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**IN THE SUPREME COURT OF PENNSYLVANIA,
MIDDLE DISTRICT**

97 MAP 2022

**COMMONWEALTH OF PENNSYLVANIA,
Appellant,**

v.

**GEORGE J. TORSILIERI,
Appellee**

COMMONWEALTH'S BRIEF FOR APPELLANT

Appeal from the August 22, 2022, Order of the Honorable Allison Bell Royer of the Chester County Court of Common Pleas at Docket Number CP-15-CR-1570-2016, Granting Torsilieri's *Nunc Pro Tunc Post-Sentence Motion to Bar the Application of SORNA* and Declaring Act 29, Subchapter H, 42 Pa.C.S. §9799.10 *et seq*., Unconstitutional.

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STATEMENT OF JURISDICTION

This appeal is from a final order of the Chester County Court of Common Pleas declaring Act 29, Subchapter H, unconstitutional. This Court has exclusive jurisdiction over the Commonwealth's appeal pursuant to §722 of the Judicial Code. 42 Pa.C.S. §722(7); *Commonwealth v. LaCombe*, 234 A.3d 602, 606-07 (Pa. 2020).

ORDER IN QUESTION

The Chester County Court's order states:

> AND NOW, this 22nd day of August 2022, in response to the June 16, 2020 directive of the Pennsylvania Supreme Court, after reviewing the record established June 28, 29, and 30 of 2021, and post-hearing submissions of the Commonwealth and the Defendant, it is hereby **ORDERED AND DECREED** that Defendant's Supplemental Post Sentence Motion Filed Nunc Pro Tunc, filed February 27, 2018, is and/or remains **GRANTED** on the grounds that SORNA is unconstitutional both facially and as applied to this Defendant on the bases that it employs an irrebuttable presumption that is not universally applicable and because its punitive nature offends *Alleyne* and *Apprendi*;[1] results in a criminal sentence in excess of the statutory maximums; violates Federal and State proscriptions against cruel and unusual punishment; and breaches the separation of powers doctrine.

See Appendix B.

[1] *Alleyne v. United States*, 570 U.S. 99 (2013), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

STATEMENT OF SCOPE AND STANDARD OF REVIEW

The constitutionality of a statute is a question of law for which the scope of review is plenary and the standard of review is *de novo*. *Lacombe*, 234 A.3d at 608.

"[D]uly enacted legislation carries with it a strong presumption of constitutionality," which will not be overcome unless the legislation "clearly, palpably, and plainly" violates the constitution. *Commonwealth v. McMullen*, 961 A.2d 842, 846 (Pa. 2008). The party challenging a statute bears the burden to prove unconstitutionality, *West Mifflin Area School District v. Zahorchak,* 4 A.3d 1042, 1048 (Pa. 2010), and only the clearest proof will suffice. "[A]ll doubts are to be resolved in favor of a finding of constitutionality." *Commonwealth v. Mayfield*, 832 A.2d 418, 421 (Pa. 2003) (citations omitted).

Deciding the extent of a public problem and "the means necessary to combat that problem" is "the province of the legislature, not the judiciary." *Basehore v. Hampden Indus. Dev. Auth.*, 248 A.2d 212, 217 (Pa. 1968); *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 505 (1987) (courts generally defer to legislative judgment as to the necessity and reasonableness of a particular measure). This is because "Courts are not in a position to assemble and evaluate the necessary empirical data which forms the basis for the legislature's findings." *Basehore*, *supra*.; *see Naylor v. Twp. of Hellam*, 773 A.2d 770, 777 (Pa. 2001)

(recognizing the Legislature's superior ability to examine social policy issues and determine legal standards so as to balance competing concerns).

The courts' role is to enforce legislative policy, subject, of course, to constitutional limitations. *Program Admin. Servs., Inc. v. Dauphin Cty. Gen. Auth.*, 928 A.2d 1013, 1017-18 (Pa. 2007). However, "the power of judicial review must not be used as a means by which the courts might substitute [their] judgment as to the public policy for that of the legislature," *Parker v. Children's Hosp. of Philadelphia*, 394 A.2d 932, 937 (Pa. 1978), lest they "usurp the legislative role and . . . strike down laws merely because they are imperfect [or] unwise . . ." *Shoul v. Commonwealth, Dep't of Transp., Bureau of Driver Licensing*, 173 A.3d 669, 693 (Pa. 2017) (Wecht, J. concurring).[2]

This Court has held that legislative findings can, in the rare case, be overcome if a scientific consensus has formed refuting those findings. *Commonwealth v. Torsilieri*, 232 A.3d 567, 583 (Pa. 2020). But a *consensus* must exist. And the findings must be utterly without scientific support. *Id.* Moreover, Pennsylvania courts will "not interfere any more than the constitution requires with the Legislature's deliberative process in refining the treatment of sexual offenders to best protect the citizens of the Commonwealth." *Commonwealth v. Killinger*, 888 A.2d 592, 601 (Pa. 2005).

[2] "Surely, some very large proportion of legislative work could fall within one or more of these categories. But republican democracy is a messy business." *Id.*

STATEMENT OF QUESTIONS PRESENTED

1. Did the lower court err in deeming Act 29, Subchapter H, unconstitutional by substituting its own policy views for those of the General Assembly where the evidence did not prove a scientific consensus negating the statute's legislative findings?

   (Suggested Answer: Yes).

2. Did the lower court err in deeming Act 29, Subchapter H, unconstitutional absent evidence establishing "clearest proof" that the statute is punitive in effect, and where there would plainly be no constitutional violation (separation of powers, cruel and unusual, or *Alleyne*) even if registration were "punishment?"

   (Suggested Answer: Yes).

STATEMENT OF THE CASE

Defendant, George Torsilieri, climbed on top of the sleeping victim, kissed her mouth, fondled her breasts, and penetrated her vagina without her consent. A Chester County jury convicted him of aggravated indecent assault and indecent assault, and the trial court sentenced him to a term of county imprisonment followed by probation. Defendant also had to register as a sex offender for life. He filed a *nunc pro tunc* post-sentence motion challenging the constitutionality of Pennsylvania's sex offender registration statute, 42 Pa.C.S. §9799.10, *et seq*. Following extensive litigation, including a remand by this Court for an evidentiary hearing, the lower court found the statute unconstitutional and barred its application to defendant. Because the lower court's findings are not supported by the record, but driven by policy considerations, and its legal analysis is flawed, the order deeming Subchapter H unconstitutional should be reversed.

Factual History

On the evening of November 13, 2015, the victim and three friends gathered at Jessica Penman's apartment in West Chester, Chester County, to socialize following dinner out together. Several other people, including defendant, joined them over the course of the evening. At 11:30 p.m., the victim, defendant, Ms. Penman, and another friend, Ryan Quirk, left the apartment to walk to local bars. They drank alcohol at two places until 2:00 a.m. The victim and defendant did not

know each other and had never met prior to this evening. *Commonwealth v. Torsilieri*, No. 2300 EDA 2018, 2019 WL 3854450, at *1 (Pa. Super. Ct., Aug. 16, 2019) (unpublished memorandum).

The foursome made its way back to Penman's apartment, where they sat together in the living room and finished a bottle of wine. They socialized for the better part of an hour. At approximately 3:15 or 3:30 a.m. the victim fell asleep on the couch. At some point, she awoke to find defendant on top of her, kissing her face and neck and touching her breasts under her shirt. Over the next ten minutes, defendant penetrated her vagina with his fingers and penis. When he finished, the victim went to the bathroom and saw she was bleeding from her vagina. It was approximately 5:50 a.m. *Id.*, at *1-*2.

The victim sent a text message to her best friend and woke Penman up. Penman drove the victim to the police station, where she reported the assault. The victim then went to the hospital where a specially trained nurse examined her. *Id.*, at *2. Defendant was charged with one count each of rape, 18 Pa.C.S. §3121(a)(1), and sexual assault, 18 Pa.C.S. §3124.1, and two counts each of aggravated indecent assault, 18 Pa.C.S. §3125(a)(l), and indecent assault, 18 Pa.C.S. §3126(a)(l).

Procedural History[3]

On July 3, 2017, at the conclusion of a six-day trial, a jury sitting before the Honorable Anthony A. Sarcione convicted defendant of one count each of aggravated indecent assault and indecent assault. He was acquitted of the remaining charges.[4] Judge Sarcione deferred sentencing.

Two weeks later, on July 17, 2017, this Court decided *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), which found Pennsylvania's then-prevailing sex offender registration statute, the Sexual Offender Registration and Notification Act (SORNA), 42 Pa.C.S. §§9799.10-9799.41, *effective December 20, 2012, through February 20, 2018*, punitive and violative of the Pennsylvania and federal *Ex Post Facto* Clauses. *Muniz* concerned the legality of retroactively applying SORNA to sexual offenders whose offense conduct predated SORNA's December 20, 2012, effective date. Thus, *Muniz* did not affect defendant because he assaulted the victim in 2015.[5]

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[3] As this Court has recognized, the procedural history of this case is "inextricably tied" to intervening appellate court decisions declaring aspects of prior versions of Pennsylvania's sex offender registration and notification law unconstitutional, and the legislative responses to those decisions. *Commonwealth v. Torsilieri*, 232 A.3d 567, 572 (Pa. 2020). The Commonwealth therefore includes relevant legislative history here.

[4] At the conclusion of the Commonwealth's case, the trial court granted defendant's motion for judgment of acquittal as to rape, one count of aggravated indecent assault, and one count of indecent assault. The jury acquitted defendant of sexual assault.

