IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

In the Interest of

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MEMORANDUM OF LAW OPPOSING MOTIONS FOR *NUNC PRO TUNC RELIEF*

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STANDARD OF REVIEW

In considering a challenge to the constitutionality of a statute, courts adhere to the following principle:

> A statute will be found unconstitutional only if it clearly, palpably, and plainly violates constitutional rights. Under well-settled principles of law, there is a strong presumption that legislative enactments do not violate the constitution. Further, there is a heavy burden of persuasion upon one who questions the constitutionality of an Act.

Commonwealth v. Leddington, 908 A.2d 328, 332 (Pa. Super. 2006) (*quoting* Commonwealth v. MacPherson, 561 Pa. 571, 752 A.2d 384 (2000).

COUNTERSTATEMENT OF FACTS

On November 30, 2010, [redacted] was adjudicated delinquent after admitting to two counts of aggravated indecent assault, graded as Felonies of the Second Degree, for sexually assaulting two of his minor siblings.

[redacted] was adjudicated delinquent on August 26, 2011, after admitting to one count of aggravated indecent assault, victim under 13 years of age, graded as a Felony of the Second Degree, for sexually assaulting a relative.

On November 20, 2008, [redacted] was adjudicated delinquent after admitting to one count of Involuntary Deviate Sexual Intercourse, graded as a Felony of the First Degree, for sexually assaulting his younger brother.

[redacted] was adjudicated delinquent on January 5, 2011, after admitting to one count of Rape of a Child, a Felony of the First Degree.

On July 18, 2011, [redacted] was adjudicated delinquent after being found to have committed the offenses of aggravated indecent assault (graded as a Felony of the Second Degree) and indecent assault (graded as a Misdemeanor of the Second Degree), due to his sexually assaulting a fourteen-year old girl.

After an admission on August 9, 2012, [redacted] was adjudicated delinquent for the offenses of Involuntary Deviate Sexual Intercourse, a Felony of the First Degree, and Indecent Assault, graded as a third-degree Felony, for two separate instances of sexual assault.

Following a fact-finding, [redacted] was adjudicated delinquent on December 10, 2010, for committing the offenses of Involuntary Deviate Sexual Intercourse (two counts), Felonies of the First Degree, and one count of Attempted Rape, also a Felony of the First Degree, due to numerous sexual assaults committed against a minor victim.

In 2006, President George W. Bush signed into law the Adam Walsh Child Protection and Safety Act, which, *inter alia*, revised the registration system for sex offenders. As a result of the Adam Walsh Act, each state was required to, in order to receive certain federal funds, bring its sex offender registry into compliance with the requirements of the Adam Walsh Act. In 2012, Governor Tom Corbett signed the Sex Offender Notification and Registration Act (SORNA), which, *inter alia*, required certain juvenile sex offenders to register sex offenders retroactively. SORNA took effect on December 20, 2012, and the above-listed Juvenile Defendants were informed that they now had to register as sex offenders, when they previously did not have to do so. All seven of the Juvenile Defendants filed timely motions for *nunc pro tunc* relief.

ARGUMENT

I. SORNA IS A COLLATERAL CONSEQUENCE.

The Juvenile Defendants consistently refer to SORNA and its registration requirements as a "punishment." *See* Juvenile Defendants' Memorandum of Law, *passim*. This is a mischaracterization of what SORNA requires the Juvenile Defendants to do, and this claim is not in conformity with the relevant jurisprudence. It is undisputed that certain juvenile offenders must register as sex offenders. 42 PA. CON. STAT. §9799.15. Specifically, a juvenile offender for SORNA's purposes is defined as follows:

> One of the following:
>
> (1) An individual who was 14 years of age or older at the time the individual committed an offense which, if committed by an adult, would be classified as an offense under 18 Pa.C.S. § 3121 (relating to rape), 3123 (relating to involuntary deviate sexual intercourse) or 3125 (relating to aggravated indecent assault) or an attempt, solicitation or conspiracy to commit an offense under 18 Pa.C.S. § 3121, 3123 or 3125 and either:
>
> (i) is adjudicated delinquent for such offense on or after the effective date of this section; or
>
> (ii) has been adjudicated delinquent for such offense and on the effective date of this section is subject to the jurisdiction of the court on the basis of that adjudication of delinquency, including commitment to an institution or facility set forth in section 6352(a)(3) (relating to a disposition of delinquent child).
>
> (2) An individual who was 14 years of age or older at the time the individual committed an offense similar to an offense under 18 Pa.C.S. § 3121, 3123 or 3125 or an attempt, solicitation or conspiracy to commit an offense similar to an offense under 18 Pa.C.S. § 3121, 3123 or 3125 under the laws of the United States, another jurisdiction or a foreign country and was adjudicated delinquent for such an offense.
>
> (3) An individual who, on or after the effective date of this paragraph, was required to register in a sexual offender registry in another jurisdiction or foreign country based upon an adjudication of delinquency.
>
> The term does not include a sexually violent delinquent child.

