

IN THE COURT OF COMMON PLEAS OF MONTGOMERY COUNTY
PENNSYLVANIA
CRIMINAL DIVISION


COMMONWEALTH OF PENNSYLVANIA : CP-46-CR-0001445-1997

V. :

CLAUDE LACOMBE : 35 MAP 2018

OPINION

CARPENTER J. : SEPTEMBER 25, 2018

2018 SEP 26 AM 8:54
CLERK OF COURTS
OFFICE OF
MONTGOMERY COUNTY
PENNSYLVANIA


FACTUAL AND PROCEDURAL HISTORY

The Commonwealth appeals from an order dated June 21, 2018, granting the Amended Petition to Terminate Sexual Offender Registration Requirements filed by Appellee, Claude LaCombe (“LaCombe”), terminating his sexual offender registration requirements. The Order declared the Sexual Offender Registration and Notification Act codified in 42 Pa.C.S. §§9799.51, *et seq*, Subchapter I, 42 Pa.C.S. §§9799.10, *et seq.*, to be punitive, unconstitutional and severable from Subchapter H, and concluded that it cannot be applied retroactively.

By way of a brief background, on October 15, 1997, a jury found LaCombe guilty of involuntary deviate sexual intercourse¹ (“IDSI”), sexual assault², indecent assault³, official oppression⁴ and unsworn falsification to

¹ 18 Pa.C.S.A. §3123(a)(1).

² 18 Pa.C.S.A. §3124.1.

authorities⁵. On January 9, 1998, LaCombe was sentenced to an aggregate term of six to twenty years' imprisonment. He was not deemed a sexually violent predator.

The version of Megan's Law in effect at that time, Megan's Law I, required that LaCombe register as a sex offender with the Pennsylvania State Police for a period of ten years upon release from prison based upon his conviction of IDSI. Under Megan's Law I, there were no registration requirements for any of the other convictions.

LaCombe was released on parole on April 11, 2005, at which time he registered as a sex offender with the Pennsylvania State Police. Therefore, LaCombe's registration period under Megan's Law I would have terminated sometime in 2015.

There had been several intervening changes in sex offender law since Megan's Law I. Pertinently, Megan's Law III, 42 Pa.C.S. §9791 *et seq.*, was in effect at the time of LaCombe's release on parole. Under which LaCombe was required to register as a sex offender for life. 42 Pa.C.S. §9795.1(b)(2).

On December 20, 2012, the Sex Offender Registration and Notification Act ("SORNA"), 42 P.S.C. §9799.10 to 9799.41, became effective and repealed and replaced all prior versions of Megan's Law. Under SORNA,

³ 18 Pa.C.S.A. §3126(a)(1).

⁴ 18 Pa.C.S.A. §5301.

⁵ 18 Pa.C.S.A. §4904(a)(1).

LaCombe was classified as a Tier II offender and was thus subject to the lifetime registration requirements.

On July 19, 2017, the Pennsylvania Supreme Court decided Commonwealth v. Muniz, 164 A.3d 1189 (2017), which held that the registration and reporting provisions of SORNA are punitive, and retroactive application of these provisions violate the *ex post facto* clause of the Pennsylvania Constitution and are unconstitutional.

On February 20, 2018, LaCombe filed a petition to terminate sexual offender registration. The Commonwealth filed its answer and motion to deny the petition. On June 5, 2018, LaCombe filed an amended petition to terminate sexual offender registration requirements, at issue in this appeal.⁶

On June 19, 2018, argument was conducted, and the petition was granted on June 21, 2018, terminating LaCombe's sexual offender registration requirements. The Commonwealth filed a Motion for Reconsideration, which was denied.

The Commonwealth filed this timely appeal on July 19, 2018, with the Pennsylvania Supreme Court. The Commonwealth filed a concise statement of errors complained of on appeal pursuant to Pa.R.A.P. 1925(b) as directed by this Court.

⁶ This Court recognizes that amendments are not self-authorizing. Commonwealth v. Porter, 35 A.3d 4, 12 (Pa.2012). The correct procedure would have been to either order an amendment pursuant to Pa.R.Crim.P. 905(B) or for PCRA counsel to have requested leave to amend under Pa.R.Crim.P. 905(A). However, there is no prejudice, because if sought this amendment would have been granted.

Commonwealth v. Muniz

On July 19, 2017, the Pennsylvania Supreme Court decided Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017). The Muniz Court examined whether SORNA constituted an unconstitutional *ex post facto* law. The Court opined there are two critical elements that must be met for a criminal or penal law to be deemed *ex post facto*. First, “it must be retrospective, that is, it must apply to events occurring before its enactment.” Muniz, 164 A.3d at 1195-96 (citation omitted). Second, “it must disadvantage the offender affected by it.” Id. at 1196. Applying this analysis to SORNA, the Court determined that application of SORNA implicated the *ex post facto* clause because the statute would inflict greater punishment on the sex offender than the law in effect at the time he committed his crimes. Id.