[5] In October 2017, the Superior Court of Pennsylvania decided *Commonwealth v. Butler* (*Butler I*), 173 A.3d 1212 (Pa. Super. 2017), which, in an extension of *Muniz*, found the sexually violent predator (SVP) provisions of SORNA unconstitutional under *Apprendi* and *Alleyne*. *Butler I* had no impact on defendant, however, as he was not deemed an SVP. In any event, this Court

Judge Sarcione sentenced defendant on November 27, 2017, to imprisonment of one year minus one day to two years minus one day, followed by three years' probation. He further ordered that defendant would be eligible for work release after eighteen months and parole after twenty-two months. Defendant was also required to comply with the Tier III requirements of SORNA.

Defendant filed a post-sentence motion challenging the weight of the evidence and seeking reconsideration of his sentence. On February 8, 2018, without reconvening the parties, Judge Sarcione granted defendant's post-sentence motion in part by altering his sentence to allow work release after fourteen months and parole after eighteen months. The Commonwealth timely moved for reconsideration, arguing the trial court erred in resentencing defendant without reconvening the parties.

On February 21, 2018, the Pennsylvania Legislature enacted Act 10 of 2018 (H.B. 631 OF 2017). Act 10 amended SORNA to remedy the constitutional flaws identified by this Court in *Muniz* and the Superior Court in *Butler I* (42 Pa.C.S. §§9799.11(b)(4); 9799.51(b)(4)), and divided the registration statute into two subchapters. Subchapter H, 42 Pa.C.S. §§9799.10-9799.42, applied to sexual offenders who committed their offenses after December 20, 2012, and to whom *Muniz's* prohibition against the retroactive application of SORNA did not apply.

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subsequently reversed *Butler I*, finding Pennsylvania's SVP statutory scheme constitutionally sound. *Commonwealth v. Butler* (*Butler II*), 226 A.3d 972 (Pa. 2020).

42 Pa.C.S. §9799.11(c). Subchapter I, 42 Pa.C.S. §§9799.51-9799.75, an entirely new subchapter, applied to sexual offenders who committed their offenses before December 20, 2012, and whose registration obligations were potentially affected by *Muniz*. 42 Pa.C.S. §9799.52. Subchapter H applied to defendant.

On February 27, 2018, defendant sought permission to file a *nunc pro tunc* supplemental post-sentence motion challenging the constitutionality of Act 10. Judge Sarcione granted the request and, on May 18, 2018, defendant filed a post-sentence motion and memorandum of law, claiming that the legislative underpinnings of Subchapter H were empirically false. He proffered reports from three researchers asserting that adult sex offender recidivism rates are low and that tier-based registration systems threaten public safety.[6]

On July 9, 2018, Judge Sarcione held a hearing to address the two outstanding motions. He conceded error for not resolving defendant's sentencing reconsideration motion in open court, vacated the prior resentencing order, and reimposed the same modified sentence. He denied defendant's post-sentence motion in all other respects.[7]

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[6] While that motion and the Commonwealth's reconsideration motion were pending, on June 12, 2018, the Legislature enacted Act 29 of 2018 (H.B. 1952 of 2017), which replaced Act 10. Act 29 is substantially the same as Act 10, and is Pennsylvania's current sexual offender registration statute.

[7] Defendant filed a timely appeal, challenging the weight and sufficiency of the evidence. The Pennsylvania Superior Court affirmed his judgments of sentence on August 16, 2019. *Torsilieri*, 2019 WL 3854450, at *1.

The parties also addressed defendant's *Motion to Bar the Application of SORNA*. Relying on this Court's decision in *Muniz*, the Commonwealth argued that defendant's constitutional claims, which were premised on challenges to legislative fact-finding and policy, should be resolved by the Legislature, not the court. Judge Sarcione nevertheless permitted defendant to introduce reports and supporting documents into evidence. The Commonwealth stipulated to the content of defendant's exhibits but not to their validity or relevance. It did not introduce any evidence and rested on legal argument.

Judge Sarcione granted defendant's motion, vacating his registration requirements. Judge Sarcione found that Subchapter H violated defendant's due process rights by infringing on his right to reputation through the use of an irrebuttable presumption, and by failing to provide notice and an opportunity to be heard. He further concluded the statute was punishment and, as such, violated the separation of powers doctrine by removing the trial court's ability to fashion an individualized sentence. He also found Subchapter H violative of *Alleyne* and *Apprendi* based on an irrebuttable presumption of future dangerousness that was not determined by the chosen fact-finder beyond a reasonable doubt. *See Torsilieri*, 232 A.3d at 574-75 (summarizing Judge Sarcione's opinion).

The Commonwealth appealed to this Court, which vacated the portion of the order declaring Subchapter H unconstitutional. It concluded that defendant had

failed to demonstrate a consensus of scientific evidence invalidating the legislative determinations: "(1) that all sexual offenders pose a high risk of recidivation and (2) that the tier-based registration system of Revised Subchapter H protects the public from the alleged dangers of recidivist sexual offenders." *Id.* at 584. Given the procedural posture of the case, this Court concluded that a remand for further development of the record was warranted. It specifically instructed the lower court to "provide both parties an opportunity to develop arguments and present additional evidence" and "to weigh that evidence in determining whether [defendant] has refuted the relevant legislative findings supporting the challenged registration and notification provisions of Revised Subchapter H." *Id.* at 587-88, 594-95.

Evidence Presented at the Hearing

On June 28-30, 2021, the trial court, presided over by Judge Allison Bell Royer following Judge Sarcione's retirement, held a three-day evidentiary hearing. The following is the evidence presented at that hearing.

A. Dr. R. Karl Hanson

Defendant's first witness was R. Karl Hanson, a Canadian research psychologist qualified as an expert in the field of "recidivism risk of individuals with a history of sexual crime." Dr. Hanson studies rates of recidivism and desistence – the cessation of offending – to statistically analyze risk of reoffense in

target cohorts. He conducts his own research and also utilizes meta-analyses, which combines the results of multiple studies. His research does not include data or subjects from Pennsylvania, and he is unfamiliar with Subchapter H. Dr. Hanson opined that sexual offender registration and notification (SORN) laws are ineffective because they fail to reduce recidivism, waste public resources, and impose unnecessary burdens on sex offenders. *N.T. 6/28/21* at 24, 28-32, 39, 49-55, 58-59, 71-80, 82-83, 123, 163-64, 168-69, 172, 190, 204; R.161a, R.166a-R.170a, R177a, R.187a-R193a, R.196-R.197a, R.209-R.218a, R.220a-R.221a, R.261a, R.301a-302a, R.306a-307a, R.310a, R.328a, R.342a.

Dr. Hanson testified, in relevant part, that sex offender recidivism rates, measured by return to the criminal justice system, vary widely, from as low as 1% to as high as 60%. The rate for the convicted sex offender cohort generally ranges from 10% to 20% within 10 years, but will increase the longer the group is studied. Most significantly, ***Dr. Hanson testified on cross-examination that convicted sex offenders are three or more times as likely to be arrested for a sexual offense as non-sex offenders.*** *Id.*, 30-31, 54-59, 64-69, 82-83, 123, 167-173, 204, 217; R.168a-169a, R.192a-R.197a, R.202a-R.207a, R.220a-R.221a, R.261a, R.305a-R.311a, R.342a; R.355a.

Dr. Hanson also discussed the Static-99 (later modified into the Static-99R), an actuarial tool for assessing recidivism risk in sex offenders. The Static-99

utilizes a ten-point scale correlated to risk factors for sexual recidivism, such as prior sex-offense history. Upon tallying these values, offenders are assigned to one of five possible risk tiers. Dr. Hanson developed the Static-99 and he advocates for its use in the criminal justice system. He cautioned, however, that the Static-99 is not meant to predict future behavior, but rather to assess *relative* risk. He believes it can provide a cost-effective means of triaging those sex offenders at the highest risk of reoffense. *Id.*, 66, 68-69, 82-83, 141-147; R.204a, R.206a-R.207a, R.220a-R.221a, R.279a-R.285a.

Dr. Hanson acknowledged that the Static-99 has limitations. Among others, it uses age at release as an analytic measure whereas age at time of offense is a better predictor of sexual reoffending. Although it is meant to be simple to use, the Static-99 requires careful training and adherence to a lengthy coding manual. Even with conscientious application, the error rate is 7% to 30%; it jumps to 40% when "operator error" is calculated. To exemplify these issues, the prosecutor asked Dr. Hanson about two well-known prolific offenders – Jerry Sandusky and Larry Nasser. Although, surprisingly given his area of expertise, Dr. Hanson was unfamiliar with them, he agreed both men could score very low on the Static-99, even in the negatives, indicating they are low risk to reoffend. *Id.*, 103, 106, 118, 126-27, 137-41, 153-54, 157, 162-63, 210; R.241a, R.244a, R.256a, R.264a-R.265a, R.275a-R.279a, R.291a-R.292a, R.295a, R.300a-R.301a, R.348a. Finally,

as Dr. Hanson acknowledged, studies show the Static-99 does not work well across diverse populations, including Black, Hispanic, transgender, and "crossover" offenders (offenders who do not specialize in certain types of victims but offend when the opportunity presents itself), and it fails altogether when applied to women. *Id.*, 101, 155-57, 160; R.239a, R.293a-R.295a, R.298a.

B. Dr. Elizabeth J. LeTourneau

Defendant's second witness was Dr. Elizabeth LeTourneau, a professor, clinical psychologist, and grant-funded scientist with a focus on child sexual abuse prevention and offender treatment. She was qualified as an expert in "sex crime policy, practice, and prevention," and "sexual victimization and its costs." *N.T. 6/29/21*, 3-7, 15, 18, 21, 23-25, 31; R.361a-R.365a, R.373a, R.376a, R.379a, R.381a-R.383a, R.389a.