42 PA. CON. STAT. §9799.12. SORNA requires these juvenile offenders to register with the Pennsylvania State Police ("PSP") and to provide that agency with information, including, *inter alia*, information about their physical descriptions, employment, residency, and motor vehicles.

See 42 PA. CON. STAT. §9799 *et seq*. Failure to register or verify information constitutes a felony offense. *See* 42 PA. CON. STAT. §9718.4(a)(1)(iii).

While it is undisputed that SORNA imposes requirements on juvenile sex offenders, it is equally well-settled that not every effect of a conviction or of an adjudication is, in fact, a punishment that rises to the level of criminal punishment under the law. *See generally* Commonwealth v. Frometa, 520 Pa. 552, 555, 555 A.2d 92, 93, n.1 (1989)[1] (listing numerous collateral consequences of conviction or adjudication, including the loss of voting privileges, the right to enlist, to own firearms, to obtain a fishing license, to enter certain professions, grounds for divorce, termination of parental rights, disqualification from public office, and dismissal from public employment) (*internal citations omitted*); *see also* "National Inventory of the Collateral Consequences of Conviction (Pennsylvania), http://www.abacollateralconsequences.org/CollateralConsequences/QueryConsequences, accessed July 29, 2013 (listing 134 different collateral consequences for Pennsylvania sex offenders) (*citations omitted*). It should go without saying that every burden imposed on an individual cannot be considered a direct consequence of a finding of guilt.

The case of Commonwealth v. Leidig, 598 Pa. 211, 956 A.2d 399 (2008), considered the issue of collateral consequences. In Leidig, an adult defendant attempted to withdraw a no-contest plea to the charge of aggravated indecent assault, after not being informed until after his sentencing that he would be subject to Megan's Law lifetime registration requirements. Id., 598 Pa. at 215, 956 A.2d at 401. Upon appellate review, the Pennsylvania Supreme Court explicitly determined that "registration requirements under Megan's Law II do not impose a criminal penalty . . . **they are plainly a collateral consequence of his plea**." Id., 598 Pa. at 220, 956

[1] Although Frometa dealt with the collateral consequence of deportation, which has been overruled by Padilla v. Kentucky, *infra*, its general analysis of collateral consequences remains good law.

A.2d at 404 (*emphasis added*). The Court also stated that Megan's Law II registration requirements were "substantially no different from the recognized collateral consequences of deportation and driver's license suspension, **and in certain respects less onerous than either**." Id. (*footnotes omitted*) (*emphasis added*). In conclusion, the Court stated, "To the extent that there was any confusion following these decisions that the registration requirements of Megan's law are collateral and not direct consequences of a plea or other conviction, we settle the issue here: such requirements are collateral consequences . . .". Id., 598 Pa. at 223, 956 A.2d at 406.

In a recent case, the Supreme Court of Pennsylvania was given the opportunity to clarify the difference between direct and collateral consequences, which came about due to the U.S. Supreme Court's 2010 decision in Padilla v. Kentucky, 130 S.Ct. 1473, 1481 (2010) (determining that it is "'most difficult' to divorce the penalty from the conviction on the deportation context") (*internal citation omitted*). The Pennsylvania Supreme Court noted that the Superior Court of Pennsylvania determined that (1) "direct versus collateral consequences analysis" may not have been viable post-Padilla for certain claims, and that (2) pension forfeitures were equally closely linked to the conviction, similar to deportations, but found that the Superior Court's determinations were in error. *See* Commonwealth v. Abraham, 62 A.3d 343, 348 (2012). In so determining, the Court noted that "Padilla did not abrogate application of [direct versus collateral consequences] analysis in cases that do not involve deportation." Id., 62 A.3d at 350. As noted in Frometa and Leidig, *supra*, many so-called punishments fail to rise to the level of a direct consequence flowing from a finding of guilt. As the Court in Abraham stated, "The distinction between a direct and collateral consequence of a guilty plea has been effectively defined by this Court as the distinction between a criminal penalty and a civil requirements over which a sentencing judge has no control." Id., 62 A.3d at 350 (*internal*

citations and quotation marks omitted). To determine if a requirement is criminal or civil in nature, one must determine if (1) the intent of the measure is punitive or civil, and (2) if it is civil, whether the measure is, nevertheless, so punitive that it overrides the legislative intent that the measure be civil. *See* Smith v. Doe, 538 U.S. 84 (2003). Generally, courts will defer to the stated intent of the legislature; "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." Abraham, 62 A.3d at 350 (*internal citation and quotation marks omitted*). When examining the second prong of the Smith test, the courts examine seven factors, as delineated in Kentucky v. Mendoza-Martinez, 372 U.S. 144 (1963), which are as follows:

> whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment--retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned[.]

