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

In the Interest of	:	[redacted]
[redacted]	:	
A Minor.	:	

In the Interest of	:	[redacted]
[redacted]	:	
A Minor.	:	

In the Interest of	:	[redacted]
[redacted]	:	
A Minor.	:	

JUVENILES' REPLY TO COMMONWEALTH'S MEMORANDUM OF LAW IN OPPOSITION TO PETITIONERS' MOTIONS FOR NUNC PRO TUNC RELIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Cases

Secondary Materials

INTRODUCTION

In its Memorandum of Law in Opposition to Petitioners' Motions for *Nunc Pro Tunc* Relief, the Commonwealth agrees with several of Petitioners' key factual assertions, including that children are different from adults; that children who offend sexually have low rates of recidivism; and that sex offender registration imposes substantial burdens on children's lives. Where the Commonwealth and the Petitioners' differ is on the legal implications of these facts. The Commonwealth believes that the instant case is controlled by prior case law regarding Megan's Law, a different statute with no applicability to children. The Commonwealth is incorrect. Although Megan's Law is similar to SORNA in that both statutes impose registration and reporting obligations, SORNA's registration and reporting requirements are exceptionally onerous and prior caselaw regarding Megan's Law never addressed the applicability of these provisions to children.

ARGUMENT

I. PENNSYLVANIA COURTS HAVE NEVER DETERMINED WHETHER SORNA IS A VIOLATION OF *EX POST FACTO* LAWS AS APPLIED TO CHILDREN; PRIOR CASELAW HOLDING THAT MEGAN'S LAW IS NOT A CRIMINAL PUNISHMENT AS APPLIED TO ADULTS IS INAPPOSITE.

The Commonwealth states that "[w]hile 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." Commonwealth's Memorandum of Law at 6. The devil is indeed in the details. These essential elements that set SORNA apart from prior versions of Megan's Law and other registration schemes applied to adults are precisely the elements that compel a different legal analysis. Furthermore, prior caselaw addressing Megan's Law examined

a statute that had no applicability to children. SORNA is *not* Megan's Law. SORNA's requirements and provisions are severe, directly connected to the criminal process, and apply automatically. SORNA imposes increased in-person reporting requirements, will lead to inevitable public disclosure and community notification, establishes innumerable obligations, and many other new requirements.

SORNA retroactively imposes mandatory lifetime registration on children as young as fourteen who were adjudicated delinquent of certain sexual offenses and were still under the supervision of the juvenile court on the effective date of the legislation, December 20, 2012. 42 Pa.C.S. § 9799.13(8)-(8.1). SORNA controls, monitors and punishes children who have committed sexual offenses regardless of the child's dangerousness, capacity to reform, current status of progress and rehabilitation, or reduced level of maturity and culpability. Registration of children under SORNA can no longer be couched in the legal fiction of merely remedial or administrative aims. The mandatory nature of SORNA, the extraordinary registration obligations, the looming risk of mandatory incarceration for any act of non-compliance, and the accompanying loss of jobs, housing, schooling and reputation all lead to the singular conclusion that this law is punitive. And the punitive effects are amplified when applied to children—children who are neither mature nor self-reliant; who are amenable to rehabilitation and unlikely to recidivate; and whose lifetime reporting requirements will endure longer than comparable registration requirements for adults.

The Commonwealth's *ex post facto* analysis misses the essential differences between SORNA and Megan's Law. The United States Supreme Court and the Pennsylvania appellate courts have never had the opportunity to consider whether SORNA is an *ex post facto* violation as applied to children. The United States Supreme Court noted that "[t]he statutory duty to

register . . . might provide grounds for a pre-enforcement challenge to SORNA's registration requirements," as applied to a juvenile. *U.S. v. Juvenile Male*, 131 S.Ct. 2860, 2864-5 (2011).[1] The Pennsylvania Supreme Court has applied an *ex post facto* analysis to prior versions and particular portions of Megan's Law previously applicable *only to adults*. *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. 1999) (whether Megan's Law I was punitive); *see also, Commonwealth v. Fleming*, 801 A.2d 1234 (Pa. Super. 2002) (whether Megan's Law II was punitive). Contrary to the Commonwealth's assertions, because Pennsylvania has never before required children adjudicated delinquent to register as sex offenders, no court has yet considered whether lifetime sex offender registration of children is excessive or punitive in violation of the prohibition against cruel and unusual punishment. Prior case law applicable to adult registration under Megan's Law is unavailing on this question.

