**COURT OF COMMON PLEAS OF MONROE COUNTY**
**FORTY-THIRD JUDICIAL DISTRICT**
**COMMONWEALTH OF PENNSYLVANIA**
**JUVENILE DIVISION**

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| In the Interest of<br><br>[redacted],<br><br>A Minor. | : | [redacted] |
| In the Interest of<br><br>[redacted],<br><br>A Minor. | : | [redacted] |
| In the Interest of<br><br>[redacted]<br><br>A Minor. | : | [redacted] |
| In the Interest of<br><br>[redacted],<br><br>A Minor. | : | [redacted] |
| In the Interest of<br><br>[redacted]<br><br>A Minor. | : | [redacted] |

**MEMORANDUM OF LAW IN SUPPORT OF MOTIONS FOR *NUNC PRO TUNC* RELIEF**

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## INTRODUCTION

Juvenile courts were established to "provide guidance and rehabilitation for the child and protection for society, not to affix criminal responsibility, guilt and punishment." *Kent v. U.S.*, 383 U.S. 541, 554 (1966). Pennsylvania's juvenile justice system protects the public by providing for the supervision, care, and rehabilitation of children who commit delinquent acts through a system of balanced and restorative justice. The system is designed to meet those goals in the least restrictive way, disrupting the child's life no more than necessary to effectively intervene. This is met 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).

To meet its rehabilitative goals, Pennsylvania has long treated children in the juvenile justice system differently from adults.[1] Since 1901, when Pennsylvania adopted its first Juvenile Court Act, children charged with committing criminal offenses were treated as "children in need of assistance" and not criminals. Following the landmark United States Supreme Court decisions of the 1960's demanding that juvenile court conform to the due process safeguards of the Constitution, the Pennsylvania General Assembly responded with the passage of the Juvenile Court Act of 1972, codifying the rights of children accused of crimes to receive written notice of charges against them, to be assisted by counsel, to confront accusers, and to be convicted only upon proof beyond a reasonable doubt. *Id.* at 21. Over the last forty years, significant

[1] *See, e.g. J.D.B. v. North Carolina*, 131 S.Ct. 2394 (2011); *Graham v. Florida*, 130 S.Ct. 2011 (2010); *In re Gault*, 387 U.S. 1 (1967); *Commonwealth v. Knox*, 2012 Pa. Super 148 (2012).

amendments have been made to the Juvenile Act to ensure adequate protection to youth throughout the proceedings as well as to ensure fidelity to the commitment to balanced and restorative justice principles.[2]

On December 20, 2012, Pennsylvania took a large step backward in its distinct treatment of children with the implementation of the juvenile offender[3] provisions of the Sex Offender Registration and Notification Act (SORNA). *See* 42 Pa.C.S. § 9799.10 *et seq.*[4] Mandatory,

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[2] In 1995, the General Assembly passed Act 33, which imbedded balanced and restorative justice principles into the Juvenile Act. Act 33's BARJ principles hold juvenile offenders accountable for their offenses by including in their case management requirements to remedy the harms that their offenses have caused victims and the community. In emphasizing accountability and the mitigation of harms, BARJ has retained the previous goals of supervision, care, and rehabilitation of juvenile offenders. In fact, BARJ has brought the implementation of these concepts to new levels by requiring training in skill-building in combination with eliminating negative behaviors. *See* Pennsylvania Council on Crime and Delinquency, Balanced and Restorative Justice in Pennsylvania, *available at* http://www.portal.state.pa.us/portal/server.pt?open=512&objID=5254&&PageID=495412&level=2&css=L2&mode=2.

[3] Pennsylvania's mandatory sex offender registration statute applies to "juvenile offenders," defined as:

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

42 Pa.C.S. § 9799.12.

[4] In 2006, the Adam Walsh Child Protection and Safety Act went into effect. Title I of this Act, the Sex Offender Registration and Notification Act (SORNA), requires states to establish uniform sex offender registration mechanisms, including definitions, in order to facilitate a national registry and enforcement. *See* 18 Pa.C.S. § 2250 (a) (SORNA Proposed Guidelines, 72 Fed. Reg. 30210-01, 30213, May 30, 2007). In order to ensure states' cooperation in creating the national registry, the Adam Walsh Act mandated a ten percent deduction of certain federal funding for states that did not substantially implement its provisions. 42 U.S.C. § 16925(a). Importantly, the original version of SORNA did not extend to children in the juvenile justice system. In 2006, in response to lobbying by the parents of an 8-year-old girl sexually assaulted by a 14-year-old boy, the Wisconsin governor signed a law into effect that required police chiefs and sheriffs to assess the public risk of each person on the registry whose offenses occurred as juveniles and notify the community about those considered likely to re-offend. Subsequently, the family of the young girl lobbied Congress to enact similar federal legislation and add Section 111 to extend the

lifelong registration with attendant onerous reporting requirements flies in the face of the constitutional and distinctive protections afforded children since *Gault* and its progeny.

Following SORNA's federal enactment, states came into varying levels of compliance—some requiring children as young as 10 to register based solely on the offense, *see* Del. Code. Tit. 11 § 4120, while others require an individual risk-assessment to determine whether registration was necessary to promote a public safety interest, *see* Ohio Rev. Code § 2950.01. Still other states opted to forgo the financial incentive, acknowledging that 1) registration was contrary to the individualized rehabilitative model of their juvenile justice systems; 2) the high cost of creating and maintaining a juvenile registry would outweigh any federal monetary benefit: and 3) there was not enough evidence suggesting it increased public safety.[5] The Adam Walsh Child Protection and Safety Act specifically provides that state courts have the authority to evaluate their individual registration schemes under state and federal constitutions. 42 U.S.C. § 16913. Upon determination that the registration scheme is in violation with constitutional law, it must be stricken without jeopardizing the state's federal financial benefits. 42 U.S.C. § 16925.

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AWA to juveniles. The law redefined the term "convicted" or a variant thereof, used with respect to a sex offense, to include adjudication of delinquency as a juvenile. 42 U.S.C. §16911 (2006). Importantly, it did not require an individual risk assessment to determine whether juveniles are likely to reoffend.

[5] In an August 17, 2011 letter to the Department of Justice, Jeffrey Boyd, General Counsel and Acting Chief of Staff to Texas Governor Rick Perry, wrote: "In dealing with juvenile sex offenders, Texas law more appropriately provides for judges to determine whether registration would be beneficial to the community and the juvenile offender in a particular case." North Carolina General Assembly, "SORNA General Information," October 13, 2011, at http://www.ncleg.net/documentsites/committees/JLOCJPS/October%2013,%202011%20Meeting/RD_SORNA_General_Information_2011-10-13.pdf (accessed April 18, 2013). In a similar letter from the State of New York, Risa Sugarman, Director of the Office of Sex Offender Management, wrote, "New York has a long standing public policy of treating juvenile offenders differently from adult offenders so that juveniles have the best opportunity of rehabilitation and reintegration. The federal requirement that juveniles be placed on the Sex Offender Registry under SORNA is in direct conflict with that public policy." Letter from Risa S. Sugarman to Linda Baldwin, "SORNA General Information," August 23, 2011 *at* http://www.ncleg.net/documentsites/committees/JLOCJPS/October%2013,%202011%20Meeting/RD_SORNA_General_Information_2011-10-13.pdf (accessed April 18, 2013). The state also expressed concern over the "fiscal impact of implementation…with no improvement in public safety."

There is a "presumption that the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth." *Commonwealth v. Ludwig*, 874 A.2d 623 (Pa. 2005). A statute is only invalidated if it clearly, palpably, and plainly violates constitutional rights. *Id.* Imposing mandatory, lifetime[6] sex offender registration on children adjudicated delinquent of certain sexual offenses clearly, palpably, and plainly violates both the Pennsylvania and United States constitutions.

## STATEMENT OF FACTS

[redacted] and [redacted]dt [hereinafter "Petitioners"] were all adjudicated delinquent prior to December 20, 2012. At the time of their adjudications, none of the petitioners were required to register as sex offenders in this Commonwealth. On December 20, 2012 Petitioners remained under court supervision. Because of their adjudications, Petitioners were required to register retroactively as sex offenders, pursuant to 42 Pa.C.S. § 9799.10 *et seq.* Because there existed no alternative remedy to have this punishment reviewed, all five youth timely filed motions for *nunc pro tunc* relief on February 18, 2013.

[redacted] is 16 years old. [redacted] was adjudicated delinquent on June 6, 2011 on charges of Aggravated Indecent Assault (F1), Aggravated Indecent Assault (F2), Indecent Assault (M1) and Indecent Assault (M2). [redacted] is currently in placement at Diversified Treatment Alternatives, where he has been for 19 months. [redacted] has Asperger's Syndrome, which will likely present difficulties for him as he attempts to comply with SORNA's requirements, as it often takes him multiple times to grasp concepts and requirements, which has been evident during his

[6] Although Pennsylvania's SORNA provides an avenue for a child to seek removal from the registry after 25 years, 42 Pa.C.S. § 9799.17, the near impossibility of SORNA compliance renders the chance for removal illusory." *See Proposed Findings of Fact* at Section II.

placement. [redacted] and his family were involved in the child welfare system before his adjudication.

[redacted] is 18 years old. [redacted] was adjudicated delinquent in Pike County on October 15, 2012, on two counts of Involuntary Deviate Sexual Intercourse (F1). His case was transferred to Monroe County for disposition. [redacted] is currently placed at La-Sa-Quik, where he has resided for five months.

[redacted] is 17 years old. [redacted] was adjudicated on December 4, 2009 on charges of Rape (F1). [redacted] spent 30 months at Abraxas Youth Center and was released on August 23, 2012. [redacted] re-entered placement on October 16, 2012 at Northwestern Academy V-Core, and will have his next re-disposition hearing on April 23, 2013, at which point he will likely be moved to the SET program. [redacted] has been institutionalized since 2007 with the exception of the three-month period during which he was released to his grandmother between placements. [redacted] grandmother is the only resource he has in the community at this time. [redacted] expresses an interest in completing an independent living program when he is released from placement.

[redacted] is 18 years old. [redacted] was adjudicated on February 3, 2011, on charges of Involuntary Deviate Sexual Intercourse (F1), Indecent Assault (F3), Involuntary Deviate Sexual Intercourse (F1), Sexual Abuse of Children – Photographing, Videotaping, Depicting on Computer, or Filming Sexual Acts (F2) and Sexual Abuse of Child – Possession of Child Pornography (F3). [redacted] spent 21 months at La-Sa-Quik and was released on December 13, 2012. [redacted] was placed on probation with restrictions on contact with children and significant counseling and aftercare requirements. [redacted] has aspirations to be a firefighter in the future.

[redacted] is 19 years old. [redacted] was adjudicated delinquent on December 9, 2010 on charges of Criminal Solicitation to Commit Involuntary Deviate Sexual Intercourse with

a Child (F1), Indecent Exposure (M1) and Open Lewdness (M3). [redacted] spent 18 months at La-Sa-Quik and was released on June 29, 2012. He later violated the terms of his release and on October 3, 2012 was sent to Adelphoi Village -Middle Creek Secure where he is currently in placement. [redacted] struggles significantly with the prospect of registration. He has struggled with sexual acting out for a long time and he worries that he will be "labeled" forever. [redacted] has aspirations to have a family in his future. After he was released from La-Sa-Quik, [redacted] did not return home to live with his parents in New Jersey because of New Jersey's harsh registration requirements.

## PROPOSED FINDINGS OF FACT

### I. CHILDREN, INCLUDING JUVENILE SEXUAL OFFENDERS, ARE LESS MATURE, MORE VULNERABLE TO NEGATIVE EXTERNAL INFLUENCES AND MORE AMENABLE TO REHABILITATION THAN ADULTS.

#### A. Children Are Less Mature, More Vulnerable to Negative Influences and More Open to Rehabilitation Than Adults.

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) (citing *Eddings v. Oklahoma,* 455 U.S. 104, 115 (1982); *Gall v. United States,* 552 U.S. 38, 58 (2007); *Roper v. Simmons,* 543 U.S. 551, 569 (2005); *Johnson v. Texas,* 509 U.S. 350, 367 (1993).

Research demonstrates that children are less mature than adults, more vulnerable to negative influences and have less control over their surroundings. *Miller*, 132 S.Ct. at 2464,

2468. In addition, children have "greater prospects for reform" than adults. *Miller*, 132 S.Ct. at 2458. The "'signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside.'" *Roper*, 543 U.S. at 553, quoting *Johnson v. Texas*, 509 U.S. 350, 368 (1993). All of these facts are consistent with research showing that brain regions responsible for executive function and decision-making are immature in adolescents. *Miller*, 132 S.Ct. a 2464.

**1. Children Lack Maturity and Responsible Decision-Making Skills.**

"As any parent knows and as the scientific and sociological studies . . . tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults." *Roper*, 543 U.S. at 569; *see also Miller*, 132 S.Ct. at 2464. This leads to "recklessness, impulsivity, and heedless risk-taking." *Miller*, 132 S.Ct. at 2464, 2467. Research shows that "[a]dolescents are less able to control their impulses; they weigh the risks and rewards or possible conduct differently; and they are less able to envision the future and apprehend the consequences of their actions."[7] "'[A]dolescents are overrepresented statistically in virtually every category of reckless behavior.'" *Roper*, 543 U.S. at 569, quoting Jeffrey Arnett, *Reckless Behavior in Adolescence: A Developmental Perspective*, 12 Developmental Rev. 339 (1992). "These observations are independent of the nature of the crime, and apply equally to adolescents involved in homicide and adolescents involved in other heinous crimes that do not involve death."[8]

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[7] Brief of the American Psychological Association, et al. as *Amicus Curiae* in Support of Petitioners, *Miller v. Alabama* at 8, cited in *Miller*, 132 S.Ct. 2454 n. 5, available at http://www.apa.org/about/offices/ogc/*Amicus*/miller-hobbs.aspx), citing Lawrence Steinberg, *Adolescent Development and Juvenile Justice*, 5 Rev. Clinical Psychol. 47, 55-56 (2008), available at http://www.annualreviews.org/doi/pdf/10.1146/annurev.clinpsy. 032408.153603.

[8] Brief of J. Lawrence Aber et al. as *Amicus Curiae* in Support of Petitioners, *Miller v. Alabama* at 13, cited in *Miller*, 132 S.Ct. at 2464 n. 5, available at http://eji.org/files/*Amicus*%20-%20Aber%20et%20al.PDF.

Children's "immaturity, impetuosity, and failure to appreciate risks and consequences" impact children in both the juvenile and criminal justice systems. See, e.g., *Miller*, 132 S.Ct. at 2468. A child "might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with . . . prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys." *Miller*, 132 S.Ct. at 2468. *See also J.D.B.*, 131 S.Ct. at 2403 ("The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them.").

**2. Children Are Vulnerable to Negative Influences and Outside Pressures.**

"[C]hildren 'are more vulnerable . . . to negative influences and outside pressures'" than adults. *Miller*, 132 S.Ct. at 2464, quoting *Roper*, 543 U.S. at 569. Childhood "is a moment and 'condition of life when a person may be most susceptible to influence and to psychological damage.'" *Miller*, 132 S.Ct. at 2467, quoting *Johnson*, 509 U.S. at 368. Research demonstrates that the mere presence of peers makes children, but not adults, more likely to engage in risk-taking behavior.[9]

Children's vulnerability to negative influences is "explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment." *Roper*, 543 U.S. 551, 569 (2005), citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003). "Difficult family and

[9] Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Marking in Adolescence and Adulthood*, 41 Developmental Psychol. 625, 634 (2005), available at http://www.wisspd.org/htm/ATPracGuides/Training/ProgMaterials/Conf2011/AdDev/PInfluence.pdf

neighborhood conditions are major risk factors for juvenile crime, including homicide."[10] Children "lack the ability to extricate themselves from horrific, crime-producing settings." *Miller*, 132 S.Ct. at 2464. A child is influenced by "the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional." *Miller*, 132 S.Ct. at 2468.