Id. at 168-69.

Upon an application of the relevant case law to the case at bar, the inescapable conclusion is that SORNA's requirements fail to meet the significantly high burden that would render said requirements a direct, rather than a collateral, consequence. In applying the first prong of the Smith test, it is conceded by the Juvenile Defendants that the stated purpose of SORNA was as follows:

> This Commonwealth's laws regarding registration of sexual offenders need to be strengthened. The Adam Walsh Child Protection and Safety Act of 2006 provides a mechanism for the Commonwealth to increase its regulation of sexual offenders in a manner which is **nonpunitive** but offers an increased measure of protection to the citizens of this Commonwealth.
>
> . . .

(1) It is the intention of the General Assembly to substantially comply with the Adam Walsh Child Protection and Safety Act of 2006 and to further protect the safety and general welfare of the citizens of this Commonwealth by providing for increased regulation of sexual offenders, specifically as that regulation relates to registration of sexual offenders and community notification about sexual offenders.

(2) It is the policy of the Commonwealth to require the exchange of relevant information about sexual offenders among public agencies and officials and to authorize the release of necessary and relevant information about sexual offenders to members of the general public as a means of assuring public protection and **shall not be construed as punitive.**

42 PA. CON. STAT. §§9799.11(a)(2), (b)(1) (*emphasis added*); *see also* Juvenile Defendants' Brief at 67. Given that the purpose of SORNA is expressly declared to be non-punitive, the Juvenile Defendants' contention that SORNA is nevertheless punitive in nature will only succeed upon the showing of the "clearest proof." Abraham, *supra*. An analysis of the Mendoza-Martinez factors illustrates that SORNA is not, in fact, punitive.

The first Mendoza-Martinez factor is to determine if "the sanction involves an affirmative disability or restraint." Id. The Juvenile Defendants argue that forcing Juvenile Defendants to register in person four times a year constitutes an arduous burden, especially given the wide range of information that must be reported. *See* Juvenile Defendants' Brief at 70. Contrary to the Juvenile Defendants' opinion, the jurisprudence of this Commonwealth does not agree that registration is so onerous so as to constitute an affirmative disability or restraint. To the contrary, "a registration requirement is perhaps the **least burdensome among the various modes of regulation a state may seek to impose**." Commonwealth v. Mountain, 711 A.2d 473, 477 (Pa. Super. 1998) (*internal citation and quotation marks omitted*) (*emphasis added*). To the extent that SORNA requires more information to be turned over than what has been previously required, the Commonwealth would aver that if turning over some information is deemed to be a very low burden, simply being required to provide additional information would not then tip the

proverbial scales so as to constitute an affirmative disability or restraint.[2] *See also* Herbert v. Billy, 160 F.3d 1131 (6th Cir. 1998) ("An affirmative disability or restraint generally is some sanction approaching the infamous punishment of imprisonment") (*internal citation and quotation marks omitted*).

The next factor under Mendoza-Martinez is if the sanction "has historically been regarded as a punishment." Id. The Juvenile Defendants argue that the SORNA requirements impose both probation and shaming—traditional forms of punishment. Concededly, both probationers and SORNA registrants are required to provide certain information. That being said, the mere similarity between probation and registration requirements cannot be said to mean that one automatically "equals" the other. After all, "whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the sting of punishment." Commonwealth v. Williams, 574 Pa. 487, 512, 832 A.2d 962, 976 (2003) (*quoting* Dep't. of Revenue of Montana v. Kurth Ranch, 511 U.S. 767, 777 fn.14 (1994)). As the General Assembly noted when passing SORNA, registration requirements are in place to protect the public, which is a compelling public interest. Similarly, SORNA requirements are not in place to "shame" a juvenile defendant. Rather, they exist for public safety. Certainly, some public embarrassment may result from having to register under SORNA, but it can hardly be said that the registration rises to the level of historical shaming and punishment. As the Pennsylvania Supreme Court noted in Williams, *supra*, "[U]nlike shaming punishments such as stocks and cages . . . the notification provisions of Megan's Law appear to be reasonably calculated to accomplish self-protection only, and not to impose additional opprobrium upon the offender unrelated to that goal." Id., 574 Pa. at 511, 832 A.2d at 977 (*internal citations omitted*). This is

[2] The Juvenile Defendants also claim that SORNA "imposes substantial, secondary affirmative disabilities and restraints." As that is not a factor for consideration under Mendoza-Martinez, the Commonwealth does not address it at this time.

further underscored by the General Assembly's stated purpose in enacting SORNA, which noted the information to be collected and exchanged "as a means of assuring public protection . . .". 42 PA. CON. STAT. §§9799.11(b)(1).