Dr. LeTourneau testified, in pertinent part, that her research and the research of others generally finds that SORN laws do not reduce recidivism. In her opinion, SORN laws have substantial costs but no public safety benefit, and thus are a waste of taxpayer money. She advocates for therapeutic approaches to recidivism reduction, such as "Circles of Accountability," which emphasizes family and community support to prevent reoffending. *Id.*, 33-35, 44-45, 59, 63, 75, 116; R.391a-R.393a, R.402a-R.403a, R.417a, R.421a, R.433a, R.474a.

Dr. LeTourneau's opinions at the hearing were based primarily on a subset of research studies looking at whether SORN laws impact recidivism rates. Despite her expertise in the area of sexual victimization and costs, she was unaware if any research studying the impact of SORN laws on victims. Like Dr. Hanson, none of her research drew from Pennsylvania and, aside from reviewing the statute before testifying, she was unfamiliar with Subchapter H. *Id.*, 34-36, 40, 45, 49, 53, 55, 57, 60, 79-80, 84, 90-93, 98-99, 114-19; R.392a-R.394a, R.398a, R.403a, R.407a, R.411a, R.413a, R.415a, R.418a, R.437a-R.438a, R.442a, R.448a-R.451a, R.456a-R.457a, R.442a-R.477a.

Finally and again most significantly, ***Dr. LeTourneau agreed on cross-examination that sex offenders are three to four times more likely than any other criminal to commit a new sex offense***. *N.T. 6/29/21*, 21-23, 83, 103; R.379a-R.381a, R.441a, R.461a.

C. Professor James J. Prescott

Defendant's third witness was James J. Prescott, a law professor with a Ph.D. in economics whose work focuses on the economics of crime and, in particular, sex offending. He is a criminal justice reform advocate whose published works consist primarily of law review articles because, that is, in his opinion, the best way for "policy makers" to take notice. He was accepted as an expert in "sex offense recidivism and registration law, policy, and effectiveness." *N.T. 6/29/21*,

139, 141, 143, 146, 150-51, 153, 160, 272; R. 497a, R.499a, R.501a, R.504a, R.508a-R.509a, R.511a, R.518a, R.630a.

Professor Prescott testified that he believes a scholarly consensus exists that SORN laws fail to reduce sex offense recidivism. He further opined that they actually *increase* sexual reoffending in convicted sex offenders, a finding refuted by Drs. Hanson and McCleary, and questioned by Dr. LeTourneau. His research was based on national studies that did not include Pennsylvania and he was unfamiliar with the statutory history and provisions of Subchapter H. *Id.*, 166-72, 185, 189, 225-57; R.524a-R.530a, R.543a, R.547a, R.583a-R.615a.

Although Professor Prescott opined about SORN laws' impact on recidivism, he conceded that the stated purpose of the laws is to provide the public with access to information. Like all of the experts, Professor Prescott agreed there is a "dark figure" of sexual recidivism, meaning the difference between reported and undetected sexual reoffending. He believes the dark figure is irrelevant to discussion SORN law policy. Finally and, again, most significantly, ***he agreed that the estimate that sex offenders recidivate sexually at a rate three to four times that of non-sex offenders is reasonable***. *Id.*, 266-68, 273, 275; R.624a-R.626a, R.631a, R.633a.

D. Dr. Richard McCleary

In rebuttal, the Commonwealth called Dr. Richard McCleary, a statistician and professor at the University of California at Irvine, in rebuttal. In his over forty-year career, Dr. McCleary researched, published, and taught in the areas of time-series analysis – a set of statistical models and methods addressed to phenomena that change over time – meta-analysis, and statistical models of recidivism. He also researched and published in the areas of test construction and actuarial risk instruments. Prior to preparing his report and testifying, Dr. McCleary reviewed the defense experts' reports and the literature referenced in their reports, as well as the entire available body of research related to SORN laws and sex offender recidivism; his methodological work is well-cited therein. He was admitted as an expert in statistical models, criminology, and sociology. *N.T. 6/30/21*, 9, 13-15, 20, 24; R.660a, R.664a-R.666a, R.671a, R.675a.

Dr. McCleary testified that the empirical literature does not support a reasonable estimate of recidivism rates of registered sex offenders. Offenders recidivate at different rates and recidivism data is difficult to measure. Results will vary depending on length of follow-up, how results are validated, and the heterogeneity of samples. Additionally, SORN laws vary by jurisdiction, and implementation differs accordingly. Given all these variables, sample groups are often not comparable and no amount of statistical adjustment can be used to make

them so. Obtaining an "average" effect is accordingly very difficult. *Id.*, 40, 44-45, 59-61; 65-72, 123-34, 146; R.691a, R.695a-R.696a, R.710a-R.712a, R.716a-R.723a, R.774a-R.785a, R.979a.

Though the experts agreed that sexual offenders reoffend sexually at a rate that is much higher than for non-sex offenders, Dr. McCleary disagreed that, within the cohort, recidivism is "low." He stated that any fair reading of the literature shows that recidivism rates vary widely based on the variables he discussed. Dr. McCleary disagreed with Professor Prescott's assertion that SORN laws increase recidivism, stating that "no strong theory in criminology exists to suggest that a law could increase a crime rate." He testified that, although there is research showing that registered sex offender recidivism declines with age, he testified that research also shows that certain cohorts of offenders, like pedophiles, have a propensity to continue to offend as they age. Citing a well-known study by Methesius and Lussier, Dr. McCleary also explained that "successful" sex offenders offend and adapt over time, victimizing those unlikely to report, which allows their offending to remain undetected. *Id.*, 28-31, 56-57, 100-01, 136-40; R.679a-R.682a, R.707a-R.708a, R.751a-R.752a, R.787a-R.791a.

As noted, Dr. McCleary strongly disagreed with Professor Prescott's contention that the dark figure is "irrelevant" to the study of sex offender recidivism. He stated that the dark figure is always relevant, indeed "crucial" to

knowing true rates of recidivism and the possible effectiveness of interventions. *Id.*, 38-39; R.689a-R.690a.

Dr. McCleary also challenged the defense experts' opinions on the collateral costs of SORN laws on registrants, noting that the research fails to support the idea that registrants suffer unique negative effects compared to convicted non-sex offenders, who have the same difficulties post-release. Moreover, the studies in this area tend to be biased and weak, relying exclusively on offender self-report data and failing to use control groups of non-sex offenders. *Id.*, 31-34, 87-89; R.682a-R.685a, R.738a-R.740a.

Finally, Dr. McCleary disagreed with Dr. LeTourneau and Professor Prescott that repeated null findings – findings that do not have a statistically significant effect and where the expected result is absent – can together be regarded as a statistically significant effect. He further testified that null findings are rarely published in peer-reviewed literature, and, with rare exception, should not be interpreted to mean anything other than that the hypothesis or design of the study were too weak. *Id.*, 79-81, 86-87, 151-52; R.730a-R.732a, R.737a-R.738a.

Finally, Dr. McCleary noted that the research relied on by the defense experts drew on data from other states, whose SORN law structures differ from Pennsylvania's to varying degrees, thus contributing to the heterogrenity problem discussed above. He also opined that any discussion of costs should focus on not

just costs to offenders, but also on costs to victims and society, an area ignored by defense. *McCleary Report*, 6.2; *N.T. 6/30/21*, 38-39, 51-54, 76-78, 88; R.689a-R.690a, R.702a-R.705a, R.727a-R.729a, R.739a.

The parties submitted post-hearing briefs and, on August 22, 2022, Judge Royer granted defendant's *Post-Sentence Motion to Bar the Application of SORNA*, and deemed Subchapter H unconstitutional. Colored by her own policy preferences, and without proof of the requisite scientific consensus, Judge Royer concluded that Subchapter H violates the right to reputation through the use of an unconstitutional irrebuttable presumption that all sex offenders are dangerous recidivists. She further found that Subchapter H is punitive in effect, and thus violates *Alleyne* and *Apprendi* and the separation of powers doctrine, and is cruel and unusual punishment.

The Commonwealth now appeals.[8]

[8] The Court did not order the Commonwealth to file a Concise Statement of Matters Complained of on Appeal.

SUMMARY OF ARGUMENT

This Court instructed the lower court to determine two things on remand: whether defendant could, as he said he would, establish a scientific consensus debunking the Legislature's judgment that registration is necessary because convicted sex offenders commit more sex crimes after release than non-sex offenders do, and whether the tier-based registration system of Subchapter H fails to protect the public from this danger. The lower court did not follow these instructions. Instead, even though defendant failed to meet his burden of proof – his evidence actually revealed a scientific consensus that *validated* the legislative findings – the court nullified the statute on the basis of her own determinations that sex offenders don't reoffend all that often and, in any event, there are better alternatives to tier-based registration.

That was error. Courts may not overturn duly enacted statutes in the absence of requisite proof, based on their personal policy preferences. As the lower court exceeded its mandate on remand and its authority over duly enacted legislation, its order should be reversed.

The lower court also erred in finding Subchapter H unconstitutionally punitive, again, in the absence of requisite "clearest proof," and, again, colored by both its own policy preferences and a misguided understanding of the purpose of the statute. It first found the statute operates as an unlawful restraint, but only after

disregarding the significance of the changes made to the statute following this Court's decision in *Muniz*. It then concluded that Subchapter H operates to punish through shaming, ostracism, and harassment, even though defendant presented no proof that registered offenders in Pennsylvania experience these things by virtue of the registry.