More specifically, in Muniz, the defendant was convicted in February 2007 of two counts of indecent assault of a person less than 13 years of age. Sentencing was scheduled for May 2007. Id. at 1193. At the time of his conviction, Muniz “would have been ordered to register as a sex offender with the Pennsylvania State Police for a period of ten years pursuant to then-effective Megan's Law III.” Id. at 1192. Muniz, however, never appeared for sentencing and absconded. He was apprehended in September 2014. Id. When Muniz was finally sentenced in 2014, the trial court ordered him to comply with the lifetime registration provisions under the then-effective SORNA, pursuant to which he was a Tier III sexual offender. Id. Muniz appealed.

On appeal, the Pennsylvania Superior Court affirmed Muniz's

judgment of sentence. Commonwealth v. Muniz, No. 2169 MDA 2014 (unpublished memorandum, Pa. Super. filed August 7, 2015).

On appeal to our Supreme Court, five of the six participating justices held that even though the General Assembly identified SORNA's enhanced registration provisions as non-punitive, they nonetheless constituted punishment. Id. at 1218. The Supreme Court further determined that the retroactive application of SORNA's registration requirements to Muniz violated the *ex post facto* clause of the Pennsylvania Constitution. Id. at 1218-19.

In reaching these holdings, the Muniz Court applied the two-part analysis set forth and applied in Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169 (1963). First, the Court considered whether the General Assembly's "intent was to impose punishment, and if not, whether the statutory scheme is nonetheless so punitive either in purpose or effect as to negate the legislature's non-punitive intent." Muniz, 164 A.3d at 1208 (quoting Commonwealth v. Williams II, 832 A.2d at 962, 971 (Pa. 2003)). If the General Assembly intended to enact a civil scheme, it must be determined whether the law is punitive in effect by considering the seven Mendoza-Martinez factors. The Muniz Court recognized that only the "clearest proof" may establish that a law is punitive. Furthermore the Muniz Court considered the SORNA's entire statutory scheme. Id. at 1223.

Act 10 of 2018 (“SORNA II”)

In response to the Supreme Court decision in Muniz⁷, on February 21, 2018, Governor Tom Wolf signed into law Act 10 of 2018 (SORNA II). Act 10 created a two track system. First, with Act 10, the Legislature amended Subchapter H of Title 42, and second, the Legislature enacted an entirely new Subchapter I. Subchapter I was created to regulate only those offenses which occurred prior to December 20, 2012. This appeal involves only Subchapter I, and for clarity purposes this Opinion will refer to the relevant portion of Act 10 as Subchapter I.

SORNA II, Subchapter I, 42 PaC.S. §9799.51 et seq.

The stated purpose of SORNA II according to the General Assembly’s stated findings and declaration policy supporting SORNA II are as follows:

§ 9799.51. Legislative findings and declaration of policy

(a) **Legislative findings.**--It is hereby determined and declared as a matter of legislative finding:

(1) If the public is provided adequate notice and information about sexually violent predators and offenders as well as those sexually violent predators and offenders who do not have a fixed place of habitation or abode, the community can develop constructive plans to prepare itself for the release of sexually violent predators and offenders. This allows communities to meet with law enforcement to prepare and obtain information about the rights and

⁷ The passage of this legislation was also in response to the holding of Commonwealth v. Butler, 173 A.3d 1212 (Pa.Super. 2017), holding that the sexually violent predator proof provisions set forth in Pa.C.S.A. §9799.24(e)(3) are unconstitutional in light of Muniz.

responsibilities of the community and to provide education and counseling to their children.

(2) These sexually violent predators and offenders pose a high risk of engaging in further offenses even after being released from incarceration or commitments, and protection of the public from this type of offender is a paramount governmental interest.

(3) The penal and mental health components of our justice system are largely hidden from public view, and lack of information from either may result in failure of both systems to meet this paramount concern of public safety.

(4) Overly restrictive confidentiality and liability laws governing the release of information about sexually violent predators and offenders have reduced the willingness to release information that could be appropriately released under the public disclosure laws and have increased risks to public safety.

(5) Persons found to have committed a sexual offense 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 sexually violent predators and 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.

(b) Declaration of policy.--It is hereby declared to be the intention of the General Assembly to:

(1) Protect the safety and general welfare of the people of this Commonwealth by providing for registration, community notification and access to information regarding sexually violent predators and offenders who are about to be released from custody and will live in or near their neighborhood.

(2) Require the exchange of relevant information about sexually violent predators and offenders among public agencies and officials and to authorize the release of necessary and relevant information about sexually violent predators and offenders to members of the general public, including information available through

the publicly accessible Internet website of the Pennsylvania State Police, as a means of assuring public protection and shall not be construed as punitive.

(3) Address the Superior Court's opinion in the case of Commonwealth v. Wilgus, 975 A.2d 1183 (2009), by requiring sexually violent predators and offenders without a fixed place of habitation or abode to register under this subchapter.

(4) Address the Pennsylvania Supreme Court's decision in Commonwealth v. Muniz, No. 47 MAP 2016 (Pa. 2016),¹ and the Pennsylvania Superior Court's decision in Commonwealth v. Butler (2017 WL 4914155).