The next factor under Mendoza-Martinez is if the requirement in question is triggered only after a finding of *scienter*. Commonwealth v.Abraham, ___ Pa. ____, 62 A.3d 343 (2012) is informative to this issue. In Abraham, the Supreme Court of Pennsylvania noted that a pension forfeiture occurred upon finding that an individual was convicted of particular crimes, "regardless of intent or awareness of the statute." Id., ___ Pa. at ___, 62 A.3d at 352. Similarly, SORNA registration requirements do not require that the Juvenile Defendants be aware of the statute when they commit their offenses; all that is required to trigger registration is a finding that they have, indeed, committed, one of the enumerated offenses. Therefore, SORNA is not triggered only after a finding of *scienter.*

Under Mendoza-Martinez, the next factor under consideration is if the requirement in question promotes traditional aims of punishment; namely, retribution and deterrence. As it relates to retribution, the Juvenile Defendants seem to believe that the mere requirement of registration qualifies as retribution. That is simply not the case. As previously noted, the objectives of SORNA are non-punitive in nature and are in place for community protection. *See* 42 PA. CON. STAT. §§9799.11(b)(1). The Juvenile Defendants argue that since lifetime registration is required for certain delinquent acts, the reasoning of Smith v. Doe, 538 U.S. 84 (2003), which did not find Alaska's Sex Offender Registration Act to have retribution as a goal, is inapplicable here. As there is no "tier" division for juvenile offenders, they argue, the statute was non-retributive in nature, as opposed to Pennsylvania's "single tier" system. However, this argument ignores the distinction that Pennsylvania does, in essence, have a tier system in that

certain SORNA offenses for adults are not registerable offenses for juveniles. *Compare* 42 PA. CON. STAT. §9799.14 *with* 42 PA. CON. STAT. §9799.12.

Additionally, the Juvenile Defendants argue that SORNA is retributive in nature by selectively quoting various individuals that helped to pass SORNA who made various comments about cracking down on sex offenders. This is a bait-and-switch. The comments cited to by the Juvenile Defendants indicate that the individuals behind SORNA wanted to increase jail sentences for the predicate offenses or for failing to comply with the registration requirements. There is nothing to indicate that the goal of the signatories to SORNA was to punish people solely through the act of registration, let alone punish juvenile offenders by making them register.

The Juvenile Defendants also argue that SORNA promotes deterrence, another traditional goal of punishment. The registration requirements are not in place with deterrence as a main objective. Indeed, registration requirements have previously been determined not to be in place primarily as deterrents; "Although registration and notification may curtail opportunities to commit future sex offenses, these measures primarily protect innocent persons from victimization by permitting such persons to alter their own behavior according to the risks posed." Commonwealth v. Williams, 574 Pa. 487, 514, 832 A.2d 962, 978 (2003) (*internal citation omitted*). Even if SORNA's registration requirements did promote deterrence, however, this would hardly be sufficient to transform those requirements from a civil requirement to a criminal penalty. Simply because a requirement has a deterrent effect does not lead to the conclusion that the requirement is a punishment. *See* Smith v. Doe, 538 U.S. 84, 102 (2003) (*internal citations omitted*).

Next, the courts must consider whether the behavior that SORNA applies to is already a crime. It is conceded that registration requirements are only initiated upon a conviction of enumerated offenses; however, as the United States Supreme Court as noted, "This is a necessary beginning point, for recidivism is the statutory concern. The obligations the statute imposes are the responsibility of registration, a duty not predicated upon some present or repeated violation." Smith v. Doe, 538 U.S. 84, 105 (2003). It would be nonsensical, as the Juvenile Defendants argue in their brief, to require registration of individuals that are incompetent, did not commit registerable offenses, or were not found to have committed registerable offenses beyond a reasonable doubt. Registration requirements are correctly limited to specific individuals.

The registration requirements of SORNA are rationally related to a non-punitive purpose. Registration is in place due to the compelling interest of public safety. Although the Juvenile Defendants argue extensively that recidivism rates are lower amongst juvenile offenders when compared to adult offenders, that does not mean that public safety fails to be a concern if there are fewer juvenile offenders that reoffend when compared to adult sex offenders (in addition, that is based on the premise that the juvenile offenders do, indeed, have lower recidivism rates than the adult offenders, let alone when only looking at the specific juvenile sex offenders subject to SORNA registration requirements—a smaller subset than juvenile sex offenders as a whole). The Supreme Court of Pennsylvania has previously concluded "that registration is regulatory and remedial, not punitive." Commonwealth v. Williams, 574 Pa. 487, 515-16, 832 A.2d 982, 970 (2003) (*internal citation omitted*). The Juvenile Defendants also argue that public safety fails as a compelling interest because of the non-public nature of the registry. This argument is especially absurd, considering the great lengths the Juvenile Defendants argue about the wide dissemination of SORNA-related information. Moreover, the registration information

is given to public agencies for the express purpose of protecting the public, further making such a claim an exercise in sophistry.