Children who offend sexually or non-sexually are both characterized by families that express less positive communication, less warmth and more parental violence than families of non-delinquent youth.[11] Additionally, children who commit sexual offenses are often themselves victims of sexual abuse.[12]

**3. Children Have a Greater Capacity for Rehabilitation Than Adults.**

Children have a greater capacity for rehabilitation and reform than adults because "a child's character is not as 'well-formed' as an adult's; his traits are 'less fixed' and his actions less likely to be 'evidence of irretrievabl[e] deprav[ity].'" *Miller*, 132 S.Ct. at 2464, quoting *Roper*, 543 U.S. at 570. "'For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood.'" *Roper*, 543 U.S. at 553, quoting Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003); *see also*

[10] Brief of the American Psychological Association, et al. as *Amicus Curiae* in Support of Petitioners, *Miller v. Alabama* at 15-16, citing, e.g., Alan Kazdin, *Adolescent Development, Mental Disorders, and Decision Making of Delinquent Youths* in *Youth on Trial* at 47 (Thomas Grisso & Robert Schwartz eds., 2000).

[11] *Juvenile Sex Offenders* at 299 citing M. Ford & J. Linney, *Comparative Analysis of Juvenile Sex Offenders, Violent Nonsexual Offenders, and Status Offenders*, 10 Journal of Interpersonal Violence 56-70 (1995).

[12] Elizabeth Garfinkle, *Coming of Age in America: The Misapplication of Sex-Offender Registration and Community-Notification Laws to Juveniles*, 91 Calif. L. Rev. 163, 205 (2003).

*Miller*, 132 S.Ct. at 2464 (same). A significant body of research recognizes the ability of children to reform and change.[13] Research consistently points to an "age-crime curve," in which criminal activity "'peak[s] sharply' in adolescence 'drop[s] precipitously in young adulthood."[14]

"It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'" *Graham*, 130 S.Ct. at 2026, quoting *Roper*, 543 U.S. at 573. Studies have "consistently concluded that the behavior of juveniles who will and will not continue as criminal offenders through adulthood is 'often indistinguishable during adolescence.'"[15] "Simply put, while many criminals may share certain childhood traits, the great majority of juvenile offenders with those traits will not be criminal adults."[16]

**4. The Brains of Adolescents Are Not Developed in the Areas Responsible for Decision-Making and Impulse Control.**

The developmental research demonstrating children's immaturity, vulnerability to negative influences and capacity to reform is supported by neuroscience research. "'[D]evelopments in psychology and brain science continue to show fundamental differences

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[13] *See, e.g.*, Laurence Steinberg & Robert G. Schwartz, *Developmental Psychology Goes to Court*, in *Youth on Trial* at 9, 23 (Thomas Grisso & Robert Schwartz eds., 2000); Scott & Steinberg, *Rethinking Juvenile Justice* 32, 49; John H. Laub & Robert J. Sampson, *Shared Beginnings, Divergent Lives: Delinquent Boys to Age 70* (2003) (documenting the criminal histories of 500 individuals who had been adjudicated delinquent and were able to change and lead law-abiding lives as adults).

[14] Brief of the American Psychological Association, et al. as *Amicus Curiae* in Support of Petitioners, *Miller v. Alabama* at 7-8, quoting Terrie Moffit, *Adolescent-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 Psychol. Rev. 674, 675 (1993), available at http://www.psychology.sunysb.edu/ewaters/55204/slide%20sets/brian_mcfarland_aggression/moffitt_aggression.pdf; Brief of J. Lawrence Aber et al. as *Amicus Curiae* in Support of Petitioners, *Miller v. Alabama* at 30.

[15] Brief of the American Psychological Association, et al. as *Amicus Curiae* in Support of Petitioners, *Miller v. Alabama* at 23, quoting Kathryn Monahan et al., *Trajectories of Antisocial Behavior and Psychological Maturity from Adolescence to Youth Adulthood*, 45 Developmental Psychol. 1654, 1655 (2009), and citing Edward Mulvey & Elizabeth Cauffman, *The Inherent Limits of Predicting School Violence*, 56 Am. Psychologist 797, 799 (2001); Thomas Grisso, *Double Jeopardy: Adolescent Offenders with Mental Disorders* 64-65 (2004). *See also* John Edens et al, *Assessment of "Juvenile Psychopathy' and Its Association with Violence*, 19 Behav. Sci. & L. 53, 59 (2001).

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

between juvenile and adult minds." *Graham*, 130 S.Ct. at 2026. "'[A]dolescent brains are not yet fully mature in regions and systems related to higher-order executive functions such as impulse control, planning ahead, and risk avoidance.'" *Miller*, 132 S.Ct. at 2464 n. 5, quoting Brief of the American Psychological Association, et al. as *Amicus Curiae* in Support of Petitioners, *Miller v. Alabama* at 4. The frontal lobes of the brain, and especially the pre-frontal cortex, continue to develop through adolescence and into one's twenties.[17]

Adolescents also undergo changes "in the brain's 'incentive processing system'—especially the parts that process rewards and social cues."[18] Dopamine levels peak in a key region, "increasing propensity to engage in risky and novelty-seeking behavior." Brief of J. Lawrence Aber et al. as *Amicus Curiae* in Support of Petitioners, *Miller v. Alabama* at 16.

The "rapid, pubertal changes in the brain's incentive and social processing systems outpace[e] the slower, steadier, and later-occurring changes in areas related to executive function and self control."[19] Because of this "disjunction" "'middle adolescence (roughly 14-17) should be a period of especially heightened vulnerability to risky behavior, because sensation-seeking is high and self-regulation is still immature. And in fact, many risk behaviors follow this pattern, including unprotected sex, criminal behavior, attempted suicide, and reckless driving.'"[20]

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[17] Brief of J. Lawrence Aber et al. as *Amicus Curiae* in Support of Petitioners, *Miller v. Alabama* at 15-16; *see also* Brief of the American Psychological Association, et al. as *Amicus Curiae* in Support of Petitioners, *Miller v. Alabama* at 25, citing Laurence Steinberg, *Should the Science of Adolescent Brain Development Inform Public Policy?*, 64 Am. Psychologist 739, 742 (2009).

[18] Brief of the American Psychological Association, et al. as *Amicus Curiae* in Support of Petitioners, *Miller v. Alabama* at 5, 17, 26, citing numerous studies.

[19] Brief of the American Psychological Association, et al. as *Amicus Curiae* in Support of Petitioners, *Miller v. Alabama* at 29-30, citing Laurence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 82 Brain & Cognition 160, 162 (2010).

[20] Brief of the American Psychological Association, et al. as *Amicus Curiae* in Support of Petitioners, *Miller v. Alabama* at 30, quoting Lawrence Steinberg, *A Behavioral Scientist Looks at the Science of Adolescent Brain Development*, 72 Brain and Cognition 160 (2010).

On the other hand, the "immaturity and plasticity" of the adolescent brain makes children open to change and reform.[21] Brain malleability in a child "enhance[s] the prospect that, as the years go by and neurological development occurs, his "'deficiencies will be reformed.'" *Miller*, 132 S.Ct. at 2465, quoting *Graham*, 130 S.Ct. at 2027, quoting *Roper,* 543 U.S. at 570.

### B. Children Who Offend Sexually Are Not Unlike Other Juvenile Offenders.

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. The belief that "sex offenders are a very unique type of criminal" is not supported with respect to juvenile offenders.[22] 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." Affidavit of Elena delBusto, M.D., Exhibit I at ¶ 16, 19. "Many demographic studies fail to identify differences in personality and psychosocial circumstances between juvenile sex offenders and non-sex offenders. Furthermore, their patterns of reoffense are similar with non-sexual offenses predominating." *Id.* at ¶ 16.

#### 1. Sexual Recidivism Rates for Children Who Sexually Offend Are Exceptionally Low.

"There are now more than 30 published studies evaluating the recidivism rates of youth who sexually offend. The findings are remarkably consistent across studies, across time, and across populations: sexual recidivism rates are low." Affidavit of Elizabeth J. Letourneau, Ph.D., Exhibit H at ¶ A. "In summary, data has shown that very few adolescents who commit sexual

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[21] Brief of J. Lawrence Aber et al. as *Amicus Curiae* in Support of Petitioners, *Miller v. Alabama* at 10-12.

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

crimes will become sexually deviant as adults." Affidavit of Elena delBusto, M.D., Exhibit I at ¶ 19. "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." Affidavit of Michael F. Caldwell, Psy.D., Exhibit J, at ¶ 3(C).

In "the most extensive" research study to date, 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." *Id.* at ¶ 3(C); *see also* Affidavit of Elena delBusto, M.D., Exhibit I at ¶ 14. "[W]hen rare sexual recidivism events do occur, it is nearly always within the first few years following the original adjudication." Affidavit of Elizabeth J. Letourneau, Ph.D., Exhibit H at ¶ A. Even "youth initially evaluated as 'high risk' are unlikely to reoffend, particularly if they remain free of offending within th[e] relatively brief period of time following initial adjudication." *Id.* at ¶ A.

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." Affidavit of Michael F. Caldwell, Psy.D., Exhibit J at ¶ 3(D-G) (citing numerous studies). In a study that compared the sexual recidivism rates of children assigned to three groups according to the severity of their offense, "[t]here was no significant difference in the recidivism rates of juvenile offenders" in each of the three groups. Affidavit of Elizabeth J. Letourneau, Ph.D., Exhibit H at ¶ C1(iii); Affidavit of Michael F. Caldwell, Psy.D., Exhibit J at ¶ 3(F-G).

**2. Sexual Recidivism Is the Same for Children Who Committed Sexual and Non-Sexual Offenses.**

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. Affidavit of Elizabeth J. Letourneau, Ph.D., Exhibit H at ¶ B,

C1(iii).[23] One research study found "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 sexual crimes. Affidavit of Elena delBusto, M.D., Exhibit I at ¶ 16.[24]

### 3. Requiring Children to Register as Sex Offenders Does Not Improve Public Safety.

Public safety may be improved either by deterring first time offenders or by reducing recidivism. Requiring children to register as sex offenders accomplishes neither. Affidavit of Elizabeth J. Letourneau, Ph.D., Exhibit H at ¶ C. Registration of adolescents "has consistently been found to have no effect on the incident of first-time adolescent sexual offending." Affidavit of Michael F. Caldwell, Psy.D., Exhibit J at ¶ 4(D). Research has also found that the recidivism rate is not measurably different for registered and unregistered children who committed sexual offenses. *Id.* at ¶ 4(C).

### 4. Children Who Offend Sexually Are Nothing Like Adult Sex Offenders.

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[23] *See also* Caldwell, M., *Sexual offense adjudication and recidivism among juvenile offenders*, Sexual Abuse: A Journal of Research and Treatment, 19, 107-113 (2007), available at http://www.njjn.org/uploads/digital-library/resource_557.pdf; Caldwell, Ziemke, & Vitacco, *An examination of the sex offender registration and notification act as applied to juveniles: Evaluating the ability to predict sexual recidivism* in Psychology, Public Policy, and Law, 14(2), 89-114 (2008), available at http://www.ncjfcj.org/sites/default/files/examinationofthesexoffender.pdf; Driessen, E., *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; Hagan, Gust-Brey, Cho, & Dow, *Eight-year comparative analyses of adolescent rapists, adolescent child molesters, other adolescent delinquents, and the general population*, International Journal of Offender Therapy and Comparative Criminology, 43(3), 314-324 (2011), available at http://ijo.sagepub.com/content/45/3/314.refs; Zimring, Jennings, Piquero, & Hays, *Investigating the continuity of sex offending: Evidence from the second Philadelphia birth cohort*, Justice Quarterly, 26, 59-76 (2009), available at http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1590&context=facpubs; Zimring, Piquero, & Jennings, *Sexual delinquency in Racine: Does early sex offending predict later sex offending in youth and young adulthood?*, Criminology and Public Policy, 6(3), 507-534 (2007), available at http://onlinelibrary.wiley.com/doi/10.1111/j.1745-9133.2007.00451.x/pdf; Caldwell, *Study Characteristics and Recidivism Base Rates in Juvenile Sex Offender Recidivism*, International Journal of Offender Therapy and Comparative Criminology, 54(10) (2009), available at http://ijo.sagepub.com/content/54/2/197.full.pdf.

[24] *See also* Letourneau, E. J., & Miner, M. H., *Juvenile sex offenders: A case against the legal and clinical status quo*, Sexual Abuse: A Journal of Research and Treatment, 17, 313-331 (2005).

"Evidence is clear that juvenile sex offenders represent a very different population from adult sex offenders." Affidavit of Elena del Busto, M.D., Exhibit I at ¶ 13, 19. Children who offend sexually have much lower rates of sexual recidivism than adults. "Because impulse control tends to improve with maturation and is more amenable to treatment, sexually reoffense rates for juveniles tend to be fairly low, only about 7%. *Id.* at ¶ 14. "This is half as frequent as adult sex offenders for whom sexual recidivism has been estimated at about 13%." *Id.*

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, to name a few." *Id.* at ¶ 13 (internal citations omitted). "[W]ith maturation, a better understanding of sexuality, and decreased impulsivity, most of these behaviors stop. Of the population of adolescents who experiment with sexual deviance, only a small fraction will maintain sexually deviant behavior in adulthood." *Id.* at ¶ 15.

### 5. Children And Their Families Suffer Psychologically As A Result Of Sex Offender Registration.

Children who must register as sex offenders for life "will face innumerable barriers to successful prosocial development." Affidavit of Elizabeth J. Letourneau, Ph.D., Exhibit H at ¶ D3. "The process of identifying oneself as a registered sex offender multiple times per year, and of being arrested and possibly charged for new offenses due in part to this label seems likely to cause registered youth to view themselves as 'delinquent' even when they are law-abiding." *Id.* at ¶ D1. "Policies that promote youths' concepts of themselves as lifetime sex offenders will likely interrupt the development of a positive self-identity." *Id.*, citing Letourneau, E. J., & Miner, M. H., *Juvenile sex offenders: A case against the legal and clinical status quo* in *Sexual*

*Abuse: A Journal of Research and Treatment*, 17, 313-331 (2005). "The result of such stigma on adolescent development only serves to worsen self-esteem, contribute to depression in some cases leading to suicide, and perpetuate criminal acts, etc." Affidavit of Elena delBusto, M.D., Exhibit I at ¶ 18.

If a child's status as a registered sex offender becomes known in the community, the result is "a seriously detrimental effect on development and social integration." *Id.* at ¶ 19.The child may experience "adverse consequences such as unemployment, relationship loss, threats, harassment, physical assault, and property damage as well as psychological symptoms such as shame, embarrassment, depression or hopelessness as result of public disclosure." Affidavit of Michael F. Caldwell, Psy.D., Exhibit J at ¶ 5(A). "Furthermore, evidence has shown that public registration results in a sense of isolation and a loss of hope for the future, sentiments which can have devastating effects on adolescent emotional development." Affidavit of Elena delBusto, M.D., Exhibit I at ¶ 18.

