’s requirements and provisions are severe, intimately connected to the criminal process, and apply automatically. SORNA imposes increased in-person reporting requirements, inevitable public disclosure and community notification, innumerable obligations, and many other previously unheard of requirements. *See* Sections IIB, *supra*. The punitive effects are significantly amplified when applied to children who are neither mature nor self-reliant; who are amenable to rehabilitation and unlikely to recidivate; and whose lifetime reporting requirements will last decades longer than the same penalty imposed upon adults. *See* Section I, *supra*.

Typically, the question of whether a law is punitive arises in the *ex post facto* setting,²² Courts evaluate whether a sanction is punitive by first examining the legislative intent and then seven factors, including

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—retribution and deterrence; 5) whether the behavior to which it applies is already a crime; 6) whether the alternative 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.

²² O.M. did not raise an *ex post facto* violation because his adjudication was after SORNA’s effective date. However, the United States Supreme Court has held that the additional punishment cannot be imposed after the conduct was committed. *Peugh v. United States*, 133 S. Ct. 2072 (2013). The conduct for which O.M. was adjudicated occurred prior to SORNA’s effective date.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963); *Lehman v. Pennsylvania State Police*, 839 A.2d 265, 271. (Pa. 2003). A brief examination of the key factors herein mandates the conclusion that SORNA is punitive when applied to O.M. and all juveniles.

1. SORNA Imposes An Affirmative Disability Or Restraint.

To determine whether a law imposes an affirmative disability, 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. This Commonwealth’s jurisprudence demonstrates that SORNA imposes an affirmative disability. The law’s effects include all of the effects, along a spectrum from direct and major effects to those effects that are indirect and minor. “If the disability or restraint is minor and indirect, its effects are unlikely to be punitive.” *Id.* In other words, a court looks to all of a law’s effects, both direct and indirect, and then seeks to determine 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).

In *Commonwealth v. Wall*, the Superior Court concluded that a mere \$200 “assessment” imposed at the time of a DUI conviction was a direct effect and punitive. *Commonwealth v. Wall*, 867 A.2d 578, 582-83 (Pa. Super. 2005). Similarly, the Pennsylvania Supreme Court held that prohibition on felons in possession of a firearm was a direct disability. *Lehman*, 839 A.2d at 272. SORNA’s direct impact on a child is overwhelmingly greater than a single assessment of a \$200 fine or a ban on purchasing a firearm.

As described in sections above, the disabilities imposed on children under SORNA are anything but minor. These affirmative disabilities severely damage the physical, social, emotional, economic and psychological well-being of children who must register. This is a major

break from precedent in this Commonwealth, which has shielded children from harsh, lasting obligations and social stigma because children are generally unable to control their own destiny, immature and have a great capacity for rehabilitation. *See Commonwealth v. S.M.*, 769 A.2d 542, 544 (Pa. Super. 2001). *See also* Section I. *supra*.

A. SORNA Imposes Major Direct Disabilities And Restraints.

SORNA requires more onerous affirmative obligations and restraints than any prior sex offender registration law in this Commonwealth and, for the first time, imposes these requirements on children. The law requires juveniles to register in-person quarterly, to disclose an extraordinary amount of information, and to appear in-person to update that information under the threat of lengthy mandatory prison sentences. *See* Section IIB, *supra*; 18 Pa.C.S. § 4915. Additionally, for the first time in Pennsylvania, SORNA will automatically result in the categorical exclusion of certain offenses for expungement purposes. *See* 18 Pa.C.S. § 9123(a.1) (prohibiting expungement for juveniles who commit registerable offenses).

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. In *Smith v. Doe*, the United States Supreme Court explained that Alaska's sex offender law did not impose an affirmative disability upon adults sufficient to tilt the balance. Alaska's law, however, did not cover juveniles, did not require in-person reporting and otherwise disclosed adult convictions as part of the public record. *See Smith v Doe*, 538 U.S. 84, 89-90 (2003); Alaska Stat. §§ 12.63.010 *et seq.* Similarly, although the Pennsylvania Supreme Court held that Megan's Law II was a only a minor restraint, *Williams* was concerned with registration

requirements significantly less onerous than SORNA, as applied to adults and as applied only after a risk-assessment. *Williams*, 832 A.2d 973-75.

A child required to register must report in-person four times a year at only an approved site. 42 Pa.C.S. § 9799.15; 42 Pa.B. 7628, Doc. No. 12-2460 (Dec. 15, 2012). Moreover, the child must also appear at a registration site within 72 hours to report any changes, additions, or deletions of nearly all required registration information. 42 Pa.C.S. § 9799.15(g). *See also* Section IIB, *supra*.²³ Indeed, other state Supreme Courts have recognized that quarterly, in-person registration requirements are an affirmative restraint. *See, e.g., Doe v. Alaska*, 189 P.3d 999, 1009 (Alaska 2008) (holding that obligations that compel offenders to repeatedly contact law enforcement constitute an affirmative disability); *Wallace v. Indiana*, 905 N.E.2d 371, 380 (Ind. 2009) (“[SORNA’s] registration and notification provisions impose substantial disability on registrants.”); *Williams*, 952 N.E.2d at 1113 (the same); *State v. Letalien*, 985 A.2d 4, 18 (Me. 2009) (holding in-person verification requirements “is undoubtedly a form of significant supervision by the state”); *Doe v. Department of Public Safety and Correctional Services*, 62 A.3d 123, 139 (Md. 2013) (holding that the application of sex offender registration “has essentially the same effect on his life as placing him on probation”).

SORNA also imposes an affirmative disability because it requires juveniles to disclose massive amounts of personal information. Under SORNA a child must for the first time and for the rest of his life, disclose personal and often non-public details such as routes to work, 42

²³ It is useful to consider the practical effects of this requirement, as applied to children. Children by nature have less ability to control their mobility. As an example, if a child is in the custody of a children and youth agency, each new foster home will add numerous new obligations. *See, e.g., In re: Adoption of S.E.G.*, 901 A.2d 1017, 1019 (Pa. 2006) (discussing the problem of “foster care drift,” in which children are moved from home to home). In some jurisdictions, registrants cannot be released from incarceration until they have a permanent address and many children in foster care lack that permanency. *Raised on the Registry*, at 68. Furthermore, in this electronically wired age, signing up for an EBay account or posting a comment on a news site. The statute requires a child to appear and report *any* change in the vehicle he operates and even to report a change in parking location. SP4-218, at 11 ¶ 2(b)(6); 42 Pa.C.S. § 9799.15(g).

Pa.C.S. § 9799.16(b)(9), vehicle information, email addresses, Internet names and “all identifiers affiliated with the sexual offender” (e.g., Facebook, Twitter, Tagged, MySpace).²⁴ *See also United States v. Jones*, __U.S.__, 132 S.Ct. 945, 956 (2012) (Sotomayor, J., concurring) (“[T]he Government’s unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse” and “chills associational and expressive freedoms.”).

The state police will then disseminate a child’s personal information to numerous state, county and federal officials, regardless of whether they are connected to the child’s case. 42 Pa.C.S. § 9799.18; Section IIB2, *supra*. SORNA also imposes direct disabilities on children by permanently removing their right to have their juvenile record expunged. Pennsylvania law entitles juveniles to expunge their records provided that they have not committed any new offenses for five years after supervision concludes. 18 Pa.C.S. § 9123(a)(3); *In re A.B.*, 987 A.2d 769 (Pa. Super. 2009), *appeal denied*, 12 A.3d 369 (Pa. 2010). SORNA removed this right. This removal directly conflicts with the goal of the expungement statute—to protect juveniles from lifelong consequences resulting from delinquent acts. *See In re A.B.*, 987 A.2d at 778-79.