The final factor under Mendoza-Martinez is whether or not the requirement is excessive in relation to its non-punitive purpose. As noted above, registration requirements under SORNA are in place to protect the public, and while such a requirement "may seem onerous . . . the question is whether it is sufficiently so to transform an otherwise remedial statute into a punitive one." Williams, 574 Pa. at 519, 832 A.2d at 981 (*internal citation omitted*). While the Juvenile Defendants descend once again into a laundry list of the various burdens that SORNA registration places upon them, the test is not "if the requirement is excessive as considered in a vacuum." The test is if the requirement is excessive in relation to its purpose of protecting the public. In that regard, the Juvenile Defendants fail to establish that there is a less excessive manner than requiring registration, or that such a method would even be appropriate. This cannot be said to be so horrific so as to transform a civil requirement into a criminal penalty.

Upon a full consideration of the Mendoza-Martinez factors, registration under SORNA is not a criminal penalty masquerading as a civil remedy. Given that the standard is the extremely heightened requirement of "the clearest proof," one cannot come to the conclusion that SORNA's registration requirements are so burdensome as to "transform what has been denominated a civil remedy into a criminal penalty." Commonwealth v. Abraham, 62 A.3d 343, 350 (Pa. 2012) (*citations omitted*). As a result, the Juvenile Defendants cannot demonstrate, either under existing case law to the contrary or under their novel interpretations of such case law, that the registration requirements are anything other than a collateral consequence.

II. SORNA DOES NOT VIOLATE THE JUVENILE ACT, AS IT IS NOT UNDER THE JURISDICTION OF THE JUVENILE ACT.

The Juvenile Defendants argue that SORNA's registration requirements are in conflict with the goals and confines of the Juvenile Act. Similarly, they argue that the juvenile courts lack the ability to enforce SORNA's registration requirements. This is incorrect, as SORNA's requirements are not part of the Juvenile Act. Additionally, as mentioned in argument I, *supra,* they are merely collateral consequences of a juvenile having been adjudicated delinquent of one of the enumerated defenses. Finally, juvenile courts may be informing juvenile offenders of the SORNA requirements, but they do not "administer" SORNA.

SORNA and its registration requirements are not governed or controlled by the Juvenile Act. Indeed, the Juvenile Defendants agree that the juvenile courts lack jurisdiction of juvenile offenders once the offenders reach age 21. The Juvenile Act, located in 42 PA. CON. STAT. §6301 *et seq.*, is meant to only address juveniles that are "alleged to be delinquent or dependent." 42 PA. CON. STAT. §6303(a)(1). The Commonwealth agrees that the juvenile courts lose jurisdiction over the Juvenile Defendants once the juveniles reach the age of 21. *See* Commonwealth v. Zoller, 498 A.3d 436 (Pa. Super. 1985). SORNA's registration requirements, by contrast, are in place to address both adult and juvenile sex offenders. *See* 42 PA. CON. STAT. §9799 *et seq.* However, as the registration requirements are part of a collateral consequence, it matters not that the juvenile court lacks jurisdiction over the matter. After all, it is not the juvenile courts that administer and monitor a juvenile offender's compliance with SORNA. Rather, it is the Pennsylvania State Police that sets forth approved registration sites, collects the required information, etc. *See* 42 PA. CON. STAT. §9799 *et seq.* An analogous situation is that of a license suspension. Upon certain convictions or adjudications of delinquency, the Pennsylvania Department of Transportation ("PENNDOT")—notably, **not** the trial or the

juvenile court—suspends the individual's driver's license. *See* 75 PA. CON. STAT. §1532. While the license may be "turned in" to the court, it is not the court that imposes that condition, it is PENNDOT. In like manner, it is a separate agency—here, the Pennsylvania State Police—that is in charge of the SORNA registration requirements. The Juvenile Defendants cannot and should not petition this Honorable Court for relief. This issue is best addressed to the agency responsible for these requirements—the State Police—not the District Attorney's Office. As with any collateral consequence occurring after a criminal conviction or a finding of delinquency, the court is, at most, a conduit for these collateral consequences—for example, one can turn in his driver's license to the court. However, that does not mean that the court is the one suspending the license or administering the civil consequence. The juvenile courts do not require registration—they simply inform the juvenile that he is now required to follow up with the State Police to do so.

