COMMONWEALTH OF PENNSYLVANIA	**: IN THE COURT OF COMMON PLEAS**
vs.	**: CHESTER COUNTY, PENNSYLVANIA**
GEORGE TORSILIERI	**: NO. 15-CR-0001570-2016**
	: CRIMINAL ACTION—LAW

Nicholas J. Casenta, Jr., Esquire, Chief Deputy District Attorney, for the Commonwealth
Marni Jo Snyder, Esquire and Vincent P. DiFabio, Esquire, for the Defendant
Marie Clouser, Office of the Clerk of Courts of Chester County

ORDER

AND NOW, this 30th day of August 2018, upon consideration of the issuance of the Rule 1925(a) Opinion in the above-captioned matter regarding the Commonwealth's direct appeal to the Pennsylvania Supreme Court, as well as upon consideration of the pending defense direct appeal to the Pennsylvania Superior Court, the Clerk of Courts of Chester County is **DIRECTED** to photocopy or make scanned reproductions of any items forwarded to the Pennsylvania Supreme Court in connection with the Commonwealth's direct appeal so that a record may be maintained at the Court of Common Pleas for use by the undersigned in connection with Defendant's direct appeal and for subsequent submission to the Pennsylvania Superior Court once the undersigned issues a Rule 1925(a) Opinion regarding Defendant's direct appeal.

BY THE COURT:

Anthony A. Sarcione, J.

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OPINION *SUR* RULE 1925(a)

Before this Honorable reviewing Court is the Commonwealth's direct appeal from our Order declaring the registration and notification provisions of SORNA unconstitutional, which was issued in resolution of cross-post-sentence motions filed by the parties. We issued our Order on July 10, 2018. The Commonwealth filed its Notice of Appeal on July 13, 2018. The Commonwealth's Notice of Appeal was timely filed. *See* Pa. R.A.P. 903(a)("Except as otherwise prescribed by this rule, the notice of appeal required by Rule 902 (manner of taking appeal) shall be filed within 30 days after the entry of the order from which the appeal is taken."); Pa. R.Crim.P. 721(B)(2)(b)(i)("If the defendant has filed a post-sentence motion, the Commonwealth's notice of appeal shall be filed within 30 days of the entry of the orders disposing of the Commonwealth's and the defendant's motions pursuant to paragraph (C)(1).").

I. JURISDICTION

We respectfully submit that, as this is an appeal by the Commonwealth from a decision of the trial court holding a statute unconstitutional, jurisdiction is properly before this Honorable reviewing Court pursuant to 42 Pa. C.S.A. § 722(a)(providing exclusive jurisdiction to the Pennsylvania Supreme Court in appeals from final orders of

the courts of common pleas in matters where the court of common pleas has held invalid as repugnant to the Constitution of the United States, or to the Constitution of this Commonwealth, any statute of this Commonwealth). *Shoul v. Commonwealth, Department of Transportation, Bureau of Driver Licensing*, 173 A.3d 669, 675 n. 6 (Pa. 2017); *In re R.M.*, 2015 WL 7587203 (Pa. Super. 2015)(where the Commonwealth files an appeal from a lower court decision holding a statute unconstitutional, jurisdiction is in the Pennsylvania Supreme Court.)

II. FACTUAL AND PROCEDURAL HISTORY

A. Factual History

This case has a somewhat prolix procedural and factual history, which we will recite in pertinent part for the convenience of this Honorable tribunal. On July 3, 2017, following a week-long trial that began on June 26, 2017, a jury returned a verdict in the above-captioned matter convicting the Defendant, George J. Torsilieri, a twenty-five (25) year old biomechanical engineer with no prior record who was approximately twenty-three (23) years old when the events giving rise to this action occurred, of one (1) count of Aggravated Indecent Assault (Count II), 18 Pa. C.S.A. § 3125(a)(1) and one (1) count of Indecent Assault, 18 Pa. C.S.A. § 3126(a)(1) (Count VI) stemming from his physical contact with a then-twenty-two (22) year old mechanical engineer on the night of November 13-14 of 2015. The jury acquitted Defendant of one (1) count of Sexual Assault, 18 Pa. C.S.A. § 3124.1 (Count IV).

A review of the record in this matter reveals that the evening of November

13, 2015 began commonly enough.[1] (Trial Transcript, 6/27/17, N.T. at 80). A small group of young professionals, including the complainant, E.G., gathered at a mutual friend's house to socialize in the early evening. (Trial Transcript, 6/27/18, N.T. 76-82). The four (4) young people, all recent college graduates, decided to go to a local restaurant/bar, Kildare's, for dinner. (Trial Transcript, 6/27/17, N.T. 76-82). Upon arriving at Kildare's sometime between 5:15 and 5:30 p.m., they each ordered a burger and a beer and continued to socialize. (Trial Transcript, 6/27/17, N.T. 82). At approximately 7:30 p.m., they returned to the friend's, Jessica Penman's, house. (Trial Transcript, 6/27/17, N.T. 82). Around 9:00 or 9:30 p.m., Defendant and a male friend named David arrived. (Trial Transcript, 6/27/17, N.T. 83-84). David brought a bottle of wine and the Defendant supplied more beer. (Trial Transcript, 6/27/17, N.T. 85). They put the alcohol in the refrigerator and joined the others in the living room for conversation. (Trial Transcript, 6/27/17, N.T. 85). Around 10:00 p.m., a third friend by the name of Ali came over. (Trial Transcript, 6/27/17, N.T. 85). Defendant and a few of the other friends, but not E.G., drank alcoholic beverages "casually" over the course of the evening. (Trial Transcript, 6/27/17, N.T. 87-89). At approximately 11:30 p.m., David, Ali and one of the other young women left Ms. Penman's house. (Trial Transcript, 6/27/17, N.T. 87). The three remaining guests, aside from Ms. Penman, included Defendant, E.G., and E.G.'s friend, Ryan Quirk. (Trial Transcript, 6/27/17, N.T. 79, 87).

[1] Unfortunately, situated in a college town like West Chester, this Court is all too frequently faced with cases involving similar, albeit not precisely identical, types of facts. Alcohol does not mix well with the inexperience of youth.

These four (4) young people decided to go bar hopping around 11:30 p.m. or midnight. (Trial Transcript, 6/27/17, N.T. 87). They walked to a local establishment, the Box Car Brewery, first. (Trial Transcript, 6/27/17, N.T. 89). At the Box Car Brewery they each ordered a beer. (Trial Transcript, 6/27/17, N.T. 93). When the Box Car Brewery closed at 1:00 a.m., the quartet walked to another local bar/restaurant by the name of Barnaby's. (Trial Transcript, 6/27/17, N.T. 94-95). They ordered shots as soon as they arrived. (Trial Transcript, 6/27/17, N.T. 95). The Defendant and E.G. also ordered Bud Lite. (Trial Transcript, 6/27/17, N.T. 95). At last call, they all got mixed drinks. (Trial Transcript, 6/27/17, N.T. 95). According to E.G.'s friend Ryan Quirk, E.G. and the Defendant were flirting with each other while the foursome were at Barnaby's. (Trial Transcript, 6/28/17, N.T. 448-49, 482). When Barnaby's closed at 2:00 a.m., the group walked to 7-Eleven. (Trial Transcript, 6/27/17, N.T. 95, 97). E.G. bought some taquitos there and ate them on the way back to Ms. Penman's. (Trial Transcript, 6/27/17, N.T. 97). As the four (4) walked back to Ms. Penman's apartment, E.G. linked arms with Ms. Penman, Mr. Quirk, and the Defendant at various times. (Trial Transcript, 6/27/17, N.T. 97-99).

When they arrived back at Ms. Penman's apartment, Ms. Penman, the Defendant and E.G. sat on the couch and Mr. Quirk sat on a recliner across from the couch. (Trial Transcript, 6/27/17, N.T. 99). E.G. sat on one end of the couch, Defendant was in the middle, and Ms. Penman was at the other end. (Trial Transcript, 6/27/17, N.T. 100). While conversing with one another, Ms. Penman, E.G. and the Defendant split one glass of wine amongst themselves in order to finish the bottle that David had brought

earlier. (Trial Transcript, 6/27/17, N.T. 99). The group continued to socialize for approximately forty-five (45) minutes to an hour. (Trial Transcript, 6/27/17, N.T. 100).

Leaning on the arm of the couch, away from the Defendant, E.G. fell asleep at approximately 3:15 or 3:30 a.m. (Trial Transcript, 6/27/17, N.T. 101). At some point, E.G. awoke to find the Defendant on top of her kissing her face and neck and touching her breasts under her shirt. (Trial Transcript, 6/27/17, N.T. 102-06). At trial, E.G. described being confused when she awoke and wondering where she was and who was on top of her. (Trial Transcript, 6/27/17, N.T. 102-03). She thought at first that it might have been her friend Mr. Quirk, who was sleeping either in the recliner or on the floor across from the couch. (Trial Transcript, 6/27/17, N.T. 102-03). Then she distinguished Defendant's facial features and realized that it was not Mr. Quirk, but the Defendant who was kissing her and fondling her breasts under her shirt. (Trial Transcript, 6/27/17, N.T. 102-06).

E.G. testified that Defendant, without saying a word or even making eye contact with her, slid his hand in E.G.'s jeans and digitally penetrated her. (Trial Transcript, 6/27/17, N.T. 108, 112). Defendant then brought his hips up to E.G.'s face such as to indicate that he wanted E.G. to perform oral sex on him. (Trial Transcript, 6/27/17, N.T. 109-10). E.G. said "No." (Trial Transcript, 6/27/17, N.T. 110). Defendant moved his hips away from E.G.'s face. (Trial Transcript, 6/27/17, N.T. 110). A few moments later he brought them back up to E.G.'s face. (Trial Transcript, 6/27/17, N.T. 110). E.G. again said "No." (Trial Transcript, 6/27/17, N.T. 110). Defendant again moved his hips away from E.G.'s face. (Trial Transcript, 6/27/17, N.T. 110). He then

"shifted down", pulled off her pants, and inserted his penis in her vagina. (Trial Transcript, 6/27/17, N.T. 110-11).

E.G. described feeling "frozen" and "paralyzed", so afraid that she couldn't move. (Trial Transcript, 6/27/17, N.T. 111-12). E.G.'s friend, Ryan Quirk, who was sleeping on the floor opposite the couch, testified that he heard "making out noises" and "moaning" that "sounded like excitement, like excitement style of moaning, that someone would be enjoying sex." (Trial Transcript, 6/27/17, N.T. 78-79, 100; Trial Transcript, 6/28/17, N.T. 464, 469, 471-74). E.G., however, describing Defendant's actions as "painful", insisted instead that the sounds Mr. Quirk heard were from her saying "ow" a few times and making what she characterized as "painful breath sounds". (Trial Transcript, 6/27/17, N.T. 112-13). She did not say no at this time and at trial had no specific recollection of telling the Defendant to stop. (Trial Transcript, 6/27/17, N.T. 113, 117). She did not cry out to any of her friends. (Trial Transcript, 6/27/17, N.T. 122).

Instead, in a "moment of clarity", she asked Defendant whether he had a condom on. (Trial Transcript, 6/27/17, N..T 114). She testified that she asked this question in order to induce the Defendant to withdraw his penis and stop the encounter. (Trial Transcript, 6/27/17, N.T. 114-15). Defendant did in fact withdraw. (Trial Transcript, 6/27/17, N.T. 115). He sat up, supported by his knees, with his legs on either side of E.G., and reached down to grab his pants. (Trial Transcript, 6/27/17, N.T. 115-16). He pulled a condom out of the wallet in his back pocket, put it on, and then reinserted his penis into E.G.'s vagina, continuing the sex act. (Trial Transcript, 6/27/17, N.T. 116-17).

After the Defendant climaxed, E.G. pushed his shoulder up, swiveled her

legs, got up, went into the bathroom and washed herself. (Trial Transcript, 6/27/17, N.T. 118). She saw she was bleeding from the vagina. (Trial Transcript, 6/27/17, N.T. 120). It was approximately 5:50 a.m. (Trial Transcript, 6/27/17, N.T. 101-02, 126). She estimated the entire encounter lasted roughly ten (10) minutes. (Trial Transcript, 6/27/17, N.T. 101-2). E.G. then texted an out-of-state friend from another room, woke Ms. Penman up, and the friend whom she texted spoke to Ms. Penman by phone to tell Ms. Penman that E.G. had just been assaulted. (121-28). Ms. Penman drove E.G. to the police station to report the assault. (130). Before they left, E.G. grabbed the used condom that was on table by the couch. (129). Defendant was lying on the couch with his head turned to the side so E.G. could not tell whether he was awake or asleep. (Trial Transcript, 6/27/17, N.T. 121-22).

B. Procedural History

On June 13, 2016, the Commonwealth filed an Information against the Defendant charging him with one (1) count of Rape (Count I), 18 Pa. C.S.A. § 3121(a)(1); graded as a Felony of the First Degree (F-1); two (2) counts of Aggravated Indecent Assault (Counts II and III), 18 Pa. C.S.A. § 3125(a)(1), -(2), graded as a Felony of the Second Degree (F-2); one (1) count of Sexual Assault (Count IV), 18 Pa. C.S.A. § 3124.1, graded as a Felony of the Second Degree (F-2); one (1) count of Indecent Assault (Count V), 18 Pa. C.S.A. § 3126(a)(2), graded as a Misdemeanor of the First Degree (M-1); and one (1) count of Indecent Assault, 18 Pa. C.S.A. § 3126(a)(1), graded as a Misdemeanor of the Second Degree (M-2).

Defendant's jury trial began on June 26, 2017. Immediately prior to trial the Commonwealth withdrew Count III, charging Aggravated Indecent Assault, 18 Pa. C.S.A.

§ 3125(a)(1), -(2). At the close of the Commonwealth's case on June 30, 2017, the defense made a motion for judgment of acquittal. Based on this Honorable reviewing Court's decision in *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994), *reargument denied* (July 5, 1994), we granted the defense motion as to all charges requiring forcible compulsion, that is, as to the charge of Rape (Count I), 18 Pa. C.S.A. § 3121(a)(1); the charge of Aggravated Indecent Assault under 18 Pa. C.S.A. § 3125(a)(2) (one (1) component of Count II); and the charge of Indecent Assault, 18 Pa. C.S.A. § 3126(a)(2) (Count V). We left the remaining three (3) charges of Aggravated Indecent Assault (Count II) under 18 Pa. C.S.A. § 3125(a)(1), Sexual Assault (Count IV), 18 Pa. C.S.A. § 3124.1, and Indecent Assault (Count VI), 18 Pa. C.S.A. § 3126(a)(1), for the jury to decide.

On July 3, 2017, as we discussed above, the jury returned a verdict convicting the Defendant of one (1) count of Aggravated Indecent Assault (Count II), 18 Pa. C.S.A. § 3125(a)(1) and one (1) count of Indecent Assault (Count VI), 18 Pa. C.S.A. § 3126(a)(1). The jury acquitted the Defendant of Count IV, Sexual Assault, 18 Pa. C.S.A. § 3124.1. Sentencing was deferred pending the completion of a Pre-Sentence Investigative Report and a Sexually Violent Predator Assessment.

On July 19, 2017, this Honorable reviewing Court issued its decision in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), *cert. denied*, *Pennsylvania v. Muniz*, 138 S.Ct. 925 (U.S. Pa. 2018), wherein the Court determined that registration and notification provisions of the Sexual Offender Registration and Notification Act, 42 Pa. C.S.A. § 9799.10 *et seq.*, constituted punishment and its application to offenders whose

crimes occurred before its enactment violated the provisions of the Ex Post Facto Clauses of the Pennsylvania and Federal Constitutions.

On August 9, 2017, the Chester County Office of Adult Probation and Parole completed Defendant's Pre-Sentence Investigative Report. On September 21, 2017, the Sexual Offenders Assessment Board submitted its report finding that Defendant did not meet the criteria to be designated a Sexually Violent Predator.

On October 31, 2017, the Pennsylvania Superior Court issued its decision in *Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. 2017), *reargument denied* (January 3, 2018), holding that the provisions of SORNA which allowed a court to declare a sexual offender a Sexually Violent Predator based on the standard of clear and convincing evidence rather than proof beyond a reasonable doubt, violated *Alleyne v. United States*, 133 S.Ct. 2151 (U.S. Va. 2013) and *Apprendi v. New Jersey*, 120 S.Ct. 2348 (U.S. N.J. 2000) because, pursuant to *Muniz*, *supra*, it increased punishment without the requisite due process of law.