B. SORNA Imposes Extraordinary Secondary Disabilities And Restraints.

SORNA also imposes substantial, secondary affirmative disabilities and restraints. As to the secondary effects of sex offender registration laws, numerous state Supreme Courts have considered these effects when applying the *Mendoza-Martinez* test and have found them to

²⁴ The disclosure of Internet identifiers alone imposes a disability, which raises its own constitutional concerns. Since a child must register every designation used online, his ability to speak freely and anonymously is directly infringed. *See Melvin v. Doe*, 836 A.2d 42, 50 (Pa. 2003) (“There is no question that generally, the constitutional right to anonymous free speech is a right deeply rooted in public policy”); *Reno v. ACLU*, 521 U.S. 844, 870 (1997); *Pilchesky v. Gatelli*, 12 A.3d 430, 438-39 (Pa. Super. 2011) (“Any ruling that does not fully protect the anonymity of the anonymous Internet speaker may deter anonymous Internet speech.” (internal citations omitted)). The registration and disclosure of anonymous Internet identifiers removes a child’s constitutional right to, for example, chat anonymously in an online Sports forum, comment anonymously to an online news article, or ever again speak anonymously on the Internet.

constitute major disabilities. *See, e.g., Starkey v. Oklahoma Dep't of Corr.*, __P.3d__, * 16-17, 2013 Okl. 43 (Okl. 2013) (quoting Justice Souter in *Smith*); *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). These cases demonstrate that disabilities and restraints that are major but indirect may be found punitive, especially, as here, when they are combined with major, direct disabilities.

For example, SORNA impacts a child's ability to travel and move out of state, his social and psychological well-being, the likelihood he or she will be subject to violence, and his or her ability to find housing, employment and schooling. *See Raised on the Registry* at 47-75. Although these effects are not statutorily imposed by SORNA, they flow directly and inevitably from the duty to register and the imposition of the sex offender label.

The secondary effects of SORNA are intimately connected to the criminal case. Both attorneys and defendants often view these consequences as more severe and more important than a jail sentence or probation. *See generally*, Gabriel J. Chin & Margaret Love, *Status as Punishment, A Critical Guide to Padilla v. Kentucky*, 25-Fall Crim. Just. 21 (2010) (discussing the importance of secondary effects). Like deportation, sex offender registration is so "enmeshed" with and "intimately related to the criminal process" that it cannot be ignored. *See Padilla v. Kentucky*, 130 S.Ct. 1473, 1481-82 (2010). *See also Taylor v. State*, 698 S.E.2d 384, 388 (Ga. App. 2010) (the same).

For a juvenile registrant who seeks to move or travel outside of Pennsylvania, the fact of registration now requires him to scour and interpret the laws of other states, find state police locations, register in-person in those states, and in some instances, subject himself to court proceedings and psychological assessments. *See Section IIB2, supra*. SORNA significantly limits where a child registrant may live, vacation, visit relatives or even go to school because

many states and communities impose stringent residency restrictions on registered sex offenders. *See* Section IIB2, *supra*; *Raised on the Registry* at 47-48. Many states and communities trigger registry restrictions after the briefest of stays. *See, e.g.*, Fla. Stat. §§ 775.21(2)(k)-(l); 985.481 to 985.4815 (5 days or more creates a residence).

Children who must register as sex offenders also face innumerable barriers to social development. Once their registration is inevitably disclosed, the child may experience psychological symptoms such as shame, embarrassment, depression, hopelessness or even suicide as result of public disclosure. *See* Letourneau, *Against the Status Quo* at 313-331; *Raised on the Registry*, at 50-60. Juveniles and their families may also become targets of harassment and violence. As Maryland's highest court recently recognized, "[a] study by the United States Department of Justice indicated that 77% of registrants in another state surveyed reported 'threats/harassment[.]'" *Doe v. Department of Public Safety and Correctional Services*, 62 A.3d 123, 142 (Md. Ct. App. 2013) (internal quotations omitted).

Registrants also face significant difficulty finding and maintaining housing and employment. Federal law permanently bars only two classes of people from admission to public housing: individuals who were convicted of manufacturing methamphetamine in publicly owned housing, 42 U.S.C. § 1437n(f), and lifetime registered sexual offenders. 42 U.S.C. §§ 13663(a). Human Rights Watch reported that of 296 youth offender registrants, over 44 percent (132 respondents) experienced at least one period of homelessness as a result of the restrictions that come with being registered. *Raised on the Registry*, at 65.

Registration affects children in far more grievous ways than an adjudication of delinquency alone. *See also* Eric Janus, *Failure to Protect: America's Sexual Predator Laws and*

the Rise of the Preventative State, Cornell Univ. Press (2006). Given the severity of these consequences, SORNA undoubtedly imposes affirmative restraints and disabilities on children.

2. SORNA Is Similar To Traditional Forms Of Punishment.

The application of SORNA to Pennsylvania’s children imposes two traditional forms of punishment—probation and shaming. The limitations and burdens imposed by SORNA are extraordinarily similar to probation in Pennsylvania. Both impose obligations to report followed by penalties for failure to comply. Both statutory schemes appear in the same sentencing code. They share a similar purpose, rest on a common assumption, and have many structural similarities. First, probation and SORNA share the stated purpose of promoting public safety. The stated purpose of probation “is to assist the offenders in their rehabilitation and reassimilation into the community *and to protect the public.*” 42 Pa. C.S. § 9912(a) (emphasis added). Juvenile dispositions likewise are designed to account for the “child’s treatment, supervision, rehabilitation, and welfare, [and] provide balanced attention to the protection of the community, the imposition of accountability” 42 Pa.C.S. § 6352(a). SORNA provides that “[i]t is the intention of the General Assembly” “to further protect the safety of and general welfare of the citizens of this Commonwealth by providing for increased regulation of sexual offenders” 42 Pa.C.S. § 9799.11(b)(1); *see also* 42 Pa.C.S. § 9799.11(b)(2) (“as a means of assuring public protection”); 42 Pa.C.S. § 9799.10.

Second, both probation and SORNA rest on the assumption that the individual requires supervision. *Commonwealth v. Chambers*, 55 A.3d 1208, 1212 (Pa. Super. 2012) (quoting *Commonwealth v. Moore*, 805 A.2d 616, 619 (Pa. Super. 2002) (A “basic assumption of the institution of probation is that the probationer ‘is more likely than the ordinary citizen to violate the law,’ ”)). Under SORNA, the General Assembly notes that underlying the law is the

assumption that registrants are more likely to recidivate as “[s]exual offenders pose a high risk of committing additional offenses.” 42 Pa.C.S. § 9799.11(4).

Probation is imposed by the trial court at the time of sentencing in criminal court or at a dispositional hearing in juvenile court. 42 Pa.C.S. §§ 6352, 9721, 9754; Pa.R.J.C.P. 512.

Registration under SORNA is also imposed “at the time of the disposition” or sentencing. 42 Pa.C.S. § 9799.23. In the case of probation, a judge will make a statement and impose probation conditions. 42 Pa.C.S. § 9754(a)-(b). In the case of SORNA, the judge will inform the child at disposition of the registration consequence. 42 Pa.C.S. §§ 9799.23(a), 9799.20(2). The interconnectedness of SORNA to the sentencing/dispositional hearing is further exemplified by pending amendments to the Rules of Juvenile Court Procedure. *See* Proposed Pa.R.J.C.P. 161, 195, 302, 407, 409, 512, 800 and 614, at <http://www.pacourts.us/assets/uploads/Resources/Documents/rules161195etaljuvct%20-%20001988.pdf?cb=17d27>. The proposed rules would mandate an extensive colloquy for any admission to a SORNA offense and would codify in the juvenile rules the many obligations of probation officers in enforcing SORNA. *See* Proposed Rules 407, 195(A)(13)-(14). The proposed rule governing dispositions would include an entire section on SORNA and would require the dispositional court to “classify” the juvenile as a “juvenile offender,” notify him of his duties, make him sign the registration form, and “issue any orders to a juvenile offender requiring the juvenile to provide information to the chief juvenile probation officer as set forth in 42 Pa.C.S. § 9799.16(B).” Proposed Rules 512(E). Moreover, courts often impose reporting probation which mandates that the defendant appear in person to check in with his probation officer at designated intervals. 42 Pa.C.S. § 9754(c)(10). SORNA imposes extreme reporting requirements, more intense than most reporting requirements imposed as a condition of probation. *See* Section IIB, *supra*.