The Juvenile Defendants also argue that the registration requirements of SORNA contravene the purposes of the Juvenile Act. While the Commonwealth agrees that the Juvenile Act's goals are to focus on treatment, reformation, and rehabilitation, as opposed to punishment, that is not the relevant inquiry. *See generally* In re J.B., 39 A.2d 421, 427 (Pa. Super. 2012) (noting the purposes of juvenile proceedings). Indeed, it is absurd to think that simply because the Juvenile Act fails to explicitly list public safety as one of its goals that it then logically flows that an interest in public safety is contrary to the objectives of the Juvenile Act. To claim that the Juvenile Act fails to appreciate or care about public safety at all is the epitome of willful blindness.

Even assuming *arguendo*, however, that the Juvenile Act does not have the same concern for public safety as SORNA does, SORNA's objectives and the Juvenile Act's objectives need

not be in alignment. SORNA's registration requirements ultimately focus on public safety. *See* 42 PA. CON. STAT. §9799.11(b)(1). The Juvenile Defendants' arguments are largely duplicative of their arguments about the punitive nature of SORNA registration requirements. Although the Commonwealth reiterates that SORNA's registration requirements are non-punitive, it would not matter if they were for the purposes of this inquiry. SORNA does not have to be wholly focused on rehabilitation or reformation, because it is separate and distinct from the Juvenile Act. The Juvenile Act's dispositions, admittedly, must have the goals of treatment and the like in mind, but as SORNA's registration requirements are not part of the juvenile dispositions, they need not comply with that requirement of the Juvenile Act. Therefore, SORNA and the Juvenile Act exist in separate spheres, and as such, it matters not that the former does not necessarily comply with the goals of the latter.

III. SORNA DOES NOT VIOLATE SUBSTANTIVE DUE PROCESS RIGHTS.

The Juvenile Defendants make the argument that SORNA registration requirements are in violation of substantive due process considerations. This claim is without merit, wholly unsupported by the case law, and must be denied. Specifically, the Juvenile Defendants claim that the registration requirements affect their fundamental freedom of reputation.

It is well-settled that statutes are presumed constitutional and will only be struck down if the law "clearly, palpably, and plainly violates constitutional rights." In the Interest of F.C. III, 607 Pa. 45, 68, 2 A.3d 1201, 1214 (2010) (*quoting* Commonwealth v. Ludwig, 583 Pa. 6, 15, 874 A.2d 623, 628 (2005)). Here, the case law amply demonstrates that the Juvenile Defendants' substantive due process rights are not violated by SORNA registration requirements. "To withstand a substantive due process challenge, a statute or regulation must seek to achieve a valid state objective by means that are rationally related to that objective." Khan v. State Bd. Of

Auctioneer Examiners, 577 Pa. 166, 184, 842 A.2d 936, 946 (2004) (*internal citation omitted*). In addition, an individual's rights are weighed in comparison to the public interest. Id., 577 Pa. at 184, 842 A.2d at 946-47 (*citations omitted*). "When confronted with a constitutional challenge premised upon substantive due process grounds, the threshold inquiry is whether the challenged statute purports to restrict or regulate a constitutionally protected right." Id., 577 Pa. at 184, 842 A.2d at 947 (*citation omitted*). Rights considered "fundamental" include the rights to privacy, marriage, and procreation, whereupon courts use strict scrutiny. Nixon v. Dep't of Pub. Welfare, 576 Pa. 385, 400, 839 A.2d 277, 287 (2003) (*internal citations omitted*). A law is constitutional under strict scrutiny if it is narrowly tailored to a compelling state interest. Id. (*citations omitted*).

In the case *sub judice*, the Juvenile Defendants are correct that reputation is considered a fundamental right under the Pennsylvania Constitution. That being said, the Commonwealth is perplexed as to how SORNA violates the Juvenile Defendants' reputation rights. The Juvenile Defendants concede elsewhere in their memorandum of law that the registry and its information is non-public. *See* Juvenile Defendants' Brief at 88. The Commonwealth agrees with this assertion; additionally, it should be noted that even if the information were, in fact, made public, it is unclear how the dissemination of **truthful** information can be considered an infringement of one's reputation rights. *See* Balletta v. Spandoni, 47 A.2d 183 (Pa. Commw. Ct. 2012) (addressing right of reputation in case involving defamation claim). In addition, it is unclear how the Commonwealth can or should be held responsible for the dissemination of information by third parties. Indeed, the Juvenile Defendants cite to no case law explaining how the Commonwealth is legally responsible for the actions of third parties. Finally, it should be noted that while the registry is confidential, the adjudication of delinquency (and thus, by extension,

the fact that the Juveniles would have to register) for the SORNA offenses is a matter of public record. *See* 42 PA. CON. STAT. §6308(b). The Commonwealth should not be blamed if a juvenile offender commits a SORNA offense, which is a matter of public record, and then concerned public citizens request information that would be publicly available upon request, even if SORNA did not exist. Any harm to the offenders' reputation, based on the speculative and heretofore unproven dissemination of truthful information, is clearly insufficient so as to constitute a substantive due process violation.