These same consequences apply to a registered sex offender's family. Family members may also experience "being threatened, harassed, and assaulted or having property damaged." Affidavit of Michael F. Caldwell, Psy.D., Exhibit J at ¶ 5(A). Any household containing a "juvenile offender" is ineligible for public housing. 42 U.S.C.S. § 13663(a); 24 C.F.R. 960.204. Family members of registered as sex offenders may also be "forced to move" by a landlord. Affidavit of Michael F. Caldwell, Psy.D., Exhibit J at ¶ 5(A). They may lose friends or feel isolated. *Id.* at ¶ 5(A).

## II. SORNA REQUIRES CHILDREN TO REGISTER, RETROACTIVELY, AS SEX OFFENDERS FOR THE REST OF THEIR LIVES.

Pennsylvania has never required children adjudicated delinquent to register as sex offenders. On December 20, 2012, the Sexual Offender Registration and Notification Act

("SORNA") changed this. Under SORNA, Pennsylvania requires a "juvenile offender" to register as a sex offender. 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.[25]

The children before the court were not registered as sex offenders at the time of their adjudication. They have been retroactively registered as "juvenile offenders" under SORNA. 42 Pa.C.S. § 9799.12. Absent an exceedingly unlikely, if not impossible exception, the registration term is life. 42 Pa.C.S. § 9799.15.[26]

**A. Initial Registration**

A child who must register as a sex offender must register a long, detailed and personal list of information. 42 Pa.C.S. § 9799.16. This includes 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 phone 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," any "passport and documents establishing immigration status," the name and address of current and

[25] This petition does not address another category of youth who must register as sexual offenders under SORNA. "Sexually violent delinquent children" are children who have been involuntarily civilly committed for inpatient treatment "as a result of having been adjudicated delinquent for the act of sexual violence." 42 Pa.C.S. §§ 6403, 9799.13(9). Involuntary civil commitment follows a finding that the child is in need of commitment for involuntary treatment due to a mental abnormality or personality disorder, either of which results in "serious difficulty in controlling sexually violent behavior." 42 Pa.C.S. §§ 6358, 9799.24.

[26] 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.

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. If the child does not have "a fixed workplace," he or she must register "general travel routes and general areas" where the child works. 42 Pa.C.S. § 9799.16(b)(9). The child must register any occupational and professional licensing information, the name and address of any school where the child is or will be a student, any motor vehicle "including watercraft and aircraft" the child owns or operates, including a description, license plate number, registration or other identification number and vehicle location, the child's driver's license or identification card, birth date "and purported date of birth." 42 Pa.C.S. § 9799.16. If the child will be away from his or her residence for seven days or more, the child must register the address, length of time and dates of the "temporary lodging," 42 Pa.C.S. § 9799.16(b)(7). This information is required by statute.

The Pennsylvania State Police will also collect additional information during the initial registration.[27] According to the Pennsylvania State Police registration form, SP4-218, the child will be 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," "personal," "work," etc. Sexual Offender Registration Notification Form SP4-218, Exhibit A at ¶ J, 9. The child will be told that an occupational or professional license may include a "car dealer, barber, realtor." *Id.* at 11, ¶ 2(c)(9). The child will be told that a "general travel route and general area" of work is where, "e.g., you have a delivery route." *Id.* at 11, ¶

[27] The probation department may enter the registry information electronically into the Sex Offender Registry Tool ("PA SORT") or use a paper registration form, numbered SP4-218. Captain Scott Price, Pennsylvania State Police, PSP Status Update 12/17/12, Exhibit B, available at http://www.portal.state.pa.us/portal/server.pt/community/pa_sexual_offender_management/20801/psp_status_update_12_17_2012/1352364. The registration form, SP4-218, is not designed for children. The registering official must check off the "juvenile offender" box. Sexual Offender Registration and Notification Form, SP4-218, Exhibit A at 7.

2(b)(3). The child will be asked to register his or her "room no." at school. *Id.* at ¶¶ H, I, 8. The child will be asked to register the telephone number at work and his or her supervisor's name. *Id.* at ¶¶ H, I, 8.

Three particularly unclear registration terms are "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, the child will be asked 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, Exhibit A at ¶ K. The child will be asked 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. A child 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*, 2012 U.S. Dist. LEXIS 148770, *31 (Neb. 2012).

A child who is registered as a sex offender 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 the child wears glasses, height, weight, hair color, eye color, race, ethnicity, birth state/territory and birth country. SP4-218, Exhibit A 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, Exhibit A at

¶ F(31-34). "Marks" may include "deformities," a "mole," "skin discoloration," or "unknown." SP4-218, Exhibit A at 7.

The child will be photographed on both his face and body. 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. Photograph Standards, Exhibit C available at http://www.portal.state.pa.us/portal/server.pt/community/pa_act_111_of_2011/20820/photograph_standards/1133435. For example, "[f]or subjects who normally wear eyeglasses, a frontal mugshot image should be captured of the subject without glasses." *Id.* "Subject illumination shall be accomplished using a minimum of three (3) point balanced illumination." *Id.* The child 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. The child 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).[28] The child must provide a DNA sample. 42 Pa.C.S. § 9799.16(c)(6).

**B. The Child Must Verify the Registry Information at Least Every 90 Days.**

A child who is registered as a sex offender must report in person to the Pennsylvania State Police to verify the registry information every ninety days, even if there have been no changes to that information. 42 Pa.C.S. § 9799.15(e). Each time, the child will be asked to verify all of the above information and will be subject to a new mugshot. 42 Pa.C.S. § 9799.15(e). There is no exception if the child attends school, works full time, or both; under the statute this requirement applies to children as young as fourteen. *Id.*

[28] Captain Scott Price, PSP Status Update 12/17/2012, Exhibit B, 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).

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 the child's obligation to find transportation to an approved registration site at least every ninety days for the rest of his or her life. The two approved registration sites in York County are the State Police, 110 Trooper Court, York 17403 and the York County Sheriff's Department, 45 North George Street, York 17401. *See* State Police, Sex Offender Registration Approved Registration Sites, 42 Pa.B. 7628, Doc. No. 12-2460 (Dec. 15, 2012). The published list of approved registration sites does not include the hours of operation and does not state whether an appointment is necessary. *Id.* It does not state how long the verification process, including waiting room times, is estimated to take. It does not suggest public transportation routes.

In addition to appearing in person every ninety days for the rest of his or her life, a registered child must also report in person to register changes to his or her registry information whenever they occur. The child must appear 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. 42 Pa.C.S. § 9799.15(g). The child must appear to report any changes with regard to a vehicle "owned or operated" by the child. *Id.* This includes a change in where the vehicle is "parked." SP4-218, Exhibit A at 11 ¶ 2(b)(6); 42 Pa.C.S. § 9799.15(g). If the child plans to travel internationally, he or she 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). The child, who is growing and developing, must also submit to a photograph whenever "there is a significant change in appearance." *Id.* at (c)(4).

### C. Children Who Lack a Stable Residence Will Be Required To Register As a Transient.

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 "a list of places the transient eats, frequents and engages in leisure activities and any planned destinations, including those outside this Commonwealth." 42 Pa. C. S. § 9799.16(B)(6).

### D. Children Will Be Subject To Mandatory State Prison Sentences for Failure To Register.

The registration form, SP4-218, contains a summary of registration requirements, which are to be read to the child and which the child must sign. These are written in legal terms, e.g. "A Juvenile offender or Sexually Violent Delinquent Child must appear in person at an approved registration site quarterly." SP4-218, Exhibit A at 11. They are also written with advanced vocabulary (e.g. furnish, commencing, periodic, disseminated). *Id.* at 11-12. According to the registration form, the child is to be told "It is your responsibility as a sex offender to review and verify all information on this form and ensure it is correct. You should immediately bring any errors to the attention of the registering official before leaving the registration site. Failure to provide complete and accurate information when registering will subject you to arrest and felony prosecution. . . ." *Id.* at 12.

If the child gives incomplete or inaccurate information, does not appear every ninety days, or does not appear within three business days of a change, the child is subject to prosecution for a new crime of failure to register, verify or provide accurate information. 18

Pa.C.S. § 4915.1. The Pennsylvania State Police have a statutory obligation to initiate arrest proceedings. They will notify the United States Marshals Service and the municipal police, who "shall locate" and arrest the child. 42 Pa.C.S. § 9799.25(b)(2-3); *see also* 42 Pa.C.S. § 9799.22. If child is not arrested, the district attorney will seek an arrest warrant. 42 Pa.C.S. § 9799.22.

The above-described failure to comply with sex offender registration requirements is a felony. There are three categories of offenses: failure to register, failure to verify, and failure to provide accurate information. 18 Pa.C.S. § 4915.1. Failure to register or verify is a felony of the second degree as a first offense and, thereafter, a felony of the first degree. 18 Pa.C.S. § 4915.1(c)(1-2). Failure to provide accurate information is always a felony of the first degree. 18 Pa.C.S. § 4915.1(c)(3). The statutory maximum sentence, in adult court, for a felony of the second degree is ten years incarceration; for a felony of the first degree it is twenty years. 18 Pa.C.S. §106.

In adult court, the crimes of failure to register, verify or provide accurate information carry *mandatory* minimum prison sentences. 42 Pa.C.S. § 9718.4. Failure to register or verify carries a mandatory minimum sentence of three to six years for a first offense and, thereafter, five to ten years. 42 Pa.C.S. §§ 9718.4(a)(1)(iii), (a)(2)(i). Failure to provide accurate information carries a mandatory five to ten years for a first offense and, thereafter, seven to fourteen years. 42 Pa.C.S. §§ 9718.4(a)(1)(iv), (a)(2)(ii).

There is little to no defense to a failure to register or verify prosecution. The Pennsylvania State Police are to mail the child notices of his or her reporting requirements. 42 Pa.C.S. § 9799.25(c). "Failure to send or receive notice of information under this section shall not relieve the sexual offender from the requirements of this subchapter." 42 Pa.C.S. § 9799.25(d). "This letter will not be forwarded." SP4-218, Exhibit A at 11 ¶ 2(c). "[A] natural

disaster or other event requiring evacuation of residences" does not relieve a child of his or her registration requirements." 42 Pa.C.S. § 9799.25(e).

### E. Information On A Child's Registry Will Be Released.

#### 1. Primary Release of Registry Information

Within three business days, the Pennsylvania State Police will make the child's registration information available to a jurisdiction where the child resides, works or goes to school, a jurisdiction where the child terminates 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. For children in a court-ordered, full-time placement, the director of the facility will receive notice. 42 Pa.C.S. § 9799.19(h)(1)(ii)(3).

The child's registry information will also be disseminated further. The child will 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 the child 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). The child's fingerprints and palm prints will be submitted to the Federal Bureau of Investigation Central Database. 42 Pa.C.S. § 9799.16(c)(5). The child's DNA will be submitted into the combined DNA Index System (CODIS). 42 Pa. C. S. § 9799.16(c)(6). The child'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.

### 2. Secondary Release of Registry Information

SORNA contains no prohibition on any official recipient's release of a juvenile offender's registry information. 42 Pa.C.S. § 9799.18. Recipients, such as municipal governments or municipal police may release this information. 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. If information is released to even a few members of the public, it may be widely disseminated. People may make fliers, post notices on social media websites, inform the public, notify neighbors, employers and anyone else.

A child's status as a sex offender may also be released unintentionally as the child attempts to fulfill his or her obligations. A child's registration status may be disseminated to household members, including foster families or group home members, who see quarterly notices from the Pennsylvania State Police in the mail. 42 Pa.C.S. § 9799.25(c).[29] A child's status as a registered sex offender may be disseminated to members of the public, who see the

[29] 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." Envelope from Pennsylvania State Police, Megan's Law Section, Exhibit E.

child enter and exit the registration site, and to anyone whom the child asks for help with transportation. A court-ordered placement may encourage a child to discuss his or her registration status during group therapy.

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."[30] There is no written requirement that the email be sent through an encrypted account or any additional safeguards for privacy.

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 on Unified Judicial System website at http://ujsportal.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 criminal filings on the Internet will

[30] Contingency Letter, Pennsylvania State Police, Megan's Law Section, Exhibit D, available at http://www.portal.state.pa.us/portal/server.pt/community/pa_sexual_offender_management/20801/psp_status_update_12_20_2012/1358131.

increase over the life of the child. *See, e.g.*, Amaris Elliott-Engle, FJD Starts Electronic-Filing Pilot Project for Criminal Cases, *The Legal Intelligencer* (Apr. 15, 2013).

## III. CHILDREN REGISTERED AS SEX OFFENDERS IN PENNSYLVANIA WILL BE TREATED DIFFERENTLY AND MORE HARSHLY BY OTHER STATES WHEN TRAVELING OUTSIDE THE COMMONWEALTH.

Registered juveniles face not only the onerous requirements imposed by Pennsylvania's SORNA, but must navigate the complex, inconsistent and ever-changing requirements of the federal government and each of the 50 states—a task that is daunting for attorneys and nearly impossible for registrants. *See generally*, Catherine L. Carpenter & Amy Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L.J. 1071, 1076-1100 (2012) (discussing the various schemes and parameters of state sex offender laws).

Set forth below is a national review of state and federal law illustrating the Orwellian nature of sex offender regimes. Any Pennsylvania juvenile offender who enters another state for any reason will likely be labeled a sex offender in that state, be put on the public website, and will be subject to all the restrictive laws of that state. Yet, to determine the exact nature of a juvenile's obligations in each state, requires a complicated analysis of the federal requirements along with each states' laws. The juvenile must be able to find and understand (a) whether another state treats Pennsylvania juvenile sex offenders as sex offenders in that state; (b) what types of contact with the state will trigger registration requirements; (c) whether the registration information will be publicly disclosed; and (d) what residency, employment, or other restrictions are imposed.

Most states require a Pennsylvania registrant to register upon minimal contact with the state and will publicly disclose registry information, nullifying Pennsylvania's non-public juvenile registration. Many states also impose significant residency, work, and education restrictions.

Overlying the entire scheme is the reality that the inevitable failure to correctly navigate these laws will lead to prosecution and significant time in jail.[31]

### A. Pennsylvania Juvenile Offenders Are Deemed Sex Offenders By Most Jurisdictions.

#### 1. Federal Classification

All Pennsylvania juvenile offenders are also sex offenders under federal law. 42 U.S.C.S. § 16911(8). Federal law sets the minimum requirements for interstate registration. *See* 42 U.S.C.S. § 16901 *et seq.* Sex offenders as defined by federal law have a duty to register. 42 U.S.C.S. §§ 16911-16913. A juvenile registrant who travels to another state and changes his "name, residence, employment, or student status" must "appear in person in at least 1 jurisdiction involved" to update his registration information or face up to 10 years in federal prison. 42 U.S.C.S § 16913 (registration requirements); 18 U.S.C.S. § 2250 (establishing crime). Federal law defines reside as "the location of the individual's home or other place where the individual habitually lives." 42 U.S.C.S. § 16911(13). Juvenile offenders who travel, vacation, or even briefly stay in another state will not trigger federal obligations. The federal requirements, however, set a floor, not a ceiling, and comprise the extent of a registrant's obligations in only the five states that expressly exempt or clearly exclude of state juveniles—Alaska, Arkansas, Connecticut, Maine, and New Mexico.[32] Every other state imposes its own more inclusive and restrictive regulations.