On November 27, 2017, we sentenced Defendant to a term of imprisonment of one (1) year minus one (1) day to two (2) years minus one (1) day, to be served in Chester County Prison, followed by three (3) years of consecutive probation, for the crime of Aggravated Indecent Assault (Count II). We ordered Defendant to pay a fine of $500.00, a DNA testing fee of $250.00, and the costs of prosecution. On his conviction for Indecent Assault (Count VI), we sentenced Defendant to a term of imprisonment of three (3) months to twenty-three (23) months in Chester County Prison, to run concurrently with the sentence imposed on Count II. We also ordered Defendant to pay a fine of $250.00 and the costs of prosecution. Defendant's sentence was ordered

to commence immediately and there was no credit for time served because Defendant had met bail. We ordered Defendant to undergo a Sex Offense Assessment and follow all recommended treatment. We made him work release eligible a the Warden's discretion after serving eighteen (18) months of his sentence and parole eligible after serving twenty-two (22) months. Defendant's aggregate prison sentence is thus one (1) year minus one (1) day to two (2) years minus (1) day in Chester County Prison. Defense counsel moved for bail pending appeal pursuant to Pa. R.Crim.P. 521 on behalf of the Defendant, but we denied her motion.

On December 7, 2017 Defendant filed a "Post Sentence Motion and Motion to Reconsider, Combined". We held an evidentiary hearing on Defendant's post sentence motion on December 18, 2017. On February 8, 2018, without reconvening the parties for a court proceedings, we issued an Order granting in part and denying in part Defendant's post-sentence motion. We granted Defendant's post-sentence motion in two respects. First, we modified Defendant's sentence by making him eligible for parole after serving eighteen (18) months of his sentence, instead of twenty-two (22) months. Second, we modified Defendant's sentence by making Defendant work release eligible after serving fourteen (14) months of his sentence, instead of eighteen (18) months. We explained our rationale for deviating from the Statewide Sentencing Guidelines in a footnote to the Order. In all other respects, Defendant's "Post Sentence Motion and Motion to Reconsider, Combined" was denied and dismissed.

On February 16, 2018 the Commonwealth filed a Motion for Reconsideration of Sentence. In its Motion, the Commonwealth complained that we modified Defendant's sentence outside of the presence of the opposing party, that is, that

we modified Defendant's sentence by court Order without convening the parties for a re-sentencing in open court. The Commonwealth objected to the terms of Defendant's modified sentenced and prayed for the Court to re-impose upon Defendant the terms of the sentence as stated on November 27, 2017.

On February 27, 2018, Defendant filed a Petition to File Post Sentence Motion Nunc Pro Tunc and a Supplemental Post Sentence Motion Filed Nunc Pro Tunc challenging the constitutionality of the registration and notification provisions of the Sex Offender Registration and Notification Act (hereinafter, "SORNA"). In his Supplemental Post Sentence Motion, Defendant argued that SORNA unconstitutionally deprives persons of their fundamental right to reputation without due process of law under Pennsylvania's Constitution by utilizing an irrebuttable presumption, namely, that all sex offenders are high-risk dangerous recidivists, that is not universally true and as to which there exist reasonable alternative means to ascertain an offender's actual risk of future dangerousness. Defendant further argued that SORNA's use of this irrebuttable presumption deprives persons of a meaningful opportunity to be heard on the question of whether he or she is at high risk for recidivism or to contest the presumption of future dangerousness. Over the Commonwealth's written objection, by Order dated March 27, 2018, we permitted Defendant to file his post sentence motion nunc pro tunc.

On May 4, 2018 Defendant filed a Reply to the Commonwealth's Motion for Reconsideration of Sentence. On May 18, 2018, Defendant filed a "Post Sentence Motion to Bar Application of SORNA, Act 10 of 2018, 42 Pa. C.S. § 9799.10-9799.42, Chapter 97, Subchapter H of Title 42; and/or Motion for Habeas Corpus and/or Bar Imposition of an Illegal Sentence" and a supporting Memorandum of Law. In this Post

Sentence Motion to Bar Application of SORNA, Defendant claimed that SORNA, including the February 21, 2018 amendments thereto signed into law by Governor Wolf as Act 10 of 2018 (H.B. 631), violates both the Federal and the State Constitutions as follows.

a. SORNA denies Petitioner due process under Articles 1 and 11 of the Pennsylvania Constitution because it creates an irrebuttable presumption that those convicted of enumerated offenses "pose a high risk of committing additional sexual offenses" depriving those individuals of their fundamental right to reputation;

b. SORNA denies Petitioner procedural due process under Article 11 of the Pennsylvania Constitution because it unlawfully impinges the right to reputation without notice and an opportunity to be heard;

c. SORNA denies Petitioner procedural due process under the Fifth and Fourteenth Amendments to the United States Constitution because it unlawfully restricts liberty and privacy without notice and an opportunity to be heard;

d. SORNA violates substantive due process under the state and federal Constitutions, U.S. Const. Amend. XIV; Pa. Const. Art. I, § 1, because SORNA deprives individuals of inalienable rights and fails to satisfy strict scrutiny;

e. SORNA constitutes criminal punishment and therefore violates the separation of powers doctrine because it usurps the exclusive judicial function of imposing a sentence;

f. SORNA contravenes the 5th, 6th and 14th Amendments of the United States Constitution and the corresponding protections of the Pennsylvania Constitution because as a criminal punishment, SORNA cannot be imposed without due process, notice and opportunity to contest its imposition, and ensuring that each fact necessary to support the mandatory sentence is submitted to a jury and proven beyond a reasonable doubt pursuant to Apprendi v. New Jersey, 530 U.S. 466 (2000) and Alleyne v. United States, 1570 U.S. 99 (2013);

g. SORNA constitutes criminal penalties and therefore the imposition of mandatory lifetime sex offender registration for nearly all Tier III offenses is a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 13 of the Pennsylvania Constitution; and

h. SORNA constitutes criminal punishment, therefore, 42 Pa. C.S. § 9799.24(e)(3) violates the Sixth amendment to the United States Constitution and the corresponding provision of the Pennsylvania Constitution as it enhances the degree of punishment beyond the otherwise proscribed SORNA requirements on a finding of clear and convincing evidence as opposed to beyond a reasonable doubt and the defendant does not have an ability to submit the question to a jury.

(Deft.'s Post Sentence Motion to Bar Application of SORNA, Act 10 of 2018, 42 Pa. C.S. §§ 9799.10 – 9799.42, Chapter 97, Subchapter H of Title 42; and/or Motion for habeas Corpus, and/or Bar Imposition of an Illegal Sentence, 5/18/18, at 4-5).

Along with his supporting Memorandum of Law, Defendant filed Exhibits A through F on May 18, 2018, which included three (3) expert affidavits attesting to the low recidivism rates attributable to the majority of sexual offenders as well as the practical and theoretical deficiencies of SORNA and the rationales that underpin it; two (2) Pennsylvania State Police Megan's Law Count Active Offenders Public Reports, one from December 20, 2012 and one from February 1, 2018, appearing to show that there are more sexual offenders now than there were when SORNA first went into effect; and an article discussing various sex offending recidivist risk assessments available to identify and treat those who do in fact pose a risk to society of future re-offending, although he advised the Court that the State Police records have not been accurately

updated and therefore this data is not useful for statistical or comparison purposes. (*See* Deft.'s Memorandum of Law, 5/18/18, at 12, N. 2).

By Order dated May 18, 2018, we granted a defense motion for a thirty (30) day extension of the deadline for a decision on the parties' cross-motions. Making an effort to accommodate the schedules of all attorneys and possible expert witnesses, we were eventually able to schedule a hearing on the parties' cross-motions for July 9, 2018.

On July 9, 2018, we held the hearing on the parties' cross-post-sentence motions. At this hearing, Senior Deputy Attorney General for the Commonwealth of Pennsylvania Brian Hughes, Esquire appeared on behalf of the Commonwealth and the Pennsylvania State Police. Over defense objection, we allowed Attorney Hughes to be heard. Attorney Hughes argued that the post-sentence motion procedure was not the proper vehicle for adjudicating a claim that a statute violates the Constitution. Attorney Hughes suggested that the appropriate record had not been made to enable the Court to address the constitutionality of SORNA. We noted for the record that the hearing had been scheduled for months. Attorney Hughes responded that he had only been apprised of the hearing at a very recent date and "can't attest to what has happened up to this point." (Cross-Post-Sentence Motions Hearing, 7/9/18, N.T. 13). We allowed Attorney Hughes to make his record and then proceeded to address the parties' cross-post-sentence motions.

As part of its presentation to the Court, the defense introduced Exhibits A through F, as submitted earlier with their Post Sentence Motion to Bar Application of SORNA, as Exhibit D-1. (*See* 7/9/18, Ex. D-1). The Commonwealth stipulated to the content of Exhibit D-1, but not to its relevance. (Cross-Post-Sentence Motions Hearing,

7/9/18, N.T. 14-18). We admitted Exhibit D-1 to the record over the Commonwealth's objection.

At the hearing, the Commonwealth presented no evidence, only argument. Its two prevailing themes seem to concern the undersigned's ability to pass judgment on the constitutionality of a legislative act and the punitive or, as it argued, non-punitive nature of SORNA following the February 21, 2018 amendments. The Commonwealth asserted that because this Honorable reviewing Court in *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), *cert. denied*, 138 S.Ct. 925 (U.S. Pa. 2018), recognizing that there were studies yielding results that are contrary to one another on the question of the future dangerousness of sex offenders, determined that any decision on the proper policy to follow in the wake of such conflicting studies should be left to the Legislature, the trial courts of this Commonwealth are forever foreclosed from reviewing the constitutional legitimacy of the actions the Legislature takes in an attempt to support that policy. The Commonwealth also argued that the February 21, 2018 amendments to SORNA removed the punitive aspects of SORNA that offended this Honorable reviewing Court in *Muniz*, *supra* and the Pennsylvania Superior Court in *Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. 2017), *reargument denied* (January 3, 2018) and that, therefore, the present articulation of SORNA does not constitute punishment. The Commonwealth further attempted to address the Defendant's arguments concerning Due Process, *Apprendi/Alleyne*, and the Eighth Amendment, among others. We would refer this Honorable reviewing Court to the transcript of the July 9, 2018 cross-post-sentence motion transcript for an accurate rendition of the entirety of the Commonwealth's position.

On July 9, 2018, following a brief recess for further deliberations, we reconvened in Court, with the Complainant and the Defendant present, to announce our resolution of the parties' cross-post-sentence motions. On the record, in open court, with respect to the Commonwealth's Motion for Reconsideration of Sentence, we granted the Commonwealth's Motion in part and denied it in part.

We granted the Commonwealth's Motion insofar as it had complained that Defendant's modified sentence was not pronounced in open court with both parties present. We denied the Commonwealth's Motion in all other respects, including its prayer that we re-impose upon Defendant the terms of his sentence as originally stated on November 27, 2017. Instead, in open court in the presence of both parties and their counsel, we vacated our February 8, 2017 Order and re-imposed Defendant's sentence as it was modified by that Order previously, i.e., we made Defendant eligible for parole after serving eighteen (18) months instead of after serving twenty-two (22) months and we made Defendant work release eligible after serving fourteen (14) months of his sentence instead of after serving eighteen (18) months. In all other respects Defendant's sentence as imposed on November 27, 2017 remained the same.

We again set forth our reasons for deviating from the Statewide Sentencing Guidelines on the record in open court. We stated,

> Now, let me do some explaining here for everyone's sake. I probably studied this sentencing more than many sentencings I've ever imposed. I have been involved in the criminal justice system for close to 40 years. Judges cannot look at things in a hyper-technical way. We must consider individual circumstances.
>
> The jury in this case struggled to some extent with this case. I struggled to some extent with this case, as you can see with

the reconsideration. Sentencing guidelines are just one factor for the Court to consider. They're not controlling. Let me say this, as well. The Court's required to consider the sentencing ranges set forth in the guidelines, but it's not bound by the sentencing guidelines.

The statewide sentencing guidelines have no binding effect and create no presumption in sentencing and do not predominate over other sentencing factors. They're advisory guide posts that are valuable, that may provide an essential starting point, and that must be respected an d considered. They recommend, however, rather than require a particular sentence. A court may deviate from the recommended statewide sentencing guidelines. They are merely one factor among many that the Court must consider in imposing the sentence.

A Court may depart from the statewide sentencing guidelines if necessary to fashion a sentence which takes into account the protection of the public, the rehabilitative needs of the defendant, the gravity of the offense as it relates to the impact on the life of the victim, and the community. It must demonstrate on the record when it departs. And I note, again, he's eligible for parole after 18 months depending on his behavior while incarcerated. This could go as long as two years minus a day that this fellow could be—remain incarcerated.

The defendant had no prior record and has no prior history of violence. This is not in any way reflecting poorly on anyone here. He did an outrageous act as I stated in my amended sentencing sheet that was—impacted this young lady, as [the prosecutor] said, that will leave an impact on her forever. There is also—this sentence—I believe this fellow is a good candidate for rehabilitation. He is highly educated, and he has a supportive family regardless of this—some comments the mother may have said.

He was gainfully employed before and up to the time of his incarceration. His employment, his livelihood has been taken from him. He's youthful. There were many character letters written in support. He's been a law-abiding citizen since this offense and before. I have a long period of supervision upon him in the event that he ever crossed the line again. I don't believe any more prison time would serve a useful purpose. I

> believe the one and a half years in prison does not depreciate the seriousness of this offense for what he did to this young lady. Again, she'll be burdened with it her whole life. This is in no way reflective or diminishing what happened here.
>
> I believe that the individual circumstances about this defendant I believe are receptive to rehabilitation. I don't see the need to warehouse this defendant. This was an unusual case, unusual facts, and it warrants a sentence that is commensurate with the facts. I believe what I said that I will control his parole authority, and if he doesn't appear to be rehabilitating within the confines of the prison, which he has been in now since November, he'll serve his full two years. That is that.

(Cross-Post-Sentence Motions Hearing Transcript, 7/9/18, N.T. 96-99).

With regard to Defendant's post-sentence motions challenging the constitutionality of SORNA we stated the following.

> With regard to the SORNA Act, and there's going to be tons of litigation coming from all counties of the Commonwealth regarding this act. I believe it is unconstitutional. It violates due process on the grounds that it impairs the fundamental right of reputation under the Pennsylvania Constitution without notice and opportunity to be heard. It violates the PA Constitution in that it punishes a person based on the application of an irrebuttable presumption. That is not universally true, especially on this record here and where there are less restrictive means available to accomplish the same objective.
>
> Furthermore, I find that it's unconstitutional on the basis of the United States Constitution on the grounds it violates due process, and I'm referring to Subsection H, I believe the lawyers referred to it, the section that we're dealing with. And it's regarding the lifetime—I'm finding unconstitutional, for specificity's sake, the lifetime registration provisions of SORNA.
>
> As the PA Supreme Court said in a previous case, it's punitive. It's punishment. This—and I know they rewrote it since that PA Supreme Court decision; however, the changes

> they made were minimal, and I believe did not impact the finding of it being punitive.
>
> I'm also concerned with the separation of powers issue in that, as I said earlier, with fashioning the sentence the courts require to balance the background, character, and circumstances of the defendant with the circumstances of the crime. I had to determine a need to incarcerate to prevent future offenses by the defendant, as well as the possibility of his rehabilitation. I have tried to do that. It's not an easy task.
>
> I believe that the SORNA, to some extent, violates the separation of powers. It erodes the individual aspect of sentencing that the law requires the Court to consider.

(Cross-Post-Sentence Motions Hearing Transcript, 7/9/18, N.T. 99-100). On July 10, 2018 we issued an Order stating, in pertinent part,

> Defendant's Supplemental Post Sentence Motion Filed *Nunc Pro Tunc* and his Post Sentence Motion to Bar Application of SORNA, Act 10 of 2018, 42 Pa. C.S. §§ 9799.10 – 9799.42, Chapter 97, Subchapter H of Title 42; and/or Motion for Habeas Corpus and/or Bar Imposition of an Illegal Sentence, filed February 27, 2018 and May 18, 2018, respective, are **GRANTED.** This Court finds that the registration requirements of Subchapter H of the Sexual Offenders Registration and Notification Act, 42 Pa. C.S.A. § 9799.10 *et seq.*, are unconstitutional as violative of, among other reasons, Federal Due Process, due to lack of notice and opportunity to be heard; State Due Process, due to lack of notice and opportunity to be heard and the unconstitutional application of an irrebuttable presumption which is not universally true and where less onerous alternatives are available to achieve the same objective, and do so with greater precision, and violates the fundamental right to reputation recognized under the Pennsylvania Constitution; the Separation of Powers doctrine, as it interferes with the Court's duty and ability to consider the totality of the circumstances in fashioning an individualized sentence for sexual offenders; and as violative of *Alleyne v. United States*, 133 S.Ct. 2151 (U.S. Va. 2013) and *Apprendi v. New Jersey*, 120 S.Ct. 2348 (U.S. N.J. 2000) as it allows for the imposition of enhanced punishment based on an irrebuttqable presumption of future dangerousness that is neither determined by the finder of fact nor premised upon

> proof beyond a reasonable doubt. Accordingly, that portion of Defendant's sentence which required him to register with the Pennsylvania State Police as a sex offender is **VACATED**.