The court compounded these errors when it found that Subchapter H is not rationally connected to its purpose because it does not reduce sexual recidivism and there are better ways to deter reoffending. But, the statute's purpose is not recidivism reduction, nor is it to treat sex offenders. It is to protect concerned members of the public by providing information enabling them to avoid potentially unsafe interactions with convicted sex offenders. Defendant never presented any evidence that the statute is ineffective at accomplishing *that* goal.

Given these errors, and defendant's utter failure to provide the clearest proof to undermine the legislative underpinnings of Subchapter H, the lower court declaration that Subchapter H is unconstitutional should be reversed.

ARGUMENT

I. The common pleas court did not, and on the evidence could not, find a scientific consensus establishing "clearest proof" to negate the legislative judgment on the efficacy of sex offender registration; absent such proof it simply substituted its own policy views.

This Court's instructions to the lower court on remand were clear: hold an evidentiary hearing to determine whether defendant could establish a scientific consensus debunking the Legislature's judgment that registration is needed because convicted sex offenders commit more sex crimes after release than non-sex offenders do, and "that the tier-based registration system of Revised Subchapter H protects the public" from this differential danger. *Torsilieri*, 232 A.3d at 584, 587-88, 594-95. The lower court did not follow these instructions. Instead, even though defendant failed to meet his burden of proof – his evidence actually revealed a scientific consensus that *validated* the legislative findings – a common pleas judge nevertheless nullified the statute on the basis of her own determinations that sex offenders don't reoffend all that often and, in any case, there are "reasonable and more effective alternatives" to tier-based registration. *Opinion of August 22, 2022, at* 13.

This ruling exceeded both the lower court's mandate on remand and its power over duly enacted legislation – and for the same reason. This Court remanded to provide the defendant an opportunity to demonstrate that "a scientific consensus has developed to overturn the legislative determinations." 232 A.3d at

587-88. This Court emphasized that the inquiry required "the "clearest proof" and "cannot be satisfied merely by providing evidence militating in favor of" the defendant's contrary policy determinations. *Id.* at 577. This Court acknowledged that its instructions imposed a "heavy burden" on the defendant. "[B]ut [it is] our constitutional duty to impose that burden in order to uphold the separation of powers between this Court and the General Assembly. Indeed … we defer policy making determinations to the legislative branch absent a challenger's demonstration that those determinations result in a statute that clearly, palpably and plainly violates the constitutional rights of citizens." *Id.* at 594 n.22.

As a result, the defendant could not satisfy his heavy burden by presenting evidence that "merely constituted a counter-narrative to the evidence that the General Assembly relied upon in gauging the necessity and formulating the provisions" of the statute. *Id.* at 577. It was the defense burden to demonstrate that there *are* no reasonable counter-narratives: that there is no real debate, because a "consensus has developed." What the defense presented instead was simply a battle of experts. And what the common pleas court decided was not that a consensus had developed, but simply that it found the defendant's narrative more persuasive than the Legislature's.

That was error requiring reversal.

A. Defendant failed to show a scientific consensus disproving the legislative judgment that sex offenders commit new sex offenses at higher rates than non-sex offenders.

This Court was very specific about "the relevant question[:]...whether sexual offenders commit more sexual crimes than other groups not subject to similar registration laws." *Id.* at 594 n.22. In fact on this point the Court expressly agreed with, and quoted from, the dissent. *Id.* at 606 (Donahue, J., dissenting). The disagreement was about whether a hearing was necessary to test defendant's assertions. *Id.* at 594 n.22. Thus the remand – and fortunately so, because the actual testimony blew up any claim of a consensus contradicting the Legislature.

Indeed, defendant failed – by any measure of proof – to debunk the legislative finding that convicted sex offenders pose a higher risk for new sex crimes than non-sex offenders. In fact, his evidence proved precisely the opposite. All three of defendant's experts agreed that adult sex offenders recidivate at a rate ***three or more times higher*** than convicted non-sex offenders. *N.T. 6/28/21*, 39, 204; R.177a, R.342a (Dr. Hanson stating that the rate of sexual recidivism among sex offenders is at least three times as high and "could actually be higher" relative to convicted non-sex offenders); *N.T. 6/29/21*, 83; R.441a (Dr. LeTourneau agreeing that sex offenders are three to four times more likely than any other criminal to commit another sex offense); *id.*, 274; R.632a (Professor Prescott agreeing that the three-to-four-times-more-likely estimate was "reasonable"). This evidence, far

from debunking the statutory underpinnings of Subchapter H, actually validated them.[9] Given the "relevant question" and the "heavy burden," both clearly articulated by this Court, that should have been the end of the matter.

Defeated by his own evidence, however, defendant responded by trying to reframe the question. Initially, defendant acknowledged that the risk inquiry was *relative*: sex offense recidivism in the sex-offender cohort as compared to the non-sex offender cohort. *N.T. 6/28/21*, 9; R.147a. But he soon shifted ground, asking his experts to testify instead about recidivism rates solely *within* the sex-offender cohort. They accordingly opined that this recidivism rate is not "high," because "only" 5% to 20% of sex offenders are arrested for a subsequent sex offense. *E.g. N.T. 6/28/21*, 57-58; R.195a-R.196a; *6/29/21*, 10, 57-58, 156; R.368a; R.415a-R.416a; R.514a.

But that was not the operative issue, nor could it have been. As Justice Donahue recognized, sex offenders as a class are "deemed by the General Assembly to present special risks that justify treating them differently from all

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[9] Not surprisingly, the defense evidence on this point is corroborated by official data compiled by the Justice Department's Bureau of Justice Statistics. For example, a study of offenders released from state prisons in 2008 shows that, after ten years, sex offenders were nearly three times more likely to be arrested for rape or sexual assault than non-sex offenders https://bjs.ojp.gov/BJS_PUB/rpr24s0810yfup0818/Web%20content/508%20compliant%20PDFs (published September 2021) (Table 11) (last visited 12/15/22). *See also* https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/rpr34s125yfup1217.pdf (published July 2021) (Table 11) (last visited 12/15/22) (showing that, of offenders released from state prisons in 2012, sex offenders were three-and-a-half times more likely to be arrested for rape or sexual assault than non-sex offenders releases over five years).

other types of offenders." Such *differential* treatment, she explained, must be based on *differential* conduct. That is why "the relevant question is not whether convicted sexual offenders are committing" new sex crimes, but whether they are doing so at higher rates than other offenders." 232 A.3d at 606 (Donahue, J., dissenting). And that is exactly the approach this Court took in *In the Interest of J.B.*, 107 A.3d 1 (Pa. 2014). The Court did not ask there simply whether juvenile sex offenders have "high" or "low" rates of reoffending. Rather, the Court recognized clearest proof, based on the consensus of scientific evidence, that juvenile sex offenders – unlike adult sex offenders – reoffend at rates that are "indistinguishable" from the rates of juvenile non-sexual offenders. *Id.* at 17.

Similarly here. This Court did not remand so that a common pleas judge could decide whether adult sex offender recidivism is low or high, little enough or too much. What is low, or high for that matter, is ultimately just a value judgment about the amount of sexual reoffending society wishes to tolerate. Value judgments like that are matters of public policy, exclusively reserved for the legislature. As the defense expert himself admitted, even his "low" recidivism estimates would still result in "hundreds" of new sex crimes by sex offenders within five years of their release, and "if you wait longer you will get more." *N.T. 6/28/21*, 169; R.307a. It was up to the Legislature, not the lower court, to decide whether it was worth trying to do something about that.

And even if "low" recidivism rates were relevant, it would still have been the defendant's burden to show clearest proof – a scientific consensus. Yet the defense experts openly admitted they could not estimate the true number of new sex offenses. Their figures were based only on *reported* crimes. *Un*reported offenses, they acknowledged – the "dark figure" – were unknown and, indeed, unknowable. *N.T. 6/28/21*, 96, 187-88; R.234a, R.325a-R.326a; *6/29/21*, 199, 267-70; R.557a, R.625a-R.628a. The court below seemed to take this as a point in defendant's favor, reasoning that, if the dark figure is unknown, then it doesn't count, and we can just act as if the defense claims about reported crimes represent the entire universe of sex offense recidivism. *See Opinion of August 22, 2022*, at 9-10. But the General Assembly was not obligated to endorse such a fiction. The Legislature was entitled to make the eminently reasonable assumption that, because of shame and revictimization, sex crimes are significantly underreported, and at rates significantly beyond those of other violent offenses, such as murder or armed robbery. Of course, the defendant could have attempted to belie that assumption with clearest proof of a scientific consensus. He obviously did not.

In effect, the court below accepted a bait and switch. The relevant question on remand, which this Court expressly spelled out for the lower court's benefit, was whether sex offenders commit new sex crimes more often than non-sex offenders. The court below entirely ignored the undisputed answer, which was:

yes, three to four times more often. Instead it focused on the side issue of whether sex offenders reoffend at supposedly "low" rates: 5%? 10%? 20%? These figures, claimed the court, proved that the presumption underlying the statute "is not universally true." Indeed, the court declared that this was "the bottom line." Opinion of 8/22/22, at 10.

It was not. As Justice Donahue recognized in *Torsilieri*, legislative judgments need not be "universally" applicable to every individual in the affected cohort. "[W]e have not applied this requirement literally; [otherwise] the existence of even one exception to the presumed fact would definitionally establish a lack of universality." 232 A.3d at 604. It was not up to the court below to decide which of these rates – how much reoffending – it would take to warrant a legislative response. The court's job was to adhere to this Court's instructions by holding a hearing to determine whether the defendant could meet his heavy burden of proving a scientific consensus that would disprove the Legislature's judgment that sex offenders commit new sex offenses at higher rates than non-sex offenders. The judge never answered that question. But the record has done it for her.

B. Defendant failed to prove a scientific consensus that the tier-based registration system of Subchapter H does not protect the public.