#### 2. State Classifications

[31] *See, e.g.*, 730 Ill. Comp. Stat. 150/10(a); 730 Ill. Comp. Stat. 5/5-4.5-40 (providing for at least a 2 year mandatory prison sentence for a first offense and at least a 3 year mandatory prisons sentence for second or subsequent offenses); Mass. Gen. Laws. ch. 6, § 178H (providing for a mandatory 6 month minimum prison sentence for a first offense and a 5 year mandatory prison term for second or subsequent violations).

[32] Alaska, Ala. Stat. § 12.63.100, Arkansas, *see* A.G. Opinion No. 2009-198 (not requiring registration); Connecticut, Conn. Gen Stat. § 54-250 et seq., Maine, Me. Rev. Stat. tit. 34A § 11202, New Mexico, N.M. Stat. § 29-11A-3.

In forty-five states, Pennsylvania registrants are included as registerable sex offenders under most circumstances.[33] These states adopt different approaches to determine whether a juvenile offender is a registerable sex offender. In twenty-six states, registration is required for Pennsylvania juveniles if they were required to register in the adjudicating state.[34] *See, e.g.,* S.C. Code Ann. § 23-3-430(a) ("[a]ny person, regardless of age, residing in the State of South Carolina . . . who has been convicted of, adjudicated delinquent for, pled guilty or nolo contendere, or found not guilty by reason of insanity to an offense for which the person was required to register in the state where the conviction or plea occurred.").

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[33] *See* Ala. Code §§ 15-20A-3; 15-20A-5; Ariz. Rev. Stat. §§ 13-3821(A)-(R); Cal. Pen. Code §§ 290-002 to 005 (appearing to require adjudicated juveniles in California to register but only those out of state registrants who work or go to school in California to register); Colo. Rev. Stat. § 16-22-108 (2012); Del.Code. 11 § 4120; Fl. Stat. § 985.4815(d)(2); Ga. Code § 42-1-12(e)(6)-(8); Haw. Rev. Stat. § 846E-2(b); Idaho Code § 18-8403; 730 Ill. Comp. Stat. 150/2 to150/6; Ind. Code § 11-8-8-4.5(b)(1) (2013); Iowa Code § 692A.103; Kan. Stat. § 22-4902(a)(4) (2013); Ky. Rev. Stat. § 17.510(7); La. R.S. 15:542.1.3; Md. Code , Crim. Pro. §§ 11-704(a)-(b) & 11-704.1 (2012); Mass. Gen. Laws. ch. 6, § 178E; 6 (2012); Mich. Comp. Laws §§ 28.723., 28.724(6) (2013); Minn. Stat. § 243.166, subd. 1b(b)(3); Miss. Code §§ 45-33-25(1)(a)(2012); (b); Mo. Rev. Stat. §§ 211.425(1), 589.400 (because Pennsylvania juvenile offenders will likely be deemed adult offenders); Mont. Code § 46-23-502(9)(b); Neb. Rev. Stat. § 29-4003(1)(iv) (2013); Nev. Rev. Stat. §§ 179D.095, 179D.097 (2012); N.H. rev. Stat. §§ 651-B:1(V)(c), 651-B:2 (2013); N.J. Stat. §§ 2C:7-2(a)(2), 2C:7-2(b)(3) (2013); N.M. Stat. § 29-11A-3 (2013); N.D. Cent. Code, § 12.1-32-15(3)(b) (2012); Okl. Stat. tit. 10A § 2-8-102(4); Or. Rev. Stat. §§ 181.597(6), 181.609 (2013); 42 PA.C.S. § 9799.13(8); R.I. Gen. Laws § 11-37.1-3(d) (2013); S.C. Code § 23-3-430 (2012); S.D. Codified Laws § 22-24B-2 (2012); Tenn. Code §§ 40-39-202 to 203; Tex. Code Crim. Proc. art. §§ 62.001, 62.002 (2013); Vt. Stat. tit. 13 § 5401(10)(D) (2013); Va. Code §§ 9.1-901, 9.1-902; Wash. Rev. Code § 9A.44.128(2), (10); W. Va. Code § 15-12-9(c) (2013); Wis. Stat. § 301.45(1g)(dj) (2012) (but only if still on supervision as a result of the offense); Wyo. Stat. §§ 7-19-301 to 302 (2013). Four more states, specifically New York, North Carolina, Ohio, and Utah do or appear to require registration, but the statutes or current state of the law make determining the scope the law ambiguous. *See* N.Y. Correct. Law §168-a(2)(d) (not expressly cleat as to whether a "conviction" as understood by New York law applies to out of state adjudications, but see *Matter of Daniel Kasckarow v. Bd. Of Exam*, 936 N.Y.S.2d 498 (N.Y. Sup. 2011); *People v. Kuey*, 83 N.Y.2d 278 (N.Y. App. 1994) (suggesting conviction includes adjudications)). In North Carolina any person must register if he has "a final conviction in another state of an offense that requires registration under the sex offender registration statutes of that state." N.C. Gen. Stat. § 14-208.6(4)(b). The statute however does not define what is or is not a "final conviction." Yet, North Carolina does register juvenile offenders. N.C. Gen. Stat.. § 14-208.26. Given that North Carolina punishes failures to register as a felony, N.C. Gen. Stat.. § 14-208.11, it would be unwise to fail to inform the State Police. *See also* Ohio Rev. Code § 2950.01; *but see In re. C.P.*, 967 N.E.2d 729 (Ohio 2012) (holding juvenile registration is punishment); Utah Code § 77-41-102.

[34] Ariz. Rev. Stat. §§ 13-3821(A)-(R); Cal. Pen. Code §. 290-002-005; Colo. Rev. Stat. § 16-22-108; Fl. Stat. § 985.4815(d)(2) (2013); Ga. Code § 42-1-12(e)(6)-(8) (2013); Haw. Rev. Stat. § 846E-2(b); Idaho Code § 18-8403 (2013); Ind. Code § 11-8-8-4.5(b)(1) (2013); Iowa Code § 692A.103 (2013); Kan. Stat. § 22-4902(a)(4) (2013); Ky. Rev. Stat. § 17.510(7); Mich. Comp. Laws §§ 28.723., 28.724(6); Minn. Stat. § 243.166, subd. 1b(b)(3); Mont. Code § 46-23-502(9)(b); Neb. Rev. Stat. § 29-4003(1)(iv) (2013); N.H. Rev. Stat. §§ 651-B:1(V)(c), 651-B:2 (2013); N.Y. Correct. Law §168-a(2)(d); N.C. Gen. Stat. § 14-208.6(4)(b) & N.C. Gen. Stat. § 14-208.26; Okl. Stat. tit. 10A § 2-8-102(4); S.C. Code § 23-3-430 (2012); S.D. Codified Laws § 22-24B-2 (2012); Vt. Stat. tit. 13 § 5401(10)(D) (2013); Va. Code §§ 9.1-901, 9.1-902; Wash. Rev. Code § 9A.44.128(2), (10); W. Va. Code § 15-12-9(c) (2013); Wis. Stat. § 301.45(1g)(dj) (2012) (but only if still on supervision as a result of the offense).

Twelve states require registration for children whose offenses in the adjudicating state are similar to registerable offenses under their own laws.[35] Pennsylvania juvenile registrants will almost universally be required to register under this scheme, but to be sure, all children must engage in a complicated multi-step comparison of definitions and criminal codes. *See, e.g.*, Del. Code. 11 §§ 4120(e)(1), 4121; 765-80 (cross referencing each provision); 730 Ill. Comp. Stat. 150/2 (the same). Six other states and Pennsylvania adopt a catch-all approach of registering juveniles who were placed on a registry in the state in which they were adjudicated or were adjudicated of offenses similar to those enumerated in 42 Pa.C.S. § 9799.12.[36] *See, e.g.*, Nev. Rev. Stat. Ann. § 179D.097(s)-(t) (illustrating a catchall approach). This detailed analysis of each states' comparison is only the beginning of what a juvenile offender must do upon traveling. Once he determines if his registration in Pennsylvania requires registration in another state, he must then determine what type of contact with the state demands registration.

### B. State Contacts Triggering Registration

Similar to federal law, juvenile offenders will have to register upon residing, working, or becoming a student within the state. Each state sets forth different triggering contacts, some of which are so minimal that just stepping foot into the state can trigger registration. *See, e.g.*, Wyo. Stat. § 7-19-301 (including "hotels, motels, public or private housing, camping areas, parks, public buildings, streets, roads, highways, restaurants, libraries or other places . . ."). These

[35] Ala. Code §§ 15-20A-3; 15-20A-5; Del. Code. 11 § 4120 et seq.; 730 Ill. Comp. Stat. 150/2 to150/6; LA. R.S. 15:542.1.3; Mass. Gen. Laws. ch. 6, § 178E; 6 (2012); Mo. Rev. Stat. § 211.425(1); N.D. Cent. Code, § 12.1-32-15(3)(b) (2012); Ohio Rev. Code § 2950.01; R.I. Gen. Laws § 11-37.1-3(d) (2013)(requiring the offense to be similar but also on the registry of another state); Tex. Code Crim. Proc. art. §§ 62.001, 62.002 (2013); Utah Code § 77-41-102; Wyo. Stat. §§ 7-19-301 to 302 (2013).

[36] Md. Code , Crim. Pro. §§ 11-704(a)-(b)& 11-704.1 (2012); Miss. Code §§ 45-33-25(1)(a)(2012); Nev. Rev. Stat. §§ 179D.095, 179D.097 (2012); N.J. Stat. §§ 2C:7-2(a)(2), 2C:7-2(b)(3) (2013); Or. Rev. Stat. §§ 181.597(6), 181.609 (2013); Tenn. Code §§ 40-39-202 to 203.

contacts generally fall into three categories—establishing some form of residence, taking on work (both paid and volunteer), or becoming a student. *See infra* sections B(1) and (2).

Oklahoma, however, takes a unique approach. Although there is no residency, work, or schooling criteria for purposes of registration, the District Attorney may make an application to include the juvenile in the state registry. Okl. Stat. tit. 10A § 2-8-104. The application will include an assessment and criteria for a court to review to determine if the juvenile warrants inclusion. *Id.* While in some respects this approach is more protective of juveniles, this statute places nearly unfettered discretion in the hands of the local district attorney to determine if a juvenile offender shall register. A child registrant coming in from out of state cannot know whether he will or will not be subject to registration. The only method to surely avoid Oklahoma registration is to not enter the state. The differences in each state's types of contacts means that a juvenile offender will have to assess each and every state's triggering contacts to conclusively determine if he has to register.

**1. Residence**

Pennsylvania requires a sex offender to register upon establishing a "residence within the Commonwealth" 42 Pa.C.S. § 9799.13(8). Residence is defined as "a location where an individual is domiciled or intends to be domiciled for 30 consecutive days or more during a calendar year." 42 Pa.C.S. § 9799.12. This definition is generally much more forgiving than those of other states. In Alabama, a juvenile sex offender must register within 3 days of establishing a "residence." Ala. Code § 15-20A-32(a). Residence is defined as

> Each fixed residence or other place where a person resides, sleeps, or habitually lives or will reside, sleep, or habitually live. If a person does not reside, sleep, or habitually live in a fixed residence, residence means a description of the locations where the person is stationed regularly, day or night, including any mobile or transitory living quarters or locations that have no specific mailing or street address. Residence shall be construed to refer to the places where a person

> resides, sleeps, habitually lives, or is stationed with regularity, regardless of whether the person declares or characterizes such place as a residence.

Ala. Code § 15-20A-4(20).

This sort of sweeping yet ambiguous definition is not uncommon. *See, e.g.,* Ariz. Rev. Stat. § 13-3821(R) ("'residence' means the person's dwelling place, whether permanent or temporary"); Colo. Rev. Stat. § 16-22-102(5.7) ("a place or dwelling that is used, intended to be used, or usually used for habitation by a person" or a temporary shelter used for14 consecutive days or more"); La. Rev. Stat. 15:542.1.3 ("[r]esidence" means a dwelling where an offender regularly resides, regardless of the number of days or nights spent there" and includes places here a homeless offender habitually stays). In Delaware, the court stepped in to require some level of permanence to the statutory definition there. *Andrews v. State*, 34 A.3d 1061 (Del. 2011). Nevada has adopted an unclear circular definition: "'[r]esides' means the place where an offender resides . . . ." Nev. Rev. Stat. § 179D.090.

Many states require registration for even very short stays in the state.[37] Florida, for example, requires registration of a permanent residence, which means any "place where the person abides, lodges, or resides for 5 or more consecutive days." Fla. Stat. §§ 775.21(2)(k)-(l); 985.481 to 985.4815. It is unclear whether one can have more than one permanent residence. Fla. Stat. §

[37] *See also, e.g.*, Del.Code. 11 § 4120(a) (definitions); Colo. Rev. Stat. § 16-22-102 (14 days or longer); Ga. Code. § 42-1-12; Haw. Rev. Stat. § 846-2 (not defining residence but discussing addresses in terms of length of stay); 730 Ill. Comp. Stat. 150/1 et seq.; Iowa Code § 692A-101 ("'Residence' shall be construed to refer to the places where a sex offender resides, sleeps, habitually lives, or is stationed with regularity, regardless of whether the offender declares or characterizes such place as the residence of the offender."); Kan. Stat. § 22-4902(j) (30 days); Ky. Rev. Stat. § 17.500(7) (any place where a person sleeps); Mass. Laws. G.L. ch. 6 § 178C; Mich. Comp. Laws. § 28.722; Minn. Stat. § 243.166; Miss. Code § 45-33-23 (7 or more consecutive days); Mo. Rev. Stat. §§ 211.425(1); 589.400 (at least 7 days in a 12 month period); Mont. Code § 46-23-504(10 consecutive days or 30 aggregate days in a year); Neb. Rev. Stat. §§ 29-4001.1, 29-4004 (at least seven days); N.H. Rev. Stat. § 651-B.4 (statute otherwise does not define the term); ("Resides" means the place where an offender resides); Nev. Rev. Stat. § 179D.120 (any employment, pay or volunteer for any amount of time); N.J. Stat. §§ 2C:7-2(a)(2); N.Y. Correct. Law §168-k (obligation upon moving into the state and requiring significant actions); N.C. Gen. Stat. § 14-208.5 et seq. (multiple requirements and unclear application); N.D. Cent. Code, § 12.1-32-15 (30 or more days); R.I. Gen. Laws § 11-37.1-2 to -3; S.C. Code § 23-3-430 (30 or more days in calendar year); S.D. Codified Laws § 22-24B-2 (specifying domicile and temporary domicile but not defining those terms); Tenn. Code §§ 40-39-202(17) (establishing a physical presence within the state).

775.21(2)(k)-(m). Indiana considers it sufficient if the "offender spends or intends to spend at least seven (7) days (including part of a day) in Indiana during a one hundred eighty (180) day period." Ind. Code. § 11-8-8-7(a)(1). In Montana, the law states "'[r]esidence' means the location at which a person regularly resides, regardless of the number of days or nights spent at that location, that can be located by a street address, including a house, apartment building, motel, hotel, or recreational or other vehicle." Mont. Code § 46-23-502(7)(a). Idaho simply refers to a residence as a person's "present place of abode." Idaho Code § 18-8303(15).

