

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
JUVENILE DIVISION

CLERK OF COURTS
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LANCASTER, PA

IN THE INTEREST OF

[REDACTED]

A Minor.

IN THE INTEREST OF

[REDACTED]

A Minor.

IN THE INTEREST OF

[REDACTED]

A Minor.

**COMMONWEALTH'S MEMORANDUM OF LAW IN OPPOSITION TO
PETITIONERS' *NUNC PRO TUNC* MOTIONS**

AND NOW, this 9th day of August, 2013, comes Craig W. Stedman, District Attorney of Lancaster County, Pennsylvania, by and through Amber L. Czerniakowski, Assistant District Attorney, and respectfully submits the following memorandum:

I. INTRODUCTION

On December 20, 2012, Pennsylvania enacted the Sex Offender Registration and Notification Act (hereinafter, "SORNA"). Under SORNA, a juvenile offender is defined as an individual who (1) is fourteen (14) years or older at the time that they committed an act; (2) committed an act that, if committed by an adult, would be Rape, Involuntary Deviate Sexual Intercourse, Aggravated Indecent Assault, or any inchoates of those acts; and (3) committed the act after December 20, 2012, or the juvenile was still on supervision on December 20, 2012. 42

Pa.C.S.A. § 9799.12. A juvenile offender is required to register as a sex offender for the life of the juvenile; however, the juvenile may petition the court to terminate the registration requirement twenty-five (25) years after the juvenile was adjudicated delinquent. 42 Pa.C.S.A. § 9799.15(a)(4), 9979.17(a)(1). To be eligible for termination, the juvenile offender must have not been convicted of a subsequent offense graded as a misdemeanor of the second degree or higher, or a crime that is punishable by more than a year of imprisonment; must have completed court ordered supervision without revocation; and must have completed a treatment program for sexual offenders. 42 Pa.C.S.A. § 9799.17(a)(2)-(4).

When a juvenile has been adjudicated of a crime that qualifies them as a juvenile offender, the court records are open to limited public inspection. *See* 42 Pa.C.S.A. § 6307(b)(1)(i)(A) (permitting public disclosure of court records when a juvenile has been adjudicated when he is fourteen (14) year old or older and the crime, if committed by an adult, would be a felony). Additionally, if a juvenile is adjudicated delinquent of a charge that would make him a juvenile offender, the juvenile does not have a right to expunge his record. *See* 18 Pa.C.S.A. § 9123(a.1).

II. STATEMENT OF FACTS

The Commonwealth agrees with the majority of Petitioners' statement of facts, except some of the dates provided by Petitioners. Petitioner ██████████ was first adjudicated delinquent on December 15, 2008, and was subsequently ordered to be committed to the Children's Aid Society on January 9, 2009. On March 9, 2009, his treatment plan was changed, and Petitioner Esh was sent to a residential treatment program. Petitioner ██████████ was adjudicated delinquent on February 13, 2008. Petitioner ██████████ II was adjudicated delinquent on September 15, 2010 and his disposition was subsequently ordered on October 25, 2010.

III. RESPONSE TO PETITIONERS' PROPOSED FINDINGS OF FACTS

The Supreme Court of the United States has discussed at length that children are different from adults. Accordingly, the Commonwealth agrees with Petitioners' Proposed Findings of Fact under subsection I(A).

The Commonwealth admits that the research provided by Petitioners show that sexual recidivism rates for children who sexually offend are lower than adult recidivism rates. The justification of SORNA, as provided by the legislature, is as follows:

- (2) This Commonwealth's laws regarding registration of sexual offenders need to be strengthened. The Adam Walsh Child Protection and Safety Act of 2006 provides a mechanism for the Commonwealth to increase its regulation of sexual offenders in a manner which is nonpunitive but offers an increased measure of protection to the citizens of this Commonwealth.
- (3) If the public is provided adequate notice and information about sexual offenders, the community can develop constructive plans to prepare for the presence of sexual offenders in the community. This allows communities to meet with law enforcement to prepare and obtain information about the rights and responsibilities of the community and to provide education and counseling to residents, particularly children.
- (4) Sexual offenders pose a high risk of committing additional sexual offenses and protection of the public from this type of offender is a paramount governmental interest.
- (5) Sexual offenders have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government.
- (6) Release of information about sexual offenders to public agencies and the general public will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is rationally related to the furtherance of those goals.
- (7) Knowledge of whether a person is a sexual offender could be a significant factor in protecting oneself and one's family members, or those in care of a group or community organization, from recidivist acts by such offenders.
- (8) The technology afforded by the Internet and other modern electronic communication methods makes this information readily accessible to parents, minors and private entities, enabling them to undertake appropriate remedial precautions to prevent or avoid placing potential victims at risk.