Probation has historically involved the imposition of conditions for which an offender must comply or face sanctions. *Korematsu v. United States*, 319 U.S. 432, 434-35 (1943). SORNA is the same. Violation of the terms and conditions of probation results in a hearing at which the sentencing court may impose a sentence of imprisonment or further sanctions, 42 Pa.C.S. § 9771(b); violations of SORNA's reporting obligations lead to arrest and incarceration for a minimum of three to six years. 18 Pa.C.S. §§ 4915, 9718.4, 9771. Probation and parole officers are tasked with enforcing the law by reporting any individual who fails to comply with SORNA's requirements. 42 Pa.C.S. § 9799.22(d).

A growing number of state courts have determined that SORNA requirements are akin to and in some cases more severe than the criminal sanction of probation. The Maryland Supreme Court found that: "[SORNA's] restrictions and obligations have the same practical effect as placing Petitioner on probation or parole. *See Doe v. State*, 189 P.3d 999, 1012 (Alaska 2008); *Wallace*, 905 N.E.2d at 380–81." *Doe*, 62 A.3d at 139 (Md. Ct. App. 2013). *See also Smith*, 538 U.S. at 115 (Ginsburg, J., dissenting); *Smith*, 538 U.S. at 111 (Stevens, J., dissenting); *Doe v. Nebraska*, 898 F. Supp. 2d 1086, 1126 (D. Neb. 2012); *Doe v. State*, 189 P.3d 999, 1009, 1012 (Alaska 2008); *Wallace v. Indiana*, 905 N.E.2d 371, 380 (Ind. 2009); *Commonwealth v. Gehris*, 54 A.3d 862, 878 (Pa. 2012) ("[R]egistration obviously has serious and restrictive consequences for the offender, including prosecution if the requirement is violated.") (Castille, J.) (opinion in support of reversal).

SORNA is also similar to the punishment of shaming, especially when applied to children. In *Williams*, the Pennsylvania Supreme Court discussed at length whether public notification of "sexually violent predator" status under Megan's Law was similar to shaming. 832 A.2d at 975-76. The *Williams* court recognized correctly that shaming punishments

disclosed essentially the same information as disclosed by Megan’s Law, and served to warn the community that the individual might reoffend and might have serious reputational consequences. *Id.* The Court fell short of accepting the analogy, however, finding that the historic intent of shaming was to stigmatize the individual, but that Megan’s Law only had the potential effect of creating that stigma. *Id.* at 976. Further, the effects, even if sufficient to make the law similar to shaming, were reasonable given the need to protect the community. *Id.*

This logic fails when applied to juveniles. Pennsylvania has historically shielded information about juvenile offenders from public disclosure. Our courts have noted “[t]here 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 the Interest of 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).

Indeed, Pennsylvania’s attempt to shield juvenile registrants’ information from public notification by creating a non-public registry is presumably reflective of the State’s otherwise longstanding commitment to protect children. 42 Pa.C.S. § 9799.28. However, as set forth above, the information will undoubtedly become public and will remain public once disclosed. Section IIB, *supra*. The combination of lifetime reporting, inevitable disclosure of ‘confidential’ information and the ban on expungement paints these children as beyond rehabilitation – a notion wholly at odds with history and purpose of Pennsylvania’s juvenile justice system. Section V, *infra*; *In re J.B.*, 39 A.2d 421, 427 (Pa. Super. 2012) (“The purpose of juvenile proceedings is to seek treatment, reformation and rehabilitation, and not to punish.”). SORNA bluntly rejects these principles in favor of a lifetime characterization of these children as criminals—a message and practice historically

consistent with public shaming. “The result is that the dissemination of information about registrants, like Petitioner, is the equivalent of shaming them, and is, therefore, punitive for *ex post facto* purposes.” *Doe v. Department of Public Safety and Correctional Services*, 62 A.3d 123, 140-41 (Md. Ct. App. 2013); *see also Doe v. Alaska*, 189 P.3d at 1012 (same); *Wallace*, 905 N.E.2d at 380 (same).

3. SORNA Applies Only Upon A Finding Of *Scienter*.

The third factor asks whether the requirement comes into play only on a finding of *scienter*. Here, the obligations flow directly from a finding of criminal conduct, and the regulatory purpose is the reduction of future offending. *Scienter* is thus a necessary part of the regulatory objective, satisfying this prong of the *Mendoza-Martinez* test. *Smith*, 538 U.S. at 105.

4. SORNA Promotes The Traditional Aims Of Punishment.

A. SORNA Exacts Retribution.

SORNA punishes children by exacting retribution for past crimes. *Mendoza-Martinez*, 372 U.S. at 168. SORNA automatically imposes the lifetime consequence of sex offender registration immediately after an adjudication of delinquency. SORNA does not distinguish between children who pose a risk for future sexual crimes and those who do not. Nor does SORNA take into account the facts or circumstances of the underlying offense. Rather, under SORNA, lifetime sex offender registration is based on the adjudication of delinquency alone.

When compared to Act 21, the juvenile sexual offender involuntary civil commitment statute, SORNA’s retributive nature becomes apparent. *See In re S.A.*, 925 A.2d 838 (Pa. Super. 2007). As set forth above, Act 21 requires the committing court to conduct a hearing to determine by clear and convincing evidence whether the child “is in need of commitment for involuntary treatment due to a mental abnormality . . . or a personality disorder, either of which

results in serious difficulty in controlling sexually violent behavior.” 42 Pa.C.S. §§ 6358, 9799.24. The Superior Court, in an *ex post facto* analysis, found that because the law 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 at 842-44 (emphasis in the original). SORNA is exactly the opposite. The requirements of SORNA apply as a result of “prior criminal conduct” only.

SORNA punishes children adjudicated delinquent of a predicate offense regardless of the underlying facts or circumstances or the risks that they will reoffend. Although the list of offenses is limited, SORNA sweeps up children who engaged in a broad array of behavior. SORNA also requires lifetime sex offender registration for children who may have committed no physical act, but are nevertheless adjudicated delinquent of attempt, solicitation, or conspiracy to commit a SORNA offense. 42 Pa.C.S. § 9799.12.

The U.S. Supreme Court’s reasoning regarding the non-retributive effect of Alaska’s registration law is inapposite. *Smith v. Doe*, 538 U.S. at 101-04. There, the Supreme Court found that the Alaska law did not have a retributive effect because the law divided the predicate offenses into different tiers imposing different registration requirements based upon the reasonable danger of recidivism. *Id.* In contrast, Pennsylvania’s statute has only one category of registration for “juvenile offenders” under SORNA—life. Requiring all children to register for what is likely a lifetime can only be seen as retributive in light of the substantial body of research in this area. *See* Section I, *supra*.

In addition, the legislative history of the Adam Walsh Act demonstrates that SORNA has a retributive effect. The Declaration of Purpose of the Adam Walsh Act explains that it is a “response to the vicious attacks by violent predators” against children listed in the statute and

that it will “protect the public from sex offenders and offenders against children.” 42 U.S.C. § 16901.²⁵ The remarks of the signatories to Adam Walsh confirm that SORNA is retributive. Congressman Keller, *id.* at 20192-20193, stated “I am a cosponsor of the Children’s Safety Act because we must crackdown against child molesters by making sure they serve longer sentences and by requiring sex offenders who fail to comply with registration requirements to go back to jail where they belong.” In a floor statement, Senator Grassley remarked, “I can honestly tell you that I would just as soon lock up all the child molesters, child pornography makers and murderers in this country and throw away the key.” *Juvenile Male*, 590 F.3d at 938 (citing 152 Cong. Rec. S8012, S8021 (daily ed. July 20, 2006)). This sentiment was explicit in President Bush’s signing statement: “By enacting this law we’re sending a clear message across the country: those who prey on our children will be caught, prosecuted and *punished* to the fullest extent of the law.” *President Signs H.R. 4472, The Adam Walsh Child Protection and Safety Act of 2006*, The White House Office of Communications, July 27 2006, *available at* 2006 WL 2076691 (emphasis added).

B. SORNA Promotes Deterrence.

SORNA clearly seeks to promote deterrence, another aim of punishment, albeit ineffectually. Indeed, deterrence can be seen as an “obvious” goal of sex offender registration laws. *Gehris*, 54 A.3d at 878 (J. Castille) (opinion in support of reversal) (sex offender registration “encompasses the recidivist philosophy in addition to its perhaps more obvious goals of public protection and deterrence”). In *Williams*, the Pennsylvania Supreme Court discounted adult sex offender registration as a deterrent, because of “the substantial period of incarceration attached to the predicate offense.” *Williams*, 832 A.2d at 978. The same cannot be said of

²⁵ Notably, early versions of the federal Adam Walsh Act did not require juveniles to register. 151 Cong. Rec. S. 9245 (July 28, 2005).

children, who cannot be incarcerated past age twenty-one by the juvenile court. For children, lifetime sex offender registration is a permanent punishment.