Kentucky's statute mandates nearly universal registration. It defines residence as "any place where a person sleeps." Ky. Rev. Stat. § 17.500(7). Such sweeping language explicitly means that spending a night in a hotel, getting stuck at the airport, or even parking a car while driving through the state will set off the chain of local registration. Registration may simply depend on which state one falls asleep in. Juveniles, who may have little control over their own movements, will not likely understand these counter-intuitive yet highly demanding regulations.

**2. Work or School**

"Residency" is not the only type of contact that requires registration. Most states include work and school requirements as well.[38] Michigan's registration statute generally exemplifies requirements nationwide. "Designated offenders "shall register with the local law enforcement

[38] *See, e.g.*, Ala. Code § 15-20A-28 (unclear if juveniles must register upon becoming employed as it is not discussed by the statute); Ala. Code § 15-20A-4(5) (to include any pay or volunteer for any amount of time); Del.Code. 11 § 4120(a) (definitions); 730 Ill. Comp. Stat. 150/1 et seq.; Iowa Code § 692A-101; Minn. Stat. § 243.166 subd. 1a(k) ("work" is any employment or volunteer service for 14 or more days); Miss. Code §§ 45-33-23 to 25 (specifying employment but not defining it); Mo. Rev. Stat. §§ 211.425(1); 589.400 (juvenile offenders are not required to register upon working or starting school, but because pa registrants will likely be adult offenders, works or attends school for 7 or more days in a calendar year); Mont. Code § 46-23-504(does not include work or schooling); Neb. Rev. Stat. §§ 29-4001.1 to 29-4004 (requiring registration upon "entering" state and taking up work or school but not defining those terms); N.H. Rev. Stat. §§ 651-B:1, B:4 (requiring registration for work and schooling, but not defining the terms); Nev. Rev. Stat. § 179D.120 (any employment, pay or volunteer for any amount of time); Nev. Rev. Stat. § 179D.110 (student); N.Y. Correct. Law §168-a (definitions); N.C. Gen. Stat. § 14-208.6 (14 consecutive days or enrolment); N.C. Gen. Stat. § 14-208.6 (definitions); N.D. Cent. Code, § 12.1-32-15(5)-(7) (stating but not defining); R.I. Gen. Laws § 11-37.1-2 to -3 (applying federal definitions); Tenn. Code § 40-39-202 (definitions).

agency, sheriff's department, or the department immediately after becoming domiciled or temporarily residing, working, or being a student in this state." Mich. Comp. Laws. § 28.724 sec. 4(6). However, like the term residence, each state defines work, employment or schooling differently. Michigan, for instance, defines work in terms of employment. It broadly provides that: "'[e]mployee' means an individual who is self-employed or works for any other entity as a full-time or part-time employee, contractual provider, or volunteer, regardless of whether he or she is financially compensated." Mich. Comp. Laws. § 28.722 sec.2(e). Working for Habitat for Humanity, even for a day, would require registration under Michigan law.

New Jersey's law poses significant hurdles to a juvenile offender living close to its border and trying to work or go to school.

> A person who in another jurisdiction is required to register as a sex offender and (a) is enrolled on a full-time or part-time basis in any public or private educational institution in this State, including any secondary school, trade or professional institution, institution of higher education or other post-secondary school, or (b) is employed or carries on a vocation in this State, on either a full-time or a part-time basis, with or without compensation, for more than 14 consecutive days or for an aggregate period exceeding 30 days in a calendar year, shall register.

N.J. Stat. § 2C:7-2(a)(2). The terms are not further defined. However, schooling would appear to cover on-line courses if "enrolled" as a student even if no physical contact with the state ever occurred. A person who wanted to engage in contracting or delivery work would not be able to go to New Jersey without registering, substantially limiting job opportunities.

South Dakota similarly defines student as "any person who is enrolled on a full-time or part-time basis, in any public or private educational institution, including any secondary school, trade, or professional institution, or institution of higher education." S.D. Codified Laws § 22-24B-4. No exception is made for on-line courses.

Colorado defines "temporary resident" to include students and workers. Colo. Rev. Stat. § 16-22-102(8). Although not intuitive, temporary residence includes those who are:

> (a) Employed in this state on a full-time or part-time basis, with or without compensation, for more than fourteen consecutive business days or for an aggregate period of more than thirty days in any calendar year; or (b) Enrolled in any type of educational institution in this state on a full-time or part-time basis; or (c) Present in Colorado for more than fourteen consecutive business days or for an aggregate period of more than thirty days in a calendar year for any purpose, including but not limited to vacation, travel, or retirement.

Colo. Rev. Stat. § 16-22-102(8). This definition also expressly includes vacationing in Colorado.

These statutes illustrate how quickly minor contacts with a state will mandate registration across the country. Generally, mere entry into a state in some way will trigger registration requirements. *See,* note 34 *supra.* Juvenile offenders will, if they understand the risks and are able, limit traveling so as to avoid trying to decipher these laws and to avoid the risk of failing to register. Over a lifetime, however – and Pennsylvania's juvenile registrants must deal with these demands and risks for life – children will grow up and will travel to other states where they will be forced to register.

### C. Public Disclosure of Juvenile Offender Information

Beyond facing the above regulatory hurdles, Pennsylvania juvenile registrants are subject to additional consequences under other state schemes. Pennsylvania seemingly protects juvenile registrants from having their information disclosed publicly. The provisions governing this state's public internet website do not include "juvenile offenders." *See* 42 Pa.C.S. § 9799.28. However, most states do include juvenile offenders in their public notification schemes when registration is required by that state. Moreover, once public, that information is linked to the Dru Sjodin National Sex Offender Website and numerous private sex offender notification websites. Essentially, once the information becomes publicly available, it will remain available.

### 1. States Requiring Registration Will Notify the Public

At least twenty-eight states include juvenile offenders on a public registry with little or no restrictions.[39] 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.[40] Only five states which register juvenile offenders exempt them from public notification.[41]

The states that disclose information do so in a variety of ways. Alabama exemplifies the standard practice where all specified registration information is made publicly available on a state maintained website. Ala. Code § 15-20A-08. Arizona not only provides a basic public website "for each convicted or adjudicated guilty except insane sex offender in this state who is required to register . . . ," Ariz. Rev. Stat. § 13-3827(b), but an additional one for the internet identifiers of offenders who are classified at least a level II risk (which can be found automatically if the chief of police does not have enough information, *see* § 13-3825).

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[39] *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.

[40] 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 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).

[41] 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.

In addition to a website, Florida statutes require that its department of law enforcement set up a phone alert system and may publicly disclose all information that is not otherwise deemed confidential. Fl. Stat. § 943.043. Nothing about a juvenile registrant's information is deemed confidential. Accordingly, a juvenile offender who spends five days on vacation in Florida has to register and would immediately be subject to public scrutiny. *See* Fl. Stat. § 775.21.

Many states also actively notify the community of juvenile offenders. For example, in Georgia, in addition to maintaining a public website, local Sheriffs "may post the list of sexual offenders in any public building in addition to those locations enumerated in subsection (h) of this Code section." Ga. Code Ann. § 42-1-12(j)(2). Further, "[o]n at least an annual basis, the Department of Education shall obtain from the Georgia Bureau of Investigation a complete list of the names and addresses of all registered sexual offenders and shall provide access to such information, accompanied by a hold harmless provision, to each school in this state." Ga. Code Ann. § 42-1-12(l)(1). Under the scheme, if a juvenile offender stays in Georgia for 10 consecutive days, all of the information which Pennsylvania keeps private will be uploaded to a public website, posted on public buildings, and sent to every school in the state.

Nevada takes an exceptionally active role in notifying the public. With respect to any registrants, the local police

> Shall immediately provide all updated information obtained from the Central Repository . . . to: (1) Each school, religious organization, youth organization and public housing authority in which the offender or sex offender resides or is a student or worker;(2) Each agency which provides child welfare services as defined in NRS 432B.030; (3) Volunteer organizations in which contact with children or other vulnerable persons might occur;

Nev. Rev. Stat. Ann. § 179D.475(2)(a). Nevada gives the state registry significant discretion in disclosing the information to hundreds of entities and potentially thousands of people. *See also*

W. Va. Code § 15-12-5 (2013) (including dissemination to religious and volunteer organizations).

Nevada is not alone in giving wide discretion to state officials to disclose registrants' information. Virginia, for example, gives its State Police the ability to publish, in addition to age, name, photographs and offenses, "such other information as the State Police may from time to time determine is necessary to preserve public safety . . . ." Va. Code Ann. § 9.1-913. These are not unusual provisions. *See supra.*

A few states publicly disclose juvenile offenders in the same manner as adult offenders with singular exceptions that appear meant only for states that choose to register juveniles for statutory sexual assaults or misdemeanors, neither of which apply to juvenile offenders. Iowa, for example, discloses information for all offenders except juveniles who committed a statutory sex offense. *See* Iowa Code § 692A.121(2)(b)(2)(a). Vermont also places limitations on public disclosure, but the limitations will never exempt any Pennsylvania juvenile offender. VT. Stat. Ann. tit. 13 § 5411a(a)(7) (providing disclose if the registerable offense "in the other jurisdiction was: (i) a felony; or (ii) a misdemeanor punishable by more than six months of imprisonment.").

Even in states with limited disclosure, it is still highly consequential. New Jersey's policy offers a good example. When a juvenile offender moves to or resides in New Jersey, he must be assessed by a county prosecutor to determine his risk severity. *See Attorney General Guidelines for Law Enforcement for the Implementation of Sex Offender Registration and Community Notification Laws,* New Jersey, Rev. March 2000, *available at* http://www.state.nj.us/lps/dcj/megan1.pdf); N.J. Stat. §§ 2C:7-7 to 10. If assessed to be at least a moderate risk for reoffending, even if the individual was not found to be a sexually violent

delinquent child in Pennsylvania, they are then added to the public website. N.J. Stat. § 2C:7-13(e).

The Internet is also not the only form of notification in New Jersey. The Attorney General has provided for community notification as follows:

> Where a registrant's risk of re-offense is moderate or high, notification is to be provided to organizations in the community deemed "likely to encounter" a registrant. The Prosecutor's Office shall maintain a list of community organizations which are eligible to receive notification. Organizations to be included on the notification list are to be limited to those groups, agencies and organizations that own or operate an establishment where children gather under their care, or where the organization cares for women. All public, private and parochial educational institutions up through grade 12, licensed day care centers and summer camps will be automatically included on the notification list and do not need to register.

*New Jersey Attorney General Regulations* at 10. These regulations further demonstrate that literally thousands of people will learn of an individual's juvenile offender status because of the simple act of traveling or moving out of state.

**2. Information Will Be Publicly Available and Disclosed on the Federal Internet Website and Federal Registry.**

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 (last visited April 15, 2013). 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) (last visited April 15, 2013). The website conducts searches in real time, *see*, National Sex Offender Website

FAQs, *at* http://www.nsopw.gov/en-us/Home/FAQ#answer-06, (last visited April 15, 2013). As long as a juvenile offender is listed on any jurisdiction's website, he will be nationally searchable.

### 3. Private Websites Will Retrieve Any Data Disclosed.

Many private websites also mine state registries in efforts to disseminate information, track, and humiliate 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 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/ (last visited, April 15, 2013). 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.

Further, social networking websites may contribute to public notification even when an offender does not leave the sate. Pennsylvania maintains a registry separate from the website

which contains all of the information registered by a juvenile offender. 42 Pa.C.S. § 9799.16. That registry shares all information with the National Sex Offender Registry, § 9799.16, and is maintained by the U.S. Attorney General. 42 U.S.C.S. § 16919. Information on that registry is not made available on the Internet.

In 2008, however, 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.S. § 16915b(a)(1). Social networking sites then may use the system to determine whether registered sexual offenders are using their sites. § 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. § 16915b(c)(2).

### D. Other Impacts

Once ensnared in another state's laws, juveniles will face numerous residency and employment restrictions.[42] Often, they will be unable to live in any urban center. Oklahoma, for instance, prohibits either temporarily or permanently residing

> within a two-thousand-foot radius of any public or private school site, educational institution, property or campsite used by an organization whose primary purpose is working with children, a playground or park that is established, operated or supported in whole or in part by city, county, state,

[42] *See, e.g.,* Ga. Code § 42-1-15 (2011) (prohibiting sex offenders from living within 1000 feet of schools, daycare facilities, etc.); Fl. Stat. § 775.215 (2012) (prohibiting residing within 1000 feet of school, daycare, or park); Ky. Rev. Stat. § 17.545 (2012) (barring sex offenders from residing within 1000 feet of any preschool, primary or secondary school public playground or licensed child day-care facility); *See also*, Ohio Rev. Code § 2950.034 (West 2011) (100 feet of school) invalidated by *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011) (finding section of the law unconstitutional): Okl. Stat. tit. 57 § 590 (prohibiting sex offenders from living with 2000 feet of a playground, park, school or camp); Utah Code § 77-27-21.7 (2012) (prohibiting sex offenders from being in the area, on foot or in or on any motorized or nonmotorized vehicle, of any day-care facility, public park, or primary or secondary school). *See also, Kennedy v. Louisiana*, 554 U.S. 407, 457 n.5 (2008) (Alito, J., dissenting) (collecting statutes).

> federal or tribal government, or licensed child care center as defined by the Department of Human Services.

Okl. Stat. tit. 57 § 590. Any person who intentionally moves into a prohibited area faces a mandatory minimum of one year in jail. § 590(C). California similarly bans "any person for whom registration is required pursuant to Section 290 [sex offender code] to reside within 2000 feet of any public or private school, or park where children regularly gather." Cal . Penal Code § 3003.5(b).

"Twenty-three states have also implemented electronic monitoring systems, utilizing global positioning software (GPS), to provide information to probation and parole officials regarding the location of sex offenders." Emily A. White, *Prosecutions under the Adam Walsh Act: Is America Keeping its Promise?*, 65 Wash. & Lee L. Rev. 1783, 1790 (2008). These monitoring restrictions are not limited to those offenders serving probation or parole, but in some cases may apply for life. *See, e.g.*, Sarah Shekhter, *Note, Every Step You Take, They'll Be Watching You: The Legal and Practical Implications of Lifetime GPS Monitoring of Sex Offenders*, 38 Hastings Const. L.Q. 1085, 1085-92 (2011).

Even when states do not impose residency restrictions, many municipalities will. *See, e.g., Wilson v. Flaherty*, 689 F.3d 332 (4th Cir. 2012) (Wynn, J., dissenting) (compiling ordinances and cases) ("Commerce, Tex., Code of Ordinances ch. 66, art. IV, § 66-102(2) (2007)[;]...Killeen, Tex., Code of Ordinances ch. 16, art. VIII, § 16-141 (2007)[;] . . . Stephenville, Tex., Code of Ordinances tit. XIII, § 130.82 (2007) . . .); *see also, e.g., Doe v. Miller*, 298 F. Supp. 2d 844, 851 (S.D. Iowa 2004) (discussing Des Moines ordinance). Many communities with ordinances now even erect "tiny parks" to prevent registered offenders from living in the towns. *See* Ian Lovett, *Neighborhoods Seek to Banish Sex Offenders by Building Tiny Parks*, N.Y. Times (March 9, 2013).

## PROPOSED CONCLUSIONS OF LAW

### I. SORNA'S REQUIREMENT THAT JUVENILES ADJUDICATED DELINQUENT OF OFFENSES COMMITTED PRIOR TO SORNA'S EFFECTIVE DATE REGISTER AS SEX OFFENDERS IMPOSES ADDITIONAL PUNISHMENT IN VIOLATION OF THE *EX POST FACTO* CLAUSES OF THE PENNSYLVANIA AND UNITED STATES CONSTITUTIONS.