42 Pa.C.S.A. § 9799.11(a). Whether the application of this statute to juveniles in light of their recidivism rates represents a sound policy decision is a political question reserved by the

legislature. Such issues should only be decided by a representative, deliberative body, and not by judicial fiat. Additionally, the application of SORNA to juvenile offenders is similar to the application to adult offenders because they face the same issues, e.g., residency issues and employment issues.

Petitioners were adjudicated delinquent of a SORNA qualifying offense prior to December 20, 2012. As a result of still being on supervision on December 20, 2012, they are considered juvenile offenders and are required to register as a sex offender. 42 Pa.C.S.A. § 9799.12. The Commonwealth agrees with Petitioners' representation of the requirements of juvenile offenders under SORNA.

How juvenile offenders are treated when traveling outside of the Commonwealth has no bearing on the instant motions. Since Petitioners have yet to travel outside of the state, any issue regarding their ability to travel is not ripe for decision at this time. *See Commonwealth v. Moody*, 843 A.2d 402, 406 (Pa.Super. 2004).

IV. RESPONSE TO PETITIONERS' PROPOSED CONCLUSIONS OF LAW

It is well settled law that “[a] statute will not be invalidated unless there is a clear, palpable and plain demonstration that the statute violates a constitutional provision.” *Commonwealth v. Rishel*, 658 A.2d 352, 354 (Pa.Super. 1995), *citing Commonwealth v. Kohl*, 615 A.2d 308 (Pa. 1992).

A. *Ex Post Facto*

States are forbidden from passing *ex post facto* laws. U.S. Const. Art. 1 § 10. The following are *ex post facto* laws:

1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the

law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder v. Bull, 3 U.S. 386, 390 (1798). Legislation which is non-punitive or civil in nature may be applied retroactively. *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). The legislature's designation of a particular provision as "civil" is not always dispositive, but a court will reject the legislature's intent only where the challenging party provides "clearest proof" that "the statutory scheme is so punitive, either in purpose or effect, as to negate the State's intention to deem it 'civil.'" *Hendricks*, 521 U.S. at 361 (citing *United States v. Ward*, 448 U.S. 242, 248-249 (1980)). To provide clearest proof, the "factors must weigh heavily in favor of finding a punitive purpose or effect." *Commonwealth v. Lee*, 935 A.3d 865, 877-78 (Pa. 2007); *see also Flemming v. Nestor*, 363 U.S. 603 (1960).

Pennsylvania has adopted a two-prong test analysis to determine whether legislation violates the *ex post facto* clause. The first prong is what the legislative intent was; if the intent was punitive, then the act cannot be applied retroactively. *Commonwealth v. Williams*, 832 A.2d 962, 970 (Pa. 2003). If the intent is non-punitive, the second prong weighs the seven *Mendoza-Martinez* factors as articulated by the Supreme Court of the United States. The seven factors that are to be weighed when determining whether a statutory scheme is punitive despite the legislature's intent are:

(1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment – 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 to be excessive in relation to the alternative purpose assigned.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-89 (1963).

Examining how Megan's Law was analyzed is helpful because Megan's Law is substantially similar to SORNA. While SORNA increases the length of time someone is required to register, the frequency with which one must appear in person to update information, and increases the amount of information someone must report, the requirements and effects of those requirements remain the same. Although there are increases to the requirements, Megan's Law still required registration,¹ in-person updating,² and reporting of personal information,³ just as SORNA does. Since the two are substantially the same, an analysis of the requirements of Megan's Law would be dispositive of an analysis of the requirements of SORNA. The justification for SORNA is discussed *supra*. The legislature clearly enumerates several non-punitive purposes for the SORNA. The next step would be to analyze SORNA under the Mendoza-Martinez factors. The best guidance is to determine how the courts viewed Megan's Law in response to challenges pursuant to the *ex post facto* clause.

The Supreme Court of Pennsylvania does a thorough analysis of the seven *Mendoza-Martinez* factors as they apply to Megan's Law.⁴ *Williams*, 832 A.2d at 973-84. Under the first prong, the Court determined that the legislative intent was non-punitive, that it was to further the goal of public safety, and this was a sufficient basis for the law. *Williams*, *Id.* at 972. Since Megan's Law does not impose a deprivation on a person directly and is merely a secondary effect, Megan's Law does not create an affirmative disability or restraint. *Id.* at 973. Historically, release of personal information in relation to one's prior criminal history is not considered a punishment. *Id.* at 976. Not all of the predicate offenses under Megan's Law require a finding of scienter, so Megan's Law is not implicated only upon a finding of scienter.