5. The Behavior To Which SORNA Applies Is Already A Crime.

SORNA applies only after a child has been adjudicated delinquent of a qualifying offense. “‘The fact that the [a]ct uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community . . . there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.’” *Letalien*, 985 A.2d at 4 (quoting *Smith*, 538 U.S. 108 (Souter, J., concurring)). There can be no argument that this factor is obviously weighted in favor of punishment.

6. SORNA Is Not Rationally Related To A Non-Punitive Purpose.

As applied to children, SORNA cannot be considered rationally-related to a non-punitive purpose for two reasons. First, the rate of sexual offense recidivism for children is exceedingly low. *See* Section IB, *supra*. Second, the registry, while plainly porous, *see* Section IIB, was not intended to be available to the public. 42 Pa.C.S. § 9799.28.

Pennsylvania courts look at recidivism rates when determining whether a sex offender registration scheme is punitive. *Lee*, 935 A.2d at 882. However, the oft-repeated adult statistic, a “high rate of recidivism among convicted sex offenders,” is inapplicable to children.²⁶ *See Williams*, 832 A.2d at 979. Children and adults are vastly different. Section I, *supra*. *See also Roper*, 543 U.S. 551; *Graham*, 130 S.Ct. 2011; *J.D.B.*, 131 S.Ct. 2394; *Miller*, 132 S.Ct. 2455. Children who offend sexually have much lower rates of sexual recidivism than adults, who

²⁶ This conclusion about adult sex offenders has also faced significant recent criticism. *See, e.g.,* Molly J. Walker Wilson, *The Expansion of Criminal Registries and the Illusion of Control*, 73 La. L. Rev. 509, 520-22 (2013) (referencing numerous recent studies); Richard Tewksbury, Ph.D., Wesley G. Jennings, Ph.D., Kristen Zgoba, Ph.D., *Final Report on Sex Offenders: Recidivism and Collateral Consequences*, National Criminal Justice Reference Service, Dep’t of Justice (March 2012) (making numerous findings of low rates of recidivism and ineffectiveness of SORNA).

already have lower rates of recidivism than other categories of offenders. *See, e.g.* Caldwell *Recidivism Study 2007* at 107-113; Caldwell, et al., *supra* note 4 at 89-114; Section I, *supra*.

The recidivism rate of sexual offenses is lower for children than for adults because children are different. Section IB, *supra*. As applied to children, SORNA is not rationally-related to a non-punitive purpose because the rate of recidivism is low. Studies have universally shown that juveniles are unlikely to recidivate and therefore pose little risk to the community. *See, e.g.*, Caldwell, *Recidivism Study 2010* at 197-212; Section I, *supra*.

Research has also shown that requiring children to register does not improve public safety. *See* Elizabeth Letourneau, et al., *Do Sex Offender Registration & Notification Requirements Deter Juvenile Sex Crimes*, 37 CRIM. JUST. & BEHAV., 553, 556 (2010); Section IB, *supra*. Registration has no impact on the already very low rates of recidivism, nor has registration been demonstrated to prevent first offenses. *See generally* Caldwell, *Recidivism Study 2010*. Conversely, requiring a child to register as a sex offender may have a negative impact on public safety in the realm of *non-sexual* offenses, by setting up obstacles between a child and a normal, productive life. In light of their low recidivism rate, including children on a sex offender registry could also diminish public safety by diverting resources away from high-risk offenders. Moreover juvenile registration requirements may actually impede the prosecution of juvenile sex cases as it reduces families and prosecutors' willingness to move forward.²⁷

²⁷ Moreover, a recent South Carolina study of the effects of juvenile sex offender registration showed that, in addition to an absence of any deterrent effect, the results indicated a significant decline in the likelihood of prosecutors' moving forward on juvenile sex crime cases after the implementation of SORN; thus, community safety was not improved and in fact could be compromised as a result of the reduced likelihood of prosecution for juvenile sex crimes. Letourneau, et. al, *Do Sex Offender Registration and Notification Requirements Deter Juvenile Sex Crimes?* 37 CRIM. JUST. & BEHAV. 553, 556 (2010).

7. Lifetime Sex Offender Registration For Juveniles Is Excessive.

SORNA is excessive as applied to children. This factor alone is enough to make the law 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.”). 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. This reasoning applies here. SORNA requires children to register as sex offenders for their entire life, with no finding that they are likely to re-offend; as explained in detail above, studies have overwhelmingly demonstrated that children convicted of sexual offenses rarely re-offend. *See* Section IB, *supra*. SORNA thus sweeps up many, many children—perhaps more than 90% of all children who are required to register—who will never commit another sexual offense in their lifetime. Indeed, SORNA is excessive as applied to children; so excessive that it violates the Eighth Amendment.

A. Lifetime Sex Offender Registration Is A Disproportionate Punishment For Children.

A proportionality review bars the imposition of SORNA’s registration requirements on juveniles. As the Ohio Supreme Court reasoned “for a juvenile offender who remains under the jurisdiction of the juvenile court, the Eighth Amendment forbids the automatic imposition of lifetime²⁸ sex-offender registration and notification requirements.” *See In re C.P.*, 967 N.E.2d at 732. Under a proportionality review, “the Court implements the proportionality standard by certain categorical restrictions considering the nature of the offense and the characteristics of the

²⁸ SORNA requires lifetime registration for juveniles. Although the juvenile *may* petition for removal after 25 years, 42 Pa.C.S. § 9799.17, the standard is high and actual removal is discretionary. Furthermore, once the information becomes disseminated, it is impossible to remove the perception and label of sex offender. *See* Section II,

offender.” *Graham*, 130 S.Ct. at 2021-22. In *Graham*, the Court engaged in a two-step process in adopting categorical rules in regard to punishment: first, the court considers whether there is a national consensus against the sentencing practice at issue, and second, the court determines “in the exercise of its own independent judgment whether the punishment in question violates the Constitution.” *Id.* at 2022.

Although many states indeed require juveniles to register, there exists no national consensus to the way juvenile registration is administered nationwide.²⁹ Juvenile registration requirements vary across states. Notably, as of 2011 only a small number of states opted to register children based solely upon an adjudication of delinquency, as in Pennsylvania. *Raised on the Registry*, at 24 citing Carole J. Petersen and Susan M. Chandler, *Sex Offender Registration and the Convention on the Rights of the Child: Legal and Policy Implications of Registering Juvenile Sex Offenders*, 3 Wm. & Mary Pol’y Rev. 1, 11 (2011). For example, prior to ruling juvenile registration unconstitutional, Ohio provided hearings prior to tier classification, *See In re G.M.*, 935 N.E.2d 459, 461 (Ohio 2010) citing Ohio Rev. Code. § 2152.831(A). In Oklahoma, a child accused of committing a registerable offense undergoes a risk assessment reviewed by a panel of experts and judge who make a recommendation as to treatment. The decision regarding their registration is deferred until their release from placement or treatment. Okl. Stat. tit. 10A § 2-8-104. New Jersey does not require in-person reporting. N.J. Stat. § 2C:7-2. Some states

²⁹ Although the Supreme Court has previously held that national consideration of a sentencing practice is necessary, a finding is not determinative. In *Miller*, the Court reasoned that previous decisions did not rely on simply counting the number of states that imposed the sentence. *Miller*, 132 S.Ct. at 2471-72. (“In *Graham*, we prohibited life-without-parole terms for juveniles committing nonhomicide offenses even though 39 jurisdictions permitted that sentence. ... That is 10 more than impose life without parole on juveniles on a mandatory basis. And...in *Atkins*, *Roper*, and *Thompson*, we similarly banned the death penalty in circumstances in which “less than half” of the “States that permit [ted] capital punishment (for whom the issue exist[ed])” had previously chosen to do so. So we are breaking no new ground in these cases.” (internal citations omitted).) The Court further reasoned that simply counting state statutes provided a distorted view because the way in which the sentence was administered varied across jurisdictions. *Id.* at 2472.

maintain juvenile registration information on a publicly-accessible website, *see, e.g.* Ala. Code § 15-20A-08, and others actively notify the public. *See* Nev. Rev. Stat. § 179D.475(2)(a).