42 Pa.C.S. § 9799.51

Subchapter I applies to: (1) convicted of a sexually violent offense committed on or after April 22, 1996, but before December 20, 2012, whose period of registration with the Pennsylvania State Police, as described in section 9799.55 (relating to registration), has not expired; or (2) required to register with the Pennsylvania State Police under a former sexual offender registration law of this Commonwealth on or after April 22, 1996, but before December 20, 2012, whose period of registration has not expired. 42 Pa.C.S. § 9799.52.

The registration requirements of Subchapter I are applicable to the following individuals: (1) An individual who committed a sexually violent offense within this Commonwealth and whose period of registration with the Pennsylvania State Police, as specified in section 9799.55 (relating to registration), as of February 21, 2018, has not expired. (2) An individual who committed a sexually violent offense within this Commonwealth and who has failed to register with the Pennsylvania State Police. (3) An individual who

committed a sexually violent offense within this Commonwealth and is an inmate in a State or county correctional facility of this Commonwealth, including a community corrections center or a community contract facility, is being supervised by the Pennsylvania Board of Probation and Parole or county probation or parole, is subject to a sentence of intermediate punishment or has supervision transferred under the Interstate Compact for Adult Supervision in accordance with section 9799.62(e) (relating to other notification). (4) An individual who was convicted of an offense similar to an offense set forth in section 9799.55 under the laws of the United States or one of its territories or possessions, another state, the District of Columbia, the Commonwealth of Puerto Rico, a foreign nation or under a former law of this Commonwealth or who was court martialed for a similar offense and who, as of February 21, 2018, has not completed registration requirements. 42 Pa.C.S.A. § 9799.54.

Offenders must register for a period of ten years or life, and SVP's register for life. 42 Pa.C.S. §9799.55. All offenders must register and submit to fingerprinting and photographing at approved registration sites. 42 Pa.C.S. §9799.56(e). Subchapter I provides a mechanism for possible removal from the registry for a lifetime registrant after a term of 25 years. 42 Pa.C.S.A. §9799.59. The offender can only petition the court if he is not convicted of an offense punishable by more than one year in jail, after the commencement of his registration or release from custody, whichever is later. Additionally, an offender has to be assessed by the Sexual Offender Assessment Board ("SOAB"),

and prove by “clear and convincing evidence” “that he is not likely to pose a threat to safety of any other person.” 42 Pa.C.S. §9799.59(a).

The registration procedures require that offenders and SVP’s to register with the Pennsylvania State Police (“PSP”) upon release from incarceration, upon parole from a State or county correctional facility or upon the commencement of a sentence of intermediate punishment. 42 Pa.C.S. §9799.56(a)(1)(i),(ii). If an offender has a change of residence or the establishment of additional residence or residences he must notify the PSP within three business days. 42 Pa.C.S. §9799.56(a)(2)(1). If the offender or SVP is homeless he has the burden to within three business days to inform the Pennsylvania State Police the location of his temporary habitat, lists of places the individual eats, frequents and engages in leisure activities and any planned destinations. 42 Pa.C.S. §9799.56(a)(2)(i)(B).

The penalty for an offender who is subject to the registration provisions who fails to register with the PSP is subject to prosecution under 18 Pa.C.S. §4915.2⁸ and subject to a felony conviction. . 42 Pa.C.S. §9799.56(d).

⁸ (a) **Offense defined.**--An individual who is subject to registration under 42 Pa.C.S. § 9799.55(a), (a.1) or (b) (relating to registration) or who was subject to registration under former 42 Pa.C.S. § 9793 (relating to registration of certain offenders for ten years) commits an offense if the individual knowingly fails to:

- (1) register with the Pennsylvania State Police as required under 42 Pa.C.S. § 9799.56 (relating to registration procedures and applicability);
- (2) verify the individual’s residence or be photographed as required under 42 Pa.C.S. § 9799.60 (relating to verification of residence); or
- (3) provide accurate information when registering under 42 Pa.C.S. § 9799.56 or verifying a residence under 42 Pa.C.S. § 9799.60.

18 Pa.S.C. § 4915.2.

In Section 9799.63, Subchapter I establishes a statewide registry of sexual offender to be created and maintained by the Pennsylvania State Police (“PSP”). 42 Pa.C.S. §9799.63(b). The stated legislative findings as set forth in the statute as it relates to the creation and maintenance of this registry states as follow:

(a) Legislative findings.--It is hereby declared to be the finding of the General Assembly that public safety will be enhanced by making information about sexually violent predators, lifetime registrants and other sex offenders available to the public through the Internet and electronic notification. Knowledge of whether a person is a sexually violent predator, lifetime registrant or other sex 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 sexually violent predators, lifetime registrants and other sex offenders. The technology afforded by the Internet and electronic notification would make this information readily accessible to parents and private entities, enabling them to undertake appropriate remedial precautions to prevent or avoid placing potential victims at risk. Public access to information about sexually violent predators, lifetime registrants and other sex offenders is intended solely as a means of public protection and shall not be construed as punitive.