IV. SORNA REGISTRATION REQUIREMENTS DO NOT VIOLATE PROCEDURAL DUE PROCESS RIGHTS.

The Juvenile Defendants argue that registration under SORNA is a denial of procedural due process, as no hearing is required prior to registration. This claim is also without merit and should not be grounds for relief. Presumably, their argument is premised on the fact that registration is mandatory for the enumerated offenses. It is well-settled, however, that registration requirements, which are non-punitive in nature, do not require "the full panoply of due process protections that attach where punishment is in the offing[.]" Commonwealth v. Lee, 594 Pa. 266, 270, 935 A.2d 865, 867 (2007) (*internal citation omitted*). Registration requirements for sexual offenders have also been determined to be a relatively minor inconvenience, especially when compared to the weighty public policy goal of ensuring the safety of the public at large. *See* Commonwealth v. Mountain, 711 A.2d 473, 477-78 (Pa. Super. 1998) (*internal citations omitted*). In addition, courts have determined that there would be nothing to gain from a hearing before one would be required to register, as "guilt already has been determined, [the] sentence imposed and no further penalty attaches by way of the registration provisions." Id. at 478. Also analogous is Commonwealth v. Lee, 594 Pa. 266, 935 A.2d 865 (2007), which affirmed the hearing requirements for sexually violent predators. In

Lee, the Supreme Court of Pennsylvania declared that the hearing requirements of Megan's Law II for sexually violent predators could only be constitutionally infirm if the Court were to "accept the premise, which we have all but categorically rejected in our prior cases, that the registration, notification, and counseling provisions of Megan's Law II are punitive in the constitutional sense[.]" Id., 594 Pa. at 290, 935 A.2d at 880. The Court noted that the expansive due process protections that are required for criminal prosecution were not needed in the context of Megan's Law II registration requirements. Id. In essence, there is no requirement that a juvenile defendant be given a hearing prior to having to register under SORNA, and this Court should not be required to create one.

V. SORNA DOES NOT CREATE ANY REBUTTABLE PRESUMPTIONS.

The Juvenile Defendants argue that the registration requirements of SORNA create rebuttable presumptions that they are forever dangerous or in need of treatment. This claim is without merit. SORNA does not create any presumptions, rebuttable or otherwise. Rather, as noted in arguments I-III, *supra*, SORNA only requires that certain juvenile offenders, after having been adjudicated delinquent of enumerated offenses must register with the Pennsylvania State Police. Certainly, the Commonwealth would note that sexual offenders generally have a high rate of recidivism and that the public has the right to be kept safe from sexual offenders, and as such, registration promotes the collateral consequence of public safety. That being said, the registration requirements do not create any presumptions about sexual offenders. SORNA merely requires that certain sexual offenders register upon a conviction or adjudication. It is silent about the dangerousness of individuals on the registry, about the likelihood of reoffending, and any other factor that would be a "presumption" about those on the list. *See generally* Dial v. Vaughn, 733 A.2d 1 (Pa. Commw. Ct. 1999). The Juvenile Defendants point to cases addressing

license revocations[3] and placement of delinquent students into alternative education classes,[4] but, notably, fail to acknowledge that requiring an offender to register under Megan's Law or its progeny has never been held to create any rebuttable presumptions. Therefore, this claim is without merit and must fail.

VI. SORNA DOES NOT CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT.

The Juvenile Defendants contend that SORNA and its registration requirements are in violation of the Cruel and Unusual Punishment clauses of both the United States and Pennsylvania Constitutions. This claim is wholly without merit, as the registration requirements of SORNA do not constitute punishment. *See generally* Williams, *supra* (noting that Megan's Law II's registration requirements did not constitute criminal punishment). As noted in argument I, *supra*, the registration requirements of SORNA are collateral consequences of the adjudication, not a criminal punishment, and the Commonwealth would reincorporate that argument by reference as if stated in full here. The Juvenile Defendants rely on case law that notes the potential of children to rehabilitate, why children should not be subjected to the same punishments as adults, and other factors militating against specific criminal sentences. Conveniently ignored in this analysis, however, is the simple fact that SORNA's registration requirements cannot be a violation of the Cruel and Unusual Punishment clauses because it is not a criminal punishment, but merely a collateral consequence of the adjudication. All of the Juvenile Defendants' arguments are premised upon the assumption that the "punishment" of registration is disproportionate to their offenses. However, since registration is not a punishment, proportionality does not come into play. Therefore, SORNA's registration requirements cannot be struck down on that basis.

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[3] Dep't of Trans. v. Clayton, 546 Pa. 342, 684 A.2d 1060 (1996).
[4] D.C. v. Sch. Dist., 879 A.2d 408 (Pa. Commw. Ct. 2005).