“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.” *Miller*, 132 S.Ct. at 2026. In *Miller*, the Court stated that even in sentencing contexts outside life without parole, the characteristics of youth weaken the rationales for punishment. “‘An offender’s age,’ we made clear in *Graham*, ‘is relevant to the Eighth Amendment,’ and so ‘criminal procedure laws that fail to take defendants’ youthfulness into account at all would be flawed.’” *Miller*, 132 S.Ct. at 2466 (quoting *Graham*, 130 S.Ct. at 2031). While SORNA purports to take the distinguishing characteristics of youth into account by establishing a non-public registry for juveniles, this privacy is illusory. *See* Section IIB, *supra*. In all other key respects juvenile and adult sex offenders are treated alike. The U.S. Supreme Court has firmly established that juveniles are categorically less culpable than adults for their criminal conduct. Additionally, 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*, 543 U.S. at 570). Because lifelong registration is irrevocable, a juvenile’s potential for rehabilitation is “particularly relevant.” *See In re C.P.* 967 N.E.2d at 741. Therefore, a proportionality analysis of mandatory, lifelong juvenile offender registration must consider the reduced culpability of juveniles.

For juveniles, lifelong registration is a particularly harsh punishment. Although it is not lifelong incarceration, a juvenile registrant will spend a greater portion of his/her life subject to

registration requirements than will an adult offender. *See Graham*, 130 S.Ct. at 2028. The Ohio Supreme Court described this aspect of registration:

For juveniles, the length of the punishment is extraordinary, and it is imposed at an age at which the character of the offender is not yet fixed. Registration and notification necessarily involve stigmatization. For a juvenile offender, the stigma of the label of sex offender attaches at the start of his adult life and cannot be shaken. With no other offense is the juvenile's wrongdoing announced to the world. Before a juvenile can even begin his adult life, before he has a chance to live on his own, the world will know of his offense. He will never have a chance to establish a good character in the community. He will be hampered in his education, in his relationships, and in his work life. His potential will be squelched before it has a chance to show itself. A juvenile—one who remains under the authority of the juvenile court and has thus been adjudged redeemable—who is subject to sex-offender notification will have his entire life evaluated through the prism of his juvenile adjudication. It 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.2d at 741-42. It is difficult to overstate the depth and breadth of the impact that sex offender registration can have on a juvenile's life and livelihood. Even if O.M. is somehow able to petition for removal from the registry after 25 years, 42 Pa.C.S. § 9799.17, the onerous registration and reporting requirements will likely have already imposed irrevocable damage.

Miller, *Graham*, and *Roper* all recognized that the distinctive attributes of youth substantially negate the penological justifications—deterrence, retribution, incapacitation and rehabilitation—for imposing harsh sentences on juvenile offenders.

Because “[t]he heart of the retribution rationale” relates to an offender’s blameworthiness, “the case for retribution is not as strong with a minor as with an adult.” *Graham*, 130 S.Ct. at 2029 (quoting *Tison v. Arizona*, 411 U. S. 137, 149 (1987); *Roper*, 543 U. S. at 571). Nor can deterrence do the work in this context, because “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). Similarly, incapacitation could not support the life-without-parole sentence in *Graham*: Deciding that a “juvenile offender forever will be a danger to society” would require “mak[ing] a judgment that [he] is incorrigible”—but “incorrigibility is inconsistent with youth.” 130 S.Ct. at 2029 (quoting *Workman v. Commonwealth*, 429 S. W. 2d 374, 378 (Ky. App. 1968)).

Miller, 131 S.Ct. at 2464-65. Penological justifications for a sentencing practice are relevant to the Eighth Amendment proportionality analysis. *Graham*, 130 S. Ct. at 2028, *Kennedy v. Louisiana*, 554 U.S. 407, 441-42 (2008); *Roper*, 543 U.S. at 571-72; *Atkins v. Virginia*, 536 U.S. 304, 318-20 (2002). Noting that legislatures have discretion to choose among a variety of penological interests when crafting criminal punishments, the *Graham* Court acknowledged that the purposes and effects of penal sanctions are relevant to the determination of whether a sanction violates the Eighth Amendment. Indeed, “[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.” *Graham* 130 S.Ct. at 2028.

Because youth would not likely be deterred by the registration requirements imposed by SORNA, the goal of deterrence does not justify the statutory scheme. Criminological studies showing that adult sentences fail to deter youth further illustrate that the goals of deterrence are not well-served by juvenile sex offender registration. See Jeffrey Fagan, *Juvenile Crime and Criminal Justice: Resolving Border Disputes*, 18 *Future of Child*. 81, 102-03 (2008); David Lee and Justin McCrary, *Crime, Punishment, and Myopia* (Nat’l Bureau of Econ. Research, Working Paper No. W11491, 2005). See also Donna Bishop, *Juvenile Offenders in the Adult Criminal System*, 27 *Crime & Just.* 81 (2000) (citing Eric L. Jensen & Linda K. Metsger, *A Test of the Deterrent Effect of Legislative Waiver on Violent Juvenile Crime*, 40 *Crime & Delinq.* 96, 96-104 (1994)); Richard Redding & Elizabeth Fuller, *What Do Juveniles Know About Being Tried as Adults? Implications for Deterrence*, *Juvenile & Family Court Journal* (Summer 2004) in Elizabeth S. Scott & Laurence Steinberg, *Rethinking Juvenile Justice* 199 (2008)). If the threat of adult sentences generally fails to deter youth, the possibility of lifetime sex offender registration is unlikely to do so either. *Roper*, 543 U.S. at 571.

“The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.” *Tison*, 481 U.S. at 149. As *Roper* observed, “[w]hether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult.” 543 U.S. at 571. (internal citations omitted). Severely retributive punishment is inappropriate in light of juvenile immaturity and capacity to change. *Id.*

Finally, mandatory, lifelong registration is in direct conflict with the legitimate penological interest of rehabilitation. *See* Section VB, *infra* (describing how SORNA contravenes the rehabilitative purpose of the Juvenile Act). Lifetime registration, like lifetime incarceration, obviously “forswears altogether the rehabilitative ideal.” *Graham*, 130 S.Ct. at 2030. By restraining a juvenile’s housing and employment opportunities at a minimum, and stigmatizing the juvenile forever as a sexual offender, the Commonwealth “makes an irrevocable judgment about that person’s value and place in society” at odds with a child’s capacity for change. *Id.*

B. Mandatory, Lifelong Registration is Unconstitutional as Applied to Juveniles.

The mandatory sentencing scheme prescribing lifetime registration for children adjudicated of certain sex offenses violates the United States and Pennsylvania Constitutions. The mandatory registration requirement unconstitutionally forecloses the court’s consideration of a host of youthful attributes, including age, immaturity, impulsivity, underdeveloped sense of responsibility, reduced mental capacity, susceptibility to negative influences and outside pressures, reduced role in the offense, capacity for change or any other factors related to his or her young age. These are precisely the characteristics that the United States Supreme Court has deemed applicable to all juvenile offenders under 18, regardless of the specific crime 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....”). The Court in *Miller* noted that “everything we said in *Roper* and *Graham* about that stage of life also appears in [our decisions requiring individualized sentencing in death penalty cases]” and describing as especially pertinent the fact that “we insisted in these rulings that a sentencer have the ability to consider the ‘mitigating qualities of youth.’” *Id.* at 2467.

Mandatory, lifelong registration schemes by definition allow for no individualized determinations and further offend the federal and state constitutions by imposing those requirements for the remainder of the offender’s life. The statute disregards the settled research discussed above and now adopted as axiomatic by the Supreme Court since *Roper*. *See, e.g., J.D.B.*, 131 S. Ct. at 2403-04. It is precisely this “one size fits all” feature that is so directly at odds with the Court’s holding in the *Roper* line of cases, as it prohibits consideration of age as a factor at all while simultaneously proscribing any “realistic opportunity” for the juvenile offender to demonstrate his or her rehabilitation. *Graham*, 130 S.Ct. at 2034.