42 Pa.C.S. §9799.63(a). Under subsection (c), the “information permitted to be disclosed regarding individuals” include:

- (1) For sexually violent predators, the following information shall be posted on the Internet website:
 - (i) name and all known aliases;
 - (ii) year of birth;
 - (iii) in the case of an individual who has a residence as defined in paragraph (1) of the definition of “residence” in section 9799.53 (relating to

definitions), the street address, municipality, county and zip code of all residences, including, where applicable, the name of the prison or other place of confinement;

(iv) the street address, municipality, county, zip code and name of an institution or location at which the person is enrolled as a student;

(v) the municipality, county and zip code of an employment location;

(vi) a photograph of the individual, which shall be updated not less than annually;

(vii) a physical description of the offender, including sex, height, weight, eye color, hair color and race;

(viii) identifying marks, including scars, birthmarks and tattoos;

(ix) the license plate number and description of a vehicle owned or registered to the offender;

(x) whether the offender is currently compliant with registration requirements;

(xi) whether the victim is a minor;

(xii) a description of the offense or offenses which triggered the application of this subchapter;

(xiii) the date of the offense and conviction, if available; and

(xiv) in the case of an individual who has a residence as defined in paragraph (2) of the definition of "residence" in section 9799.53, the information listed in section 9799.56(a)(2)(i)(C) (relating to registration procedures and applicability), including, where applicable, the name of the prison or other place of confinement.

(2) For all other lifetime registrants and offenders subject to registration, the information specified in paragraph (1) shall be posted on the Internet website.

42 Pa.C.S. §9799.63(c). In addition, Subchapter I's registry provision states the registry shall be "incorporated as part of the registry established under Subchapter H. 42 Pa.C.S. §9799.67(1).

The website provides for a feature to allow a member of the public to receive electronic notification when an offender provides moves into or out of a geographic area chosen by the user.” 42 Pa.C.S. § 9799.63(b)(7). Further, Subchapter I requires that the information be shared on a public website. 42 Pa.C.S. §9799.63.

The in-person reporting requirement requires an offender to appear annually, and SVP's, four times a year, at an approved registration site to verify a residence. 42 Pa.C.S. §9799.60(a), (b). Subchapter I eliminates the requirement that the offender receive notice of quarterly, annual or monthly notifications from the PSP. 42 Pa.C.S. §9799.60(f). All offenders are required to appear in person at an approved registration site within 3 days of any changes their registration information. This includes a change in residence, change in employer or employment location, change in institution is enrolled as a student or becoming enrolled as a student. 42 Pa.C.S. 9799.56(a)(2)(i)-(iv). For an offender with a “temporary habitat” located in Pennsylvania, he is required to appear every 30 days at an approved registration site. 42 Pa.C.S. §9799.60(b)(b.2).

With this backdrop, next this Court will address the issues that the Commonwealth has raised on appeal.

ISSUES

- I. Whether this Court properly denied the Commonwealth motion to reconsider, when it requested this Court to review LaCombe’s challenge to the requirements imposed by Subchapter I as an untimely PCRA petition.

- II. Whether the requirements of the current sex offender registration law are punitive.
- III. Whether the punitive requirements are not severable from the remainder of the statutory requirements of Subchapter I.
- IV. Whether upon finding Subchapter I to be punitive and unconstitutional, this Court properly did not apply the most recent non-punitive version of the law.

DISCUSSION

- I. This Court properly denied the Commonwealth motion to reconsider, when it requested this Court to review LaCombe's challenge to the requirements imposed by Subchapter I as an untimely PCRA petition.

First on appeal, the Commonwealth contends that LaCombe's challenge to the requirements imposed by Chapter I should have been treated as an untimely PCRA petition. This Court disagreed and denied the Commonwealth's motion for reconsideration.

In the motion for reconsideration, the Commonwealth argued that this Court's finding of Chapter I to be punitive means that those requirements are a part of LaCombe's sentence. Motion for Reconsideration 6/29/18 p. 2 ¶3. Therefore, LaCombe's challenge to Chapter I's requirements as unconstitutional implicates the legality of his sentence and is cognizable under the PCRA, and must be raised in a timely PCRA petition. *Id.* at ¶¶4, 5. Accordingly, because LaCombe's PCRA petition is untimely his claim is time barred and has not met any exceptions to the timeliness requirements, and this Court lacked jurisdiction to consider his claim. *Id.* at ¶¶8, 13.

The fundamental flaw in this argument is that it relies on circular logic. In order to determine whether LaCombe's claim should have been

brought under the PCRA as a legality of sentence issue, this Court would have to first establish whether Chapter I is civil, and therefore not a legality of sentencing issue and not under the purview of the PCRA or a criminal punishment and unconstitutional, and therefore a legality of sentencing issue which would come under the purview of the PCRA. However, this Court cannot get to the underlying substantive merit review of the constitutional challenge to Chapter I without first establishing jurisdiction over that claim. And this Court cannot answer the jurisdiction question without first reviewing the underlying constitutional challenge. Therefore, LaCombe's challenge to Chapter I was properly brought as petition to terminate his sexual offender registration requirements since it is not established whether Chapter I as civil or criminal in purpose; therefore, no determination can be made that it is a legality of sentencing issue. In other words, one can't get to the underlying challenge, without first reviewing the underlying constitutional challenge.