As above, this Court clearly instructed the court below on the defendant's burden; as above, defendant responded by having his experts testify to a different issue; as above, the common pleas court failed to address the relevant question and

instead made a policy choice favoring defendant's counter-narrative over the legislative judgment.

As this Court has recognized, the key purpose of registration, including Subchapter H, is to protect concerned members of the public by providing information enabling them to avoid potentially unsafe interactions with convicted sex offenders.[10] This Court offered the defense the chance to prove that the statute does not further this purpose: remand was granted to allow defendant "to present additional argument and evidence addressing whether a scientific consensus has developed to overturn the legislative determinations…in regard to…the effectiveness of a tier-based registration and notification system." 232 A.3d at 587-88.

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[10] **(a) Legislative findings.--**The General Assembly finds as follows: …

(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….

(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 placing potential victims at risk.

42 Pa.C.S. §9799.11(a). *See also LaCombe*, 234 A.3d at 625 (noting that Subchapter I of Act 29 serves the legitimate purpose of "protecting and informing the public regarding sexual offenders the General Assembly considers dangerous"); *Lee*, 935 A.2d at 883 (recognizing the importance of adequately informing the community about the presence of sex offenders for the protection of vulnerable community members).

Defendant didn't do that. Instead he had his experts, again, address a different question: whether registration *deters potential sex offenders*, and thereby reduces recidivism. But the goal of recidivism reduction appears nowhere in the statute. There are certainly laws that address deterrence directly, mostly by imposing imprisonment and fines. Act 29, however, has a separate purpose, which is to provide concerned citizens with information to change *their own* behavior, not the perpetrator's, in order to avoid dangers they could otherwise not control.[11]

The distinction between these concepts – deterrence and avoidance – is hardly mysterious. Neighborhood crime logs, for example, provide information about where and when various crimes have occurred. The purpose of publicizing this data is not to persuade the thief not to steal, or the burglar not to burgle. Rather, it is to inform members of the community that thefts and burglaries have occurred, so they may take precautions, such as avoiding certain areas at night or locking their doors. Some citizens will read such logs religiously, and take care never to park in locations that have seen numerous break-ins. Others will take the risk but leave nothing valuable in the car. Still others will not bother to read the log at all.

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[11] Indeed, this is the premise underpinning all "Megan's Laws," which are named for Megan Kanka, a seven-year-old New Jersey girl who was sexually assaulted and murdered by a neighbor who – unbeknownst to the Kanka family – had two prior convictions for sexual offenses against children. *E.B. v. Verniero*, 119 F.3d 1077, 1081 (3d Cir. 1997). Had the Kanka's known about their neighbor, they might have taken measures to help ensure Megan's safety.

Likewise with registration. Those who may feel particularly vulnerable, such as prior assault victims or some parents of young children, may feel the need to consult the registry. Most people will not. There could in theory be some indirect effect on the behavior of perpetrators, by reducing the number of easy targets available. But any such effect would be only incidental to the statute's purpose, which is to provide an information service to those citizens who require it in order to maintain a sense of personal security in a sometimes violent world. That purpose is served whether or not overall recidivism rates decline.

Defendant had his experts opine extensively about the relation between registration and recidivism – but he presented no research or evidence, much less *proof of a scientific consensus*, that the registry fails to offer concerned citizens information they can use to avoid trouble to begin with. His experts conducted no research studies, nor did they review or rely on any, that surveyed victims, victim advocates, law enforcement officers, or anyone else about the use or effectiveness of Subchapter H for its stated purpose. *N.T. 6/28/21*, 48, 136; *6/29/21*, 9, 18, 25-26, 88; R.186a, R.274a; R.367a, R.376a, R.383a-R.384a, R.446a.

The lower court disregarded this deficiency. Instead it addressed a digression, adopting wholesale the opinions of defendant's witnesses that registration systems "do not appreciably reduce the rate of recidivism." *Opinion of August 22, 2022*, at 22. But the court was not free to redefine the statute's purpose

in order to dismiss it. The way in which the registry is intended to protect the public is by offering avoidance, not by ensuring deterrence.

C. It was not the lower court's task to determine whether "reasonable alternatives" exist.

As discussed above, this Court directed the lower court to conduct two specific inquiries on remand: determine whether, by scientific consensus, sex offenders commit new sex crimes no more often than non-sex offenders, and determine whether, by scientific consensus, the registration statute fails to serve its public protection function. These were discrete factual questions, albeit of a highly unusual and limited nature. The defendant has chosen to challenge the statute by attacking "the fact-finding foundation of the legislative policy determinations." 232 A.3d at 594 n.22. Only in what "will be a rare situation" may a court accept such a challenge, and then only upon "the clearest proof," established by scientific consensus, that the legislative determination was wholly unfounded. *Id.* at 596. Yet the court below failed to hold defendant to that burden of proof, and instead offered up its views (which were just defendant's views) on "reasonable alternatives" to registration.

The lower court misunderstood its role. The factual determinations it was assigned to make were not invitations to a policy debate; they were threshold questions. Without resolving them, the court had no authority to invoke the boilerplate language of the commonly cited "irrebuttable presumption" doctrine. It

is hard to imagine a more legislative function than evaluating reasonable alternatives to solve societal problems. Choosing among such alternatives is exactly what legislators are elected to do.

But the lower court did it anyway, asserting that "a court may substitute its judgment for that of the legislature when the legislature has enacted unconstitutional legislation." *Opinion of September 27, 2022*, at 4. That is incorrect at a very fundamental level. A court is not empowered to declare legislation unconstitutional simply because the court disagrees with the legislature's judgments, either about the nature of the problems to be solved or the best means of doing so. Such a power would not be the judicial power at all.

That is why it is so essential that this Court enforce the demanding standard it established in *Torsilieri*. As the Court there observed, "all cases are evaluated on the record created in the individual case." *Id.* at 595-96. The record created in this case will not be binding in other cases, pending or future. There will always be another study to present, and another professor to call, offering another "counter-narrative to the evidence that the General Assembly relied upon." *Id.* at 577. Nor will "scientific consensus" stand still; even on such "hard" science questions as COVID-19 response, many presumed truths have come and gone in the space of just 30 months.

These vagaries cannot properly support an attack on legislation (or executive action) duly adopted in response to societal problems, new or old, large or small. After *Torsilieri*, the only ceiling on such constant constitutional litigation is rigorous application of the "heavy burden" imposed on challengers. The defendant here did not meet that burden.

II. Subchapter H is not punitive; the lower court's finding to the contrary should be reversed.

The lower court also erred in finding Subchapter H punitive. As with its irrebuttable presumption analysis, the lower court's finding on this question rests on a critical misunderstanding of the purpose of the statute. Subchapter H is meant to protect through information sharing, not by reducing recidivism. Because defendant failed to present any evidence, much less the clearest proof of a scientific consensus that Subchapter H fails to protect the public in the manner intended, the lower court's determination that the statute is punitive cannot stand.

A. Subchapter H is Not Punishment.

In *Torsilieri* this Court determined that the lower court's analysis of the "punishment" issue was infected throughout by its uncritical acceptance of opinions proffered in expert reports. On remand, this Court directed the lower court to reconsider the issue in light of actual evidence presented at a hearing. The Court was very clear on the demanding standard of proof – "clearest proof" – that must be met to overturn the Legislature's directive that the statute is not punitive.

The court below did not faithfully apply that demanding standard. Instead it once again merely presented its own policy preferences as constitutional analysis.

Pennsylvania courts use the two-part *Mendoza-Martinez* test, which examines the statute's intent and effect, when determining whether a statute is punitive. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963). Legislative intent is not at issue here; the statute is clear that Subchapter H "shall not be construed as punitive." 42 Pa.C.S. §9799.11(b)(2). Therefore, the analysis turns to whether it is punitive in effect. Courts apply the seven-factor test set forth in *Mendoza-Martinez, supra*, to make that determination. The factors are:

1. Whether the statute involves an affirmative disability or restraint;
2. Whether the sanction has been historically regarded as punishment;
3. Whether the statute comes into play only on a finding of scienter;
4. Whether the operation of the statute promotes the traditional aims of punishment;
5. Whether the behavior to which the statute applies is already a crime;
6. Whether there is an alternative purpose to which the statute may be rationally connected; and
7. Whether the statute is excessive in relation to the alternative purpose assigned.

In weighing these factors, "no one factor should be considered controlling as they 'may often point in differing directions.'" *Hudson v. United States*, 522 U.S. 93, 101 (1997), *quoting Mendoza-Martinez*, 372 U.S. at 169. Moreover, only the "clearest proof" can establish that a law is punitive when the General Assembly specified otherwise. *Muniz*, 164 A.3d at 1208, citing *Commonwealth v. Lee*, 935 A.2d. 865, 876-877 (Pa. 2007).

The lower court did not consider Factors 3 and 5 in its analysis, as those factors are of "little significance" to the analysis of a sex offender registration and notification statute. *Muniz*, 164 A.3d at 1214; 1216. The Commonwealth addresses the remaining five factors below.

i. Subchapter H does not impose an affirmative disability or restraint (Factor 1).

In addressing the first factor, courts examine whether the statute imposes "physical restraints" upon the offender or "restrain[s] activities sex offenders may pursue" such as changing jobs or residences. *Smith*, 538 U.S. at 100. To qualify, any such restraint must be significant: "If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.*; *Commonwealth v. Williams (Williams II)*, 832 A.2d 962, 973 (Pa. 2003).