Similar to the sentencing schemes struck down in *Roper*, *Graham* and *Miller*, mandatory registration imposes a life-long penalty on juveniles that fails to account for the child’s “chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences.” *Miller*, 132 S. Ct. at 2468. The statute also disregards the documented differences between juveniles adjudicated or convicted of sex offenses and adults convicted of the same offenses—and imposes a “one size fits all” approach to sex offender registration.

V. LIFETIME JUVENILE SEX OFFENDER REGISTRATION CONTRAVENES THE PENNSYLVANIA JUVENILE ACT.

A. The Juvenile Court Has No Authority To Impose A Punishment That Extends Over The Lifetime of the Juvenile, Where the Juvenile Court's Jurisdiction Otherwise Ends At Age 21.

The Pennsylvania Juvenile Act applies to “proceedings in which a child is alleged to be delinquent or dependent.” 42 Pa.C.S. § 6303(a)(1). In relevant part, the act defines “child” as “(1) an individual under the age of 18; (2) an individual under the age of 21 who committed an act of delinquency before reaching the age of 18. . .” 42 Pa.C.S. § 6302. This definition is inconsistent with SORNA’s definition of a juvenile offender. 42 Pa.C.S. § 9799.12³⁰ 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). This holding as well as the plain language of 42 Pa.C.S. § 6302 forbid juvenile court judges from imposing penalties or conditions of disposition extending beyond the child’s twenty-first birthday. Thus, lifetime SORNA registration is proscribed.

Although there are circumstances in which juvenile adjudications may lead to adult consequences—civil commitment and continuing restitution obligations—they are distinguishable from SORNA’s reporting and registration requirements because SORNA does not provide for any individualized assessment of the juvenile to whom the penalties may apply. For example, as described above, under Pennsylvania’s civil commitment statute, an adult court has the power to order certain juveniles convicted of sexual offenses to be involuntarily committed for an indefinite amount of time, even after they have turned 21. 42 Pa.C.S. §

³⁰ This definition of “child” would exclude a number of individuals who would be subject to SORNA’s registration and reporting requirements because registration extends the juvenile’s lifetime, well beyond age 21. 42 Pa.C.S. § 9799.15(a)(4).

6403(d).³¹ However, this is only after an individualized assessment and careful determination by the Court. SORNA gives the juvenile court the authority to impose lifelong registration and reporting requirements on a juvenile with no further review for a minimum of twenty-five years. The requirements are tied to the disposition of the original juvenile offense. Without periodic review by the court imposing the registration requirement, the authority of the juvenile court to continue to impose the requirements after the age of 21 is not established.

Secondly, juveniles can be required to fulfill remaining restitution obligations resulting from their adjudications after they have been released from juvenile court supervision. 42 Pa.C.S. § 6352(a)(5). Any order by the juvenile court for payment of restitution, reparations, fines, fees, or costs is considered a judgment against the juvenile in favor of the county's adult probation department. This permits the continued collection of monetary obligations even after the juvenile court's supervision has terminated. Like civil commitment, however, the amount of restitution is based on an individualized assessment of the juvenile and the damages he has caused. This individualized determination is mandated by the Juvenile Act.³² Although restitution obligations may follow a juvenile beyond his or her 21st birthday, they were initially

³¹ The juveniles subject to civil commitment must have (1) been previously adjudicated delinquent for rape, involuntary deviate sexual intercourse, sexual assault, aggravated indecent assault, indecent assault, or incest; (2) been placed in a juvenile facility and remained there until reaching 21 years of age; (3) been found by the court to be in need of involuntary treatment for a mental abnormality or personality disorder that prevents them from controlling their sexually violent behavior. 42 Pa.C.S. § 6403(a).

³² The Court considers (1) The amount of loss suffered by the victim; (2) The fact that defendant's action caused the injury; (3) The amount awarded does not exceed defendant's ability to pay; [and] (4) The type of payment that will best serve the needs of the victim and the capabilities of the defendant. *In re Dublinski*, 695 A.2d 827, 829 (Pa. Super. 1997) (quoting *Commonwealth v. Valent*, 463 A.2d 1127, 1128 (Pa. Super. 1983)). While restitution obligations of adult defendants are not adjusted based on the financial resources of the defendant, *see* 18 Pa.C.S. § 1106, the court in *Dublinski* emphasized that the language of the Juvenile Act demands that orders for payment consider "the nature of the acts committed and the earning capacity of the child." 695 A.2d. at 830 (quoting 42 Pa.C.S. § 6352(a)(5)). The court further described factors relevant to the analysis, including her "mental ability, maturity and education; her work history, if any; the likelihood of her future employment and extent to which she can reasonably meet a restitution obligation; the impact of a restitution award on her ability to acquire higher education and thus increase her earning capacity; and her present ability to make restitution." *Id.*

based on a careful assessment of the juvenile's unique circumstances and subject to review separate from the adjudication.

Similarly, the Ohio Supreme Court justified its rejection of SORNA as applied to juveniles by emphasizing the lack of a role for a juvenile court judge in determining whether the registration and reporting requirements should apply. *Id.* at 748-49. The Court explained that when an adult sentence may be imposed on a serious youthful offender (SYO)³³ the juvenile court must first determine that the juvenile has committed an additional bad act while under supervision, must determine that the juvenile is unlikely to be rehabilitated while under juvenile court supervision, and may modify the previously determined adult sentence. *Id.* at 749. Under Pennsylvania's SORNA, the adult penalties are automatically applied to juveniles who have been adjudicated for a covered crime and the juvenile judge does not have a comparable level of discretion. *Id.* This reasoning prompted the Ohio Supreme Court to hold that its version of SORNA violated due process. *Id.* at 750.

The Ohio Supreme Court's reasoning in *In re J.V.* is also instructive. 979 N.E.2d 1203 (Ohio 2012). *In re J.V.* also dealt with a SYO who initially received a blended sentence for a non-SORNA offense. The Ohio Supreme Court found that the juvenile court lacked jurisdiction over J.V. when it imposed post-release conditions at age 22 and voided the disposition. *Id.* at 1210-11. The Court held that even though the juvenile court could impose a blended-sentence

³³ Ohio law creates a class of juveniles who receive sentences that incorporate elements of both the juvenile justice system and the adult justice system. Juveniles classified as "serious youthful offenders" receive a juvenile disposition and an adult sentence. 21 Oh. R.C. § 2152.13. The adult sentence is stayed pending the completion of the juvenile disposition. *Id.* Only if the juvenile fails to complete his or her juvenile disposition successfully will he or she be required to serve the adult sentence. *Id.* When Ohio implemented SORNA, it differed from this system because the registration requirements were imposed on the juvenile regardless of his completion of the terms of his juvenile disposition. *In re CP*, 967 N.E.2d at 735.

that would follow J.V. into adulthood, this dispositional authority did not give the court jurisdiction over J.V. beyond the age of 21.³⁴ *Id.*

Finally, Pennsylvania law requires that any penalties imposed by the juvenile court must be expressly provided in the Juvenile Act. *In re J.J.*, 848 A.2d 1014, 1016-17 (Pa. Super. 2004) (“Dispositions which are not set forth in the Act are beyond the power of the juvenile court.”). Because of this limit on the dispositional authority of the court, Section 6352³⁵ expressly provides both for the imposition of restitution and its continued collection under Section 9728. Even after the enactment of SORNA, nothing in Section 6352 expressly grants the juvenile court authority to require registration and reporting pursuant to SORNA.