VII. SORNA IS NOT AN EX POST FACTO VIOLATION.

The Juvenile Defendants aver that SORNA is a violation of the *ex post facto* clauses of both the United States and the Pennsylvania Constitutions. As this claim is meritless, it should not be grounds for relief. A requirement cannot constitute an *ex post facto* violation if it is non-punitive, even if it retroactively applied. *See* Smith v. Doe, 538 U.S. 84, 105-06 (2003). As discussed at length in argument I, *supra*,[5] the registration requirements of SORNA are civil in nature, and are merely a collateral consequence of the adjudication. As previously noted, the legislative intent in enacting SORNA was non-punitive in nature. Id. at 92; *see also* 42 PA. CON. STAT. §9799.11(b)(1) (indicating the non-punitive objective of SORNA). This, along with the fact that a weighing of the Mendoza-Martinez factors indicates that there lacks sufficient proof to supersede the stated intent of the legislature to make a civil action a criminal penalty, demonstrates that SORNA and its registration requirement are not punitive, and, as a result, cannot be a violation of *ex post facto* clauses to either the United States or Pennsylvania Constitutions.

VIII. AS SORNA IS A COLLATERAL CONSEQUENCE TO A JUVENILE ADJUDICATION, THE ADMISSIONS ENTERED INTO BY THE JUVENILE DEFENDANTS WERE INTELLIGENT, KNOWING, AND VOLUNTARY.

In some of the Juvenile Defendants' motions for *nunc pro tunc* relief, a claim is made that the admissions they entered into were not intelligent, knowing, and voluntary, due to the new registration requirements they were unaware of at the time an admission was entered.[6] This claim is without merit and must be denied, as counsel cannot be held responsible for future changes to the law. It is well settled that once an individual pleads guilty (or, in the case of a

[5] The Commonwealth would reincorporate all relevant argument regarding the non-punitive nature of SORNA from argument I, as if stated in full, here.

[6] As not all of the Juvenile Defendants entered into admissions for their underlying offenses, only the ones that did so have this specific claim.

juvenile, enters an admission), he may not then claim that his admission was involuntary, unknowing, or unintelligent unless he is alleging that his counsel was constitutionally defective in representing him, and that ineffectiveness caused him to enter into an invalid plea. *See* Commonwealth v. Hickman, 799 A.2d 136, 141 (Pa. Super. 2002). To establish a claim of ineffective assistance of counsel, one must demonstrate that (i) the underlying claim is of arguable merit; (ii) counsel's particular course of conduct had no reasonable basis; and (iii) prejudice resulted from the ineffective actions of counsel. Commonwealth v. Pierce, 567 Pa. 186, 786 A.2d 203 (2001). A failure to satisfy any of the three prongs means that the claim fails. Id. Presumably, the Juvenile Defendants that entered admissions are claiming that their admissions are defective because they were not informed of the requirement of registration at the time they entered their admissions.

Any claim that counsel was ineffective for not informing his client of the consequences of registration under SORNA is wholly without merit. It is undisputed that the Juvenile Defendants all entered admissions in their cases before December 21, 2012—the date that SORNA first became effective. However, as SORNA provisions were made retroactive, offenses that did not require registration previously now do require the Juvenile Defendants to register as sex offenders. The Juvenile Defendants have no claim of arguable merit, because for counsel to have advised their clients about registration consequences, they would have had to be clairvoyant. After all, counsel would have had to not only predict that at some point in the future, offenses that were not registerable would be amended to become registerable offenses, **and** that such registration requirements would be made retroactive. Trial counsel cannot be faulted for failing to predict the future. Indeed, similar arguments about registration requirements for sex offenders have been considered, and properly rejected, by the courts. *See*

Commonwealth v. Benner, 853 A.2d 1068 (Pa. Super. 2004) (holding that failure to inform defendant of registration requirements did not invalidate plea or preclude him from registration requirements); *see also* Commonwealth v. Leidig, 598 Pa. 211, 956 A.2d 399 (2008) (finding that confusion over length of registration requirement is not a basis for withdrawal of a plea). In contrast to Padilla, *supra*, a registration requirement has never been held to be so inextricably linked to a conviction or adjudication that a defendant must be made aware of those consequences in order to make the plea valid, especially when said registration consequences did not exist when the plea was entered. *See also* Chaidez v. United States, 568 U.S. ____ (2013) (holding that Padilla is not retroactive). As a result, the Juvenile Defendants should not be permitted to challenge their admissions for not being made aware of registration requirements that, at the time they made their admissions, simply did not exist.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Honorable Court DENY the Juvenile Defendants' request for relief, as SORNA and its registration requirements are not unconstitutional.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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