In addition there is support in the law for this sort of petition, when case law has yet to adopt a settled procedure for challenging the retroactive application of a Megan's Law's registration requirement.

Commonwealth v. Bundy, 96 A.3d 390, 394 (Pa. Super. 2014).

II. The requirements of the current sex offender registration law are punitive.

Next, the Commonwealth contends that this Court erred in terminating LaCombe's sex offender registration requirements because the

requirements of the current sex offender registration law are not punitive. This Court disagrees.

To determine whether Subchapter I's retroactive application to LaCombe constitutes punishment, a two part analysis employed in In Commonwealth v. Williams, 832 A.2d 962 (Pa. 2003) (Williams II), and most recently in Muniz, was be applied.

a. Intent of the Legislature

First, it must be considered whether the Legislature's "intent was to impose punishment, and if not, whether the statutory scheme is nonetheless so punitive in purpose or effect as to negate the legislature's non-punitive intent." Muniz, 164 A.3d at 1208 (quoting Williams II, 832 A.2d at 971). Therefore, the first element of this test involves whether the legislature intent was to punish. Muniz, 164 A.3d at 1209. This requires a statutory construction analysis. Id.

Here, the legislative purpose is specifically stated that Subchapter I is the "protect the safety and general welfare of the people of this Commonwealth" 42 Pa.C.S. §9799.51(b)(1). Additionally, the creation of the registry is a "means of assuring public protection and shall not be construed as punitive." 42 Pa.C.S. §9799.51(b)(2). Further, the purpose is to address the Pennsylvania Supreme Court's decision in Muniz and Commonwealth v. Butler, 173 A.3d 1212 (Pa.Super. 2017). Accordingly, the expressed purpose of Subchapter I explicitly states the intention of the Legislature was anything other than to enact a civil scheme.

b. Mendoza-Martinez Factors

Next, because the stated intent was to create a civil scheme, the seven Mendoza-Martinez factors will be applied to determine whether Subchapter I is “punitive in effect to overcome the General Assembly’s stated nonpunitive purpose.” Muniz, 164 A.3d at 1210 (quoting Williams II, 832 A.2d at 971). 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 1210.

1. Affirmative Disability or Restraint

The first factor under the Mendoza-Martinez analysis is whether the statute involves an affirmative duty or restraint. In determining that Subchapter I is punitive in effect, this Court was guided by Muniz.

The Muniz Court held that SORNA involved an affirmative disability or restraint, as a factor weighing in favor of finding SORNA punitive in effect. The Court reasoned that a defendant would be affirmatively required to appear in person at a registration site four times a year, a minimum of 100 times over the next 25 years, extending for the remainder of his life, and defendant would be required to make in-person appearances for every change

in residence or employment. (Per Dougherty, J., for an equally divided court.). Therefore the Court held “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.”

The registration requirements of Subchapter I do not differ significantly from those that concerned the Muniz Court. In Subchapter I, an SVP is required to appear annually, and SVP's, four times a year, at an approved registration site to verify a residence. 42 Pa.C.S. §9799.60(a), (b). All offenders must appear in person at an approved registration site within 3 days of any changes their registration information. This includes a change in residence, change in employer or employment location, change in institution is enrolled as a student or becoming enrolled as a student. 42 Pa.C.S. 9799.56(a)(2)(i)-(iv). For an offender with a “temporary habitat” located in Pennsylvania, he is required to appear every 30 days at an approved registration site. 42 Pa.C.S. §9799.60(b)(b.2). The minor differences between SORNA and Subchapter I in this regard do not save it from constitutional infirmity.

In fact, Subchapter I as compared to SORNA is more onerous in that Chapter I actually eliminates the requirement that the offender receive notice of quarterly, annual or monthly notifications from the PSP. 42 Pa.C.S. §9799.60(f).

Further, in LaCombe's specific case, application of Subchapter I's requirements dramatically changes his registration responsibilities as

compared to the sex offender law in existence at the time he was originally sentenced. For instance, Subchapter I now makes LaCombe a lifetime registrant for involuntary deviate sexual intercourse, compared to the ten years originally required. With regard to his sexual assault conviction, Subchapter I turned this into a lifetime registration requirement, whereas at the time of his conviction and sentencing there was no such requirement. And finally for LaCombe's indecent assault conviction, under the old sex offender law carried a 15-year registration requirement, which has now become a lifetime registration offense. Therefore, Subchapter I as specifically applied to LaCombe greatly expands his registration requirements.

Accordingly, the amendments by the Legislature in this regard are no less of a direct restraint on LaCombe and as a factor weighs in favor of finding Subchapter I's effect to be punitive.

2. The Sanction is Regarded as Punishment

In Muniz, the Court held that "SORNA's publication provisions—when viewed in the context of our current internet-based world—to be comparable to shaming punishments." Muniz, 164 A.3d at 1213. The Muniz Court focused its analysis on the statewide registry for sexual offenders, first setting forth SORNA's requirements in this regard as follows:

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).

Muniz, 164 A.3d at 1207-08. The Muniz Court held that based upon SORNA publication provisions- when viewed in the context of our internet based world

- to be comparable to shaming punishments and more akin to probation. *Id.* at 1213. The Court concluded that this factor weighed in favor of finding SORNA's effect to be punitive.