This Court concluded in *LaCombe* that Subchapter I's requirements did *not* constitute an affirmative disability or restraint. In making that determination, this Court weighed heavily the fact that the number of in-person registration visits had been reduced from a minimum of 100 over twenty-five years under SORNA, to 25 over twenty-five years in Subchapter I. *LaCombe*, 234 A.3d at 619. It noted that the remaining in-person reporting obligations were minimal, and necessary to accomplish a core purpose of the statute: providing accurate, up-to-date photographs of registrants. *See id.* (recognizing that annual appearance is necessary to maintain a useful updated photograph).

In Subchapter H, the Legislature made similar changes to the in-person registration requirements, reducing the minimum number of required in-person reports for Tier III registrants to 34 – a 66% reduction – and 28 for Tier II registrants – a 72% reduction. 42 Pa.C.S. §9799.15(e). This drastic reduction renders the number of minimal in-person visits in Subchapter H almost the same as under Subchapter I, which this Court found non-punitive in *LaCombe*. The same result is warranted here.

The addition of a removal provision was also significant to the *LaCombe* Court's finding Subchapter I was non-punitive in effect. *Id.* at 619. That provision permits offenders to petition for removal from the registry after twenty-five years upon a showing that they are not a danger to the community. Given that the identical twenty-five-year removal provision is included in Subchapter H, *compare* 42 Pa.C.S. §§9799.15(a.2) and 9799.59, the Court should look with equal favor upon that change here. These two significant changes – a drastic reduction in the number of required in-person registration visits and the addition of a removal provision – should alleviate this Court's concerns just as they did in *LaCombe*, and tip the scales toward a finding of non-punitive for this factor.

Despite these meaningful statutory changes, the lower court still found Subchapter H "oppressive," dismissing the 66% to 72% reduction in in-person reporting requirements as "cosmetic" and emphasizing that Tier III offenders, like

defendant, are still required to contact the state police by phone for updates in addition to in-person annual reporting. *Lower Ct. Op.* at 18. The court's focus on the number of required updates – Tier II offenders must update biannually and Tier III registrants quarterly – without consideration of the nature of them is misplaced. Making a telephone call – all that is required for the vast majority of updates – consumes far less time, energy, and effort than appearing in person, and given that mobile phones are ubiquitous, can be done from virtually anywhere.

The lower court also found Subchapter H "oppressive" because it requires in-person updates for significant life changes. *Opinion of August 22, 2022, at* 18. But the update requirement is hardly oppressive. Updates are required for a minimal number of significant events, like name, address, and employment changes, *see* 42 PA.C.S. §9799.15(g) (identifying the 9 life events requiring updates), which are relatively infrequent for most people.[12] A brief visit to the registration site is not meaningfully more inconvenient than the myriad other collateral tasks – such as filling out legal documents, transferring money, and notifying insurance companies – associated with those same types of life changes.

[12] Indeed, it is reasonable to think that the average person changes jobs or gets a new car only every several years. *See* https://www.businesswire.com/news/home/20190627005234/en/Average-Age-of-Cars-and-Light-Trucks-in-U.S.-Rises-Again-in-2019-to-11.8-Years-IHS-Markit-Says (last visited 12/15/22) (showing that average age of cars on the road is increasing, meaning people are owning cars for longer); https://www.bls.gov/news.release/pdf/nlsoy.pdf (last visited 12/15/22) (reporting average number of jobs held over lifetime and showing the frequency of job changes decreases with age).]

And, again, these minimal updating requirements are necessary to insure that the registry is up to date and accurate; outdated information would defeat the registry's purpose.[13]

Given these substantial changes in Subchapter H relative to its predecessor, and its similarities to Subchapter I, which this Court has deemed non-punitive, this factor weighs in favor of finding this statute non-punitive.

ii. Sex offender registration has not been historically regarded as punishment (Factor 2).

The second *Mendoza-Martinez* factor looks at whether the nature of the provision in question has traditionally been regarded as punishment. Both the United States Supreme Court and this Court have previously rejected the argument that sex offender registration and notification requirements are substantially similar to colonial era punishments such as public shaming. *Smith*, 538 U.S. at 97-99; *Williams II*, 832 A.2d at 975-76. However, more recently, in *Muniz* and *LaCombe*, this Court reached a different conclusion, finding the registry akin to public shaming. *LaCombe*, 234 A.3d at 600-01, quoting *Commonwealth v. Perez*, 97 A.3d

[13] The lower court also called Subchapter H's twenty-five-year removal mechanism "illusory," *Lower Ct. Op.* at 19, primarily because registrants must wait twenty-five years to invoke it. It did not clarify how the provision, which confers a benefit on registrants, allowing them to potentially be relieved of registration obligations far earlier than they otherwise would be, is somehow punitive. Moreover, this Court has implicitly rejected that argument, which was made by appellants in *LaCombe* and its companion case, *Commonwealth v. Witmayer*, when it noted that the addition of the removal mechanism helps alleviate punitive concerns identified in *Muniz*.

747, 765-766 (Pa. Super. 2014) (Donohue, J. concurring); *Muniz*, 164 A.3d at 1212.

The Court has been troubled by the registry's availability on the internet, emphasizing that the technological environment has advanced significantly since *Smith* and *Williams* were decided. *LaCombe*, 234 A.3d at 600-01 (citations omitted). It expressed concern about the ability of the internet to disseminate information worldwide in a way that can "expose[] registrants to ostracism and harassment." *Id.*

These were certainly legitimate concerns. But they do not fully account for the maturing nature of the internet, and the manner in which registry information is handled on it. The common pleas court here asserted that registry data is "publicized to the entire world, who can access this information without knowing or caring about any specific offender," thereby amounting to a "scarlet letter" and a "suffocating net." *Opinion of August 22, 2022*, at 4-5. Such overheated language does not properly describe the operation of the registry.

The registry is *not* a search engine, like Google. In today's world, search engines are the most common way in which people interact with the internet. These search engines "crawl" through millions of websites, aggregating information and returning "hits" based on proprietary algorithms. Anyone anywhere can enter a name in the search box and, in a matter of moments, pull up

home addresses, birthdates, employment history, phone numbers, email addresses, and the names of spouses, children, and parents.

But the one thing no one will find in such a search is the identity of an offender in the registry. It is not accessible to search engines. The only way to acquire information from it is to learn of the registry's existence, locate its specific website, accept its legal terms prohibiting any misuse of the data, and enter search parameters on the website itself. Common experience suggests that most people will not go to these lengths. Defendant was free to show otherwise, but he presented no evidence at all on this essential point. He cannot claim clearest proof that the registry spreads information to eyes around the world without having offered the most basic data on how much it is actually used.

The mere fact that the registry is kept on the internet is not enough to make it a "punishment." Where else would it be kept? The internet is the library, the warehouse, the newspaper, and the radio of modern life. Mobile and smart phones have taken the place of books and landlines, transcending age, race, gender, and economic divides. According to recent data published in 2021, 97% of American adults own a cell phone of some kind, and 85% own a smartphone, which is up from just 35% in 2011. https://www.pewresearch.org/internet/fact-sheet/mobile/ (last visited 12/15/22). The internet has therefore replaced other forms of information storage. But the question is not whether information exists on the

internet; the question is how, and how often, it is accessed. Registry information is never "pushed" to anyone. It is only "pulled" by those motivated to search for it.

This is exactly what modern government does with information today, including criminal justice system information. The sex offender registry is just one of a number of websites utilized in the Commonwealth to get information to crime victims and others who may be affected by the system.

This type of on-line repository is a common and effective tool for protection of the public. For instance, the Commonwealth regulates the practice of many professions in Pennsylvania, over and above the educational requirements needed to achieve the academic degrees associated with those fields. These professions include psychology, dentistry, accountancy, medicine, and law. State boards control professional licenses, without which it is illegal to practice. *See, e.g.*, 63 P.S. §422.28 (license to practice); 63 P.S. §422.39 (penalties). These boards have the concomitant power to suspend those licenses, or even to revoke them permanently. *See, e.g.*, 63 P.S. §422.42.

State boards have undertaken considerable effort to ensure that the public is kept informed of these occupational expulsions. The Pennsylvania Department of State maintains a comprehensive website that permits anyone, worldwide, to discover disciplinary actions simply by entering one or more search terms: by

profession, by last (or first) name of the licensee, by the licensee's facility, or by type of discipline. https://www.pals.pa.gov/#/page/search (last visited 12/15/22).

Perhaps the prime example is the website of the Pennsylvania Disciplinary Board, which is maintained by the judicial branch. The site provides abundant information about Commonwealth attorneys who have been subject to disciplinary action. Curious parties can search by first or last name, attorney identification number, or geographic locality. Results will deliver disciplinary status along with addresses, which, for attorneys who have been disciplined, will often be a home address. Alternatively, users can pour through all recent disciplinary actions. The website helpfully links to the full text of disciplinary opinions, so that readers can obtain a detailed account of the attorney's misconduct. *See generally*, https://www.padisciplinaryboard.org (last visited 12/15/22).

Surely, however, the availability of these details, sometimes even lurid details, does not mean that the disciplinary board website constitutes a punishment. In fact, the disciplinary board has a separate process for that, involving public reprimand and censure, which is what shaming actually looks like.[14] Rather, the information on these websites is for the public's benefit. People want to know if the lawyer or doctor whose services they might seek is likely to harm instead of

[14] *See* Pa.R.D.E. 204; https://www.padisciplinaryboard.org/for-attorneys/rules/rule/5/the-pennsylvania-rules-of-disciplinary-enforcement#rule-20 (last visited 12/15/2022).

help them, just as they might desire to be informed if a neighbor in contact with their children has a history of sex abuse.

To be sure, inclusion on the disciplinary board website may be less "shameful" than presence on the sex offender registry. But that is not because there is a website. It is because of the underlying conduct. Sexual assault is, generally, more shameful than violating the disciplinary rules. That cannot mean it is unconstitutional for Pennsylvania to place the former information on the internet, but not the latter.