¹ 42 Pa.C.S.A. 9795.1 (2011).

² 42 Pa.C.S.A. 9796(b) (2011).

³ See 42 Pa.C.S.A. 9798.1(c) (2011).

⁴ Although the offender challenging Megan's Law in *Williams* was also determined to be a Sexually Violent Predator, the case discusses at length the constitutionality of Megan's Law in general.

Id. at 977-78. The registration requirement does not act as a deterrence to commit an enumerated crime considering the length of imprisonment that is likely the result. Any possible retributive effect that may result, would be a secondary effect of the primary purpose of public safety. *Id.* at 978. The requirement to register is not as a result of one's adjudication of the crimes, but it is merely one's status as someone who has been adjudicated of an enumerated crime that requires registration. Therefore, the requirement to register does not apply to criminal behavior. *Id.* Registration of sex offenders is a non-punitive, remedial measure. *Id.* at 979 (citing *Commonwealth v. Gaffney*, 733 A.2d 616, 622 (Pa. 1999)). Lastly, the Court determined that the registration and verification requirements are not burdensome enough to be considered excessive punishment. *Id.* at 981. Accordingly, the registration and notification requirements of Megan's Law "constitute non-punitive, regulatory measures supporting a legitimate governmental purpose." *Id.* at 986.

In *Smith v. Doe*, the Alaska Sex Offender Registration Act was challenged. 538 U.S. 84, (2003). The Alaska Sex Offender Registration Act required convicted sex offenders to register as such for a period of fifteen (15) years, it required annual verification of information, and required report of personal information. The registration requirements were retroactive. *Smith*, 538 U.S. at 84. This act is analogous to SORNA in the same ways that Megan's Law is. Accordingly, the Court's discussion of the Alaska Sex Offender Registration Act is on point. The Supreme Court held that the act did not violate the *ex post facto* clause because it was non-punitive. The aim of the act was clearly civil and was intended as a non-punitive means of identifying previous offenders for the protection of the public.

Where a legislative restriction is an incident of the State's power to protect the health and safety of its citizens, it will be considered as evidencing an intent to exercise that regulatory power, and not a purpose to add to the punishment.

Id. at 93-94 (internal citations omitted). The resulting stigma did not make the act punitive since the information did not create any significant affirmative disability or restraint. *Id.* at 99.

As the Courts have upheld the constitutionality of Megan's Law and the Alaska Sex Offender Registration Act following claims that the laws were invalid because they violated the *ex post facto* clause, the constitutionality of SORNA should be upheld following the same claim.

B. *Cruel and Unusual Punishment*

The registration requirements of Megan's Law are not punishment but are merely a collateral consequence. *Commonwealth v. Leidig*, 850 A.2d 743, 748 (Pa.Super. 2004), *aff'd* 956 A.2d 399 (2008); *Commonwealth v. Williams*, 832 A.2d 962, 972 (Pa. 2003). As discussed *supra*, the requirements of Megan's Law are substantially similar to the requirements of SORNA. Accordingly, just as Megan's Law is not punishment, neither is SORNA. Because SORNA is not punishment, it cannot be considered cruel and unusual punishment.

Further, there is a two step process to analyze whether the punishment is proportional, and therefore not cruel and unusual: (1) whether there is a national consensus against the sentencing practice; and (2) whether the court, through its own judgment, determines that the punishment in question violates the constitution. Firstly, the Petitioners have thoroughly pointed to a plethora of jurisdictions which require juveniles to register, thus showing that there is no national consensus against the practice. Additionally, the courts, as a standard practice, have upheld the constitutionality of the registration requirements, so it should not now, determine that it would violate the constitution. *Commonwealth v. Howe*, 842 A.2d 436 (Pa.Super. 2006). Also, while juveniles are treated differently than adults under the law, that does not invalidate SORNA's applicability to juveniles. Life without parole was cruel and unusual because it was mandatory confinement; it did not give the children a chance to be paroled. *See Graham v.*

Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). Here, SORNA is not confinement and is not a mandatory lifetime requirement. Juvenile offenders have a chance to be removed from the registration list and requirements twenty-five (25) years after adjudication. 42 Pa.C.S.A. § 9979.17(a)(1), 9799.15(a)(4). Further, registration and periodic check-ins can hardly be considered equivalent to the harsh, punitive, and irrevocable sanction of life imprisonment.