(*Commonwealth v. Torsilieri,* No. 15-CR-0001570-2016, Order at 2-3 (Chester July 10, 2018)(Sarcione, J.)).

On July 13, 2018 the Commonwealth filed its Notice of Appeal to the Pennsylvania Supreme Court. By Order dated July 17, 2018, we directed the Commonwealth to file within twenty-one (21) days a Concise Statement of the Errors Complained of on Appeal, pursuant to Pa. R.A.P. 1925(b). The Commonwealth timely complied on August 2, 2018.

In its Statement of Matters Complained of on Appeal, the Commonwealth set forth that portion of our Order dated July 10, 2018 which we reproduced above and claimed that our conclusion that Subchapter H of SORNA is unconstitutional is erroneous for the following reasons.

> 3. The Honorable Anthony A. Sarcione erred to the extent that he relied upon the decision in Commonwealth v. Muniz, ___ Pa. ___, 164 A.3d 1189 (2017), *cert. denied*, ___ U.S. ___, 138 S.Ct. 925, 200 L.Ed.2d 213 (2018), which only declared the prior version of SORNA unconstitutional if applied retroactively. Judge Sarcione's Order declared the current version of Subchapter H of SORNA unconstitutional as applied prospectively. Defendant's challenge only concerned the prospective application of SORNA, which became effective December 20, 2012. Defendant's offenses occurred on November 14, 2015. Consequently, in the case at bar, there is no *ex post facto* issue, as there was in the Muniz case. Moreover, the current version of Subchapter H of SORNA is not punishment.
>
> 4. The Honorable Anthony A. Sarcione erred to the extent that he relied upon Commonwealth v. Butler, 173 A.3d 1212 (Pa. Super. 2017)(***Petition for Allowance of Appeal, granted 07/31/18, at 47 WAL 2018***). In Butler, the Superior

Court concluded that, in light of the decision in Muniz, § 9799.24(e)(3) concerning Sexual Violent Predator (SVP) hearings, under the prior version of Subchapter I of SORNA, violates the federal and state constitutions as it increases the criminal penalty without the chosen fact-finder making the necessary factual findings beyond a reasonable doubt. Butler at 1217-1218. In the case at bar, there are no issues concerning SVP hearings or the prior or current version of Subchapter I of SORNA, as there were in the Butler case. Moreover, in Butler, the Superior court remanded for compliance with Subchapter H registration requirements, as Subchapter H of SORNA is not punishment.

5. The Honorable Anthony A. Sarcione erred to the extent that he relied upon Alleyne v. United States, 570 U.S. 99, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013)(any fact that increases a mandatory minimum sentence is an element of the crime must be submitted to jury), and Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)(other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt). The registration requirements of Subchapter H of SORNA are triggered solely by a conviction. Consequently, Alleyne and Apprendi are not violated by the registration requirements of Subchapter H of SORNA. *See* Commonwealth v. Resto, ____ Pa. ___, 179 A.3d 18 (2018)(mandatory minimum sentencing provision for conviction of rape of a child did not violate Sixth Amendment's prohibition against judicial fact-finding as no facts had to be found beyond simply being conviction of the enumerated offense). Moreover, the current version of Subchapter H of SORNA is not punishment.

6. The Honorable Anthony A. Sarcione erred in finding that the current version of Subchapter H of SORNA violates federal due process, state due process, and the right to reputation.

7. The Honorable Anthony A. Sarcione erred in finding that the current version of Subchapter H of SORNA does not provide notice and opportunity to be heard. The registration requirements of Subchapter H of SORNA are triggered solely by a conviction. Defendants have notice of the registration requirements of Subchapter H of SORNA as they are set forth in the relevant statutes, and defendants have the opportunity

to be heard at their trials. Moreover, the current version of Subchapter H of SORNA is not punishment.

8. The Honorable Anthony A. Sarcione erred in finding that current version of Suchapter H of SORNA violates the Separation of Powers doctrine.

9. The Honorable Anthony A. Sarcione erred in finding that current version of Subchapter H of SORNA interferes with the court's duty and ability to fashion an individualized sentence for sexual offenders. Judge Sarcione violated the Separation of Powers doctrine. "The philosophy of indeterminate or individualized sentencing was explicitly recognized by the Pennsylvania Legislature early in this century. FN #8. The Act of June 19, 191, P.L. 1055, § 6, as amended, 19 P.S. § 1057 (1964)." Commonwealth v. Devers, 519 Pa. 88, 91-92, 546 A.2d 12, 13 (1988)(footnote included with text); Commonwealth v. Luketic, 162 A.3d 1149, 1160 (Pa. Super. 2017). As individualized sentencing is a legislative creation it can be changed by the Legislature. "'While it is the judiciary's function to impose sentence upon conviction, it is for the legislature to fix the penalties for crimes.' Commonwealth v. Ehrsam, 355 Pa. Super. 40, 62, 512 A.2d 1199, 1210 (1986), *cert. denied*, 493 U.S. 932, 110 S.Ct. 321, 107 L.Ed.2d 311 (1989)." Commonwealth v. Green, 406 Pa. Super. 120, 124, 593 A.2d 899, 901-902 (1991). In Green, the Superior Court held that where the legislature has determined that the protection of the public requires that a mandatory minimum sentence be imposed upon all persons convicted of specific crimes, the individual circumstances of the particular case are only to be considered in determining whether sanctions in excess of the mandatory minimum sentence should be imposed. Green at 126, 593 A.2d at 902; Commonwealth v. Howard, 373 Pa. Super. 246, 250, 540 A.2d 960, 962 (1988). Moreover, the current version of Subchapter H of SORNA is not punishment.

10. The Honorable Anthony A. Sarcione erred in finding that current version of Subchapter H of SORNA is punishment. The General Assembly has amended SORNA by enacting [*Act 2018-10 (H.B. 631), effective February 21, 2018, reenacted by Act 2018-29 (H.B. 1952), effective June 12, 2018*]; in part for the following reason, as set forth in 42 Pa. C.S.A. § 9799.11, titled, "Legislative findings, declaration of policy and scope", provides in part: "**(b) Declaration of**

policy. – The General Assembly declares as follows: ... (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. ... (4) It is the intention of the General Assembly to address the Pennsylvania Supreme Court's decision in Commonwealth v. Muniz, ... and the Pennsylvania Superior Court's decision in Commonwealth v. Butler [.]" Consequently, the current version of SORNA is not punishment. Moreover, ***assuming arguendo***, that the current version of SORNA is punishment, it is irrelevant. There is no *ex post facto* issue raised, as there was in the Muniz case. Also, it is for the legislature to fix the penalties for crimes.

11. The Honorable Anthony A. Sarcione erred in finding that current version of Subchapter H of SORNA is an unconstitutional application of an irrebuttable presumption which is not universally true and where less onerous alternatives are available to achieve the same objective, and do so with greater precision. In *In re J.B.*, 630 Pa. 408, 107 A.3d 1 (2014), the Supreme Court recognizing the difference between juveniles and adults stated: "We additionally agree with the Juveniles' assertion and the trial court's holding that SORNA's presumption that sexual offenders pose a high risk of recidivating is not universally true when applied to juvenile offenders. ... [*However see*] Commonwealth v. Lee, 594 Pa. 266, 935 A.2d 865, 885 (2007)(observing in regard to adult sexual offenders that 'there is little question that the threat to public safety and the risk of recidivism among sex offenders is sufficiently high to warrant careful record-keeping and continued supervision.')." In re J.B. at 434-435, 107 A.3d at 17-18. Moreover, the current version of Subchapter H of SORNA is not punishment.

12. The Honorable Anthony A. Sarcione erred to the extent he relied upon expert reports and disregarded the finding of the Legislature. Judge Sarcione violated the Separation of Powers doctrine. As the Supreme Court stated in Muniz: "We recognize there are studies which find the majority of sexual offenders will not re-offend, and that sex offender registration laws are ineffective in preventing re-offense; we also recognize there are studies that reach contrary conclusions.

> In this context, we find persuasive PDAA's argument that policy regarding such complex societal issues, especially when there are studies with contrary conclusions, is ordinarily a matter for the General Assembly. *See e.g.,* Commonwealth v. Hale, 633 Pa. 734, 128 A.3d 781, 785 (2015)(where 'substantial police considerations' are involved such matters are generally reserved ... to the General Assembly'). The General Assembly made legislative findings that 'sexual offenders pose a high risk of committing additional sexual offenses and protection of the public from this type of offender is a paramount government interest.' 42 Pa. C.S. § 9799.11(a)(4). Although there are contrary scientific studies, we note there is by no means a consensus, and as such, we defer to the General Assembly's findings on this issue. We are also cognizant that the General Assembly legislated in response to a federal mandate based on the expressed purpose of protection from sex offenders. *See* 42 U.S.C. § 16901 ('In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders....'). We therefore conclude there is a purpose other than punishment to which the statute may be rationally connected and this factor weighs in favor of finding SORNA to be nonpunitive." Muniz at ____, 164 A.3d 1217.
>
> 13. The Honorable Anthony A. Sarcione erred in finding that **"among other reasons"** the current version of Subchapter H of SORNA is unconstitutional. Judge Sarcione erred by not disclosing to the parties and the public all of the reasons for his decision.

(Cmwlth.'s Statement, 8/2/18, at 2-5)(emphasis in original).

Having reviewed the record in light of the relevant constitutional, statutory and decisional law, we are now prepared to issue, in accordance with the mandate of Pa. R.A.P. 1925(a), a recommendation with respect to the merits of the Commonwealth's direct appeal.

III SORNA's HISTORY

In *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), *cert. denied*, *Pennsylvania v. Muniz*, 138 S.Ct. 925 (U.S. Pa. 2018), this Honorable reviewing Court set forth a history of the Commonwealth's sexual offender registration and notification laws as follows.

> In *Commonwealth v. Williams*, 574 Pa. 487, 832 A.2d 962 (2003)(*Williams II*), this Court provided a history of Pennsylvania's sex offender registration laws up until the time of that decision.
>
> > In 1995, the General Assembly amended the Sentencing Code by adding Subchapter H, entitled "Registration of Sexual Offenders, " codified at 42 Pa. C.S. §§ 9791-9799m and generally referred to as "Megan's Law" (hereinafter, "Megan's Law I"). Among other things, Megan's Law I established a procedure for adjudicating certain offenders—namely, those that committed one of the predicate offenses listed in the statute—as "sexually violent predators." The mandated procedure included a postconviction, pre-sentence assessment by the Board, followed by a hearing before the trial court. At the hearing, the offender was presumed to be a sexually violent predator and bore the burden of rebutting such presumption by clear and convincing evidence. If the individual was adjudicated a sexually violent predator, he was subjected to an enhanced maximum sentence of life imprisonment for the predicate offense, as well as registration and community notification requirements that were more extensive than those applicable to an offender who was not adjudicated a sexually violent predator.
>
> > In *Commonwealth v. Williams*, 557 Pa. 285, 733 A.2d 593 ([Pa.] 1999)(*Williams I*), this Court struck down

> the sexually violent predator provisions of Megan's Law I based upon the conclusion that a finding of sexually violent predator status under that enactment entailed a "separate factual determination, the end result of which is the imposition of criminal punishment," *i.e.*, increasing the offender's maximum term of confinement above the statutory maximum for the underlying offense. *See id.* ... at 603 .... Notably, in view of the punitive nature of the increased maximum prison sentence, the *Williams I* Court invalidated the challenged provisions without reaching the question of whether the enhanced registration and notification requirements constituted criminal punishment. *See id.* ... at 602 n. 10.
>
> After *Williams I* was decided, the General Assembly passed Megan's Law II, which was signed into law on May 10, 2000. Although the stated legislative police remained the same as in Megan's Law I, the General Assembly altered the manner in which an individual convicted of a predicate offense was adjudicated a sexually violent predator. The critical distinction, for present purposes, is that, under Megan's Law II an offender convicted of an enumerated predicate offense is no longer presumed to be a sexually violent predator. ... Additionally, persons adjudicated to be sexually violent predators are no longer subjected to an automatic increased maximum term of imprisonment for the predicate offense. Instead, they are required to undergo lifetime registration, notification, and counseling procedures; failure to comply with such procedures is penalized by a term of probation or imprisonment.
>
> Under Megan's Law II, any offender convicted of a predicate offense, whether or not he is deemed a sexually violent predator, must: (1) register his current residence or intended residence with the state police upon release from incarceration, parole from a correctional institution, or commencement of an intermediate punishment or probation; (2) inform the state police within ten days of a change in residence; and (3) register within ten days with a new law enforcement agency after establishing residence in another state. State police officials then forward this

> data, together with fingerprint and photographic information obtained from the sentencing court to the chief of police of the locality where the offender will reside following his change of address or release from prison. For sexually violent predators, the police chief in turn notifies the individual's neighbors, as well as day care operators and school officials within the municipality. The data sent to these recipients includes the offender's name, address, offense, and photograph (if available), as well as the fact that he has been determined by a court to be a sexually violent predator, "which determination has or has not been terminated as of a date certain." The sexually violent predator's name and address, including any subsequent change of address, is also sent to the victim of the offense, until the victim requests that such notification be terminated.
>
> ***
>
> In addition to registration upon release from prison and upon changes of address, sexually violent predators must periodically verify their addresses with the state police. To accomplish this, the state police send a verification form once every three months to the last residence reported. Upon receipt of this form, the sexually violent predator must appear within ten days at any state police station to submit the completed form and be photographed. The Act also requires a sexually violent predator to attend "at least monthly" counseling sessions in a program approved by the Board, and to pay all fees assessed from such sessions, unless he cannot afford them, in which case they are paid by the parole office. The Board monitors compliance with this requirement; the sexually violent predator must also verify such compliance with the state police as part of the quarterly verification process discussed above.

Williams II, 832 A.2d at 965-68 (internal citations and footnotes omitted).

The General Assembly made further amendments to Megan's Law II with the passage of Act 152 of 2004, commonly referred to as Megan's Law III, which was signed into law on

November 24, 2004. *Commonwealth v. Neiman*, 624 Pa. 53, 84 A.3d 603, 607 (2013). Although this Court struck down that statute on the basis its passage violated the single subject rule, we recognized Megan's Law III made the following substantive legal changes:

> (1) established a two-year limitation for asbestos actions[ ]; (2) amended the Crimes Code to create various criminal offenses for individuals subject to sexual offender registration requirements who fail to comply; (3) amended the provisions of the Sentencing Code which govern "Registration of Sexual Offenders"; (4) added the offenses of luring and institutional sexual assault to the list of enumerated offenses which require a 10-year period of registration and established local police notification procedures for out-of state sexual offenders who move to Pennsylvania; (5) directed the creation of a searchable computerized database of all registered sexual offenders ("database"); (6) amended the duties of the Sexual Offenders Assessment Board ("SOAB"); (7) allowed a sentencing court to exempt a lifetime sex offender registrant, or a sexually violent predator registrant, from inclusion in the database after 20 years if certain conditions are met; (8) established mandatory registration and community notification procedures for sexually violent predators; (9) established community notification requirements for a "common interest community"—such as a condominium or cooperative—of the presence of a registered sexually violent predator; (10) conferred immunity on unit owners' associations of a common interest community for good faith distribution of information obtained from the database; (11) directed the Pennsylvania State Police to publish a list of approved registration sites to collect and transmit fingerprints and photographs of all sex offenders who register at those sites; and (12) mandated the Pennsylvania Attorney General to conduct annual performance audits of state or local agencies who participate in the administration of Megan's Law, and, also, required registered sex offenders to

> submit to fingerprinting and being photographed when registering at approved registration sites.

Id., 84 A.3d at 606-07 (footnotes omitted), *citing* 18 Pa. C.S. § 4915; 42 Pa. C.S. §§ 5524.1, 9792, 9795.1(a)(1), 9795.4, 9795.5, 9796, 9798, 9798.1, 9799, 9799.1, 9799.8. Megan's Law III was replaced by SORNA.

. . .