Turning to Subchapter I, this Court acknowledges there have been changes to the publication provisions of Chapter I as compared to SORNA, and notably a mechanism, largely illusory, for an offender to be removed from the registry. Further, the Legislature set forth its legislative findings. However, this Court does not believe that these tweaks are enough to make it nonpunitive in effect.

In this case, Subchapter I, Section 9799.63 first sets out its legislative findings, namely that the information to be shared via the internet is for the enhancement of public safety by making this information available to the public because this knowledge "could" be a significant factor in protecting oneself or one's family members from the recidivist acts. It further states that this information is "intended solely as a means of public protection and shall not be construed as punitive." *Id.* at §9799.63(a). The information available shall include name and all known aliases, year of birth; the street address, municipality, county and zip code of all residences, including, where applicable, the name of the prison or other place of confinement, the street address, municipality, county, zip code and name of an institution or location at which the person is enrolled as a student, the municipality, county and zip code of an employment location, a photograph of the individual, which shall be updated not less than annually, a physical description of the offender, including sex,

height, weight, eye color, hair color and race; identifying marks, including scars, birthmarks and tattoos; the license plate number and description of a vehicle owned or registered to the offender; whether the offender is currently compliant with registration requirements; whether the victim is a minor; a description of the offense or offenses; the date of the offense and conviction, if available. This Court notes that these requirements seem on the surface to be less onerous however, it is not clear as to whether offenders that fall within Subchapter I will be required to produce additional information because Subchapter I's registry provision states the registry shall be "incorporated as part of the registry established under Subchapter H. 42 Pa.C.S. §9799.67(1)".

⁹ Chapter H, Section 9799(b) requires the following information to be disclosed on the public statewide registry:

(b) Information provided by sexual offender.--An individual specified in section 9799.13 (relating to applicability) shall provide the following information which shall be included in the registry:

- (1) Primary or given name, including an alias used by the individual, nickname, pseudonym, ethnic or tribal name, regardless of the context used and any designations or monikers used for self-identification in Internet communications or postings.
- (2) Designation used by the individual for purposes of routing or self-identification in Internet communications or postings.
- (3) Telephone number, including cell phone number, and any other designation used by the individual for purposes of routing or self-identification in telephonic communications.
- (4) Valid Social Security number issued to the individual by the Federal Government and purported Social Security number.
- (5) Address of each residence or intended residence, whether or not the residence or intended residence is located within this Commonwealth and the location at which the individual receives mail, including a post office box. If the individual fails to maintain a residence and is therefore a transient, the individual shall provide information for the registry as set forth in paragraph (6).
- (6) If the individual is a transient, the individual shall provide information about the transient's temporary habitat or other temporary place of abode or dwelling, including, but not limited

to, a homeless shelter or park. In addition, the transient shall provide a list of places the transient eats, frequents and engages in leisure activities and any planned destinations, including those outside this Commonwealth. If the transient changes or adds to the places listed under this paragraph during a monthly period, the transient shall list these when registering as a transient during the next monthly period. In addition, the transient shall provide the place the transient receives mail, including a post office box. If the transient has been designated as a sexually violent predator, the transient shall state whether he is in compliance with section 9799.36 (relating to counseling of sexually violent predators). The duty to provide the information set forth in this paragraph shall apply until the transient establishes a residence. In the event a transient establishes a residence, the requirements of section 9799.15(e) (relating to period of registration) shall apply.

(7) Temporary lodging. In order to fulfill the requirements of this paragraph, the individual must provide the specific length of time and the dates during which the individual will be temporarily lodged.

(8) A passport and documents establishing immigration status, which shall be copied in a digitized format for inclusion in the registry.

(9) Name and address where the individual is employed or will be employed. In order to fulfill the requirements of this paragraph, if the individual is not employed in a fixed workplace, the individual shall provide information regarding general travel routes and general areas where the individual works.

(10) Information relating to occupational and professional licensing, including type of license held and the license number.

(11) Name and address where the individual is a student or will be a student.

(12) Information relating to motor vehicles owned or operated by the individual, including watercraft and aircraft. In order to fulfill the requirements of this paragraph, the individual shall provide a description of each motor vehicle, watercraft or aircraft. The individual shall provide a license plate number, registration number or other identification number and the address of the place where a vehicle is stored. In addition, the individual shall provide the individual's license to operate a motor vehicle or other identification card issued by the Commonwealth, another jurisdiction or a foreign country so that the Pennsylvania State Police can fulfill its responsibilities under subsection (c)(7).

(13) Actual date of birth and purported date of birth.

(14) Form signed by the individual acknowledging the individual's obligations under this subchapter provided in accordance with section 9799.23 (relating to court notification and classification requirements).

Those that are set forth in Subchapter H are the same that the Muniz Court considered to be an affirmative disability or restraint. Therefore, there is no difference between the registries under SORNA and Chapter I.

Even if Subchapter H's registry information requirements are not applied to those offenders subject to Subchapter I, Subchapter I's registry still remains a shaming punishment.