The Commonwealth addresses the *Mendoza-Martinez* factors as applied to prior versions of Megan's Law and not to juvenile SORNA at issue in the instant case. The Commonwealth argues that "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." Commonwealth Memorandum at 6. However, as set forth in detail in Petitioner's Memo, this *ex post facto* jurisprudence demonstrates that SORNA indeed imposes an affirmative disability. Petitioners' Memorandum of Law in Support of Motions for *Nunc Pro Tunc* Relief {hereinafter "Petitioners' Memo"} at Section IV. The disabilities imposed on children under SORNA are

[1] The US Supreme Court held that mootness prevented the Court from determining whether the retroactive application of federal SORNA registration to a juvenile violated the *Ex Post Facto* Clause. 131 S. Ct. 2860.

anything but minor. These affirmative disabilities severely will detrimentally impact the physical, social, emotional, economic and psychological well-being of children who must register. This breaks from longstanding tradition and precedent in the Commonwealth which has shielded children from the lasting consequences and stigma of criminal convictions because of their immaturity, dependency and greater capacity for rehabilitation. *See Commonwealth v. S.M.*, 769 A.2d 542, 544 (Pa. Super. 2001). *See also* Petitioners' Memo Section I.A (detailing how children are less mature, more vulnerable to negative influences, and more open to rehabilitation than adults).

SORNA requires more onerous affirmative obligations and restraints than any prior sex offender registration law in Pennsylvania and, for the first time, imposes these requirements on children. The Commonwealth fails to account for the fact that the law requires juveniles to register in-person every ninety days, to disclose an extraordinary amount of information, and to appear in-person to update that information or record any change in circumstance under the threat of mandatory, lengthy prison sentences. *See* Petitioners' Memo Section II (detailing registration and reporting requirements); 18 Pa.C.S. § 4915. The leading cases cited by the Commonwealth that have considered whether Megan's Law imposes an affirmative disability or restraint are not dispositive of SORNA, especially as applied to children. In *Smith*, 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, required only annual verification and not quarterly in-person reporting as is the case here, 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 classifying the adult as a "sexually violent predator" based upon a scientific risk-assessment. *Williams*, 832 A.2d 973-75.

Although the Commonwealth argues that *Smith v. Doe* is dispositive of the challenge under the *ex post facto* clause, several state courts have reconsidered this question in light of changes in their state registration laws. The Alaska Supreme Court found that even if the legislature did not intend to create a penal or punitive statute, the sex offender registration law was punitive *as a matter of state law*. *Doe v. State*, 189 P.3d 999, 1000 (Alaska 2008). The Ohio Supreme Court held that the state's SORNA was punitive and violated the prohibition on retroactive laws contained in the Ohio Constitution. *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011). The Supreme Judicial Court of Maine held that the retroactive application of the state's amended sex offender registration law violated the co-extensive *ex post facto* clauses of the United States and Maine Constitutions. *State v. Letalien*, 985 A.2d 4 (Me. 2009). The Court of Appeals of Maryland held that the retroactive application of the state's sex offender registration law violated the *ex post facto* clause of the Maryland Declaration of Rights. *Doe v. Department of Public Safety*, 62 A.3d 123, 143 (Md. 2013) (holding that "[t]he application of the statute has essentially the same effect upon Petitioner's life as placing him on probation and imposing the punishment of shaming for life, and is, thus, tantamount to imposing and additional sanction for Petitioner's crime"). Indiana has reached the same result. *Gonzalez v. State*, 980 N.E. 2d 312 (Ind. 2013); *Hevner v. State*, 919 N.E.2d 109 (Ind. 2010); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009).

Indeed, even 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 rise, severity, and importance of what were previously deemed collateral/secondary effects). Courts now recognize that even some legislation facially designated "civil" is "so severe," so "intimately related to the criminal process," and so "nearly an automatic result of some convictions" that it demands some of the constitutional protections afforded within the criminal sphere. *Padilla v. Kentucky*, 130 S.Ct. 1473, 1481-82 (2010) (holding that counsel was ineffective for not providing defendant with information regarding his automatic deportation upon conviction). Although *Padilla* was a case about ineffective assistance of counsel, its discussion of direct versus collateral consequences is instructive: the United States Supreme Court in *Padilla* "breached" the "chink-free wall between direct and collateral consequences, notwithstanding the then-dominant view" that collateral consequences of a conviction do not give rise to rights in the criminal setting. *Id; see also People v. Fonville*, 804 N.W. 2d 878, 894-5 (Mich. Ct. App. 2011) (holding that sex offender registration requires the effective assistance of counsel); *United States v. Riley*, 72 M.J. 115, 121 (C.A.A.F. 2013) (holding that "in the context of a guilty plea inquiry, sex offender registration consequences can no longer be deemed a collateral consequence of the plea"). Like deportation, sex offender registration is so "enmeshed" with and "intimately related to the criminal process" that it cannot be ignored. *See Padilla*, 130 S.Ct. at 1481-82 (2010). *See also Taylor v. State*, 698 S.E.2d 384, 388 (Ga. App. 2010) ("[L]ike deportation, registration as a sex offender is 'intimately related to the criminal process' in that it is an "automatic result" following certain criminal convictions. [. . . and] is 'most difficult' to divorce the requirement of registration from the underlying criminal conviction.'"). 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 must be found to impose affirmative restraints and disabilities on children, and moreover, that these disabilities constitute *punishment* that is *excessive*.