The General Assembly enacted SORNA in response to the federal Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248, 42 U.S.C. §§ 16901-16991, [ ] [2] which mandates that states impose on sex offenders certain tier-based registration and notification requirements in order to avoid being subject to a penalty, *i.e.*, the loss of federal grant funding.[ ] *In re J.B.*, 630 Pa. 408, 107 A.3d 1, 3 (2014). Accordingly, Pennsylvania's General Assembly sought to comply with this federal legislation by providing for "the expiration of prior registration requirements, commonly referred to as Megan's Law [III], 42 Pa. C.S. §§ 9791-9799.9, as of December 20, 2012, and for the effectiveness of SORNA on the same date." *Id.*

The purposes of SORNA, as stated by the General Assembly, are as follows:

> (1) To bring the Commonwealth into substantial compliance with the Adam Walsh Child Protection and Safety Act of 2006 ...
>
> (2) To require individuals convicted or adjudicated delinquent of certain sexual offenses to register with the Pennsylvania State Police and to otherwise comply with this subchapter if those individuals reside within this Commonwealth, intend to reside within this Commonwealth, attend an educational institution inside this

[2] In enacting the Adam Walsh Child Protection and Safety Act of 2006, the Federal Legislature was aware that compliance with the Adam Walsh Act might very well conflict with State constitutional provisions. *In re R.M.*, 2015 WL 7587203 (Pa. Super. 2015). Recognizing this, they provided an accompanying exception to the Adam Walsh Act in order to allow States the necessary leeway to abide by their own governing documents without suffering a penalty in funding. *Id.*

Commonwealth or are employed or conduct volunteer work within this Commonwealth.

(3) To require individuals convicted or adjudicated delinquent of certain sexual offenses who fail to maintain a residence and are therefore homeless but can still be found within the borders of this Commonwealth to register with the Pennsylvania State Police.

(4) To require individuals who are currently subject to the criminal justice system of this Commonwealth as inmates, supervised with respect to probation or parole or registrants under this subchapter to register with the Pennsylvania State Police and to otherwise comply with this subchapter. To the extent practicable and consistent with the requirements of the Adam Walsh Child Protection and Safety Act of 2006, this subchapter shall be construed to maintain existing procedures regarding registration of sexual offenders who are subject to the criminal justice system of this Commonwealth.

(5) To provide a mechanism for members of the general public to obtain information about certain sexual offenders from a public Internet website and to include on that Internet website a feature which will allow a member of the public to enter a zip code or geographic radius and determine whether a sexual offender resides within that zip code or radius.

(6) To provide a mechanism for law enforcement entities within this Commonwealth to obtain information about certain sexual offenders and to allow law enforcement entities outside this Commonwealth, including those within the Federal Government, to obtain current information about certain sexual offenders.

42 Pa. C.S. § 9799.10. Furthermore, the General Assembly expressed the legislative findings and declaration of policy supporting SORNA as follows:

(a) Legislative findings.—The General Assembly finds as follows:

(1) In 1995 the General Assembly enacted the act of October 24, 1995 (1st Sp. Sess. P.L. 1079, No. 24), commonly referred to as Megan's Law. Through this enactment, the General Assembly intended to comply with legislation enacted by Congress requiring that states provide for the registration of sexual offenders. The Federal statute, the Jacob Wetterling Crimes Against children and Sexually Violent Offender Registration Act (Public Law 103-322, 42 U.S.C. 14071 *et seq.*) has been superseded by the Adam Walsh Child Protection and Safety Act of 2006 (Public Law 190-248, 120 Stat. 587).

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

(3) If the public is provided adequate notice and information about sexual offenders, the community can develop constructive plans to prepare for the presence of sexual offenders in the community. This allows communities to meet with law enforcement to prepare and obtain information about the rights and responsibilities of the community and to provide education and counseling to residents, particularly children.

(4) Sexual offenders pose a high risk of committing additional sexual offenses and protection of the public from this type of offender is a paramount governmental interest.

(5) Sexual offenders have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government.

(6) Release of information about sexual offenders to public agencies and the general public will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is rationally related to the furtherance of those goals.

(7) Knowledge of whether a person is a sexual offender could be a significant factor in protecting oneself and one's family members, or those in care of a group or community organization, from recidivist acts by such offenders.

(8) The technology afforded by the Internet and other modern electronic communication methods makes this information readily accessible to parents, minors, and private entities, enabling them to undertake appropriate remedial precautions to prevent or avoid place potential victims at risk.

(b) Declaration of policy—The General Assembly declares as follows:

(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.
>
> (3) It is the intention of the General Assembly to address the Pennsylvania Supreme Court's decision in *Commonwealth v. Neiman*, [624 Pa. 53, 84 A.3d 603] (Pa. 2013), by amending this subchapter in the act of March 14, 2014 (P.L. 41, No. 19).

SORNA's registration provisions are applicable to, *inter alia*, the following individuals: (1) those convicted of a sexually violent offense, [ ] on or after the effective date of SORNA, who are residents of Pennsylvania, employed in Pennsylvania, students in Pennsylvania or transients; (2) those who are inmates, on or after the effective date of SORNA, in state or county prisons as a result of a conviction for a sexually violent offense; (3) those who, on or after the effective date of SORNA, are inmates in a federal prison or are supervised by federal probation authorities as a result of a sexually violent offense and have a residence in Pennsylvania, are employed in Pennsylvania, are students in Pennsylvania or transients; and, pertinent to this appeal, (4) those who were required to register under previous versions of Megan's Law and had not yet fulfilled their registration period as of the effective date of SORNA. 42 Pa. C.S.§ 9799.13.

SORNA classifies offenders and their offenses into three tiers. 42 Pa. C.S. § 9799.14. Those convicted of Tier I offenses are subject to registration for a period of fifteen years and are required to verify their registration information and be photographed, in person at an approved registration site, annually. 42 Pa. C.S. § 9799.15(a)(1), (e)(1).[ ] Those convicted of Tier II offenses are subject to registration for a period of twenty-five years and are required to verify their registration information and be photographed, in

person at an approved registration site, semi-annually. 42 Pa. C.S. § 9799.15(a)(2), (e)(2).[1]

Those convicted of Tier III offenses are subject to lifetime registration and are required to verify their registration information and be photographed, in person at an approved registration site, quarterly. 42 Pa. C.S. § 9799.15(a)(3), (e)(3). The Tier III offenses enumerated in SORNA--including the crime of which appellant was convicted, indecent assault where the individual is less than thirteen years of age—are as follows:

(1) 18 Pa. C.S. § 2901(a.1)(relating to kidnapping).

(2) 18 Pa. C.S. §3121 (relating to rape).

(3) 18 Pa. C.S. § 3122.1(b) (relating to statutory sexual assault).

(4) 18 Pa. C.S. § 3123 (relating to involuntary deviate sexual intercourse).

(5) 18 Pa. C.S. § 3124.1 (relating to sexual assault).

(6) 18 Pa. C.S. § 3124.2(a.1) [relating to institutional sexual assault].

(7) 18 Pa. C.S. § 3125 (relating to aggravated indecent assault).

(8) 18 Pa. C.S. § 3126(a)(7) (relating to indecent assault [of victim under 13 years of age]).

(9) 18 Pa. C.S. § 4302(b) (relating to incest).

(10) 18 U.S.C. § 2241 (relating to aggravated sexual abuse).

(11) 18 U.S.C. § 2242 (relating to sexual abuse).

(12) 18 U.S.C. § 2244 [abusive sexual contact] where the victim is under 13 years of age.

(13) A comparable military offense or similar offense under the laws of another jurisdiction or foreign country or under a former law of this Commonwealth.

(14) An attempt, conspiracy or solicitation to commit an offense listed in paragraph (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), or (13).

(15) (Reserved).

(16) Two or more convictions of offenses listed as Tier I or Tier II sexual offenses.

42 Pa. C.S. § 9799.14(d).

SORNA also establishes a statewide registry of sexual offenders to be created and maintained by the state police. 42 Pa. C.S. § 9799.16(a). The registry contains information provided by the sexual offender, including: names and aliases, designations used by the offender for purposes of routing or self-identification in internet communications, telephone numbers, social security number, addresses, temporary habitat if a transient, temporary lodging information, passport and documents establishing immigration status, employment information, occupational and professional licensing information, student enrollment information, motor vehicle information, and date of birth. 42 Pa. C.S. § 9799.16(b). The registry also contains information from the state police, including the following: physical description of the offender, including a general physical description, tattoos, scars and other identifying marks, text of the statute defining the offense for which the offender is registered, criminal history information, current photograph, fingerprints, palm prints and a DNA sample from the offender, and a photocopy of the offender's driver's license or identification card. 42 Pa. C.S. § 9799.16(c).

Not only does SORNA establish a registry of sexual offenders, but it also directs the state police to make information available to the public through the internet. 42 Pa. C.S. § 9799.28. The resulting website "[c]ontains a feature to permit a member of the public to obtain relevant information for an

> [offender] by a query of the internet website based on search criteria including searches for any given zip code or geographic radius set by the user." 42 Pa. C.S. § 9799.28(a)(1)(i). The website also "[c]ontains a feature to allow a member of the public to receive electronic notification when [an offender] provides [updated] information [and also allows] a member of the public to receive electronic notification when [an offender] moves into or out of a geographic area chosen by the user." 42 Pa. C.S. § 9799.28(a)(1)(ii). The Pennsylvania website must coordinate with the Dru Sjodin National Sex Offender Public Internet Website (https://www.nsopw.gov) and must be updated within three business days of receipt of required information. 42 Pa. C.S. § 9799.28(a)(1)(iii), (iv).
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> In addition to the offender's duty to appear at an approved registration site annually, semi-annually, or quarterly, depending upon the tier of their offense, all offenders are also required to appear in person at an approved registration site within three business days of any changes to their registration information including a change of name, residence, employment, student status, telephone number, ownership of a motor vehicle, temporary lodging, e-mail address, and information related to professional licensing. 42 Pa. C.S. § 9799.15(g). Offenders must also appear in person at an approved registration site within twenty-one days in advance of traveling outside the United States and must provide dates of travel, destinations, and temporary lodging. 42 Pa. C.S. § 9799.15(i). Furthermore, transients, *i.e.*, homeless individuals, must appear in person monthly until a residence is established. 42 Pa. C.S. § 9799.15(h)(1). Offenders who fail to register, verify their information at the appropriate time, or provide accurate information are subject to prosecution and incarceration under 18 Pa. C.S. § 4915.1 (failure to comply with registration requirements). 42 Pa. C.S. § 9799.21(a).

Commonwealth v. Muniz, 164 A.3d 1198 (Pa. 2017), *cert. denied*, *Pennsylvania v. Muniz*, 138 S.Ct. 925 (U.S. Pa. 2018).

On July 19, 2017 the Pennsylvania Supreme Court issued the *Muniz*, *supra* decision which held, for the first time, that SORNA's registration and notification

provisions constituted criminal punishment, the retroactive application of which violated the *Ex Post Facto* clauses of the Federal and State Constitutions. *Commonwealth v. Muniz*, 164 A.3d 1198 (Pa. 2017), *cert. denied*, *Pennsylvania v. Muniz*, 138 S.Ct. 925 (U.S. Pa. 2018). Prior to *Muniz*, *supra*, sex offender registration and notification provisions had been treated in the decisional law as collateral civil consequences of a criminal conviction. *See Commonwealth v. Britton*, 134 A.3d 83 (Pa. Super. 2016); *Commonwealth v. Giannantonio*, 114 A.3d 429 (Pa. Super. 2015); *Commonwealth v. McDonough*, 96 A.3d 1067 (Pa. Super. 2014), *appeal denied*, 108 A.3d 34 (Pa. 2015). The *Muniz*, *supra* Court acknowledged that the General Assembly stated that the purpose of SORNA was non-punitive; however, after reviewing each of the applicable *Mendoza-Martinez*[3] factors for determining whether legislation is punitive, the Pennsylvania Supreme Court analogized SORNA's registration and notification provisions as akin to probation, which has historically been treated as punishment, and declared that SORNA is sufficiently punitive in effect to overcome the General Assembly's stated non-punitive purpose. *Commonwealth v. Muniz*, 164 A.3d 1198 (Pa. 2017), *cert. denied*, *Pennsylvania v. Muniz*, 138 S.Ct. 925 (U.S. Pa. 2018).

On October 31, 2017, the Pennsylvania Superior Court issued its decision in *Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. 2017), *reargument denied* (January 3, 2018), wherein the Court held that SORNA's provisions allowing for an offender to be designated a sexually violent predator and subjected to enhanced (lifetime) registration requirements as a result thereof on the basis of clear and

[3] *Kennedy v. Mendoza-Martinez*, 83 S.Ct. 554 (U.S. D.C./Cal. 1963).

convincing evidence were, in light of the holding in *Muniz*, *supra* as well as the holdings of *Alleyne v. United States*, 133 S.Ct. 2151 (U.S. Va. 2013) and *Apprendi v. New Jersey*, 120 S.Ct. 2348 (U.S. N.J. 2000), constitutionally infirm, because they allowed punishment to be enhanced without proof to the chosen fact-finder beyond a reasonable doubt.

In response to *Muniz*, *supra* and *Butler*, *supra*, the Legislature amended SORNA on February 21, 2018. *See* Act 2018, Feb. 21, P.L. 27, No. 10, § 6, imd. effective; 42 Pa. C.S.A. § 9799.11(b)(4). They made the operation of SORNA prospective from the date of its enactment, December 20, 2012, thus addressing the *Ex Post Facto* conflict discussed in *Muniz*, *supra*, albeit not the punishment aspect of SORNA or the *Alleyne/Apprendi* concerns of *Butler, supra*. *See* 42 Pa. C.S.A. § 9799.11(c). They enacted Subchapter I, which addresses the application of sexual offender registration and notification requirements to persons whose offenses pre-date SORNA. 42 Pa. C.S.A. § 9799.51 *et seq.* They enacted a limited procedure whereby some offenders may, after the expiration of twenty-five (25) years from the imposition of sentence, petition the court for removal from the registration and notification requirements of SORNA. 42 Pa. C.S.A. § 9799.15(a.2). They enacted a provision by which offenders who have been in compliance with SORNA's in-person reporting requirements for three (3) years may appear in person once per year and complete the remainder of their reporting requirements beyond that one in-person appearance per year electronically. 42 Pa. C.S.A. § 9799.25(a.1). Finally, the Legislature removed Intentional Interference with Custody of a Child as a predicate offense when the defendant is the parent of the child at issue. 42 Pa. C.S.A. § 9799.14(b)(3). While the Legislature stated in its preamble its

intent to respond to the Pennsylvania Superior Court's decision in *Butler, supra* as well as to the Pennsylvania Supreme Court's decision in *Muniz*, *supra*, 42 Pa. C.S.A. § 9799.11(b)(4), it does not appear that a procedure for designating an offender as a Sexually Violent Predator has been enacted in a way that addresses the concerns of *Butler, supra.* However, that is beyond the scope of this appeal.

The Legislature again amended SORNA effective June 12, 2018, largely by re-enacting numerous provisions of the statute with an applicability only to those persons whose offenses occurred after December 20, 2012. *See* Act 2018, June 12, P.L. 140, No. 29, § 7, imd. effective. None of the June 12, 2018 amendments/re-enactments to/of SORNA affect our analysis of the merits of the present appeal.

IV. ANALYSIS

A. Substantive and Procedural Due Process

An act of the Legislature is presumed to be valid and will not be declared unconstitutional unless it clearly, palpably and plainly violates the Constitution. *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003); *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth. 2015). *See also Pennsylvania Bar Association v. Commonwealth*, 607 A.2d 850 (Pa. Cmwlth. 1992)(lawfully enacted statute enjoys a presumption in favor of constitutionality and will not be declared unconstitutional unless it clearly, palpably and plainly violates the Constitutions of the Commonwealth or the United States). A party challenging the constitutionality of a statute bears a very heavy burden to overcome the presumption of validity. *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth. 2015); *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Cmwlth. 2012).

There are two types of challenges to the constitutionality of a statute; they

either attack a statute on its face or as it is applied in a particular case. *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Cmwlth. 2012). A "facial attack" tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case. *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth. 2015); *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Cmwlth. 2012). An "as-applied attack" does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right. *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth. 2015); *Johnson v. Allegheny Intermediate Unit*, 59 A.3d 10 (Pa. Cmwlth. 2012). A challenge to the constitutionality of a statute presents a pure question of law, over which an appellate court's standard of review is *de novo* and the scope of review is plenary. *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth. 2015).