And while offenders might *feel* shame at their inclusion in the internet registry, "whether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the sting of punishment." *Williams*, 832 at 976. Defendant had the opportunity, and the burden, to prove his claims that Subchapter H operates to punish through shaming, ostracism, and harassment. *Torsilieri*, 232 A.3d at 591. But, he presented nothing – no research, data, or other evidence that registered offenders in Pennsylvania experience these things by virtue of the registry.

By virtue of the registry. That point is critical precisely *because* the internet exists. Unlike the registry, most information about the commission of sex offenses – media reports, social media postings, etc. – actually *is* available through internet

search engines. That kind of information is not only easy to find; it also almost never goes way.[15]

Moreover, in contrast to unrestricted internet information, the registry does not provide any mechanisms for online shaming of offenders, such as the ability to post comments or interact with other readers. *See Smith,* 538 U.S. at 99. On the contrary, the registry has prohibitions in place specifically to deter harassment and shaming. Before entering the Pennsylvania Megan's Law website, users must affirmatively acknowledge that they will not use its information to harass offenders, and they are warned that if they do, they will be subject to criminal prosecution and civil liability. This acknowledgment appears before a user may enter the site and upon returning to the site, and is labeled "Warning" in large red letters. Users must affirmatively click "accept" to proceed into the site. *See* https://www.pameganslaw.state.pa.us (last visited 12/15/22).

The lower court nonetheless insists that the registry is used to harass offenders in other aspects of their lives, such as housing and employment. But just as defendant offered no evidence of how many people even visit the website, he similarly presented no proof that those who do visit the site use it (in violation of its terms) to discriminate against offenders. Dr. LeTourneau's testimony

[15] Nor is the internet the only way in which members of the public may learn of sex offenses. Statutes other than Subchapter H affirmatively require the dissemination of such information. Schools, for example, camps, and similar organizations are legally mandated to conduct background and clearance checks, not only for job applicants, but for employees, volunteers, and visitors. 23 Pa.C.S. §6344 *et seq.*

concerning such possible effects relied only on offender self-reports, in jurisdictions other than Pennsylvania. *N.T. 6/29/21*, 95-96; *6/30/21*, 32-33, 87-89; R.453a-R.454a; R.683a-R.684a, R738a-R74a. Such studies are inherently weak, since offenders are not exactly neutral subjects, and in any case they cannot know whether their alleged harassers read the registry. As even Dr. LeTourneau acknowledged, there is no research indicating that the "costs" she described stem from inclusion in the registry, or from the fact of the underlying conviction. *N.T. 6/29/21*, 94; R.452a. Professor Prescott similarly speculated that there might be occasions where inclusion on the registry, as opposed to the fact of the underlying crime, would result in a lost employment opportunity; yet he too did not present any data or research to support his assertion. *Id.*, 278; R636a. Defendant's failure to offer any proof of his claim that the website operates to shame offenders defeats his argument.

In any event, to the extent registered offenders in Pennsylvania experience ostracism or harassment, that is not the fault of Subchapter H, but rather a direct consequence their sexual crimes. As the United States Supreme Court in *Smith* explained, "[a]lthough the public availability of the information [found in the registry] may have a lasting and painful impact on the convicted sex offender, these consequences flow not from the Act's registration and dissemination

provisions, *but from the fact of conviction, already a matter of public record*." *Smith*, 538 U.S. at 101 (emphasis added).

At best, defendant's evidence suggests that sex offenders do not like being on registries, an unsurprising conclusion. To the extent that sex offenders in Pennsylvania are ostracized or shamed – and, again, defendant presented no evidence of actual ostracism or shaming – there was simply no proof, much less *the clearest proof*, that those experiences resulted from inclusion in the registry. Accordingly, this factor weighs in favor of a finding of non-punitive.

iii. Subchapter H does not promote traditional aims of punishment: retribution and deterrence (Factor 4).

The fourth *Mendoza-Martinez* factor examines whether the statute in question operates in a manner that promotes traditional aims of punishment: retribution and deterrence. In *LaCombe*, this Court gave this factor little weight, finding that the statute may be retributive but did not promote deterrence. 234 A.3d at 624.

Although not entirely retroactive like Subchapter I,[16] Subchapter H still does not promote deterrence. As this Court noted in *Williams II*, future registration and notification requirements are unlikely to deter anyone from committing a sexual offense. 832 A.2d at 978. It is unreasonable to think a sex offender would choose

[16] Subchapter H applies retroactively to a significant subset of offenders, those whose offense conduct occurred between December 20, 2012, and June 12, 2018.

not to offend because of the prospect of registration when arrest, criminal conviction, and jail time are at stake. Even for Tier I crimes that carry shorter registration periods, like indecent assault, 18 Pa.C.S. §3126(a)(1), it is difficult to imagine that any sex offender would be more concerned about the prospect of potentially having his name, address, and picture on a website, at some point in the future, than he would be about getting caught and convicted of the actual offense. If the public humiliation of being arrested and charged with a sex crime, the emotional and monetary costs of going through a trial or plea, including paying an attorney, and the prospect of jail or probation were not enough to deter a sex offender, time on a registry seems unlikely to as well. This is even more true for the Tier II and III offenses, where the offenses are more serious and carry the prospect of a felony conviction and more significant jail time.

In *Muniz*, this Court found SORNA had a deterrent effect, emphasizing that the prospect of a long period of registration for crimes that carried little prospect of significant jail time operated to deter. *Muniz*, 164 A.3d at 1215. Respectfully, however, that analysis did not sufficiently consider other negative potential consequences for getting caught for a sex crime, separate and apart from eventual registration, that must be considered in the deterrence analysis. For example, even the misdemeanor offender will suffer initial public humiliation as a result of the arrest and processing of his charges. He will suffer personal humiliation within his

circle of family and friends. He will have to spend time and money defending his criminal case, potentially missing (or losing) work for court proceedings, and eventually sitting through a public trial or plea proceeding. For a sex offender who is not deterred by the prospect of all these consequences along with a potential loss of liberty, time on the registry is unlikely to change the equation. *See Williams II*, *supra*.

Nevertheless, the lower court concluded that Subchapter H promotes deterrence. It reasoned that "[p]ersons who are considering whether to commit a sexual offense may be deterred from doing so by the obligations to register and the knowledge that one's personal information will be broadcast to the world..." *Opinion of August 22, 2022, at* 20-21. Tellingly, the court did not cite any record evidence to support this proposition and, as noted above, there was none. Defendant failed to introduce any evidence, much less the clearest proof, that Subchapter H operates to deter sexual offending.[17]

In any event, this factor should be given little weight in the overall punitive analysis, as any deterrent effect – and again, defendant did not prove any – would be minimal. *See LaCombe*, 234 A.3d at 624 n.15 (this factor weighed in favor of a

[17] Defendant's evidence actually supported the opposite conclusion, since his experts opined that Subchapter H fails to reduce recidivism and that most sex offenses are committed by "first-time" offenders. *Letourneau Affidavit*, 2-3.

finding of punitive for Subchapter I but was assigned little weight; noting that even if Subchapter I were prospective it carries little if any deterrent purpose).

iv. Subchapter H is rationally connected to its purpose of promoting public safety through information sharing (Factor 6).

This factor considers whether the statute has a rational non-punitive purpose. It is a "'[m]ost significant' factor in [the court's] determination that the statute's effects are not punitive." *Smith v. Doe*, 538 U.S. 84, 102 (2003), *quoting United States v. Ursery,* 518 U.S. 267, 290 (1996); *see also Commonwealth v. Williams* ["*Williams II*"], 832 A.2d 962, 979 (Pa. 2003) *quoting Smith*, *supra*. Here, this factor weighs against finding Subchapter H punitive, as public safety is clearly a purpose of the statute. *See LaCombe*, 234 A.3d at 625 (concluding "there is a purpose other than punishment to which Subchapter I may be rationally connected – protecting and informing the public regarding sexual offenders the General Assembly considers dangerous – and this factor clearly weighs in favor of finding Subchapter I nonpunitive"). Even the *Muniz* Court found this factor to be non-punitive for SORNA, as it was clear that the statute's purpose was public safety and health. *Id.* at 1217. The same result is warranted here.

Nevertheless, even after first acknowledging that there is "unquestionably" a valid purpose to Subchapter H that is unrelated to punishment, the lower court concluded that Subchapter H is *not* rationally related to its non-punitive purpose.

Lower Ct. Op. at 22; 26 (finding that because SORN laws do not have the effect on recidivism anticipated by the legislature they are "not rationally related to the purposes for which they were enacted")(emphasis added). As discussed above, however, this conclusion rests on the false premise that the statute's purpose is deterrence. It would hardly be surprising if the statute has little effect on recidivism, because it is not intended to. Subchapter H promotes public safety through information sharing, not recidivism reduction. Thus, whether the statute reduces recidivism is irrelevant to the analysis of this factor. Because defendant did not present any proof that the statute, as structured, does not protect the community in the manner designed, this factor weighs in favor of a finding of non-punitive.

The lower court's efforts to escape this conclusion were strained. The court discoursed at length on "null findings" – studies that fail to show statistically significant results in any direction. *Opinion of August 22, 2022*, at 23-26. The court relied on defense witness assertions that, if lots of recidivism studies return null – *i.e.*, no reliable – findings, then the repeated failure to prove anything actually proves something. As this Court knows from reviewing "cumulative error" claims, however, zero plus zero plus zero is still zero. *See, eg., Commonwealth v. Williams*, 615 A.2d 716, 722 (Pa. 1992) ("no number of failed claims may collectively attain merit if they could not do so individually"). In any case,

whatever meaning can be inflated from "null findings," they surely do not amount to "clearest proof" – a standard that the court below completely ignored.