B. Lifetime Registration For Juvenile Offenders Contradicts The Rehabilitative Purposes Of The Juvenile Act.

Rehabilitation and attention to the long-term interests of juveniles remain integral to the express purpose of the Pennsylvania juvenile justice system. With a focus on “development of competencies” to ensure that youth who go through the system become “productive members of the community,” the system is not intended to impose harsh, long-lasting punishment, such as sex offender registration. The Juvenile Act provides that the court must use the “least restrictive intervention that is consistent with the protection of the community, the imposition of accountability for offenses committed and the rehabilitation, supervision, and treatment needs of the child.” 42 Pa.C.S. § 6301(b)(2). Moreover, the Act requires “employing evidence-based

³⁴ Pennsylvania courts do not impose blended sentences for juveniles. Registration must therefore end when juvenile court jurisdiction ends. The juvenile court is “vested with ‘original and exclusive jurisdiction of the child.’” *Kent*, 383 U.S. at 556. To vest an adult criminal court with jurisdiction over a juvenile court disposition is impermissible under due process. “[W]ithout ceremony” or “without hearing,” the juvenile court may not relinquish control to the adult criminal court, nor may it continue imposing punishment when its jurisdiction has ceased. *Id.* at 554.

³⁵ A juvenile’s disposition includes “[1] any orders authorized by § 6351. [2] Probation as provided by § 6363. [3] Committing child to an institution, youth development center, camp, or facility for delinquent children operated under the direction or supervision of the court or other public authority and approved by the Dept. of Public Welfare. [4] If 12 years or older, committing to committing child to an institution operated by Dept. of Public Welfare. [5] Ordering fees, fines, costs, restitutions, as deemed appropriate.” 42 Pa.C.S. § 6352 (a)(1-6).

practices whenever possible and, in the case of a delinquent child, by using the least restrictive intervention that is consistent with the protection of the community, the imposition of accountability for offenses committed and the rehabilitation, supervision and treatment needs of the child.” 42 Pa.C.S. § 6301(b)(3)(1).

Pennsylvania courts have consistently underscored these rehabilitative aims. In *Commonwealth v. S.M.*, this Court stated “[T]he purpose of juvenile proceedings is to seek treatment, reformation and rehabilitation of the youthful offender, not to punish.” 769 A.2d 542, 544 (Pa. Super. 2001) (internal quotations omitted). The rehabilitative purpose has notable practical effects on the way in which the court system responds to criminal behavior, as the court has emphasized in the context of certification proceedings. In *Commonwealth v. Ghee*, this Court listed the benefits of a youth remaining under the juvenile court’s jurisdiction, reasoning that “the juvenile system’s goal is to rehabilitate the juvenile on an individual basis without marking him or her as a criminal, rather than to penalize the juvenile.” 889 A.2d 1275, 1279 (Pa. Super. 2005) (discussing the lack of publicity and disqualification from public employment as well as the limits on detention as important distinctions between adult and juvenile dispositions). See also, *In re B.T.C.*, 863 A.2d 1203, 1205 (Pa. Super. 2005) (“[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.”)

Generally, in ordering a disposition, the 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). In other words, the juvenile court judge is required to consider the protection of the public interest, and to 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). Mandatory juvenile registration contravenes these goals.

SORNA is punitive in effect; this runs counter to the express rehabilitative purpose of the Juvenile Act as set forth above. It clearly limits the ability of juvenile offenders to become “responsible and productive member[s] of society.” Because the registration and reporting requirements continue over the full duration of the juvenile’s life, it will impede their opportunities to develop competencies, be held accountable and then move forward. Similarly, registration fails to “provide for the care, protection, safety and wholesome mental and physical development of children [adjudicated delinquent of the enumerated offenses].” 42 Pa.C.S. § 6302. To the contrary, SORNA ensures that children will encounter difficulties that run counter to their wholesome development and, in some cases, safety, well into adulthood.

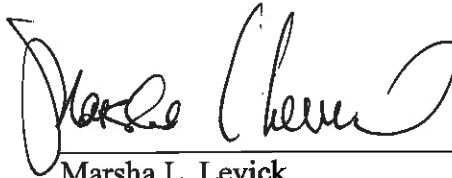
SORNA also fails to comply with the Act’s mandate to “provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community.” As discussed above, the deterrent and incapacitating effects of registration are negligible at best and the registration requirements are antithetical to the development of competencies to enable juvenile offenders to become productive members of the community.

Lastly, SORNA fails to employ evidence-based practices in responding to juvenile sex offending. 42 Pa.C.S. § 6301(b)(3)(i). Quite the opposite—requiring lifelong registration for this population directly contravenes uncontroverted research about the risk of re-offending among juveniles convicted of sex offenses. Rather than employing “the least restrictive intervention that is consistent with the protection of the community, the imposition of accountability for offenses committed and the rehabilitation, supervision and treatment needs of the child,” SORNA directly inhibits the rehabilitation and treatment needs of the child.

CONCLUSION

WHEREFORE, O.M., by and through counsel, respectfully requests that this Honorable Court reverse the decision of the trial court and declare 42 Pa.C.S. § 9799.10 *et seq.* unconstitutional as it applies to O.M. and other juvenile offenders and violative of the Juvenile Act, and remand the case so the trial court may declassify O.M. as a “juvenile offender” and order the Pennsylvania State Police to remove his name, photographs, and all other information from the sex offender registry.

Respectfully submitted,



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Riya Saha Shah
Supreme Court ID: 200644
Juvenile Law Center
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Wayne McGrew
Supreme Court ID: 70576
Mark Ramsier
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(724) 830-3542

Dated: November 4, 2013

APPENDIX A

Orders of Trial Court

April 12, 2013

May 2, 2013

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IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA
FAMILY COURT – JUVENILE DIVISION

IN THE INTEREST OF:

ORLANDO MORGAN

BORN: 01-03-95

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No. JV-551-2012
JP-028637

MEMORANDUM

Before this Court are 1) the Juvenile's Amended Post-Dispositional Motion; and 2) Motion for Reconsideration.

Upon re-consideration of these motions, the Court affirms the findings and the disposition order which has been entered, except for that portion of the Order which requires that the Juvenile register pursuant to the Sexual Offender Registration Notification Act (SORNA).

It appears to the undersigned that substantial issues have been raised regarding the applicability and constitutionality of this Juvenile's SORNA registration requirement. However, the juvenile's obligation to register is not activated until such time as he is released from his current placement. 42 Pa. C.S.A. § 9799.15. Thus, consideration and argument of SORNA issues is premature, and will be considered upon review of his placement.

An Order is attached.

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA

FAMILY COURT – JUVENILE DIVISION

IN THE INTEREST OF:

ORLANDO MORGAN

BORN: 01-03-95

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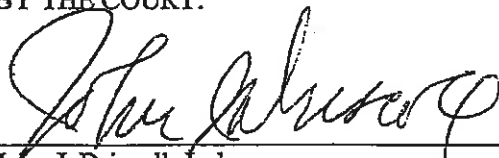
No. JV-551-2012
JP-028637

ORDER OF COURT

AND NOW, this 12th day of April, 2013, the Juvenile's Amended Post-Disposition Motion and Motion for Reconsideration are denied, except as to the questions and issues raised which relate to the requirement that the Juvenile register in accordance with the Pennsylvania sexual offender registration requirements, 42 Pa. C.S.A. 9799.15.

These matters will be considered upon review of the Juvenile's placement and prior to release from placement.

BY THE COURT:



John J. Driscoll, Judge

cc: Mark Ramsier, Esq. - Public Defender's Office
Wayne Gongaware, Esq. - District Attorney's Office
Dan Hayden - JPO

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2013 MAY -3 AM 8:51

CLERK OF COURT
JUVENILE DIVISION

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA
FAMILY COURT – JUVENILE DIVISION

IN THE INTEREST OF:

ORLANDO MORGAN

BORN: 01-03-95

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No. JV-551-2012
JP-028637

MEMORANDUM

Before the Court is the juvenile's Petition for Clarity as to the disposition dated April 12, 2013. In that order, the juvenile was not ordered to register as a sex offender.

The order provided that the juvenile need not yet comply with SORNA requirements, as he is in placement and not actually required to register until released from placement.

Counsel for juvenile seeks a determination as to whether registration will be required. To clarify this matter (and to ensure the juvenile can challenge the registration requirement without fear of waiving his challenge) the disposition order will be amended.

This amended disposition orders the juvenile to register, pursuant to 42 Pa.C.S.A. Chapter 97, Subchapter H, even though the undersigned has grave concerns as to the constitutionality of SORNA and believes the requirement is unconstitutional as to this juvenile.¹ The constitutionality

¹ Most of these concerns are encapsulated in the reasons and contentions set forth in the juvenile's post-dispositional motion previously filed.

of the registration requirements as to juveniles – and to THIS juvenile – should be decided on appeal.²

The amended order is attached.