In determining the constitutionality of a law, the courts may not question the propriety of the public policies adopted by the Legislature for the law; rather, the inquiry is limited to examining the connection between those policies and the law. *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003); *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth. 2015). Although the question of whether a particular sanction is justified for particular conduct is a legislative question in the first instance, *see Commonwealth v. Eisenberg*, 98 A.3d 1268 (Pa. 2014)(the Legislature has the exclusive power to pronounce which acts are crimes, to define crimes and to fix the punishment for all crime and there is no constitutional requirement prohibiting the Legislature from imposing a mandatory minimum sentence when, in its judgment, such a sentence is necessary), it is beyond peradventure that the Legislature's determination is subject to judicial review for

compliance with constitutional requirements. *Shoul v. Commonwealth, Department of Transportation, Bureau of Driver Licensing*, 173 A.3d 669 (Pa. 2017).

Courts reviewing a facial challenge to the constitutionality of a statue apply the "plainly legitimate sweep standard", which provides that a statute is facially invalid only when its invalid applications are so real and substantial that they outweigh the statute's "plainly legitimate sweep"; stated differently, a statute is facially invalid when its constitutional deficiency is so evident that proof of actual unconstitutional applications is unnecessary. *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth. 2015). It is our position that the registration and notification provisions of SORNA fail under this standard, as well as in their actual application to this Defendant.

The Legislature may, under its police power, limit the rights of the Commonwealth's citizens by enacting laws to protect the public health, safety and welfare, but these limits are subject to judicial review using a substantive due process analysis. *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003); *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth. 2015). Under a due process analysis, courts weight the rights infringed upon by the law against the interest the Legislature sought to achieve, and scrutinize the relationship between the law (the means) and that interest (the end). *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003); *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth 2015).

When laws infringe upon certain rights considered fundamental, such as the right to privacy, the right to marry, and the right to procreate, courts apply the strict scrutiny test, for purposes of the substantive due process analysis; under that test, the law may only be deemed constitutional if it is narrowly tailored to a compelling state

interest. *Nixon v. Commonwealth*, 839 A.2d 277 (Pa. 2003); *Taylor v. Pennsylvania State Police of Commonwealth*, 132 A.3d 590 (Pa. Cmwlth. 2016).

Article I, Section I of the Pennsylvania Constitution provides, in pertinent part, "All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness." Pa. Const., Art. I, § 1; *Pennsylvania Bar Association v. Commonwealth*, 607 A.2d 850 (Pa. Cmwlth. 1992)(*quoting* Pa. Const., Art. I, § 1). The right to reputation is a fundamental right guaranteed under the Pennsylvania Constitution, entitled to the protection of due process. *Pennsylvania Bar Association v. Commonwealth*, 607 A.2d 850 (Pa. Cmwlth. 1992). *See also Taylor v. Pennsylvania State Police of Commonwealth*, 132 A.3d 590 (Pa. Cmwlth. 2016)(a person's reputation is among the fundamental rights that cannot be abridged without compliance with the State constitutional standards of due process). The existence of government records containing information that might subject a party to negative stigmatization is a threat to that party's reputation. *In re R.M.*, 2015 WL 7587203 (Pa. Super. 2015)(*citing Pennsylvania Bar Association v. Commonwealth*, 607 A.2d 850, 853 (Pa. Cmwlth. 1992)(*citing Wolfe v. Beal*, 384 A.2d 1187, 1189 (Pa. 1978))). The Federal Constitution does not recognize reputation, standing alone, as a fundamental constitutional right. *In re J.B.*, 107 A.3d 1, 16 (Pa. 2014).

A statute is not narrowly tailored when a "less restrictive alternative [to accomplish the legislative goal] is readily available." *In re R.M.*, 2015 WL 7587203 (Pa. Super. 2015)(*quoting Boos v. Barry*, 108 S.Ct. 1157 (U.S. D.C. 1988)). Neither is a

statute narrowly tailored if it is over-inclusive, covering situations which are not pertinent to the legislative goal. *In re R.M.*, 2015 WL 7587203 (Pa. Super. 2015)(*citing Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 112 S.Ct. 501 (U.S. N.Y. 1991)). In the matter *sub judice*, SORNA fails on both accounts.

In order to accomplish its goal of protecting public safety, the Legislature in enacting SORNA resorted to the use of an irrebuttable presumption that all sexual offenders, regardless of their personal characteristics and circumstances, pose a high risk of sexual recidivism in the future. 42 Pa. C.S.A. § 9799.11(a)(4). An irrebuttable presumption is not constitutional where: (1) it encroaches on an interest protected by the due process clause; (2) the presumption is not universally true; and (3) reasonable alternative means exist for ascertaining the presumed fact. *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth. 2015). Here, SORNA's irrebuttable presumption violates all three of these requirements.

First, as we noted above, SORNA's irrebuttable presumption concerning sex offenders' heightened future dangerousness indisputably encroaches upon a person's fundamental right to reputation under Article I, Section I of the Pennsylvania Constitution. SORNA's irrebuttable presumption unduly stigmatizes persons convicted of committing sexual offenses, a class of crimes that covers a wide spectrum of conduct. A person convicted of a sex offense subject to SORNA will likely experience difficulty in finding housing, employment/education, and establishing pro-social relationships with others, three (3) factors described by experts as the "most important factors contributing to successful re-entry and maintenance of a law-abiding lifestyle." (7/9/18, Ex. D-1(A), Affid. of Professor Elizabeth J. Letourneau, Ph.D. at 6, para. 12 (*citing* studies by the

National Institute of Justice)). (*See also* 7/9/18, Ex. D-1(B), Affid. of Jill S. Levenson, Ph.D., LCSW at 1 ["Innumerable collateral sanctions now associated with registration status include housing restrictions, employment barriers, restrictions at educational institutions, exclusion from social media, voter disenfranchisement, and even limits on receiving residential services in settings such [ ] as homeless shelters, drug and alcohol abuse treatment centers, or long-term medical care facilities."). The public declaration, based on faulty premises, as we will demonstrate below, that all sexual offenders are dangerous recidivists only serves to compound the isolation and ostracism experienced by this population and sorely diminish their chances of productively reintegrating into society.

Not only does this label ruin the chances for sex offenders to successfully rehabilitate under Pennsylvania law, rehabilitation being another indisputable aim of penal legislation and an equally compelling interest and policy of the Commonwealth, *see Fross v. County of Allegheny*, 20 A.3d 1193 (Pa. 2011), *aff'd*, 438 Fed. Appx. 99 (3rd Cir. Pa. 2011)(purpose of Sentencing and Parole Codes includes the rehabilitation, reintegration, and diversion from prison of appropriate offenders); *Secretary of Revenue v. John's Vending Corp.*, 309 A.2d 358 (Pa. 1973)(it is a deeply ingrained public policy of this State to avoid unwarranted stigmatization of and unreasonable restrictions upon former offenders), it catches within its suffocating net persons whose crimes may have no sexual component to them whatsoever, crimes such as the offense of Unlawful Restraint (18 Pa. C.S. § 2902(b)), which is a Tier I offense and subject to fifteen (15) years of

registration and public infamy,[4] *see* 42 Pa. C.S.A. §§ 9799.14(b)(1), 9799.15(a)(1), the offense of False Imprisonment (18 Pa. C.S. § 2903(b)), *see* 42 Pa. C.S.A. §§ 9799.14(b)(2), 9799.15(a)(1), the offense of Interference with Custody of Children (18 Pa. C.S. § 2904), *see* 42 Pa. C.S.A. §§ 9799.14(b)(3), 9799.15(a)(1), and the offense of Kidnapping (18 Pa. C.S. § 2901(a.1)) (Tier III, Lifetime Registration), *see* 42 Pa. C.S.A. §§ 9799.14(d)(1), 9799.15(a)(3), characterizing these offenders and subjecting them to global public shaming as incorrigible sexual recidivists regardless of the circumstances of their crime.[5] There can be no real disagreement that the label of high risk dangerous sex offender impacts one's fundamental right to reputation.

Moving on to the second prong of the test for the constitutionality of irrebuttable presumptions, whether the presumption is universally true, the evidence presented to this Court demonstrates that it is not. Professor Elizabeth J. Letourneau, a tenured full professor in the Department of Mental Health at Johns Hopkins University and the inaugural director of the Moore Center for the Prevention of Child Sexual Abuse, states, "In fact, nearly all methodologically rigorous studies find that 80% to 90% of adult male sex offenders are never reconvicted for a new sexual crime." (7/9/18, Ex. D-1(A), Affid. of Elizabeth J. Letourneau, at 4). Jill S. Levenson, Ph.D., LCSW, a Professor of Social Work at Barry University, describes numerous studies across the United States and North America that show that "sex offenders typically have lower recidivism rates (re-arrest for the same type of crime) than other criminal offenders." (7/9/18, Ex. D-1(B),

[4] This Honorable reviewing Court noted that SORNA's inclusion of "relatively minor offenses within its net" was "troubling" and "actually cast doubt" on the stated non-punitive legislative intent. *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), *cert. denied*, *Pennsylvania v. Muniz*, 138 S.Ct. 925 (U.S. Pa. 2018).

[5] And quite possibly violating the Single Subject Rule. *See Commonwealth v. Neiman*, 84 A.3d 603 (Pa. 2013)(discussing Single Subject Rule).

Affid. of Jill S. Levenson, Ph.D., LCSW, at 3). According to Professor Levenson, "The Department of Justice tracked over 272,000 inmates released from prisons in 15 states over three years, and found that 5.3% of the sex offenders were re-arrested for a new sexual crime." (7/9/18, Ex. D-1(B), Affid. of Jill S. Levenson, Ph.D., LCSW, at 3). R. Karl Hanson, Ph.D., C. Psych., an adjunct professor in the Psychology Department of Carleton University in Ottowa, Canada and adjunct faculty at the Yeates School of Graduate Studies at Ryerson University in Toronto, Canada, states that,

> 6. . . . During the period in which sexual victimization was being first recognized as a serious social problem (the1980s and 1990s), there also developed a public perception that individuals convicted of sexual crimes were very likely to reoffend sexually. As well, there was a common belief among the public, policy makers and researchers that this risk endured for decades, if not for the offender's whole life. Such beliefs were not based on strong research evidence. Instead, they were based on highly publicized cases of serious new offenses (sexual murders) by known sexual offenders, and on small, descriptive studies of non-representative clinical samples.
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> 7. It turns out we were wrong. As the research evidence accumulated, the empirical findings painted a different picture of the typical individual with a history of sexual crime: the recidivism risk of most of these individuals is actually quite low, and they are even less likely to commit another offense the longer they remain offense-free in the community.

(7/9/18, Ex. D-1(C), Affid. of R. Karl Hanson, Ph.D., C. Psych., at 5). Pertinent to our consideration of the constitutionality of applying SORNA to the Defendant *sub judice*, Dr. Hanson states, with respect to what he described as the most widely used sex offense risk assessment instruments in the world, the Static-99 and the Static-99R, "[t]he lowest risk category (Level I) are generally prosocial individuals who have nonetheless committed crime. They would not be expected to have the criminal backgrounds,

significant life problems, or the prognosis typical of offenders." (7/9/18, Ex. D-1(C), Affid. of R. Karl Hanson, Ph.D., C. Psych, at 12). Defendant *sub judice* would fall into this category. With respect to these types of offenders, Dr. Hanson stated that "[t]he lowest risk groups have sexual recidivism rates that are no different than the rate of spontaneous, first-time sexual offenses among individuals with a non-sexual criminal conviction but no history of sexual crime (<2 % after 5 years[ ])." (7/9/18, Ex. D-1(C), Affid. of R. Karl Hanson, Ph.D., C. Psych. At 7).

The evidence presented to this Court demonstrates that the conclusion that all sex offenders pose a high risk of future dangerousness is not universally true. This Honorable reviewing Court, in *Muniz*, *supra* even acknowledged that studies existed which showed that "the majority of sexually offenders will not re-offend, and that sex offender laws are ineffective in preventing re-offense[.]" *Muniz*, 164 A.3d at 746. While this Honorable reviewing Court noted that there were also studies extant reaching contrary conclusions, it determined that policy regarding such "complex societal issues" should be left to the discretion of the General Assembly. *Muniz*, 164 A.3d at 746. We have no issue with the Court's determination that policy is within the domain of the Legislature; we take no issue with the Legislature's policy that the protection of the public from dangerous sex offender recidivists is a compelling government interest. It is the Legislature's manner of implementing that policy, of branding all as evil for the actions of a most perverse few, that we reject. Thus, contrary to the Commonwealth's argument that *Muniz*, *supra* forecloses any further judicial inquiry regarding the constitutionality of SORNA, we would respectfully submit that neither our hands, nor those of this Honorable reviewing Court, are so tied. The fact that there are divers studies reaching dramatically

different conclusions demonstrates unequivocally that the presumption that all sex offenders are dangerous recidivists cannot be universally true.

Turning to the final prong of the test for determining the constitutionality of an irrebuttable presumption, namely, whether reasonable alternatives exist for accomplishing the legislative goal, the answer is in the affirmative. Defendant's Exhibits identify several risk assessment tools which have been developed over the last few decades to identify individuals who have a greater likelihood of reoffending sexually than the general population of sex offenders and do so with greater accuracy than the Tier system promulgated under SORNA and the Adam Walsh Act. (*See* 7/9/18, Ex. D-1(B), Affid. of Jill S. Levenson, Ph.D., LCSW, at 8-9; 7/9/18, Ex. D-1(C), Affid. of R. Karl Hanson, at 2, 9-15; 7/9/18, Ex. D-1(F)). These reports, articles and studies also demonstrate that there are other more effective means available, such as specialized treatment programs and coordinated professional support systems, to accomplish the SORNA aim of reducing sexual recidivism. (7/9/18, Ex. D-1(B), Affid. of Jill S. Levenson, Ph. D., LCSW, at 7-8; Affid. of R. Karl Hanson, at 25-26). They suggest that by using the blanket label of dangerous sexual recidivist for all sex offenders, the State is diverting vital resources from treatment of the small percentage of this population who actually pose a risk of sexual recidivism, where such resources are most needed and would be most effective in promoting the goals of public protection and safety as well as rehabilitation.

We need not rely only upon Defendant's experts, however. In *In re J.B.*, 107 A.3d 1 (Pa. 2014), this Honorable reviewing Court found that the reasonable alternative of individualized risk assessment was available, and indeed in use in SORNA

with respect to Sexually Violent Predator assessments and reassessments for adjudicated juveniles who are nearing their twentieth birthdays, to ascertain whether a particular juvenile offender poses a high risk of sexual recidivism. *In re J.B.*, 107 A.3d at 19. If such individualized risk assessment procedures are available to identify in juveniles, a population whose character traits have been recognized as changeable and not fully ingrained, *In re J.B.*, 107 A.3d at 18, those youths who are most likely to re-offend sexually, then certainly it is no great leap to conclude that the application of individualized risk assessments via a pre-deprivation hearing for adult offenders is not only possible, but is also actually available to the criminal justice system, and constitutes a reasonable, more effective alternative for identifying high-risk recidivists and reducing sexual re-offending than the draconian public shaming/warning procedures, so reminiscent of colonial-age stocks and scarlet letters, currently in place for all adult sexual offenders regardless of risk under SORNA.

SORNA's irrebuttable presumption that all sexual offenders are high-risk dangerous recidivists does not survive scrutiny under the three-prong test for constitutionality set forth in *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth. 2015). The presumption negatively impacts one's right to reputation, which, as we noted above, is a fundamental right under the Pennsylvania Constitution. The presumed fact is not universally true, and there are indisputably reasonable and even more effective alternatives for accomplishing the aims of SORNA both to identify for safety purposes those few offenders who do pose a risk to society and to reduce the amount of sexual re-offending generally. Finally, SORNA encompasses offenders whose crime(s) may lack any sexual component to them whatsoever. For all of these reasons, we respectfully

submit that SORNA's registration and notification provisions, which directly derive from the application of this unconstitutional irrebuttable presumption to all sex offenders and even those whose offenses cannot be considered "sexual", are not narrowly tailored to advance the compelling State interest in protecting society from sexual recidivists.