The United States Constitution provides that "[n]o Bill of Attainder or ex post facto Law shall be passed." U.S. Const. art. 1, § 10. The Clause is aimed at "laws that retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 41 (1990) (internal citations omitted).

No Pennsylvania court has considered whether the punitive provisions in the SORNA render it violative of the Ex Post Facto clause.[43] The courts' previous interpretations of Megan's Law are not dispositive of Petitioner's claims because the current version of SORNA, 42 Pa.C.S. § 9799.10, *et seq*. requires more onerous and affirmative reporting obligations and applies, for the first time, to juveniles. Indeed, no Pennsylvania court has considered the appropriateness of the registration requirements at all as applied to juveniles.[44]

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[43] Previous versions of this legislation, known as Megan's Law I and II have been found to not violate the ex post facto provisions of the Pennsylvania and U.S. Constitutions. *See Com. v. Benner*, 853 A.2d 1068 (Pa. Super. 2004) *Commonwealth v. Williams*, 574 Pa. 487, 832 A.2d 962, 982 (2003); *Commonwealth v. Gaffney*, 557 Pa. 327, 733 A.2d 616 (1999): *See also Commonwealth v. Leidig*, 850 A.2d 743 (Pa.Super.2004), aff'd 956 A.2d 399 (Pa.2008) (mandatory registration under Megan's Law II was determined to be a collateral and not punitive consequence of the guilty plea and therefore defendant was not entitled to withdraw plea because of lack of knowledge of requirement).

[44] In *U.S. v. Juvenile Male,* 590 F.3d 924 (2009), the Ninth Circuit held that juvenile SORNA did violate ex post facto laws, given the many punitive effects of the law and the fact that there was no evidence that juvenile sex offenders had high rates of recidivism. Although the case was vacated on mootness grounds, the Ninth Circuit analysis is highly instructive. Many state courts have also found similar constitutional problems. In Ohio, the retroactive application of newly enacted registration requirements (removing the right to a hearing, automatically labeling certain individuals as Tier II offenders, and requiring registrations in the county of residence, work, and school for 25 years) violated the state constitution's ban on Ex Post Facto laws. *See State v. Williams*, 952 N.E.2d 1108 (Ohio 2011). In Indiana, registration requirements were also found to be violative of the state's ex post facto clause. The Indiana Supreme Court found that the retroactive application of the registration requirements did not give fair warning and violated the petitioner's rights. *See Wallace v. State*, 905 N.E.2d 371, 378 (Ind. 2009). In Maine, SORNA provisions were found unconstitutional on ex post facto grounds where the amendments changed key provisions adding more punitive effects on the petitioner. *State v. Letalien*, 985 A.2d 4 (Me. 2009) (15 year registration requirement was extended to lifelong, quarterly verification requirements without affording opportunities for relief from the sentencing court).

The U.S. Supreme Court developed the leading test for determining whether a measure is punitive. *Smith v. Doe*, 538 U.S. 84 (2003).[45] This test has been embraced by the Pennsylvania Supreme Court. *See Commonwealth v. Abraham*, 62 A.3d 343 (Pa. 2012); *Lehman v. Pennsylvania State Police*, 576 Pa. 365, 373 (Pa. 2003); *Commonwealth v. Williams*, 832 A.2d 962 (2003). In *Smith v. Doe*, the U.S. Supreme Court used a two-pronged analysis to determine whether a law violates the ex post facto provision of the U.S. Constitution. The first prong considers whether the legislature's intent was punitive. A finding that the intent of the legislation is punitive results in a clear violation of the ex post facto clause. *Lehman*, 576 Pa. at 373; *Williams*, 832 A.2d at 971. If the court finds that the legislative intent was *not* to create a punitive measure, the court then analyzes whether the measure "nevertheless provide[s] for sanctions so punitive as to transform what was clearly intended as a civil remedy into a criminal penalty." *U.S. v. Ward*, 448 U.S. 242, 249 (1980). *See also Smith*, 538 U.S. at 85.

The Pennsylvania General Assembly has stated that the intention of registration is to disseminate information about sexual offenders, protect the safety and general welfare of the public, and that the registration requirements were not to be construed as punitive. 42 Pa.C.S. § 9799.11(b)(2). *See also Commonwealth v. Gehris,* 54 A.3d 862 (Pa. 2012); *Commonwealth v. Williams*, 832 A.2d at 972 (quoting *Commonwealth v. Gaffney*, 733 A.2d 616, 619 (1999)). Therefore the first prong, when read in light of the stated intention of the legislature, is not met. The effects of the legislation, however, are punitive, satisfying the second prong.

The Supreme Court set forth factors that a Court must consider in determining whether a regulatory scheme is in fact punitive. These are: 1) whether the sanction involves an affirmative disability or restraint; 2) whether it has historically been regarded as a punishment; 3) whether it

[45] *See, e.g., Artway v. Attorney General of State of New Jersey*, 81 F.3d 1235 (3d Cir. 1996) (using three-part test of 1) actual purpose; 2) objective purpose; and 3) effect to measure whether a consequence is punitive) and *State v. Williams*, 952 N.E.2d 1108 (Ohio 2011) (using the *Kennedy-Mendoza* factors).

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; 7) whether it appears excessive in relation to the alternative purpose assigned. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). "The *Mendoza–Martinez* factors are neither exhaustive nor dispositive, *Smith,* 538 U.S. at 97, but they must be considered in relation to the statute on its face, and only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Lehman*, 576 Pa. at 375 (internal quotations omitted). Under this test, SORNA is indeed punitive. Moreover, when applied to juveniles, a population that is neither mature nor self-reliant, more amenable to rehabilitation and unlikely to recidivate, the punitive effects are amplified.

*SORNA Imposes An Affirmative Disability or Restraint*

Pennsylvania's SORNA imposes significant affirmative obligations, results in harsher and disparate treatment when traveling, and places a severe stigma on every juvenile who is required to register. In a review of the previous Megan's Law's punitive effects, the Pennsylvania Supreme Court found that the effect of registration is non-punitive because the information required to be provided to law enforcement was minimal. *Gaffney*, 733 A.2d at 621 (finding that registration was a "minor inconvenience Appellant may experience in verifying his address over a ten year period" and it would be "difficult to fathom how the effects of this requirement could be characterized as "so harsh" as constituting punishment for purposes of the Ex Post Facto Clause."). The version of SORNA at issue in the instant petitions stands in a starkly different position than former Megan's Laws. SORNA requires more onerous affirmative obligations and restraints including quarterly in-person registration and re-

registration, additional disclosure of an unfathomable amount of information, additional in-person reporting to diligently upkeep that information, and subjects juveniles to travel, residency, employment, and education restrictions, all of which are imposed under a threat of elevated mandatory prison sentences. 18 Pa.C.S. § 4915. These registration requirements were expanded to include any and all names, aliases, internet identifiers, and addresses, telephone numbers, social security number, temporary lodging information, travel documents, current photograph, fingerprints and palm prints, DNA, employment information, and additional information. 42 Pa.C.S. §9799.16. See also *Proposed Findings of Fact* at Section II.A *supra*.

Furthermore, the time periods associated with the Act are as intrusive as possible. With one remote and possibly unattainable exception, a child required to register under SORNA must register for the rest of his life. 42 Pa.C.S. § 9799.15. Moreover, for a child as young as fourteen, lifetime registration will undoubtedly be much longer than lifetime registration would be for an adult. *See Graham*, 130 S.Ct. at 2028.

In *Smith,* the Supreme Court held that the Alaska Sex Offender Registration Act (ASORA) provisions did not violate the U.S. Constitution's Ex Post Facto prohibition, but the Court's reasoning is inapposite to juvenile registration. *Smith*, 538 U.S. at 84. *Smith* did not address the impact of registration, public disclosure, and other restrictions on *juveniles*. Further, while in *Smith* there was no in-person registration requirement, Pennsylvania's SORNA requires, at minimum, in-person reporting every 90 days. *Id.* at 87; 42 Pa.C.S. § 9799.15.

Pennsylvania's juvenile registration and reporting provisions are more akin to those described in *U.S. v. Juvenile Male*, 590 F.3d 924, 936 (9th Cir. 2009) *cert. granted and vacated on mootness grounds*, 131 S. Ct. 2860 (2011), where the Ninth Circuit differentiated in-person registration requirements, stating that:

> [E]very former juvenile offender subject to SORNA, by contrast, must register in person four times a year for at least 25 years. This requirement for appearances every three months before law enforcement officials is neither "minor" nor "indirect." Every three months, the former juvenile offenders will be required to be absent from work, appear before public officials, and publicly reaffirm that they are guilty of misdeeds that were previously protected from disclosure.

*Juvenile Male*, 590 F.3d at 936 (quoting *Smith v. Doe*, 538 U.S. at 99-100). Pennsylvania's SORNA likely requires significantly more in-person appearances as juveniles must 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. § 9799.16. SORNA could require reporting on a near-weekly basis unless individuals actively avoid driving any new cars, signing up for new websites or accounts, pursuing new educational opportunities, or changing jobs.

Additionally, other state courts have held in-person quarterly registration requirements to be punitive. *See Williams*, 952 N.E.2d at 1108 (holding in-person registration requirement for 25 years in addition to other factors was punitive). *See also State v. Letalien*, 985 A.2d 4 (Me. 2009) (Change of registration requirements of sex offenders from 15 years to lifetime, and imposing a quarterly in person verification requirement without affording an opportunity for relief with sentencing court, was constitutionally prohibited).

The burdensome and onerous reporting requirements for youth are compounded by the fact that these youth are at a critical time in their lives and will be foreclosed from numerous current and future educational, employment, social and civic opportunities. Juveniles subject to SORNA will face public humiliation and obstacles in finding jobs, housing, and educational opportunities. 42 U.S.C. § 13663. *See also Juvenile Male*, 590 F.3d at 935. Juvenile offenders will be constrained in choosing where and with whom they live. Juvenile offenders must register all employment, and *intended* employment. 42 Pa.C.S. § 9795.2. Juvenile offenders are not free to travel and would be limited if their work required travel that was not planned well in advance.

42 Pa.C.S. § 9799.15(i) (requiring travel related reporting, if internationally, at least 21 days before travel, providing dates of travel, destinations, and temporary lodging); 42 Pa.C.S. § 9799.16(7) (If away from registered home for more than 7 days, must register with the specific length of time and dates during which individual will be temporarily lodged). Moreover, any change to registration information, including a change of telephone number, social network username and password, requires in-person updating within three days of the change. 42 Pa.C.S. § 9799.15(g).[46]

Requiring registration also limits a child's mobility. Children may not reside even temporarily in many states and communities as residency restrictions exist in numerous states and cities. *See Proposed Findings of Fact at S*ection III supra (discussing residency restrictions nationwide). The requirements imposed by other states also cannot be ignored. Every time a child leaves Pennsylvania, the fact of his registration now requires him to scour and interpret those state's laws, *see id.* at A-B *supra.,* find state police locations, register in-person in those states, and in some instances, subject himself to court proceedings and psychological assessments, *See, e.g., Attorney General Guidelines for Law Enforcement for the Implementation of Sex Offender Registration and Community Notification Laws,* New Jersey, Rev. March 2000, *available at* http://www.state.nj.us/lps/dcj/megan1.pdf); N.J. Stat. §§ 2C:7-7 to 10. And because each state individually defines what information must be registered and when and imposes different obligations upon registering, the task of interstate registration is anything but minor or simply duplicative of Pennsylvania's requirements.

*Registration is Similar to Historical Forms of Punishment*

[46] Although some courts have contended that registrants are "free to move where they wish and to live and work as other citizens with no supervision," *Smith*, 538 U.S. at 101, and are not required to seek permission before acting – they need only provide notification – the law in Pennsylvania imposes more affirmative duties that do not render this true.

The second factor considers whether the requirement has historically been regarded as a punishment. *Mendoza-Martinez*, 372 U.S. at 168. As previously stated, the Pennsylvania Supreme Court has held that the prior version of SORNA, known as Megan's Law II, was not punishment. *Williams*, 832 A.2d at 984. *Williams* addressed specifically whether sexually violent predator community notification was similar to the historical punishment of shaming. *Id* at 975-76. The Court found that although it might have some shaming effect, the impact was sufficiently incidental to the need to notify the community of risky individuals that it did not alone make the law punishment. *Id.*

Pennsylvania law does not intend to make juvenile information public because it is reasonably likely the General Assembly recognized the need to treat juveniles differently and that public notification would shame or impact them more than their adult counterparts. However, despite this intent, the objective effect of registration has a shaming effect on children and their families. Children labeled sex offenders will continue to view themselves as "delinquent" even when they are law-abiding. Affidavit of Elizabeth J. Letourneau, Ph.D., Exhibit H at ¶ D1. *See also Proposed Findings of Fact* at Section I.B.5, *supra*. Historically, notice of the conviction evinced the shame of punishment. *Williams*, 832 A.2d at 984. Registration is not merely notice of the conviction or adjudication. Even though research demonstrates otherwise, being placed on a sex offender registry falsely sends the message that the child is likely to re-offend and is dangerous. *See Proposed Conclusions of Law* at Section IV, *supra*. Furthermore, SORNA registration is almost identical and nearly always more intrusive and severe than historical forms of probation. In the adult context, probation is punishment and part of sentencing, 42 Pa.C.S. § 9754(b), and in the juvenile context, it is a valid disposition. 42 Pa.C.S. § 6363. "[T]he basic objective of probation is to provide a means to achieve

rehabilitation without resorting to incarceration" *Commonwealth v. Kates*, 305 A.2d 701, 708 (Pa.1973).

When comparing registration requirements to probation, Pennsylvania's registration requirements for juveniles are stronger and more punitive. Although both registration and probation are imposed by the sentencing court and probationers are required to report regularly, have restrictions on their living arrangements, are required to provide some information about where they live and work, are subject to punishment for violation, the conditions of probation are individually assessed and are discretionary. Among the discretionary provisions of probation are rules that require that defendants refrain from possessing firearms, they make restitution for fruits of crime, they report as directed to the court or probation officer, and they notify the court or the probation officer of any change in address or employment. 42 Pa.C.S. § 9754(b)(7-10). The duration of probation is also discretionary, but it can last no longer than the amount of time the defendant could be confined in prison. 42 Pa.C.S. § 9754(a). The criminal penalty for violating probation is not allowed to be fixed prior to a finding on the record that a violation has occurred. 42 Pa.C.S. § 9754(d).

In contrast, the SORNA reporting requirements last a lifetime. Moreover, violation of the strict registration and reporting requirements demands mandatory prison sentences. In *Wallace*, the Indiana Supreme court found that the similarity of registration requirements, and the possibility that it could exceed the requirements of probation alone could support concluding that the registration requirement had historical connections to punishment. *Wallace*, 905 N.E.2d at 381. When viewed this way, current SORNA provisions exceed the stated purpose of protecting the safety and general welfare of the public. 42 Pa.C.S. § 9791(b)(2).

*SORNA Applies Only Upon a Finding of* Scienter.