² Unlike the reasonable and appropriate statutory schedule of Act 21, (which properly identifies a defendant or a juvenile as a “sexual offender” prior to imposing burdens), Act 111 imposes burdens and limits the juvenile’s freedom without requiring a reasonable determination that the juvenile is actually, in fact, a “sexual offender”. Attaching the classification of “sexual offender” to the within juvenile based solely on his (albeit unlawful) one act of consensual intercourse is a devastating violation of this juvenile’s right to due process of the law.

The statute’s equation (that one act of consensual intercourse by a seventeen-year-old with a twelve-year-old, requires registration for a lifetime) is irrational, for it “automatically” requires registration. The “automatic” triggering of the registration requirements is the irrational and devastating, though subtle, violation of this juvenile’s right to due process of law. More clearly said: one act of consensual intercourse with a twelve-year-old by a juvenile does not provide a rational basis for requiring lifetime registration.

The facts of this matter do not prove (or suggest) that the juvenile is possessed of qualities of deviancy, has or is likely to commit acts of forcible sex, or is in any way a threat to the safety of others. In fact, it appears that actual sex offender evaluations have determined the juvenile to be an excellent candidate for complete rehabilitation. Though the juvenile does, or, most likely will be determined to, not need sex offender treatment, he will nevertheless be required to register for a lifetime. This incongruity demonstrates the practicality and wisdom of Act 21 as to the involuntary impatient treatment; treatment is mandated where appropriate, but not when unnecessary. SORNA requires registration whether necessary or not. This fact renders it punitive and irrational, thus unconstitutional, as to this juvenile. To merely say registration is a “collateral consequence” of the adjudication is deceptive, and cleverly avoids the question of due process.

Registration is not a mere “collateral consequence”, but is a substantial life-long burden on the juvenile’s freedoms, perhaps for no good purpose. (Moreover, unnecessary registrations impose unnecessary burden on government). This serious constitutional infirmity could be avoided by an Act 21 process, which provides a rational process for determining whether the juvenile is actually a “sexual offender”.

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA
FAMILY COURT – JUVENILE DIVISION

IN THE INTEREST OF:

ORLANDO MORGAN

BORN: 01-03-95

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No. JV-551-2012
JP-028637

ORDER OF COURT

AND NOW, this 2nd day of May, 2013, it is HEREBY ORDERED AND DECREED
that the juvenile's Post-Dispositional Motion is denied and the juvenile is to comply with 42
Pa.C.S.A. Chapter 97, Subchapter H by registering as a sex offender prior to release from
placement.

BY THE COURT:



John A. Driscoll, Judge

cc: Mark Ramsier, Esq. - Public Defender's Office
Wayne Gongaware, Esq. - District Attorney's Office
Dan Hayden - JPO

APPENDIX B

**Trial Court 1925 Opinion
June 11, 2013**

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA
FAMILY COURT - JUVENILE DIVISION

IN THE INTEREST OF:

ORLANDO MORGAN

BORN: 01-03-95

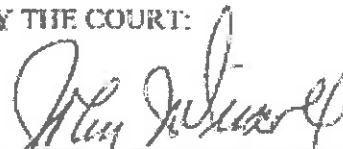
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No. JV-551-2012
JP-028637

TRIAL COURT'S RULE 1925 OPINION

Appearing to the Court that the Juvenile, Orlando Morgan, has filed an appeal from the Order of Court dated April 12, 2013 as clarified by the May 2, 2013 Order of Court, and a concise statement pursuant to Pa.R.A.P. 1925(b) has been filed, the Court wishes it to be known that the basis of the Order may be found in this Court's Memorandum (specifically footnote #2), accompanying the May 2nd, 2012 Order of Court, which is attached hereto.

BY THE COURT:


JOHN J. DRISCOLL

cc: Mark Ramsier, Esq. & Wayne P. McGrew, Esq. - Attorneys for Juvenile
Wayne Gengaware, Esq. - District Attorney's Office

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2013 MAY -3 AM 8:51

CLERK OF COURT
JUVENILE DIVISION

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA
FAMILY COURT – JUVENILE DIVISION

IN THE INTEREST OF:

ORLANDO MORGAN

BORN: 01-03-95

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No. JV-551-2012
JP-028637

MEMORANDUM

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Counsel for juvenile seeks a determination as to whether registration will be required. To clarify this matter (and to ensure the juvenile can challenge the registration requirement without fear of waiving his challenge) the disposition order will be amended.

This amended disposition orders the juvenile to register, pursuant to 42 Pa.C.S.A. Chapter 97, Subchapter H, even though the undersigned has grave concerns as to the constitutionality of SORNA and believes the requirement is unconstitutional as to this juvenile.¹ The constitutionality

¹ Most of these concerns are encapsulated in the reasons and contentions set forth in the juvenile's post-dispositional motion previously filed.

of the registration requirements as to juveniles – and to THIS juvenile – should be decided on appeal.²

The amended order is attached.

² Unlike the reasonable and appropriate statutory schedule of Act 21, (which properly identifies a defendant or a juvenile as a “sexual offender” prior to imposing burdens), Act 111 imposes burdens and limits the juvenile’s freedom without requiring a reasonable determination that the juvenile is actually, in fact, a “sexual offender”. Attaching the classification of “sexual offender” to the within juvenile based solely on his (albeit unlawful) one act of consensual intercourse is a devastating violation of this juvenile’s right to due process of the law.

The statute’s equation (that one act of consensual intercourse by a seventeen-year-old with a twelve-year-old, requires registration for a lifetime) is irrational, for it “automatically” requires registration. The “automatic” triggering of the registration requirements is the irrational and devastating, though subtle, violation of this juvenile’s right to due process of law. More clearly said: one act of consensual intercourse with a twelve-year-old by a juvenile does not provide a rational basis for requiring lifetime registration.

The facts of this matter do not prove (or suggest) that the juvenile is possessed of qualities of deviancy, has or is likely to commit acts of forcible sex, or is in any way a threat to the safety of others. In fact, it appears that actual sex offender evaluations have determined the juvenile to be an excellent candidate for complete rehabilitation. Though the juvenile does, or, most likely will be determined to, not need sex offender treatment, he will nevertheless be required to register for a lifetime. This incongruity demonstrates the practicality and wisdom of Act 21 as to the involuntary impatient treatment; treatment is mandated where appropriate, but not when unnecessary. SORNA requires registration whether necessary or not. This fact renders it punitive and irrational, thus unconstitutional, as to this juvenile. To merely say registration is a “collateral consequence” of the adjudication is deceptive, and cleverly avoids the question of due process.

Registration is not a mere “collateral consequence”, but is a substantial life-long burden on the juvenile’s freedoms, perhaps for no good purpose. (Moreover, unnecessary registrations impose unnecessary burden on government). This serious constitutional infirmity could be avoided by an Act 21 process, which provides a rational process for determining whether the juvenile is actually a “sexual offender”.

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA
FAMILY COURT – JUVENILE DIVISION

IN THE INTEREST OF:

ORLANDO MORGAN

BORN: 01-03-95

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No. JV-551-2012
JP-028637

ORDER OF COURT

AND NOW, this 2nd day of May, 2013, it is HEREBY ORDERED AND DECREED
that the juvenile's Post-Dispositional Motion is denied and the juvenile is to comply with 42
Pa.C.S.A. Chapter 97, Subchapter H by registering as a sex offender prior to release from
placement.

BY THE COURT:



John J. Driscoll, Judge

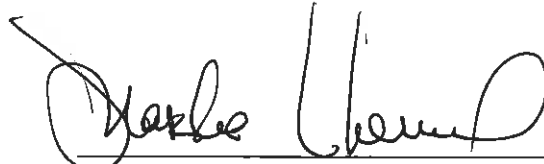
cc: Mark Ramsier, Esq. - Public Defender's Office
Wayne Gongaware, Esq. - District Attorney's Office
Dan Hayden - JPO

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellant has been served on this 4th day of November, 2013, upon the following persons by first class mail, which satisfies the requirements of Pa.R.A.P. 121:

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Juvenile Division
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John W. Peck, Esq.
District Attorney
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