The Commonwealth may argue that the fact that the February 21, 2018 amendments to SORNA included an opportunity for some offenders to petition the court to be removed from SORNA's registration and notification provisions after twenty-five (25) years means that SORNA's presumption as to future dangerousness is not irrebuttable. This is illusory. A post-deprivation process that provides for a hearing concerning the deprivation of a fundamental right that occurs twenty-five (25) years after the injury is akin to the provision of no process at all. It is effectively no right to rebut the presumed fact prior to the damage having been done. Unlike juveniles, as to whom the Pennsylvania Superior Court has already acknowledged a twenty-five (25) year waiting period is meaningless, *see In re R.M.*, 2015 WL 7587203 (Pa. Super. 2015), adults will be effectively placed out of the job market, ostracized from pro-social resources, and unduly stigmatized for the majority of their most productive years. The opportunity to be heard at a meaningful time and in a meaningful manner is recognized by the United States Supreme Court as a fundamental requirement of procedural due process. *Pennsylvania Bar Association v. Commonwealth*, 607 A.2d 850 (Pa. Cmwlth 1992). SORNA does not provide it. Because SORNA's post-deprivation process is inadequate and illusory, we would respectfully submit that SORNA's presumption that all sex offenders are high-risk dangerous recidivists is, for all practical intents and purposes, properly characterized as irrebuttable in fact.

The Commonwealth also suggests that because convicted offenders have had a trial, they have been given ample notice that they face being labeled as a dangerous recidivist. This argument completely ignores the facts that individuals are presumed innocent until they are found guilty by proof beyond a reasonable doubt and, as many of these types of cases boil down to a he-said, she-said situation, the presumption is much more than a mere platitude and may indeed be held very dear by those who stand accused of sexual offenses, where circumstances are often ambiguous and there are usually no eyewitnesses. The trial itself gives a criminal defendant no opportunity to contest future dangerousness; that is not even at issue in the determination of whether one is guilty of having committed a particular sexual offense in the past. It is only after they are convicted, after a judge or a jury of twelve of their peers decides that no, in fact, they are not innocent and are no longer deserving of the presumption, that the cloak of innocence is removed and they are, without recourse to any pre-deprivation procedure, automatically proclaimed to be the worst of the worst, a high risk dangerous and incorrigible recidivist sexual predator who must be relegated to the margins of society for the rest of their lives, or at least for the most significant and productive years they may have. The trial does not provide any process whatsoever for notifying a person that they are going to be labeled as a high-risk dangerous recidivist, as the accused may sincerely and strongly embrace the notion of his innocence and the trial may yet result in an acquittal, which will likely be perceived as a confirmation of that personal belief he has held onto throughout the trial and the chief reason for his doing so. If he is acquitted, the skewed label will not be applied and the attendant consequences of that reflexive label will not be experienced. It is only once a guilty verdict is entered that

the stigma of the State's flawed irrebuttable presumption comes into play, and there is no opportunity to avert its application or to meaningfully challenge its reactionary prejudice either during the trial, or, as SORNA stands now, afterwards either.

For all of the foregoing reasons, we respectfully submit that SORNA's irrebuttable presumption does not withstand constitutional scrutiny, both on its face and as applied to the Defendant *sub judice*. Consequently, we would respectfully submit that we properly struck the registration and notification provisions of SORNA that are based on this reflexive unconstitutional irrebuttable presumption and removed from Defendant any obligation to comply with this constitutionally offensive Act.

B. *Apprendi/Alleyne*

SORNA's unsupported irrebuttable presumption is not the only grounds upon which we concluded that SORNA's registration and notification provisions violate the Pennsylvania and Federal Constitutions. We also determined that SORNA violates *Apprendi v. New Jersey*, 120 S.Ct. 2348 (U.S. N.J. 2000) and *Alleyne v. United States*, 133 S.Ct. 2151 (U.S. Va. 2013) because it permits the finding of a fact by one other than the chosen factfinder on proof less than the criminal standard beyond a reasonable doubt.

In *Apprendi, supra*, the United States Supreme Court held that any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and determined by proof beyond a reasonable doubt. *Apprendi v. New Jersey*, 120 S.Ct. 2348 (U.S. N.J. 2000). *Alleyne, supra* followed thirteen (13) years later with the corollary that any fact that increases the mandatory minimum sentence for a crime is an

element of that crime and must be submitted to the jury and determined by proof beyond a reasonable doubt. *Alleyne v. United States*, 133 S.Ct. 2151 (U.S. Va. 2013).

SORNA has effectively permitted the Legislature, never the fact-finder in a criminal trial, to determine a fact, namely, future dangerousness, that increases the punishment for a crime, specifically, registration and public notification, without proof to a judge or jury beyond a reasonable doubt. The Legislature, through SORNA, has mandated that this fact be presumed and applied with respect to all sexual offense convictions, regardless of individual circumstances. Because SORNA contains an implicit finding of fact which was not submitted to a judge or jury nor found by proof beyond a reasonable doubt, SORNA violates *Apprendi*, *supra* and *Alleyne*, *supra* and cannot stand.

The Commonwealth makes two (2) arguments in response. First, it claims that SORNA does not violate *Apprendi, supra* or *Alleyne*, *supra* because it does not involve the finding of any facts. Secondly, as we noted earlier, the Commonwealth argues that the registration and notification provisions of SORNA do not constitute punishment. We will address both arguments *seriatim.*

First, with respect to the Commonwealth's argument that SORNA does not require a factual finding, we are aware that there is decisional law stemming from the *Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. 2017), *reargument denied* (January 3, 2018) decision, which declared that, based on *Muniz, supra*, SORNA's provisions for determining Sexually Violent Predator status violated *Apprendi, supra* and *Alleyne, supra* because they permitted a fact which increased the penalty for a crime, namely, the fact of SVP designation, to be determined by clear and convincing evidence instead of beyond a

reasonable doubt, that suggests that the imposition of the registration and notification provisions of SORNA do not violate *Apprendi, supra* or *Alleyne*, *supra* because they do not require the finding of a fact in order to enhance the penalty; that is, the registration and notification provisions of SORNA, it is posited, apply directly from the conviction of a sex offense and do not require any additional findings of fact before application. This theory appears to stem from the *Butler* Court's decision to maintain the Defendant's SORNA registration and notification obligations after invalidating his designation as a Sexually Violent Predator. *See Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. 2017), *reargument denied* (January 3, 2018). *See also Commonwealth v. Curran*, 2018 WL 3133181 (Pa. Super. June 27, 2018); *Commonwealth v. Farrales*, 2018 WL 1441898 (Pa. Super. March 23, 2018).

In *Butler*, *supra* the defendant only contested SORNA's procedure for determining SVP status. *Butler*, *supra*. The Superior Court in *Butler*, *supra* was not faced with deciding whether the registration and notification provisions of SORNA violate *Apprendi, supra* and *Alleyne*, *supra*. That the Court decided to comment on the registration and notification provisions in its decision regarding the validity of SORNA's procedures for determining SVP status does not, with all due respect to our learned colleagues on the appellate bench, constitute binding precedent on the issue of the constitutionality of SORNA's non-SVP registration and notification provisions or foreclose further inquiry into the issue. Those comments may be regarded as *dicta*.

Further, the argument that SORNA's registration and notification provisions do not require any additional fact-finding is a conflation of the process by which the fact of future dangerousness has been determined. As we have demonstrated above, the fact

of future dangerousness has been pre-determined, erroneously as we have already discussed, by the Legislature, a body other than the Defendant's chosen fact-finder. It has not been subjected to the rigors of the adversarial process nor has it, as we discussed earlier, been established by proof beyond a reasonable doubt. We have already demonstrated that the presumption, the "fact" as it stands, of future dangerousness is not universally true. As we discussed above, this Honorable reviewing Court in *Muniz*, *supra* noted that the studies concerning the future dangerousness of sex offenders were not in consensus on the universality of the proposition. Yet the Legislature has pre-empted judicial fact-finding on the issue by presumptively concluding, without proof beyond a reasonable doubt, that all sex offenders pose a grave risk of re-offending and by requiring that the Defendant's chosen fact-finder apply penalties that have been enhanced as a result of this deficient and unconstitutional legislative fact-finding. The "fact" of future dangerousness is implicitly found in the irrebuttable presumption embraced by the Legislature, which we have already determined is unconstitutional. The Court is required to apply this fact, which was not tested by the adversarial process nor proven beyond a reasonable doubt, as the predicate for imposing significant penalties which, as we shall demonstrate below, are enhanced beyond the statutory maximums otherwise applicable to the offender's crime. The fact-finding is implicit, performed by a body other than the chosen fact-finder, arrived at without proof beyond a reasonable doubt, and penalties are required to be reflexively applied without process or opportunity for the offender to demonstrate that his or her individual circumstances warrant departure.

SORNA is Punishment

And here we come to what may fairly be described as the crux of the Commonwealth's argument, specifically, that SORNA's registration and notification provisions do not constitute punishment. We have all read *Muniz, supra*, which held that the registration and notification provisions of SORNA constituted punishment and as a result SORNA could not be retroactively applied to offenders whose offenses occurred prior to its enactment. The Commonwealth argues that the February 21, 2018 amendments to SORNA (hereinafter "Act 10") remove SORNA's registration and notification provisions from the penumbra of punishment. We will show why the Commonwealth's argument is fundamentally flawed.

The proper means for determining whether a statute should be deemed to be penal for constitutional purposes requires a court to first determine whether the Legislature's intent was to impose punishment, and, if it was not, to inquire whether the statutory scheme is nonetheless so punitive either in purpose or effect as to negate the Legislature's non-punitive intent. *Commonwealth v. Williams*, 832 A.2d 962 (Pa. 2003). "To make this latter determination, the Supreme Court has used a multi-factored balancing analysis . . . involving several considerations that were first enumerated in *Kennedy v. Mendoza-Martinez*, . . . 83 S.Ct. 554 . . . ([U.S. D.C./Cal.] 1963)(the '*Mendoza-Martinez* factors')." *Commonwealth v. Williams*, 832 A.2d 962, 971 (Pa. 2003). As this Honorable reviewing Court set forth in *Muniz*, 164 A.3d at 1200,

> The *Mendoza-Martinez* factors are as follows: '[w]hether 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[.]

Muniz, 164 A.3d at 1200 (*quoting Kennedy v. Mendoza-Martinez*, 83 S.Ct. 554 (U.S. D.C./Cal.1963)). The Pennsylvania Supreme Court utilized the *Mendoza-Martinez* factors in determining that the pre-Act 10 version of SORNA constituted punishment under Pennsylvania and Federal law. *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), *cert. denied*, *Pennsylvania v. Muniz*, 138 S.Ct. 925 (U.S. Pa. 2018). The Pennsylvania Supreme Court noted that "only the 'clearest proof' may establish that a law is punitive in effect" and that, "in determining whether a statute is civil or punitive, we must examine the law's entire statutory scheme." *Muniz*, 164 A.3d at 1208

1. Legislative intent

In addressing the first prong of the test for determining whether a statute is punitive, namely, whether the Legislature's intent was to impose punishment, this Honorable reviewing Court in *Muniz, supra* stated with respect to SORNA,

> "In applying the first element of this test, the sole question is whether the General Assembly's intent was to punish." *Williams II*, 832 A.2d at 971. This is a question of statutory construction and "[w]e must consider the statute's text and its structure to determine the legislative objective. *Smith*, 538 U.S. at 92, 123 S.Ct. 1140, *citing Flemming v. Nestor*, 363 U.S. 603, 617, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960). Furthermore, "considerable deference must be afforded to the intent as the legislature has stated it." *Id.* at 93, 123 S.Ct. 1140. The General Assembly specifically stated SORNA "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." 42 Pa. C.S. § 9799.11(a)(2). The statute further states "the exchange of relevant information about sexual offenders. . . [is] a means of assuring public protection and shall not be construed as

> punitive." 42 Pa. C.S. § 9799.11(b)(2). Furthermore, the first listed purpose of SORNA is "[t]o bring the Commonwealth into substantial compliance with the [federal] Adam Walsh Child Protection and Safety Act of 2006." 42 Pa. C.S. § 9799.10(1). Nothing in the expressed purpose, legislative findings, or declaration of policy of SORNA explicitly states the legislature intended the law to do anything other than create a remedial civil scheme to comply with federal legislation and protect the public.
>
> At the same time, we recognize the following aspects of SORNA are troubling and actually cast doubt on the stated legislative intent: the act encompasses a much broader class of offenders than Megan's Law II, and includes relatively minor offenses within its net; the act is codified within the sentencing section of the Crimes Code; and the act[ ] vests regulatory authority with the state police. However, we note the fact SORNA encompasses a broad class of offenders is a reflection of the legislature's intent to comply with federal sex offender laws for funding purposes. Furthermore, Megan's Law II was also codified completely within the Crimes Code and also vested regulatory authority in the state police. As such, we recognize the General Assembly's intent in enacting SORNA apparently was twofold: to comply with federal law; and, as we stated in *Williams II*, "not to punish, but to promote public safety through a civil, regulatory scheme." *Williams II,* 832 A.2d at 972.

Muniz, 164 A.3d at 1209-10. Based upon this analysis, the Pennsylvania Supreme Court determined that, in enacting SORNA, "the intent of the General Assembly was to enact a civil scheme[.]" *Muniz*, 164 A.3d at 1210.

With the amendments enacted in Act 10 of 2018, none of the observations of the General Assembly need be disturbed. The legislative findings and stated purpose have not changed. Of course, SORNA still encompasses a broader class of offenders than Megan's Law II, still includes relatively minor offenses and non-sexual offenses at that within its net, is codified in the sentencing provisions of the Crimes Code, and vests regulatory authority in the State Police. Nevertheless, the Pennsylvania Supreme Court

did not, in *Muniz*, *supra*, find that these concerns rendered the Legislature's intent punitive. As Act 10 of 2018 did not change any of the Legislature's stated findings and purposes with respect to SORNA as amended, except to note that in enacting the amendments the Legislature was endeavoring to comply with the Pennsylvania Supreme Court's decision in *Muniz*, *supra* and the Pennsylvania Superior Court's decision in *Butler*, *supra*, we would respectfully recommend that the Act 10 amendments to SORNA do not change the Pennsylvania Supreme Court's determination in this respect and that SORNA, as amended by Act 10 of 2018, still reflects a legislative attempt to enact a civil regulatory scheme as opposed to a punitive one.

However, the question remains whether SORNA, as amended by Act 10 of 2018, is nevertheless still sufficiently punitive in effect to overcome the Legislature's stated non-punitive purpose. To answer this question, we must examine the *Mendoza-Martinez* factors.

2. *Mendoza-Martinez* Factors

a. Affirmative Disability or Restraint

The first *Mendoza-Martinez* factor queries whether the sanction involves an affirmative disability or restraint. The pre-Act 10 version of SORNA required Tier III offenders to report to the State Police in person four (4) times per year and whenever he or she makes a "free" choice of changing his address or changing his appearance. *Muniz*, 164 A.3d at 1210-11. For a Tier III lifetime registrant, the Pennsylvania Supreme Court noted that his or her in-person registration requirements would result in a minimum of 100 in-person visits to the State Police over the course of twenty-five (25) years and would continue for the remainder of the person's life. *Muniz*, 164 A.3d at 1210-11. The

Pennsylvania Supreme Court concluded with respect to the first *Mendoza-Martinez* factor that, "we find the in-person reporting requirements, for both verification and changes to an offender's registration, to be a direct restraint upon appellant and hold this factor weighs in favor of finding SORNA's effect to be punitive." *Muniz*, 164 A.3d at 1211.

The Act 10 amendments to SORNA retain the obligation of the Tier III registrant to appear in person at the State Police quarterly each year for verification purposes as well as to appear in person to update his registration information whenever any changes are made, such as to residence, employment, vehicle owned, etc. 42 Pa. C.S.A. § 9799.15(e), -(g). Act 10 of 2018 reduced the registrant's number of in-person appearances by allowing offenders who have been in compliance with their quarterly and updated registration requirements for three (3) years to thereafter appear once in person per year and perform all other reporting requirements by telephone to an established Pennsylvania State Police telephone number. 42 Pa. C.S.A. § 9799.25(a.1). Thus, after three (3) years, a lifetime registrant, like the Defendant *sub judice*, who has been convicted of a Tier III offense at age twenty-five (25), will have to appear in person at an approved registration site at least twelve (12) times in three (3) years and then, provided that he is in compliance with these requirements, may appear once per year in person for the rest of his life, which could be anywhere from fifty (50) to seventy-five (75) or more years, resulting in total annual registration requirements of fifty (50) to seventy-five (75) or more times over the course of one's life, not to mention the telephone updates any time one changes address, cars, employment, or educational status. 42 Pa. C.S.A. § 9799.25(a.1).

Act 10 of 2018, as we discussed earlier, also provided a process whereby

twenty-five (25) years after one's conviction, some offenders can petition the court for permission to be relieved from SORNA's registration and notification requirements. The Commonwealth argues that Act 10's alternative reporting requirements and "post-deprivation procedure" remove the onus of disability or restraint with which the Pennsylvania Supreme Court associated the pre-Act 10 version of SORNA with in *Muniz*, *supra* and render the post-Act 10 version of SORNA non-punitive in effect.