The third factor asks whether the requirement comes into play only on a finding of *scienter*. "The existence of a *scienter* requirement is customarily an important element in distinguishing criminal from civil statutes." *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997). In other words, if there is no *mens rea* element, it is less likely the condition was intended as a punishment. *Wallace,* 905 N.E.2d at 381 (2009). Here, the regulatory 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, *Smith* at 105, satisfying this prong of the *Mendoza-Martinez* test.

*SORNA Promotes Traditional Aims of Punishment*

The fourth factor asks whether the SORNA requirement's operation will promote the traditional aims of punishment, namely retribution and deterrence. *Mendoza-Martinez*, 372 U.S. at 168. The legislative history of the Adam Walsh Act evinces the retributive goal of enacting these registration and reporting provisions. In enacting SORNA, Pennsylvania aimed to bring the state into compliance with the Adam Walsh Child Protection and Safety Act of 2006. 42 Pa.C.S. § 9799.11(a)(1). The Declaration of Purpose section of the law 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.[47]

[47] The early versions of the federal Adam Walsh Act did not require juveniles to register. 151 Cong. Rec S. 9245 (July 28, 2005). As originally conceived, adopted definitions of "sexually violent offense," "sexually violent predator," and other terms that limited its application from an earlier law – the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. § 14071 et. seq. The Adam Walsh Act later expanded the application of the law to juvenile offenders by providing for an expansive reading of the term "conviction" that includes juvenile adjudications. Pub. L. 109-248 § 111(8). The inclusion of juveniles in the Sex Offender Registration provisions was spearheaded by efforts of a victim of sexual assault, whose perpetrator was a juvenile. She lobbied for the expansion of registration requirements after her perpetrator re-offended against another person. *See* Martha Moore, *Sex Crimes Break the Lock on Juvenile Records*, USA TODAY (Jul. 10, 2006, 10:57 PM). The provisions were adopted in the Children's Safety and Violent Crime Reduction Act (CSVCRA) of 2005, expanding the definition of sex offender to include juveniles adjudicated as delinquent. (H.R. 4472, Subtitle A (2005)). As of June 28, 2011 when the Bill was first introduced into the Pennsylvania Senate, the juvenile adjudication provision was already part of the Bill. *See* Senate Bill 1183, Printer's No. 1449 (Pa. 2011), *available at*

These statutory goals suggest retribution and security as the primary purposes of the law. The remarks of President George W. Bush upon signing the bill into law confirmed these purposes. "Our society has a duty to protect our children from exploitation and danger. 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.

The Congressional statements of many of the sponsors and co-sponsors of the CSVCRA imply a desire to punish through the registration requirements. Congressman Keller, Cosponsor, *id.* at 20192-20193, stated "I am a cosponsor of the Children's Safety Act because we must crack down 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 *Juvenile Male*, the Ninth Circuit found most persuasive the statement that the statute was enacted "in response to the vicious attacks by violent predators against the victims listed below," followed by a list of seventeen names and descriptions of the crimes committed against them. 590 F.3d at 938. The court also quoted a floor statement in which 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." *Id.* (citing 152 Cong. Rec. S8012, S8021 (daily ed. July 20, 2006)).

Research demonstrates that juveniles convicted of sex offenses rarely recidivate, s*ee*, *supra,* and therefore lifelong in-person registration requirements imposed on every juvenile far

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http://www.legis.state.pa.us/cfdocs/legis/PN/Public/btCheck.cfm?txtType=HTM&sessYr=2011&sessInd=0&billBody=S&billTyp=B&billNbr=1183&pn=1449.

exceed the stated purpose of protecting the welfare of the public. As such, the new SORNA provisions are not reasonably calculated to accomplish the goal of public safety, and heap additional "opprobrium upon the offender unrelated to that goal." *Williams*, 832 A.2d at 976. Lifetime registration requirements imposed on a juvenile offender, without consideration of the reform or rehabilitation of the individual, expose them to the consequences akin to historical shaming punishments.

*SORNA Applies To Behavior That Is Already Criminal*

As with the third factor regarding *scienter*, both *Smith* and *Juvenile Male* passed over this factor without analysis, noting only that it was a necessary beginning point for the legislation that reporting requirements apply to those convicted of a crime. 538 U.S. at 105; 590 F.3d at 931 n.6. As discussed below, SORNA applies only upon a finding that the juvenile was adjudicated delinquent on one of the enumerated offenses. With no additional inquiry into the necessity for registration, SORNA wrongly presumes that by virtue of adjudication, registration is necessary. *See Proposed Conclusions of Law* at Section II.A, *supra.*

*SORNA is Not Rationally Connected to a Non-Punitive Purpose*

Although purportedly enacted to serve a non-punitive purpose, SORNA, in effect, serves a very punitive purpose, especially when applied to juveniles. Ironically, in providing for non-public registration of juveniles, the statute misses its mark and is not narrowly drawn to serve its non-punitive purpose. In *Smith*, the Court identified this sixth *Mendoza-Martinez* factor as the most significant to its conclusion that the Alaskan statute was not punitive. *Smith*, 538 U.S. at 102. The Court identified public safety as the non-punitive purpose of the registration requirements. *Id.* at 102-03. *See also Gehris*, 54 A.3d at 862; *Williams*, 832 A.2d at 972. Yet, as the Ohio Supreme Court in *In re C.P.* articulated, although public safety seemingly is furthered

by registration, it is difficult to assess how well it is served where the statutory scheme allows for no judicial or other determination as to how dangerous a child offender may be or what level of registration would be adequate to serve the public interest. *In re C.P.*, 967 N.E.2d 729, 743 (Ohio 2012). In *Williams*, the Pennsylvania Supreme Court noted that Megan's Law II responded to legitimate concerns over recidivism by sex offenders. 832 A.2d at 979. The Court stated that registration and notification requirements enable members of the public to take steps to protect children or themselves from dangerous predators. *Id.* The Court held that the requirements,

> appear[] to be a reasonable means chosen by the Legislature to serve the legitimate governmental interest in providing persons who may be affected by the presence of a sexually violent predator with the information they need to protect themselves or those under their care against predation by tak[ing] the common-sense steps that might prevent such an occurrence.

*Id.* at 981 (internal quotations omitted). Yet the juvenile registration requirements do not really enable the public to "take the common-sense steps" to prevent victimization by a juvenile sex offender. The information reported by juvenile sex offenders is not required to be included on a publicly available database. 42 Pa.C.S. § 9799.28(b). Furthermore, as demonstrated, studies have universally shown that juveniles are far less likely to recidivate and therefore pose less risk to the community. *See Proposed Findings of Fact* at Section I.B, *supra*. Research has also shown that requiring children to register does not improve public safety. *See id.* at Section I.B.3. Registration has not been demonstrated to deter or prevent first offenses. Moreover, it has no impact on the already very low rates of recidivism, but rather, may have a negative impact due to the barriers registration erects to leading a normal and productive life.

*SORNA is Excessive in Relation to a Non-Punitive Purpose*

The question here is whether the regulatory means chosen are "reasonable in light of the non-punitive objective." *Smith*, 538 U.S. at 105. The rationale in *Smith* for upholding the

registration requirements is inapposite in this case. *Smith* rejected the argument that the duration of the registration requirements was excessive, citing statistics that recidivism could occur as late as twenty years after the original offense. *Id.*[48] Research supports the contrary conclusion regarding juvenile offenders. While SORNA presumes that juvenile sex offenders are on a "singular trajectory to becoming adult sexual offenders," that finding is unsupported by empirical data, "is inconsistent with the fundamental purpose of juvenile court, and may actually impede the rehabilitation of youth" adjudicated for a sexual offense." *Caldwell, et al.* at 104. This lack of empirical support, coupled with mandatory lifetime registration with only the possibility of termination after 25 years, is undoubtedly excessive for a juvenile.

Under SORNA, registration is based solely on the offense committed, rather than an individualized assessment of dangerousness. SORNA requires the court to notify the juvenile offender "at the time of disposition" of his duty to register.[49] 42 Pa.C.S. § 9799.23. There is no separate proceeding or hearing at which this occurs. The Pennsylvania Supreme Court has held that Megan's Law merely required the sentencing court to inform the defendant of the registration obligation at the time of sentencing and this did not impose additional punishment,

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[48] *See also Williams,* 832 A.2d at 981. The *Williams* court expressed concern over the lack of a judicial mechanism to review the risk posed by a particular offender during the course of registration:

> [O]ne of the most troubling aspects of the statute is that the period of registration, notification, and counseling lasts for the sexually violent predator's entire lifetime. A reasonable argument could be made that, to avoid excessiveness, the Legislature was required to provide some means for a sexually violent predator to invoke judicial review in an effort to demonstrate that he no longer poses a substantial risk to the community.

*Id.* at 982-83. Despite its concern, the court determined that there was insufficient evidence that a sexually violent predator could overcome the mental abnormality that led to his classification as such and accordingly presumed that the statute was valid. *Id.* at 983.

[49] *See also* 42 Pa. Cons. Stat. Ann. § 9799.15, "For an individual who is a juvenile offender, the period of registration shall commence upon: (A) release from an institution or facility set forth in section 6352(a)(3) (relating to disposition of delinquent child), if the juvenile offender is, on or after the effective date of this section, subject to the jurisdiction of a court pursuant to a disposition entered under section 6352 and is under court-ordered placement in an institution or facility set forth in section 6352(a)(3); or (B) disposition, if the juvenile offender is, on or after the effective date of this section, subject to the jurisdiction of a court pursuant to a disposition entered under section 6352 and is placed on probation or is otherwise subject to jurisdiction of a court pursuant to a disposition under section 6352 that did not involve out-of-home placement."

*Gehris*, 54 A.3d at 862. The court reasoned that the statute must be construed in accordance with the plain meaning of the statute rather than strictly against the Commonwealth. *Id.* A plain reading as applied to juveniles mandates a different conclusion. SORNA requires that the juvenile be informed by the judge at disposition of the registration consequence and in writing when entering an admission via written colloquy.[50] 42 Pa.C.S. §§ 9799.23(a), 9799.20(2). A juvenile standing before a judge to accept his disposition, which would likely be out-of-home placement, is unlikely to separate the placement from the information regarding registration, understanding that one is the sentence for his crime and the other is not. Moreover, at disposition, courts are not obligated to inform the juvenile of any collateral consequences of their adjudications—other than registration. *See* 42 Pa.C.S. § 6352; 42 Pa.C.S. § 9799.20(1). For these youth, disposition means placement and registration – and nothing else. The registration imposition is simply not collateral.[51] *See also Proposed Conclusions of Law* at Section II, *supra*.

[50] Some of the Petitioners in the instant case entered admissions that resulted in their adjudications of delinquency. These admissions were infirm because Petitioners could not have been fully aware of the additional punishment that was to be imposed on December 20, 2012 prior to entering their admissions. "Before the court can accept an admission, the court shall determine that the admission is knowingly, intelligently, and voluntary made." Pa.R.J.P. 407. *See also Johnson v. Zerbst*, 304 U.S. 458, 466 (1938) (holding that because a guilty plea is an "admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."). Moreover, in adult court, a plea agreement is a bargained-for and negotiated exchange of promise between the defendant and the government. *Santobello v. New York*, 404 U.S. 257, 262 (1971). It has been recognized in the Court of Common Pleas that "a plea cannot be made voluntarily and knowingly with a full understanding of the consequences . . . if the plea agreement may be altered by imposition of conditions that did not even exist at the time of the entry of the plea." *Commonwealth v. Japalucci*, No. 2478 C. 2008, 12, 24 (Pa. Commw. 2013) (*citing Commonwealth v. Parsons*, 969 A.2d 1259). *See also Commonwealth v. Zuber*, 353 A.2d 441 (holding that the consequences of the plea agreement must be fully understood).

[51] The superior court has analyzed whether a consequence is direct or collateral in determining whether notification to the individual is necessary. *See Commonwealth v. Leidig*, 850 A.2d 743, 747 (Pa. Super. 2004) (reasoning that a collateral consequence is not related to the length or nature of the sentence and a direct consequence has a definite, immediate and largely automatic effect on the range of the individual's punishment). *See also Commonwealth v. Fleming*, 801 A.2d 1234 (Pa. 2002); *Padilla v. Kentucky*, 130 S. Ct. 1481 (2010). In the instant case, an analysis of whether registration is a direct versus collateral consequence is unnecessary. As registration is imposed during the disposition hearing, it becomes part of the juvenile's disposition. It is not a consequence imposed after adjudication. It is imposed upon the adjudication and impermissibly extends the disposition beyond the juvenile reaching the upper edge of juvenile court jurisdiction. *See Proposed Conclusions of Law* at Section V.A, *supra* (reasoning that lifetime registration impermissibly extends juvenile court jurisdiction).

The *Smith* court also reasoned that individualized assessments of dangerousness were unnecessary because the legislature could make a general rule applicable to an entire class of sex offenders and the public could make its own assessments of individual dangerousness based on the available information. *Id.* at 104. While the 'non-public' registry is substantially more 'public' than presumably intended, *see Proposed Findings of Fact*, Section II.E, *supra*, the problem with this "public assessment" when applied to juvenile cases is that the public does not officially have access to records with which to make such an assessment.

Moreover, as discussed in *Proposed Conclusions of Law* Section V.A, *supra*, juvenile court dispositions must end at the juvenile's 21st birthday. Lifetime reporting and registration requirements fly in the face of this jurisdictional limitation; it is also excessive given the empirical data showing a minimal likelihood of recidivism among these juvenile offenders. The lack of any individualized review for decades only heightens the irrationality of these provisions.

Finally, SORNA demands a break with traditional juvenile court values of rehabilitation and confidentiality. It undermines the ability of a juvenile, whose immaturity and impulsiveness may influence his behavior, to grow and move forward. It contravenes the fundamental principles which underlie the juvenile justice system and wholly disregards any notion of 'second chances.' For individuals previously adjudicated delinquent, SORNA requires that they repeatedly revisit an offense they may feel they had put behind them in accordance with the traditional functioning of the juvenile justice system.

## II. IN PROVIDING FOR MANDATORY LIFETIME REGISTRATION, 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 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 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)).[52] 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.

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.[53] *See Clayton*, 684 A.2d at 1063; *Vlandis*, 412 U.S. at 452.

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[52] 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).

[53] 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. Finally, in *Doe*, the Court upheld the

*Clayton*[54] 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

statute because the Connecticut law explicitly provided for registration based on the conviction alone, with no other fact relevant to the dissemination of the registrants' information. *Doe*, 538 U.S. at 7.

[54] 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.*

opportunity to be heard on the matter at issue at a "hearing appropriate to the nature of the case.") (internal citations omitted).