C. Irrebuttable Presumption

Petitioners argue that an irrebuttable presumption is created under SORNA that a juvenile offender is in need of lifetime registration solely as a result of his adjudication. Petitioners' seemingly argue that their due process rights have been violated. 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. The irrebuttable presumption must also implicate fundamental freedoms. There is no fundamental freedom that is restricted due to the labeling one as a sexual offender.

The Superior Court has categorically rejected the premise that the registration of sexual offenders under Megan's Law violates either substantive or procedural due process rights. *Com. v. Mountain*, 711 A.2d 473, 475-76 (Pa. Super. 1998). As stated *supra*, the requirements of Megan's Law and SORNA are similar, so an analysis of SORNA would be similar as well. Accordingly, SORNA does not impede Petitioners' procedural or substantive due process rights, so it cannot be determined to create an irrebuttable presumption.

D. Reputation

The Pennsylvania Constitution establishes a fundamental right to reputation. Pa. Const. Art. I, § 1, 11. It is a fundamental interest that cannot be abridged without compliance with due process and equal protection. *R. v. Com., Dep't of Pub. Welfare*, 636 A.2d 142, 149 (Pa. 1994).

While reputation is recognized as one of an individual's certain inalienable rights, the General Assembly may, under its police power, limit those rights by enacting laws to protect the public health, safety, and welfare of its citizenry. *Nixon v. Dept. of Pub. Welfare*, 839 A.2d 277, 286 (Pa. 2003). The Court must weigh the infringement on an individual's rights against the interest sought to be achieved. *Id.* at 287. The justification of SORNA is discussed *supra*. The interest that the legislature seeks to achieve through SORNA is great; it overrides a juvenile offender's right to guard his reputation under the Pennsylvania Constitution.

Additionally, juvenile offenders have already been labeled sex offenders as a result of their adjudication. Their cases are open to public inspections and cannot be expunged. Therefore, the registration requirements of SORNA do not place any additional label on the juvenile offenders that their adjudication does not already attach to them.

E. *Juvenile Act*


The requirements of SORNA are not a part of the Juvenile Act, so the limitations of jurisdiction placed on the courts under the Juvenile Act have no bearing on SORNA. Even so, the registration requirement of SORNA is not supervisory; it is merely a civil, statutory requirement as a result of adjudication. While, the judges of the juvenile courts may not impose penalties or conditions of disposition beyond the age of twenty-one (21), the requirements of SORNA are not a penalty of adjudication or a condition that the court imposes at disposition. Just as an adult's supervision would end, but his requirement to register does not, so would the juvenile's registration requirement outlive the court's supervision. Registration is merely a collateral consequence of being adjudicated of the enumerated offenses. *See Commonwealth v. Parsons*, 969 A.2d 1259, 1268 (Pa.Super. 2009).

The Juvenile Act lists the purpose of the Juvenile Act in order to guide the court in how to interpret the Juvenile Act. 42 Pa.C.S.A. § 6301(b). However, as SORNA is not part of the Juvenile Act, it cannot be said to run afoul of the guidance in interpreting the Juvenile Act. Even if SORNA were to be interpreted and construed based on the purposes listed in the Juvenile Act, SORNA would not contradict the rehabilitative purpose of the Juvenile Act because SORNA is not a punishment.

V. CONCLUSION

WHEREFORE, the Commonwealth respectfully requests that this Honorable Court deny Petitioners' *Nunc Pro Tunc* Motions.

Respectfully submitted,
OFFICE OF THE DISTRICT ATTORNEY



Amber L. Czerniakowski
Assistant District Attorney
Attorney I.D. 308147
50 North Duke Street
P.O. Box 83480
Lancaster, PA 17608-3480
(717) 299-8100

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
JUVENILE DIVISION

IN THE INTEREST OF

WALTER ESH,

A Minor.

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Petition No. J1085-2008

IN THE INTEREST OF

JEROMY KEMERY,

A Minor.

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Petition No. J162-2008

IN THE INTEREST OF

WILLIAM GEIBEL, II,

A Minor.

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Petition No. J664-2011


CERTIFICATE OF SERVICE

I hereby certify that I served one (1) copy of the foregoing, "Commonwealth's Memorandum of Law in Opposition to Petitioners' *Nunc Pro Tunc* Motions" upon the person and in the manner as follows: Service by first class mail, postage pre-paid, and addressed as

follows:

Marsha L. Levick, Esq.
Riya Saha Shah, Esq.
Juvenile Law Center
1315 Walnut Street, Suite 400
Philadelphia, PA 19107

Date: 8/9/13


Amber L. Czerniakowski
Assistant District Attorney
Attorney I.D. 308147
50 North Duke Street
P.O. Box 83480
Lancaster, PA 17608-3480
(717) 299-8100