We disagree. A lifetime registrant who offends, as this Defendant did, in his early twenties, will still have to submit to the state in person over the course of his life at least sixty-two (62) to eighty-seven (87) or more times, depending on how long he lives, will have to continue to verify his personal information and life circumstances with the Pennsylvania Supreme Court every three (3) months, and will still have to update his registration information telephonically during that period every time a change in his life's circumstances occur. The onus under Act 10 of 2018, as compared to the pre-Act 10 version of SORNA, is reduced, but the reduction is largely ephemeral. The registrants are still, for all intents and purposes, on probation for the entirety of their lives, with all of the regulation, control and sundering of privacy that such status entails. They cannot change their address without reporting it to the police. They cannot begin school or switch schools without notifying the police. They cannot buy a new car without informing the police. Nor can they take a new job without reporting it to the police, so that this fact, along with the rest of the personal aspects of their lives, can be further disseminated to anyone in the world via the Internet. The burden on all registrants is still oppressive, notwithstanding that, after three (3) years of compliance, the in-person aspect of the reporting requirements is somewhat reduced. Similarly, as we discussed earlier, the so-

called post-deprivation procedure that requires registrants to wait twenty-five (25) years before the opportunity to contest the fact of future dangerousness may be availed by some is illusory and akin to no post-deprivation process at all. Act 10 of 2018 did not meaningfully reduce the palpable onus to any registrant and thus, we would respectfully submit, did not change this Honorable reviewing Court's conclusion in *Muniz*, *supra* that the registration and notification provisions of SORNA involve an affirmative disability or restraint upon an offender, weighing in favor of a finding that the post-Act 10 version of SORNA is still sufficiently punitive in effect so as to outweigh the Legislature's stated civil purpose.

b. Historical Regard

The second *Mendoza-Martinez* factor asks whether the sanction has historically been regarded as punishment. With respect to this factor, the Pennsylvania Supreme Court in *Muniz*, *supra* stated

> The United States Supreme Court has distinguished colonial-era public shaming punishments from sex offender registration laws by noting public shaming "involved more than the dissemination of information" but also "held the person up before his fellow citizens for face-to-face shaming or expelled him from the community." *Smith* [*v. Doe*], 538 U.S. [84] at 98m 123 S.Ct. 1140 [U.S. Alaska 2003]. The *Smith* Court found the sex offender information disseminated through the Alaska statute is accurate and, for the most part, already public. *Id.* The Court noted the publicity may cause embarrassment or ostracism for the convicted, but found "the publicity and resulting stigma [is not] an integral part of the objective of the regulatory scheme." *Id.* at 99, 123 S.Ct. 1140. The Court also stated the fact the information is posted on the internet did not alter its conclusion since the intent of the posting is to inform the public for its own safety, the website itself does not provide the public with a means to shame the offender, and members of the public must affirmatively seek out the information. *Id.*

As stated above, we recognize the significance of the *Smith* Court's decision with regard to its analysis of the Alaska statute. However, *Smith* was decided in an earlier technological environment. The concurring expression by now-Justice Donohue in *Perez* has particular force on this point:

> The environment has changed significantly with the advancements in technology since the Supreme Court's 2003 decision in *Smith*. As of the most recent report by the United States Census Bureau, approximately 75 percent of households in the United States have internet access. Yesterday's face-to-face shaming punishment can now be accomplished online, and an individual's presence in cyberspace is omnipresent. The public internet website utilized by the Pennsylvania State Police broadcasts worldwide, for an extended period of time, the person identification information of individuals who have served their "sentences." This exposes registrants to ostracism and harassment without any mechanism to prove rehabilitation—even through the clearest proof. In my opinion, the extended registration period and the worldwide dissemination of registrants' information authorized by SORNA now outweighs the public safety interest of the government so as to disallow a finding that it is merely regulatory.

Perez, 97 A3d 765-66 (Donohue, J., concurring).

Furthermore, although the *Smith* Court ultimately rejected the argument Alaska's registration system was like probation because it did not impose mandatory conditions, the High Court nevertheless recognized the argument has "some force" and the argument is therefore even more compelling where SORNA does impose such conditions. *See id.* at 763 (Donohue, J. concurring), *citing Smith*, 538 U.S. at 101, 123 S.Ct. 1140. It is clear the Alaska statute at issue in *Smith* and SORNA are materially different in this regard. As our analysis of the similarity to probation would be nearly identical to Justice Donohue's analysis of the issue in *Perez*, we again quote from her concurring opinion with minimal, bracketed differences arising out of appellant's status as a Tier III offender:

> In contrast, the mandatory in-person verification requirement in Section 9799.15(e) not only creates an affirmative restraint upon [appellant], requiring him to appear at a designated facility a minimum of [100] times over the next 25 years[, extending for the remainder of his life,] as a Tier [III] offender, but also greatly resembles the periodic meetings with probation officers imposed on probationers. . . . [B]ecause SORNA differs significantly from the statute at issue in *Smith*, these disparities must be considered.
>
> In [*Williams II*,], the Pennsylvania Supreme Court found that probation has historically been considered a tradition form of punishment. *Williams* [II], 832 A.2d at 977. Probation entails a set of mandatory conditions imposed on an individual who has either been released after serving a prison sentence, or has been sentenced to probation in lieu of prison time. 42 Pa. C.S. § 9754. These conditions can include psychiatric treatment, limitations on travel, and notifying a probation office when any change of employment or residency occurs. 42 Pa. C.S. § 9754(c). Probations are also subject to incarceration for a violation of any condition of their probation. 42 Pa. C.S. § 9771.
>
> Like the conditions imposed on probationers, registrants under SORNA must notify the state police of a change in residence or employment. 42 Pa. C.S. § 9799.15(g). Offenders also face incarceration for any noncompliance with the registration requirements. 42 Pa. C.S. § 9799.22(a). Furthermore, SORNA requires registrants who do not have a fixed place of work to provide "general travel routes and general areas where the individual works" in order to be in compliance. 42 Pa. C.S. § 9799.16. The Supreme Court in *Smith* stated that "[a] sex offender who fails to comply with the reporting requirement may be subjected to criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense." *Smith*, 538 U.S. at 101-02, 123 S.Ct. 1140. However, violations for noncompliance with both probation and SORNA

> registration requirements are procedurally parallel. Both require further factual findings to determine whether a violation has actually occurred. R42 Pa. C.S. §§ 9771(d), 9799.21. Similarly, but for the original underlying offense, neither would be subject to the mandatory conditions from which the potential violation stems. The parallels between the SORNA registration requirements and probation lead me to conclude that factor two of the [*Mendoza-Martinez*] test leans towards a finding that SORNA is punitive.
>
> We conclude the weighing process with regard to this *Mendoza-Martinez* factor presents a much closer case than the *Smith* Court's analysis of Alaska's registration statute in 2003. We consider SORNA's publication provisions—when viewed in the context of our current internet-based world—to be comparable to shaming punishments. We also find SPORNA and the Alaska statute are materially different in their mandatory conditions such that SORNA is more akin to probation. We therefore hold this factor weighs in favor of finding SORNA's effect to be punitive.

Muniz, 164 A.3d at 1212-13.

We respectfully submit that nothing about the Act 10 amendments to SORNA alters this Honorable reviewing Court's analysis. The slightly ameliorated in-person appearances do not change the global nature of the public shaming or the intensity of the probationary-style onus on the offender. The so-called "post-deprivation procedure" available to some offenders after twenty-five (25) years of public shaming and ostracism is virtually meaningless. Nothing about Act 10 of 2018 changes this Honorable reviewing Court's analysis of the second *Mendoza-Martinez* factor, i.e., whether the sanction has historically been regarded as punishment, and thus we would respectfully submit that, as the Pennsylvania Supreme Court determined that the pre-Act 10 version of SORNA has historically been regarded as punishment, so the Act 10 version of SORNA remains punitive, as registration and notification provisions have historically

been considered equivalent to colonial-era public shaming punishments and probationary status.

c. *Scienter*

With respect to the third *Mendoza-Martinez* factor, namely, whether the statute comes into play only on a finding of *scienter*, the Pennsylvania Supreme Court in *Muniz*, *supra* acknowledged that scienter is to some degree implicated in SORNA's registration and notification provisions because it only applies in the case of criminal behavior, which requires a particular mental state, the Court nevertheless determined, influenced by *Smith v Doe,* 123 S.Ct. 1140 (U.S. Alaska 2003), *rehearing denied*, 123 S.Ct. 1925 (U.S. Alaska 2003), that this factor has "little significance" to the analysis of whether SORNA's registration and notification provisions are punitive in effect. Nothing in the Act-10 amendments alters the analytical framework employed by the Pennsylvania Supreme Court in *Muniz*, *supra*. Accordingly, we are constrained to conclude that this third factor in the *Mendoza-Martinez* inquiry has little bearing on our analysis of the question of SORNA's punitive character.

d. Traditional Aims

Concerning the fourth *Mendoza-Martinez* factor, specifically, whether the operation of the statute promotes the traditional aims of punishment, theoretically speaking there can be no doubt that SORNA as enacted, with the Act 10 of 2018 amendments included, promotes the traditional aims of punishment: retribution and deterrence. Public shaming undoubtedly has a retributive component. Registration, state police supervision, and public notification may also be expected, notwithstanding their purported protective purpose, to deter individuals from committing sexual offenses.

Practically speaking, the data, like that on whether sexual offenders are uniformly high rate recidivists, diverges as to whether SORNA actually impacts the rate of recidivism of sexual offenders, that is, whether it in fact does what it is supposed to do: reduce the recidivism of sexual offenders and the occurrence offenses generally. The defense supplied the opinions of several experts who have concluded that SORNA has no impact on recidivism rates, which they describe as typically low to begin with. (7/9/18, Ex. D-1(A), -(B), -(C)). Nevertheless, in terms of the analysis of whether SORNA as enacted is designed to promote the twin penal aims of retribution and deterrence, this Honorable reviewing Court concluded with respect to the pre-Act 10 amendments to SORNA at issue in *Muniz*, *supra* that the answer was in the affirmative. The Court stated,

> We are substantially aligned with appellant as to this factor, especially in light of the Commonwealth's concession that SORNA is meant to have a deterrent effect. We agree that the prospect of being labeled a sex offender accompanied by registration requirements and the public dissemination of an offender's personal information over the internet has a deterrent effect. We are also cognizant that "the mere presence of a deterrent purpose" does not "render such sanctions criminal." *Smith*, 538 U.S. at 102, 123 S.Ct. 1140. On careful consideration, however, we cannot say there is only a "mere presence" of a deterrent effect embodied in SORNA. *See id.* (emphasis added). Contyrary to Megan's Law II, as analyzed in *Williams II,* there is not a "substantial period of incarceration attached to" many of the predicate offenses requiring registration under SORNA, many of which are misdemeanors or carry relatively short maximum terms of incarceration. [ ] *Williams II*, 832 A2d at 978. This includes interference with custody of children, 18 Pa. C.S. § 2904, a misdemeanor of the second degree which does not have a sexual component, and yet is a Tier I offense under SORNA. *See* 42 Pa. C.S. § 9799.14(b)(3). A conviction under this subsection may not lead to incarceration, but would nevertheless require registration as a sex offender for a fifteen year period. In such a case, and for many other predicate

> offenses listed in the tier system, SORNA clearly aims at deterrence.[]
>
> Although we recognize both the High Court in *Smith* and this Court in *Williams II* found sex offender laws generally do not have a retributive purpose, we note there was minimal analysis on this point in either decision. Retribution, in its simplest terms, "affix[es] culpability for prior criminal conduct," *Hendricks*, 521 U.S. at 362, 117 S.Ct. 2072, and in fact, SORNA is applicable only upon a conviction for a predicate offense. We recognize the *Smith* Court stated the dissemination of accurate, public record information, even over the internet, did not alter its conclusion that the Alaska statute did not have a punitive effect. However, the information SORNA allows to be released over the internet goes beyond otherwise publicly accessible conviction data and includes: name, year of birth, residence address, school address, work address, photograph, physical description, vehicle license plate number and description of vehicles. *See* 42 Pa. C.S. § 9799.28(b)(1) – (8). Moreover, although the *Williams II* Court determined the dissemination of registration information provided by sexually violent predators under Megan's Law II was necessary to protect the public, the Court expressly stated the public notification and electronic dissemination provisions of that statute "need not be read to authorize public display of the information, as on the Internet." *Williams II*, 832 A.2d at 980. SORNA has increased the length of registration, contains mandatory in-person reporting requirements, and allows for more private information to be displayed online. *Perez*, 97 A.3d at 765 (Donohue, J., concurring). Under the circumstances, we conclude SORNA is much more retributive than Megan's Law II and the Alaska statute at issue in *Smith*, and this increase in retributive effect, along with the fact SORNA's provisions act as deterrents for a number of predicate offenses, all weigh in favor of finding SORNA punitive.

Muniz, 164 A.3d at 1215-16.

The Act 10 amendments to SORNA did nothing to alter the deterrent and retributive effects of the pre-amendment Act under evaluation in *Muniz*, *supra.* SORNA still requires lengthy, often lifetime, registration, still requires in-person registration, places

onerous reporting burdens on offenders, and allows very private information to be published worldwide over the Internet, the Act 10 amendments notwithstanding. The analysis of this fourth *Mendoza-Martinez* factor weighs in favor of a finding that SORNA is punitive.

e. Behavior Already Criminal

Turning to the fifth *Mendoza-Martinez* factor outlined in *Muniz, supra*, specifically whether the behavior to which the statute applies is already a crime, this Honorable reviewing Court determined that, because SORNA is aimed at protecting the public against recidivism, "past criminal conduct is 'a necessary beginning point[ ]'", *see Muniz*, 164 A.3d at 1216 (*quoting Smith v. Doe*, 123 S.Ct. 1140 (U.S. Alaska 2003), *rehearing denied*, 123 S.Ct. 1925 (U.S. Alaska 2003)),and chose to give this factor little weight, the answer to the query must nevertheless be that the behavior to which SORNA applies is, indeed, already a crime, as SORNA does not come into play unless there has been criminal conduct, sexual or, as the Pennsylvania Supreme Court observed in *Muniz*, *supra*, otherwise in several circumstances. However, given the Pennsylvania Supreme Court's analysis in *Muniz*, *supra,* we are bound to give it little weight in the overall scheme.

f. Alternative Purpose

With respect to the sixth *Mendoza-Martinez* factor, namely, whether there is an alternative purpose to which the statute may be rationally connected, this Honorable reviewing Court determined that there is a purpose other than punishment to which SORNA may be rationally connected, specifically, public safety and protection, and that, therefore, this factor weighs in favor of a finding that SORNA is non-punitive. *Muniz*, 164

A.3d at 1217. Although the Act 10 amendments to SORNA do not undermine this conclusion, we respectfully submit that the evidence presented in court on July 9, 2018 gives rise to serious concerns about the rationality of SORNA's connection to its alleged non-punitive purpose. We respectfully submit that while SORNA may have an expressed non-punitive purpose, its relationship to that purpose, as we discussed in great detail earlier, is anything but rational. Nevertheless, should this Honorable reviewing Court conclude otherwise, we still conclude, as this Honorable reviewing Court did in *Muniz*, *supra*, that the *Mendoza-Martinez* balancing test results in the determination that SORNA, as amended in February and June of 2018, is sufficiently punitive in effect to overcome the Legislature's stated non-punitive purpose.

g. Excessiveness

Turning to the seventh and last factor of the *Mendoza-Martinez* balancing test, that is, the inquiry as to whether the statute is excessive in relation to the alternative purpose assigned, this Honorable reviewing Court stated the following.

> Once again, we are aligned with the arguments of appellant and PACDL. The *Williams II* Court observed with regard to Megan's Law II, "if the Act's imprecision is likely to result in individuals being deemed sexually violent predators who in fact do not pose the type of risk to the community that the General Assembly sought to guard against, then the Act's provisions could be demonstrated to be excessive. . . ." *Williams II*, 832 A.2d at 983. Furthermore, "'society has a significant interest in assuring that the classification scheme [of a sex offender registration law] is not over-inclusive.'" *Lee*, 935 A.2d at 883, *quoting Commonwealth v Maldonado*, 576 Pa. 101, 838 A.2d 710, 715 (2003). We apply this reasoning here, and we do not analyze excessiveness as applied only to appellant or sexually violent predators, but instead we examine SORNA's entire statutory scheme. *Smith*, 538 U.S. at 92, 123 S.Ct. 1140. Moreover, we have already recognized SORNA categorizes a broad range of individuals as sex

> offenders subject to its provisions, including those convicted of offenses that do not specifically relate to a sexual act. *See, e.g.*, 42 Pa. C.S. § 9799.14(b)(1) – (3), (19) (pertaining to: unlawful restraint, 18 Pa. C.S. § 2902(b); false imprisonment, 18 Pa. C.S. § 2903(b); interference with custody of a child, 18 Pa. C.S. § 2904; filing factual statement about alien individual, 18 U.S.C. § 2424). Accordingly, we conclude SORNA's requirements are excessive and over-inclusive in relation to the statute's alternative assigned purpose of protecting the public from sexual offenders.