Additionally, although Subchapter I provides a mechanism to be removed from the registry after 25 years, this process is illusory. Section 9799.59 provides a mechanism for offender to petition the court to be removed from the registry after a period of 25 years. 42 Pa.C.S. §9799.59(a). Under this process an offender must file a petition seeking removal after 25 years of registration. An offender may only petition the court for removal only if he is not convicted of an offense punishable by more than one year in jail, after the commencement of the offender's registration or release from custody, whichever is later. 42 Pa.C.S. §9799.59(a)(1). The offender must then be assessed by a Sexual Offender Assessment Boards, and prove by "clear and convincing evidence" "that he is not likely to pose a threat to the safety of any other person." 42 Pa.C.S. §9799.59(a)(2). Therefore, the removal process requires an offender to prove a negative, that he is not a danger. Further, even if an offender meets the clear and convincing evidence standard, a judge has discretion to deny the removal. 42 Pa.C.S. §9799.59(a)(5).

Accordingly, the registry remains a shaming punishment and weighs in favor that Subchapter I is punitive in effect.

3. Scienter

The third Mendoza-Martinez factor of whether the statute comes into play only on a finding of scienter to be of little significance to the current inquiry because “where the concern of a sex offender registration statute like SORNA is protecting the public against recidivism, past criminal conduct is “a necessary beginning point.” Muniz, 164 A.3d at 1214 (quotation omitted). This reasoning applies here, and therefore, this Court found this factor of little significance.

4. Whether the Operation of the Statute Promotes the Traditional Aims of Punishment

The next factor to in the Mendoza-Martinez analysis is whether the operation of the statute promotes the traditional aims of punishment – retribution and deterrence. The Muniz Court first considered the deterrent effect of SORNA, and in so doing the Court noted 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.” Id. Additionally, the Court considered the deterrent effect to be more than a “mere presence” because a conviction of a predicate offense that might not result in incarceration, could result in the applicability of the registration requirements. Id.

Under Subchapter I, the deterrent effect is also more than a mere presence. For example it increases the length of registration for those offenders that might have otherwise completed their registration requirements.

Next, the Muniz Court noted that “[r]etribution, in its simplest terms, affix[es] culpability for prior criminal conduct” and that SORNA is applicable only upon a conviction of a predicate offense. Muniz, 164 A.3d at 1215 (quoting Kansas v. Hendricks, 521 U.S. 346, 361, 117 S.Ct. 2072, 2082 (1997)). The Court noted that information that SORNA allows to be released over the internet goes beyond otherwise publically accessible conviction data and included: name, year of birth, residence address, school address, work address, photograph, physical description, vehicle license plate number and description. Id. at 1215-16. The Muniz Court then reasoned that SORNA increased the length of registration, contained mandatory in-person reporting requirements and allowed for more private information to be displayed online. These concerns have not been alleviated under Subchapter I.

Although Subchapter I has been modeled after Megan’s Law II, which has previously upheld as constitutional in Williams II, supra, the concerns of the Muniz Court are still applicable here because as noted, SORNA increased the length of the reporting requirements for many of the offenders such as LaCombe that would have completed their registration requirements under a prior sex offender law. Additionally, the dissemination of the offender information to the public remains the same. Significantly, the Muniz Court pointed out that although Williams II upheld Megan’s Law II, the Williams II Court specifically expressed that 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.” Muniz, 164 A.3d at 1216

(quoting Williams II, 832 A.2d at 980). In other words, there was no public registry website of sexual offenders in Megan's Law II, and had that been, it is doubtful that Williams II would have come to the same conclusion.

Additionally, the punishment for violations are more severe in Subchapter I than in Megan's Law II. Under Megan's Law II, the grading is a felony of the third degree, for all ten year offenses; whereas, under Subchapter I it is graded as a felony of the second degree.

The Muniz court concluded that SORNA is much more retributive than the previously enacted Megan's Law II and that this retributive effect, along with the fact that SORNA's provisions act as a deterrent for a number of predicate offenses, all weighed in favor of finding SORNA punitive. Therefore, this factor is punitive in effect.

5. Whether the Behavior to which SORNA Applies is Already a Crime

The fifth Mendoza-Martinez factor concerns whether the behavior to which the statute applies was already a crime. The Muniz Court reasoned that because SORNA was aimed at protecting the public against recidivism, past criminal conduct is "a necessary beginning point," and determined that this factor carried little weight in the balance. This applies equally to the analysis of Subchapter I, and thus, this Court determined that this factor was not substantial to the balancing of the factors.

6. Whether there is an Alternative Purpose to which the Statute may be Rationally Connected.

The sixth factor to be considered is whether there is an alternative purpose to which the statute may be rationally connected. In this regard the Muniz Court concluded that there was a purpose other than punishment to which the statute might be rationally connected and that this factor weighed in favor of finding SORNA non-punitive. This Court believes that same analysis applies to Subchapter I, and that the alternate purposes is to prevent recidivism and protection of the public. Therefore, this factor weighs in favor of a finding Subchapter I nonpunitive in effect.