In its Eighth Amendment analysis, the Commonwealth argues that "registration and periodic check-ins can hardly be considered equivalent to the harsh, punitive, and irrevocable sanction of life imprisonment." Commonwealth's Memo at 8. This statement misses the mark. The Commonwealth writes that "while juveniles are treated differently than adults under the law, that does not invalidate SORNA's applicability to juveniles." *Id*. Recent United States Supreme Court jurisprudence on juvenile sentencing establishes that children and adults must be viewed differently under the Eighth Amendment. Petitioners do not equate lifetime registration with lifetime incarceration. Rather, Petitioners cite the Supreme Court's Eighth and Fourteenth Amendment jurisprudence to support their contention that the analysis of children's rights under the Constitution is distinct – not co-extensive with that of adults. *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). As set forth in Petitioners' Memo, SORNA is unconstitutional as applied to juveniles because it is disproportionate and mandatory.

The provisions of SORNA are readily distinguishable from Megan's Law and its application to children only underscores its punitive nature. As such, its retroactive application violates the ex post facto clauses of the Pennsylvania and U.S. Constitutions and, as set forth in Petitioners' Memo, its terms and provisions also violate the Eighth Amendment prohibition against cruel and unusual punishments.

II. THE IRREBUTTABLE PRESUMPTION ANALYSIS DIFFERS FROM A STRAIGHT PROCEDURAL DUE PROCESS ANALYSIS.

The Commonwealth argues that because Megan's Law has not previously been found to be violate due process, SORNA does not run afoul of the irrebuttable presumption doctrine, a due process claim. First, as set forth *supra*, Megan's Law and SORNA are not equivalent. Previous constitutional analyses of Megan's Law do not compel a comparable analysis of SORNA.

Secondly, it is not clearly settled whether the irrebuttable presumption doctrine is a strict procedural due process analysis; it has been held to have limited applicability.

> If state legislation deprives individuals of a protected interest based on certain factual criteria, the legislation itself may be challenged on equal protection or substantive due process grounds. Procedural due process does not challenge the provision directly but mandates that, where such deprivations are affected, individuals be given an opportunity for a meaningful hearing "appropriate to the nature of the case." IPD [the irrebuttable presumption doctrine] establishes that such a hearing cannot be meaningful where a conclusive presumption eliminates consideration of the factual criteria determinative of the issue.

Alan C. Green, *Where Presumption Overshoots: The Foundation and Effects of Pennsylvania Department of Transportation v. Clayton*, 116 Penn. St. L. Rev. 1181, 1195 (2012). Irrebuttable presumptions violate procedural due process by "precluding members of a proxy class from presenting evidence tending to show that they do not belong in the determinate class." *Id.* citing *Vlandis v. Kline*, 412 U.S. 441, 452 (1973).

SORNA sets up a registration scheme that requires registration based on the adjudication of delinquency alone. It does not require a finding of dangerousness. It precludes members of a class of individuals who have been adjudicated of certain offenses from presenting any evidence that they do or do not belong in that class. This scheme flies in the face of the irrebuttable presumption doctrine implicit in the Pennsylvania constitution, a robust doctrine applied

repeatedly by Pennsylvania courts. *See, e.g.*, Borough *of Heidelberg v. W.C.A.B. (Selva)*, 928 A.2d 1006 (Pa. 2007) (workers' compensation claim); *Commonwealth Dept. of Transp., Bureau of Driver Licensing v. Clayton*, 684 A.2d 1060 (Pa. 1996) (driver's license suspension); *E.W. v. T.S.*, 916 A.2d 1197 (Pa. Super. 2007) (domestic relations case to determine paternity); *Commonwealth v. Thur*, 906 A.2d 552 (Pa. Super. 2006) (criminal case); *D.C. v. School District of Philadelphia*, 879 A.2d 408 (2005) (education issue); *Crayley v. Jet Equipment & Tools, Inc.*, 778 A.2d 701 (Pa. Super. 2001); *Fidelity Federal Sav. And Loan Ass'n v. Capponi*, 684 A.2d 580 (Pa. Super. 1986) (mortgage debt issue).