Similarly, in *D.C. v. School District of Philadelphia*, the Commonwealth Court ruled unconstitutional a statute requiring, *inter alia*, Philadelphia delinquent youth returning from placement to be automatically placed in one of four alternative education settings. 879 A.2d 408 (2005). The court ruled the statute created an irrebuttable presumption that students convicted or adjudicated of specific underlying offenses should 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 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 grounds[55] without analysis of whether the interests are fundamental. *Clayton, supra* (citing *Bell*, noting that *Bell* "remains valid precedent, is directly on point in the instant matter and, indeed, is dispositive."); *D.C., supra.* In both *D.C.* and *Clayton*, the affected parties had opportunities to challenge the *underlying* fact, but not the *presumed* fact upon which

[55] 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).

the regulatory scheme was founded.[56] Similarly, in the SORNA context, juvenile offenders will have been adjudicated delinquent, but will not have had an opportunity to challenge the statute's presumption that their adjudication means that they "pose a high risk of committing additional sexual offenses," or that their registration will "[offer] an increased measure of protection to the citizens of this Commonwealth." 42 Pa.C.S. § 9799.11. 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 with future dangerousness. Though legitimate, the interest in protecting communities from sex offenders cannot render "inviolate" 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." *See id. See also, In re W.Z.*, 957 N.E.2d 367, 376-80 (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 noted that the determination of a returning student's fitness for the regular classroom "turns on

[56] 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 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.

factors that could not be known at the time of juvenile adjudication." 879 A.2d at 418. The same can be said about the relationship between a juvenile adjudication and the child's risk of committing additional sexual offenses. In fact, because an adjudication of delinquency amounts to a finding that the child has committed a delinquent act and is in need of treatment, supervision or rehabilitation, it is inconsistent—and punitive—to presume that one who has been adjudicated delinquent *and* undergone treatment continues to pose a threat to his/her community. The right to a meaningful hearing that considers the central issue at hand is plainly violated by substituting the delinquency hearing, which addresses guilt or innocence, for a determination on the need for registration. The adjudicatory hearing neither considers nor addresses whether the child poses a high risk of committing additional sexual offenses. Because SORNA's mandatory registration scheme turns on assumptions that cannot be reliably known at the time of adjudication, it is unconstitutional for failing to provide children with an opportunity to challenge the registration requirements on an individual basis.

## III. JUVENILE REGISTRATION VIOLATES THE PENNSYLVANIA AND UNITED STATES CONSTITUTIONAL BANS ON THE INFLICTION OF CRUEL AND UNUSUAL PUNISHMENT.

SORNA violates the Pennsylvania and United States constitutional bans on the infliction of cruel and unusual punishment. Pa. Const. Art I. Sec 13;[57] U.S. Const. Amend. VIII; *See also Miller*, 132 S. Ct. at 2455. 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

[57] Art I. Sec 13 of the Pennsylvania Constitution prohibits "cruel punishments."

omitted).). A proportionality review bars the imposition of SORNA's registration requirements on juveniles. As the Ohio Supreme Court reasoned in *In re C.P.*, "for a juvenile offender who remains under the jurisdiction of the juvenile court, the Eighth Amendment forbids the automatic imposition of lifetime sex-offender registration and notification requirements." *See In re C.P.*, 967 N.E.2d at 732. *See also*, *Commonwealth v. Knox*, 50 A.3d 749 (Pa. Super. 2012); *Commonwealth v. Lofton*, 57 A.3d 1270 (Pa. Super. 2012). SORNA is unconstitutional because it is a disproportionate punishment. Its mandatory nature further renders it unconstitutional for children.

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

Under proportionality review, "the Court implements the proportionality standard by certain categorical restrictions considering the nature of the offense and the characteristics of the offender." *Graham*, 130 S.Ct. at 2021-22 (2010). 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. "The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crime and characteristics, along with the severity of the punishment in question . . . and whether the challenged sentencing practice serves legitimate penological goals." *Id.* at 2026.

Juvenile registration requirements vary across states. 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). New Jersey does not require in-person reporting. N.J. Stat. § 2C:7-2. Some states maintain juvenile registration

information on a publicly-accessible website, s*ee, e.g.* Ala. Code § 15-20A-08, and others actively notify the public. *See* Nev. Rev. Stat. § 179D.475(2)(a). Indeed, a careful consideration of the remaining elements compels the conclusion that juvenile sex offender registration violates both the Eighth Amendment and Art. I, Sec. 13.

*Culpability of Child Sex Offenders*

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). As set forth in the *Proposed Findings of Fact* at Section I, *supra*, 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 should place an emphasis on the reduced culpability of juveniles.

*Nature of Offenses*

The offenses implicated by the statutory scheme are rape, involuntary deviate sexual intercourse, aggravated indecent assault, or an attempt, solicitation or conspiracy to commit any of these. As the Supreme Court noted in *Graham*, although an offense like rape is "a serious crime deserving serious punishment,' those crimes differ from homicide crimes in a moral sense." *Graham*, 130 S.Ct at 2027 (internal citations omitted). The Ohio Supreme Court

explained part of its reasoning for declaring juvenile sex offender registration unconstitutional as follows:

> [A]s the Court pointed out in *Graham*, a juvenile who did not kill or intend to kill has "twice diminished moral culpability" on account of his age and the nature of his crime. Thus, when we address the constitutionality of the penalties resulting from an application of [SORNA to juveniles], we first recognize that those punishments apply to juveniles with a reduced degree of moral culpability.

*In re C.P.* 967 N.E.2d at 741.

*Severity of Punishment*

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 a juvenile 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 have already exacted an extraordinary toll at that point.

*Penological Justifications*

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 still 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.

*Miller*, *Graham*, and *Roper* all recognized that the distinctive attributes of youth substantially negate the penological justifications 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.

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 fails to deter youth, the possible imposition of the relatively rare and extreme adult punishment of having to register as a sex offender for the remainder of one's life is unlikely to do so either.

"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 Proposed Conclusions of Law* at Section V.B, *supra* (describing how SORNA contravenes the rehabilitative purpose of the Juvenile Act). Registration "forswears altogether the rehabilitative ideal." *Graham*, 130 S.Ct. at 2030. By denying the juvenile the right to move freely in the community without being subject to the stigma and collateral consequences of registration for the rest of their lives, 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 child's age, transient immaturity, youthful impulsivity, underdeveloped sense of responsibility, capacity for change, reduced mental capacity, susceptibility to negative influences and outside pressures, reduced role in the offense, or any other factors related to his or her young age – the precise characteristics that the United States Supreme Court has concluded categorically apply to all juvenile offenders under 18, and which the Court found conclusive in abolishing the penalty of life without parole for juvenile nonhomicide offenders in *Graham.* 130 S.Ct. at 2026, 2034. *See also 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" and extending *Graham*'s holding to mandatory life without parole sentences for juveniles convicted of homicide). 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]"[58] 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

[58] *See Proposed Findings of Fact* at Section I.A, *supra*.

requirements for the remainder of the offender's life. This fundamental flaw in the statute ignores the overwhelming social science research discussed above and adopted as axiomatic in the Supreme Court's precedent 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 disregards the differences between children and adults—and, notably, the specific 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. *See Proposed Findings of Fact* at Section I.B, *supra. See also* Affidavit of Elizabeth J. Letourneau, Ph.D. at Exhibit H. This mandatory registration scheme impermissibly ignores the uncontroverted and profound differences between these two classes of offenders. *See Graham*, 130 S.Ct. at 2034, *Miller*, 132 S.Ct. at 2468.

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. *Miller* set forth specific factors that the sentencer in a homicide case, at a minimum, should consider: (1) the juvenile's "chronological age" and related "immaturity, impetuosity, and failure to appreciate risks and consequences;" (2) the juvenile's "family and home environment that surrounds him;"

(3) "the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him;" (4) the "incompetencies associated with youth" in dealing with law enforcement and a criminal justice system designed for adults; and (5) "the possibility of rehabilitation." *Miller* at 2468. Depriving a sentencer of the opportunity to reflect on these factors and attributes "poses too great a risk of disproportionate punishment." *Id.* at 2469. As demonstrated above, mandatory, lifelong sex offender registration and mandatory juvenile life without parole share key characteristics: Both remain in effect for the rest of the juvenile's life, both preclude individualized determinations of whether the penalty is appropriate for the particular juvenile offender and, in doing so, ignore the possibility of rehabilitation. As discussed above, these common features disregard the scientific research that juvenile sex offenders are particularly amenable to rehabilitation. More significantly, they cause SORNA to run afoul of the Supreme Court's jurisprudence analyzing irrevocable penalties as applied to juveniles. Accordingly, Pennsylvania's mandatory sex offender registration scheme, as applied to juvenile offenders, is unconstitutional.

## IV. REGISTRATION IMPOSES STIGMA AND RESTRICTIONS THAT IMPEDE PETITIONER'S REPUTATION RIGHTS EXPRESSLY PROTECTED BY THE PENNSYLVANIA CONSTITUTION.

Pennsylvania expressly protects a fundamental right of reputation. Article I, Section 1 of the Pennsylvania Constitution provides that "[a]ll men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Pa. Const. art. I, § 1. Reputation is a fundamental right that cannot be abridged without compliance with state constitutional standards of due process and equal protection. *Balletta v. Spadoni*, 47 A.3d 183, 192 (Pa. Commw. Ct. 2012).

> Where laws infringe upon certain rights considered fundamental, such as the right to privacy, the right to marry, and the right to procreate, courts apply a strict scrutiny test. [. . . .] Under that test, a law may only be deemed constitutional if it is narrowly tailored to a compelling state interest.

*Nixon v. Dep't of Pub. Welfare*, 576 Pa. 385, 399-403 (Pa. 2003) (internal citations omitted).

In *R. v. Com., Dept. of Welfare*, the court 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," 636 A.2d 142, 149 (1994), in Pennsylvania, reputation is "recognized and protected by our highest state law: our Constitution." *Id.*

Information contained in the juvenile sex offender registry can easily be accessible to the general public because (1) the law does not prevent personal information from being released by law enforcement, courts, or private individuals outside of the State Police website; (2) the law requires frequent and regular in person reporting, which can lead to conclusions about an individual's activities at the approved registration sites; (3) the law does not take into account that the internet domain can be accessible by the general public even if it is on a private website; (4) the law does nothing to prohibit an individual who knows information about a registered individual from sharing it widely; and (5) the law makes registration information accessible to schools. 42 Pa.C.S. §9799.10 *et seq.*

Being labeled a sex offender is unquestionably stigmatizing. To the extent Pennsylvania's registry is more porous than sealed for juvenile offenders, children cannot escape this stigma. SORNA requires some dissemination of children's information. Additionally, Internet domains such as *Offendex* and *HomeFacts* provide information on both previous and current sex offenders, including people that are supposedly already removed from the public. These websites are accessible by the public and could create the potential for public knowledge.

Juvenile offenders are also required to report in person to the State Police every 90 days. 42 Pa.C.S. §9799.19. 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. 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, notify neighbors, employers, and anyone else. *See also Proposed Findings of Fact* at Section II.E, *supra*.

Moreover, 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 children who sexually offend are unlikely to re-offend, the public often believe offenders are dangerous and 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). 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. The fact that this designation is likely incorrect only compounds the harm.

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 stigmatizing and false. 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.

Finally, the right to reputation cannot be taken away without due process. *Simon v. Com.*, 659 A.2d 631, 637 (Pa. Commw. Ct. 1995). Because SORNA impacts this fundamental right of reputation, SORNA must be struck unless it satisfies strict scrutiny review. *Nixon v. Dep't of Pub. Welfare*, 576 Pa. 385, 399-403 (2003). SORNA fails this test. It is not narrowly tailored to meet the Commonwealth's justifications to prevent recidivism and notify community members about risky sexual offenders in their neighborhoods. 42 Pa.C.S. § 9799.11(a). Nearly all children subject to SORNA are at a low risk for reoffending, *see Proposed Findings of Fact* at Section I.B, *supra*. Juvenile registration information could become publicized, and due process is not burdensome. Due process rights tip favorably to citizens in balancing individual and governmental rights; therefore, it should shift in favor of youth adjudicated for registerable offenses in this case. *Simon*, 659 A.2d at 639.

## 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.[59] 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 two specific 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. First, 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. § 6403(d).[60] However, 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 can present expert testimony on his or her behalf and can cross-examine 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

[59] This definition of "child" would exclude a number of individuals who would be subject to SORNA's registration and reporting requirements. A juvenile offender adjudicated delinquent for one of the specified offenses must register for life. 42 Pa.C.S. § 9799.15(a)(4). They must appear at a registration site four times a year. 42 Pa.C.S. §9799.15(h)(2).

[60] 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).

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 a juvenile 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 issues to be determined at the hearing. Commitment, with the approval of the SOAB and juvenile court, is initially for a period of one year. 42 Pa.C.S. § 6404(a). The commitment is then 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. 42 Pa.C.S. § 6404(b).

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.[61] Although

[61] 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 Dublinksi*, 695 A.2d 827, 829 (Pa. Super. 1997) (quoting *Commonwealth v. Valent*, 463 A.2d 1127, 1128 (Pa. Super. 1983). While restitution

restitution obligations may follow a juvenile beyond his or her 21st birthday, they were initially 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 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)[62] 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

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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.*

[62] 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 impose on the juvenile regardless of his completion of the terms of his juvenile disposition. *In re CP*, 967 N.E.2d at 735.

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 that would follow J.V. into adulthood, this dispositional authority did not give the court jurisdiction over J.V. beyond the age of 21.[63] *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, § 6352[64] expressly provides both for the imposition of restitution and its continued collection under § 9728. Even after the enactment of SORNA, nothing in § 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

[63] Notably, 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.

[64] 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).

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 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.,* the Superior 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*, the 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.

As described in *Proposed Conclusions of Law* at Section I, *supra*, SORNA is punitive in effect; this runs counter to the express rehabilitative purpose of the Juvenile Act as set forth above.[65] 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.

[65] Courts in other jurisdictions have found that SORNA contravenes the rehabilitative purpose of juvenile court. In 2009, the Ninth Circuit addressed the purpose of the juvenile justice system, describing it as making the juvenile feel that he is "the object of the state's care and solicitude" and that he will be rehabilitated with clinical procedures rather than punitive measures. *Juvenile Male*, 590 F.3d at 932. Juveniles subject to SORNA would face public humiliation and obstacles in finding jobs, housing, and educational opportunities. *Id.* at 935. That kind of exposure, the court concluded, was more typical of the punitive adult justice system than the rehabilitative system for juveniles. *Id.* at 941. *See also In re C.P.*, 967 N.E.2d 729 (2012) (holding that SORNA imposed cruel and unusual punishment on juvenile sex offenders). In a decision prior to the Ohio Supreme Court's ruling in *In re C.P.*, the Ohio Court of Appeals found that registration and reporting under SORNA conflicted with two essential elements of the rehabilitative purpose of the juvenile justice system: confidentiality and stigmatization. *In re W.Z.*, 957 N.E.2d 367, 376 (2011).

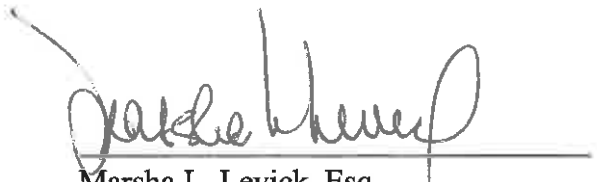
SORNA also fails to comply with the Act's mandate to "provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies 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. 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, Petitioners, by and through counsel, respectfully request that this Honorable 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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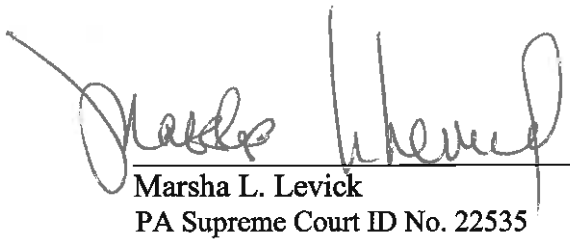
DATED: April 22, 2013

## VERIFICATION

On this 22 day of April, 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.



Marsha L. Levick
PA Supreme Court ID No. 22535

## CERTIFICATE OF SERVICE

I hereby certify that on this 22 day of April, 2013 I am serving a true and correct copy of the foregoing Memorandum in Support of Motions for *Nunc Pro Tunc* Relief as follows:

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