7. Whether the Statute is Excessive in Relation to the Alternative Purpose Assigned

The final Mendoza-Martinez factor is whether the statute is excessive in relation to the alternative purpose assigned. The Muniz Court in examining SORNA and recognized that SORNA categorized a broad range of individuals as sex offenders, including those convicted of offenses that do not specifically relate to a sexual act. Therefore, the Court concluded that SORNA's requirements were 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.

Subchapter I, did reduce the classification of individuals as sex offenders, including those convicted of offenses that do not specifically relate to a sexual act. However the largely illusory process from removal as discussed above where an offender would have to prove a negative, and in the case of

non-SVP offender's, the offender had never been proven to be dangerous in the first place, is indicative of a punishment excessive to its alternate purpose. Despite this, this factor is non-punitive.

8. Balancing of Factors

Balancing the Mendoza-Martinez factors reveals that Subchapter I is punitive in effect after having determined that it involves affirmative disabilities or restraints, its sanctions have been historically regarded as punishment and its operation promotes the traditional aims of punishment, including deterrence and retribution. Accordingly, the retroactive application of SORNA to LaCombe violates the ex post facto clause of the United States Constitution.

c. Distinctions Between Subchapter I and Megan's Law II

Finally, the changes that the Legislature made to SORNA resulting in Subchapter I, were meant to track Megan's Law II, which was held to be constitutional in Williams II, supra. However, the distinctions between Subchapter I and Megan's Law II are significant and make the Williams II reasoning inapplicable.

For example, more information is shared and to more people in Subchapter I than under Megan's Law II. In particular, Chapter I requires that information be included on a public website. This requirement of the registry website did not come about until 2005, with the passage of Megan's Law III.

Additionally, the failure to comply with Subchapter I is a felony. 18 Pa.C.S. §4915.2. An offender is subject to prosecution if he does not appear for

his verification date, does not appear within three days of any change, or gives incomplete or inaccurate information. 42 Pa.C.S. §9799.56(d). Although the PSP is supposed to send notice, the failure to send or receive notice does not relieve the offender from these registration requirements. 42 Pa.C.S. §9799.60(f).

Under Megan's law II, that statute did not criminalize the failure to provide accurate information. Subchapter I also increased the grading of the offenses. 18 Pa.C.S. §4915.2(b), (c). These distinctions between Subchapter I and Megan's Law II are significant.

Accordingly, this Court found Chapter I to be punitive in effect and therefore, unconstitutional.

III. The punitive requirements are not severable from the remainder of the statutory requirements of Subchapter I.

Third on appeal, the Commonwealth asserts that the supposed punitive requirements should have been severed from the remainder of the statutory requirements. This Court disagrees.

At the Argument on LaCombe's Amended Petition to Terminate Sexual Offender Registration Requirements held on June 19, 2018, the Commonwealth argued that if this Court found that the statute is punitive, the remedy would not necessarily be to remove LaCombe's registration obligations altogether; rather, the offending provisions should be severed.

Pennsylvania law provides for the severing of statutes where one part of a statute is found unconstitutional:

§ 1925. Constitutional construction of statutes

The provisions of every statute shall be severable. If any provision of any statute or the application thereof to any person or circumstance is held invalid, the remainder of the statute, and the application of such provision to other persons or circumstances, shall not be affected thereby, unless the court finds that the valid provisions of the statute are so essentially and inseparably connected with, and so depend upon, the void provision or application, that it cannot be presumed the General Assembly would have enacted the remaining valid provisions without the void one; or unless the court finds that the remaining valid provisions, standing alone, are incomplete and are incapable of being executed in accordance with the legislative intent.

1 Pa.C.S.A. § 1925; see also, Commonwealth v. Newman, 99 A.3d 86, 101 (Pa.Super. 2014). Furthermore, as the Muniz Court stated that “[i]n determining whether a statute is civil or punitive, we must examine the law's entire statutory scheme. Therefore, this Court reviewed the entirety of Chapter I and determined that the entire statutory scheme is unconstitutional. All of Chapter I's provisions are essentially and inseparably connected.

IV. Upon finding Subchapter I to be punitive and unconstitutional, this Court properly did not apply the most recent non-punitive version of the law.

Last on appeal the Commonwealth contends that if the current sex offender registration law is punitive the most recent non-punitive version of the law should have to returned to effect as if it had never been repealed or replaced.

Under 42 P.C.S. §9799.41, the Legislature repealed all former laws, therefore there was no law to apply.

CONCLUSION

Based upon the foregoing analysis, this Court respectfully requests that the order dated June 21, 2018, terminating LaCombe's sex offender registration requirements and declaring SORNA II, Subchapter I, to be punitive in effect, unconstitutional and severable from Subchapter H be upheld.

BY THE COURT:



WILLIAM R. CARPENTER J.
COURT OF COMMON PLEAS
MONTGOMERY COUNTY
PENNSYLVANIA
38TH JUDICIAL DISTRICT

Copies sent on September 25, 2018

By Interoffice Mail to:

Tracy Piatkowski, Esquire, Assistant District Attorney
Court Administration

By First Class Mail to:

John I. McMahon, Jr., Esquire
McMahon, McMahon & Lentz
21 W. Airy Street
Norristown, PA 19401