As stated in Petitioners' Memo, mandatory registration creates an unconstitutional irrebuttable presumption that children adjudicated delinquent of the enumerated offenses require lifetime registration based solely on their juvenile adjudication, 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. 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.

III. REGISTRATION VIOLATES PETITIONERS' RIGHTS TO REPUTATION UNDER THE PENNSYVLANIA CONSTITUTION.

The Commonwealth argues that "juvenile offenders have already been labeled sex offenders as a result of their adjudication…the registration requirements of SORNA do not place any additional label on the juvenile offenders that their adjudication does not already attach to them." Commonwealth's Memo at 10. This view substantially misunderstands the Juvenile Act and the confidentiality provisions located within it.

Pennsylvania's juvenile justice system meets its goals of protecting the public and developing competencies of youth by providing avenues for anonymity and confidentiality to children—juvenile proceedings are generally private; court records are confidential under most circumstances; and juveniles have historically had broad rights to expungement of their records. "It is the law's policy 'to hide youthful errors from the full gaze of the public and bury them in the graveyard of the forgotten past.'" *In re Gault*, 387 U.S. 1, 24 (1967) (quoting *In re Gault*, 407 P.2d 760, 767 (Ariz. 1965) (internal citations omitted). *See also In the Interest of Jacobs*, 483 A.2d 907 (Pa. Super. 1984) (providing for expungement of juvenile records); *In re M.B.*, 819 A.2d 59, 65 (Pa. Super. Ct. 2003) ("Pennsylvania's Juvenile Act demonstrates our legislature's compelling interest in safeguarding children involved in juvenile proceedings.").

Although some records of juvenile crime are available for public inspection, *See* 42 Pa.C.S. § 6308, the information that is available is limited in scope. Pa.R.J.C.P. 160A (providing that the public may only have access to the juvenile's name, age, address, offenses alleged, adjudication on each allegation, and disposition). Generally, only judges, court staff, probation officers, attorneys, or other agents having a legitimate interest in the proceedings can access more information in a juvenile's record. 42 Pa.C.S. § 6308; Pa.R.J.C.P. 160A.[2]

Being labeled a sex offender is not comparable to having a juvenile record, even one that is available for public review. Despite uncontroverted research demonstrating that children who sexually offend are unlikely to re-offend, the public often believes offenders are dangerous and

[2] In contrast, under SORNA a child must, for the rest of his life, disclose personal and often non-public details such as routes to work, 42 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).[2]" SP4-218, Exhibit A at ¶ K; 42 Pa.C.S. § 9799.16; s*ee generally* Section II.A, *supra*. (detailing registration and reporting requirements). *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.").

more likely to re-offend than other criminals, are resistant to change or treatment, and that they offend against strangers. *See e.g.*, 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). *See also* Human Rights Watch, *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US* at 7 (May 2013) at 21 (discussing that public assumption is that anyone on a registry must be a child molester or rapist, when underlying activity can vary widely). Children on registries have reported being called "pedophiles" by passing strangers. *Raised on the* Registry, at 38. While a juvenile conviction increasingly carries collateral consequences for children long after juvenile court jurisdiction has ended, the stigma of being labeled a sex offender permeates every aspect of one's participation in civil society.

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) (discussing generally perceptions and realities regarding sex offenders); *Unjust and Ineffective*, *The Economist*, August 6, 2009 (assessing Georgia registrants and concluding that 65% of them posed little threat. Another 30% were potentially threatening, and 5% were clearly dangerous."). This message is false and highly stigmatizing. A child who is a registered sex offender in Pennsylvania is required to register by virtue of his or her adjudication of delinquency, not because of any finding of future dangerousness.

CONCLUSION

WHEREFORE, Petitioners, by and through counsel, respectfully request that this Court declare 42 Pa.C.S. § 9799.10 *et seq.* unconstitutional as it applies to juvenile offenders and violative of the Juvenile Act, declassify Petitioners as "juvenile offenders" and order the Pennsylvania State Police to remove their names, photographs, and all other information from the sex offender registry.

Respectfully submitted,

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VERIFICATION

On this 22nd day of August, 2013, I hereby verify that the facts set forth in the Memorandum of Law are true and correct to my knowledge, information and belief, and that any false statements made are subject to penalties of the Crimes Code, 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd of August, 2013 I am serving a true and correct copy of the foregoing Reply to Commonwealth's Memorandum of Law in Opposition to Petitioners' Motions for *Nunc Pro Tunc* Relief as follows:

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