Muniz, 164 A.3d at 1218. Act 10 of 2018 has no impact on the concerns raised by this Honorable reviewing Court with respect to this factor in *Muniz*, *supra*. Further, this Honorable reviewing Court made this determination notwithstanding its prior conclusion that SORNA was rationally related to a non-punitive purpose. We would respectfully submit that this conclusion is even more compelling when the rationality of SORNA's relationship to its professed non-punitive purpose is deconstructed and debunked.

3. Balancing

Of the seven (7) *Mendoza-Martinez* factors considered by the Pennsylvania Supreme Court, the Pennsylvania Supreme Court in *Muniz, supra*, as we have shown above, gave weight to five (5) of them: whether the statute involves an affirmative disability or restraint; whether the sanction has historically been regarded as punishment; whether the operation of the statute promotes the traditional aims of punishment; whether there is an alternative purpose to which the statute may be rationally connected; and whether the statute is excessive in relation to the alternative purpose assigned. The Pennsylvania Supreme Court gave little weight to the factors querying whether the statute comes in play only on a finding of scienter and whether the behavior to which the statute applies is already a crime. Of the five (5) factors to which the Supreme Court

gave weight, the Pennsylvania Supreme Court determined that four (4) of them, specifically, all but the factor querying whether there is an alternative purpose to which the statute may be rationally connected, weighed in favor of finding SORNA to be punitive despite its expressed civil remedial purpose. While we would give more weight in favor of finding SORNA punitive with respect to the factor concerning whether there is an alternative non-punitive purpose to which SORNA may be rationally connected, as we do not consider SORNA to be rationally connected to any legitimate non-punitive purpose because of the evidence presented before us on July 9, 2018, we respectfully submit that even if this Honorable reviewing Court does not agree with our position in this regard, the balancing test as applied in *Muniz, supra* is not changed in any way by the 2018 amendments to SORNA and, when applied in the case *sub judice*, yields the same conclusion, namely, that SORNA is still sufficiently punitive in effect to overcome the General Assembly's stated non-punitive purpose.

Because SORNA is effectively punitive, notwithstanding the General Assembly's attempt to enact a civil regulatory scheme, it is evident that the implicit fact-finding scheme therein violates the *Apprendi/Alleyne* mandate that any fact which operates to increase either the floor or the ceiling of punishment must be submitted to the accused's chosen factfinder and proven beyond a reasonable doubt. The Legislature is not the accused's chosen factfinder. The Legislature's pre-emptive conflation of the fact-finding process removes the judicial fact-finding function and eviscerates the holdings of *Apprendi/Alleyne* by allowing a fact that increases punishment to be established without adversarial testing subjected to proof beyond a reasonable doubt. If SORNA is punitive, as this Honorable reviewing Court has already declared, then, pursuant to *Apprendi,*

supra and *Alleyne, supra*, the fact of future dangerousness, which increases the punishment for all of its predicate offenses, must be submitted to a judge or jury and established by proof beyond a reasonable doubt.

C. Illegal Sentence

The determination that SORNA is punitive leads to another troubling conclusion. If SORNA is punitive, as this Honorable reviewing Court has already declared, then its application of fifteen (15) years, twenty-five (25) years, and lifetime registration and notification requirements constitute illegal sentences because they extend punishment beyond the statutory maximum prescribed for the predicate offenses. For example, in the case *sub judice*, the Defendant was convicted of Aggravated Indecent Assault and Indecent Assault. Aggravated Indecent Assault under 18 Pa. C.S.A. § 3125(a) is a Felony of the second degree (F-2), *see* 18 Pa. C.S.A. § 3125(c)(1), which is punishable by a maximum of ten (10) years in prison. 18 Pa. C.S.A. § 1103(2). However, SORNA mandates that Defendant be subjected to punishment for the remainder of his natural life, far beyond the statutory maximum of ten (10) years. As a result, the imposition of a lifetime registration and notification period for this Defendant, or any other defendant so convicted, constitutes an illegal sentence. Defendant's conviction for Indecent Assault, under 18 Pa. C.S.A. § 3126(a)(1), is graded as a Misdemeanor of the second degree (M-2), 18 Pa. C.S.A. § 3126(b)(1), which is punishable by a maximum of two (2) years in prison. However, SORNA categorizes Indecent Assault as a Tier I offense which is subject to punishment, i.e., registration and notification, for fifteen (15) years, well in excess of the statutory maximum. Unlawful Restraint, 18 Pa. C.S.A. § 2902(b), likewise a Tier I offense, which may have absolutely

nothing to do with sexual behavior, is graded as a Felony of the second degree (F-2), 18 Pa. C.S.A. § 2902(b), and punishable, like Aggravated Indecent Assault, by a statutory maximum of ten (10) years. 18 Pa. C.S.A. § 1103(2). Yet, like Defendant's conviction for Aggravated Indecent Assault, under SORNA, a person would be subjected to punishment in the form of registration and notification as a sexual offender for a period of fifteen (15) years, again well in excess of the statutory maximum and for behavior that may have had absolutely nothing to do with sex. Similarly, the offense of Luring a Child into a Motor Vehicle or Structure, 18 Pa. C.S.A. § 2910 is, at its least offensive, a Misdemeanor of the first degree (M-1), 18 Pa. C.S.A. § 2910(a.1)(1), which is punishable by a statutory maximum of five (5) years in prison. 18 Pa. C.S.A. § 1104(1). Yet, as a Tier I offense under SORNA, an offender would be subjected to punishment for fifteen (15) years, and with no opportunity to contest the presumption of future dangerousness, as his public shaming period would expire prior to the passage of twenty-five (25) years from sentencing.[6] We need not set forth the violation of the statutory maximum for every offense under SORNA, as the most severe grading of the predicate offenses would be Felony of first degree (F-1), which is punishable by a statutory maximum of twenty (20) years in prison, 18 Pa. C.S.A. § 1102, and yet, with respect to such Tier III offenses as Kidnapping under 18 Pa. C.S.A. § 2901(a.1), a Felony of the first degree (F-1), 18 Pa. C.S.A. § 2901(b), or Statutory Sexual Assault, 18 Pa C.S.A. § 3122.1(b), also an F-1, would be subjected to actual punishment by the State for the remainder of their lives.

[6] This suggests that SORNA as well may violate Equal Protection, as the illusory post-deprivation process available to some sexual offenders after twenty-five (25) years is not available to all sexual offenders, notwithstanding the similarity of their constitutional injury.

The application of the SORNA leads to the imposition of illegal sentences. Consequently, SORNA is unconstitutional and cannot stand.

We are aware that the Pennsylvania Superior Court has recently issued an Opinion holding that the registration and notification provisions of SORNA fall under the rubric of probation, a sentencing option authorized by 42 Pa. C.S.A. § 9721, and like other sentencing options, such as the payment of a fine, are not tied to the limits of the mandatory incarceration maximums set forth in Crimes Code; consequently, they do not constitute illegal sentences. *Commonwealth v. Strafford*, ____ A.3d ____, 2018 WL 3717081 (Pa. Super. August 6, 2018). We would respectfully submit that the Superior Court's decision overlooks the fact that the payment of a fine, a punishment which one may contest prior to its imposition and which may be tailored to the individual circumstances of the offender through a court-ordered payment plan or even through a waiver based on individual financial circumstances, does not entail the extreme interference with and deprivation of the fundamental reputational, privacy, and liberty interests that accompany public registration and notification, which is more like a sentence of supervisory probation, which the Pennsylvania Superior Court did recognize, in its analogy, cannot exceed the statutory maximums. *See Commonwealth v. Stafford*, ___ A.3d ___, 2018 WL 3717081 (Pa. Super. August 6, 2018). Accordingly, we would respectfully submit that *Strafford, supra* does not compel this Honorable reviewing Court to conclude SORNA is constitutional.

D. Eighth Amendment/Article I, Section 13

Because SORNA imposes punishment without adequate process, imposes

punishment which exceeds the statutory maximum for each of its predicate offenses, and is not narrowly tailored to serve a compelling state interest but is premised upon a flawed irrebuttable presumption which is neither universally true nor without alternative less restrictive means available to ascertain the presumed fact, SORNA's registration and notification provisions are constitutionally excessive in violation of the Eighth Amendment's proscription against cruel and unusual punishments and the corresponding proscription embodied in the Pennsylvania Constitution at Article I, Section 13. U.S. Const., Amend. VIII; Pa. Const., Art I, § 13.

The Pennsylvania constitutional prohibition against cruel and unusual punishment is co-extensive with the Eighth and Fourteenth Amendments to the United States Constitution. *Commonwealth v. Bonner*, 135 A.3d 592 (Pa. Super. 2016), *appeal denied*, 145 A.3d 161 (Pa. 2016); *Commonwealth v. Elia*, 83 A.3d 254 (Pa. Super. 2013), *appeal denied*, 94 A.3d 1007 (Pa. 2014).[7] The Eighth Amendment does not require strict proportionality between the crime committed and the sentence imposed; rather, it forbids only extreme sentences that are grossly disproportionate to the crime. *Commonwealth v Succi*, 173 A.3d 269 (Pa. Super. 2017), *reargument denied* (December 12, 2017), *appeal denied*, 2018 WL 3241695 (Pa. 2018). A court's proportionality analysis under the Eighth Amendment is to be guided by objective criteria, including (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the

[7] To the extent that this argument may be one that we did not specifically articulate in our Order dated July 10, 2018, we respectfully submit that the Eighth Amendment/Article I, Section 13 argument against SORNA implicates the legality of the Defendant's sentence and as such can never be waived and may even be raised by the appellate court *sua sponte*. *Commonwealth v. Batts*, 163 A.3d 410 (Pa. 2017)(challenge to legality of sentence may be raised by appellate court *sua sponte*); *Commonwealth v. Eisenberg*, 98 A.3d 1268 (Pa. 2014)(Eighth Amendment challenge implicated legality of sentence and was non-waivable). Consequently, we would respectfully submit it is properly before this Honorable reviewing Court for consideration.

same jurisdiction; and (3) the sentences imposed for the commission of the same crime in other jurisdictions. *Commonwealth v. Succi*, 173 A.3d 269 (Pa. Super. 2017), *reargument denied* (December 12, 2017), *appeal denied*, 2018 WL 3241695 (Pa. 2018). Although there are three (3) prongs to the test, a court is not obligated to reach the second and third prongs unless a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality. *Commonwealth v. Succi*, 173 A.3d 269 (Pa. Super. 2017), *reargument denied* (December 12, 2017), *appeal denied*, 2018 WL 3241695 (Pa. 2018).

Here, it is evident that the application of SORNA's registration and notification provisions with respect to this Defendant, and all others similarly situated, is grossly disparate to the offense committed. While the offenses of Aggravated Indecent Assault is certainly grave, as is, perhaps to a lesser extent, the offense of Indecent Assault, both of which Defendant was convicted of, the statutory maximum for Aggravated Indecent Assault is ten (10) years and the statutory maximum for Indecent Assault is five (5) years, yet SORNA imposes punishment on the former for a lifetime and for the latter, for three (3) times the statutory maximum. It's gross disproportion is patent.

SORNA's registration and notification provisions are not only grossly disproportionate to the crime(s) they cover, but this gross disproportion is a direct function of the deficiency in the process by which SORNA's registration and notification provisions were derived and applied to the Defendant, and all others similarly situated, as we have already discussed above. Given the fact that SORNA was enacted pursuant to a Federal mandate imposed upon all of the States, and all sexual offenders in this jurisdiction and others are subjected to the same or similar provisions, the second and

third prongs of the test for excessive punishment in this circumstance is for all practical purposes meaningless in this context. All are subjected to grossly disproportional punishment that has been unconstitutionally derived and unconstitutionally applied to its subject offenders.

Because SORNA violates due process, *Apprendi/Alleyne*, and the statutory maximums set forth by the Legislature as described above, it is an illegal sanction that does not comport with traditional notions of decency, let alone the evolving standards of a maturing society, and cannot survive scrutiny under the Eighth Amendment or Article I, Section13 of the Pennsylvania Constitution. *See Roper v. Simmons*, 125 S.Ct. 1183 (U.S. Mo. 2005)(courts must refer to evolving standards of decency that mark the progress of a maturing society when determining which punishments are so disproportionate as to be cruel and unusual within the meaning of the Eighth Amendment prohibition).

E. Separation of Powers

Finally, as an unconstitutional, excessive punishment imposed without adequate process of law, SORNA violates the Separation of Powers doctrine as it represents an ultra vires act of the legislative branch that encroaches upon the judiciary's fact-finding and individualized sentencing responsibilities. The Separation of Powers doctrine stands for the proposition that the executive, legislative, and judicial branches of government are equal and none should exercise powers exclusively committed to another branch. *Seitzinger v. Commonwealth*, 25 A.3d 1299 (Pa. Cmwlth. 2011), *aff'd*, 54 A.3d 20 (Pa. 2012). The doctrine is not merely a matter of convenience or of governmental mechanism; its object is basic and vital—namely, to preclude a

commingling of these essentially different powers of government in the same hand. *Seitzinger v. Commonwealth*, 25 A.3d 1299 (Pa. Cmwlth. 2011), *aff'd*, 54 A.3d 20 (Pa. 2012). A significant purpose behind the Separation of Powers doctrine is to ensure that no one branch of government becomes more dominant than the others. *Seitzinger v. Commonwealth*, 25 A.3d 1299 (Pa. Cmwlth. 2011), *aff'd*, 54 A.3d 20 (Pa. 2012). A legislative action that impairs the independence of the judiciary in its administration of justice violates the Separation of Powers doctrine. *Seitzinger v. Commonwealth*, 25 A.3d 1299 (Pa. Cmwlth. 2011), *aff'd*, 54 A.3d 20 (Pa. 2012).

As this Honorable reviewing Court observed long ago, the whole judicial power of the Commonwealth is vested in the courts. *Young v. Board of Probation and Parole*, 409 A.2d 843 (Pa. 1979)(*citing Commonwealth ex rel. Johnson v. Halloway*, 42 Pa. 446, 448, 1862 WL 5111 (1862)). Not a fragment of it belongs to the Legislature. *Id.* The trial, conviction, and sentencing of criminals are judicial duties, and the duration or period of the sentence is an essential part of a judicial judgment in a criminal record. *Id.*

Pennsylvania has adopted an indiscriminate, individualized sentencing procedure whereby the court is required to consider the individual characteristics of the defendant and the individual circumstances of the crime in order to fashion an appropriate commensurate sentence within the statutory maximums. *See Commonwealth v. Martin*, 351 A.2d 650 (Pa. 1976)(regarding Pennsylvania's adoption of indiscriminate sentencing). The Legislature's ultra vires act of requiring the court to impose a static pre-determined period of punishment in excess of the statutory maximums for any predicate offense, without due process of law, and based upon a constitutionally flawed irrebuttable presumption, besides creating a sentencing option not

authorized by 42 Pa. C.S.A. § 9721(a), abridges the judiciary's function of taking into consideration the individual characteristics of a defendant and the individual circumstances of the crime to fashion an indiscriminate individualized sentence with a minimum and maximum within the standing statutory limits that is commensurate with the severity of the crime, its impact upon the victim and the community, and the rehabilitative needs of the defendant. *See* 42 Pa. C.S.A. § 9721(b). It impairs the independence of the judiciary in its administration of justice and therefore violates the Separation of Powers doctrine. *Seitzinger, supra.*

V. CONCLUSION

Although we are not unsympathetic to the concerns that motivated the Legislature's enactment of SORNA, we cannot condone the arbitrary, overbroad and constitutionally defective design through which the Legislature has attempted to implement a solution thereto. For all of the reasons discussed herein, we would respectfully submit that SORNA's registration and notification provisions are unconstitutional both on their face and as applied to this Defendant. We respectfully submit that the Commonwealth's appeal is without merit. Accordingly, we respectfully recommend that this Honorable reviewing Court deny and dismiss the Commonwealth's appeal and affirm the undersigned's Order dated July 10, 2018 declaring SORNA's registration and notification provisions unconstitutional.

BY THE COURT:

8/30/18
Date

Anthony A. Sarcione, J.