And null findings or no, recidivism reduction is not the goal of the statute anyway. When considered in light of its *actual* purpose – community protection through information – Subchapter H is rationally connected to a non-punitive purpose.

v. Subchapter H is not excessive in relation to its purpose (Factor 7).

The final *Mendoza-Martinez* factor is whether the legislation in question is excessive in relation to its assigned purpose. Here, the purpose is public safety. In making the determination, "the challenged statute's effects must be evaluated in light of the importance of the governmental interest involved," and "the effects of a measure must be extremely onerous to constitute punishment." *Williams II*, 832 A.2d at 982 (citations omitted).

The United States Supreme Court has cautioned that this factor "is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy[;]" the inquiry is only whether the regulatory means are "reasonable in light of [the legislature's] non-punitive objective." *Smith*, 528 U.S. at 105. The citizens, through their elected representatives, created Subchapter H to accomplish certain non-punitive objectives. That choice is entitled to great deference. *See Smith*, 917 A.2d at 852.

This Court has made a similar point, emphasizing that even if a statute "err[s] on the side of over inclusiveness," that does not render the statute excessive. *See Lee*, 935 A.2d at 883.[18] The Commonwealth need not enact a remedial program that examines every sex offender individually to determine risk and chance of recidivism. Rather, "the legislature has power . . . to make a rule of universal application," legislating "with respect to convicted sex offenders as a class, rather than requir[ing] individual determination[s] of their dangerousness." *Smith*, 538 U.S. at 103.

Nevertheless, the lower court found Subchapter H excessive precisely because it does not "take into consideration *the actual risk* of any particular defendant to reoffend in the future." *Opinion of August 22, 2022, at* 26. This assertion is completely divorced even from the defendant's own evidence at the hearing. That evidence made clear that *actual* risk is, in fact, unknowable. The lower court advocates for the use of an actuarial tool developed by defense witness Hanson. Yet even Dr. Hanson stated that the tool cannot be used to predict individual risk. Notwithstanding its other problems, it is meant only to be used to establish the *relative* risk presented by one offender as opposed to another.

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[18] Although *Lee* involved a challenge to the sexual violent predator provisions of Megan's Law II, the Court's analysis of the excessive factor was not limited to violent predators in discussing the broad legislative power of the General Assembly, or in favorably quoting *Smith* for how dangerous sex offenders are generally. *Lee*, 935 A.2d at 881-883, 885.

It is precisely because the *actual* risk for any particular defendant is unknowable that the Legislature was justified in addressing the cohort of sex offenders as a whole. This is what statutes do routinely. The Legislature refined that approach in Subchapter H by maintaining the tier-based classification system organized by seriousness of the offense. The lower court disagrees with this policy choice, claiming that the seriousness of the underlying offense may be unrelated to an offender's risk of reoffense (*Opinion of August 22, 2022, at* 26 citing *Hanson Declaration*). But the seriousness of the offense is tied to the *harm caused* by the sexual offenses. It may be that a "flasher" who exposes himself to middle-aged women is highly likely to recidivate. But the harm caused by the flasher is undoubtedly less than that caused by a stranger rapist who targets children, even though the stranger rapist may be less likely to recidivate than the flasher. The court below obviously had different policy predilections. But that does not make the statute unconstitutional.

The lower court also found that Subchapter H is overbroad and excessive because it "catches in its net offenders who have committed crimes with no sexual component to them." *Lower Ct. Op.* at 27. But the mere fact that a particular offense does not itself contain a sex element does not mean it lacks a close association with sexual assault. There is a reason that registration statutes include crimes like kidnapping and child luring but not shoplifting or possession of

controlled substances. The legislature reasonably concluded that certain crimes are regularly committed in order to effectuate sexual offenses.

For example, although Pennsylvania's kidnapping statute does not contain a sexual element, *see* 18 Pa.C.S. §2901, studies show that child kidnappings are, more often than not, sexually motivated. A recent analysis of stereotypical kidnappings[19] published by NISMART (National Incidence Studies of Missing, Abducted, Runaway and Throwaway Children) in 2016 showed that 63% of kidnapping victims were sexually assaulted during confinement. *See* https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/249249.pdf (last visited 12/15/22). The study also revealed that of the 105 children who were known victims of stereotypical kidnappings in 2011, about 5 victims were sexually abused or assaulted. *Id.* This data is consistent with research by the National Center for Missing and Exploited Children finding that a significant percentage of nonfamilial kidnappings and attempted kidnappings are sexually motivated. *See* https://www.missingkids.org/content/dam/missingkids/pdfs/NCMEC-Letter-to-ALI-(5-27-21).pdf at page 5 (last visited 12/15/22).

Of course, defendant could have presented his own evidence demonstrating a scientific consensus to the contrary. But he did not, and the lower court did not

[19] Stereotypical kidnappings are defined as abductions in which a slight acquaintance or stranger moves a child at least 20 feet or holds the child at least 1 hour, and in which the child is detained overnight, transported at least 50 miles, held for ransom, abducted with the intent to keep permanently, or killed. *Id.*

hold him to his burden, even though this Court specifically instructed the court to redo its "punitive" analysis on the basis of actual evidence. Instead the court below simply reasserted the same policy positions it had taken previously. Defendant has not shown that the statute is excessive in relation to its purpose.[20]

vi. Conclusion: The *Mendoza-Martinez* factors establish that Subchapter H of Act 29 does not constitute punishment.

Here, all of the significant factors weigh against finding that Subchapter H constitutes punishment. Subchapter H's registration and notification provisions support the rational purpose of public safety, and defendant did not present clearest proof to the contrary.

This is not to say that committing a sexual offense does not come with collateral consequences. As the Court noted in *Muniz*, federal law bars lifetime registrants from public housing. 42 U.S.C. §13663(a). But the mere fact that convictions have collateral consequences does not make them punishment. And committing any crime nearly always results in lost opportunities. For example, the following collateral consequences have been found *not* to be punitive:

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[20] In any case, even if this Court were to conclude that Subchapter H is overbroad and excessive in relation to its purpose because of the inclusion of "non-sex" offenses, the proper remedy would be merely to sever the relevant provisions, not to invalidate the entire statute. *See Williams II*, *supra*.

- loss of right to own a firearm, 18 Pa.C.S. §6105, *Lehman v. Pennsylvania State Police*, 839 A.2d 265, 272 (Pa. 2003) (banning felons from owning firearms is not punishment);
- loss of right to practice a particular profession, 63 P.S. §479.11 (a)(funeral director), 63 P.S. §34.19 (a)(8)(architect), *De Veau v. Braisted*, 363 U.S. 144 (1960) (forbidding felons from working as union officials is not punishment); *Hawker v. New York*, 170 U.S. 189 (1898) (prohibiting felons from practicing medicine is not punishment); and
- loss of right to enlist in the armed forces, 10 U.S.C. §504.

Some of these collateral consequences affect fundamental rights. For example, Article I §21 of the Pennsylvania Constitution and the Second Amendment of the U.S. Constitution protect citizens' fundamental right to bear arms. *See McDonald v. City of Chicago*, 561 U.S. 742 (2010). Yet the constitution permits such consequences, even without individualized hearings to determine whether a specific felon poses a particular threat to the public. *See, e.g., J.C.B. v. Pennsylvania State Police*, 35 A.3d 792, 797–98 (Pa. Super. 2012), (upholding law prohibiting possession of firearms by felons); *District of Columbia v. Heller*, 554 U.S. 570, 626–627 (2008) (same).

As with disarmament of felons, the Legislature found that sexual offenders as a cohort carry an increased risk of recidivism and that these types offenders

pose a certain kind of danger to the public. 42 Pa.C.S. §9799.11. It also found that "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." *Id.* at §9799.11(a)(7). Given these findings, Subchapter H's minimal requirements, tempered by the removal mechanism, are narrowly tailored to protect the public. Indeed, as noted by this Court, although a sex offender "may, as a consequence of public notification, be foreclosed from certain employment positions, particularly those working with children," this collateral consequence of any sex offender registry did not render Megan's Law II or Subchapter I punitive. *Commonwealth v. LaCombe*, 234 A.3d 602, 605 (Pa. 2020); *Williams II*, 832 A.2d at 973. Nor should it here.

As discussed below, however, the statute would not be unconstitutional even if it *were* punitive. For defendant, the "punitive" question is a necessary prerequisite to relief but insufficient in itself. He would still have to show that any "punishment" allegedly imposed by Subchapter H violates some constitutional provision. But his claims in this regard are thin whether the statute is punitive or non-punitive.

B. Subchapter H does not violate the Separation of Powers Doctrine.

After determining the statute was punitive, the lower court also found that the statute violated several additional constitutional provisions. However, it did not provide any additional analysis of those claims. The Commonwealth will address them briefly below.

Defendant asserted that because Subchapter H is punitive, it violates the separation of powers doctrine. He claimed it somehow strips the judiciary of its role by granting a state agency the power to determine facts necessary for application of the statute (*Defendant's Post-Hearing Brief*, 79).

First, because his argument rests on the premise that Subchapter H is punitive and, as discussed, it is not, his claim fails. Second, the only fact necessary for application of the statute is whether a defendant has been convicted of a statutorily-enumerated offense. That fact – the conviction – has already been determined, decisively, by a court before any state agency is involved.

C. Subchapter H does not impose "cruel and unusual punishment."

Defendant also claimed that Subchapter H violates the constitutional prohibition against cruel and unusual punishment. As discussed above, this claim fails because Subchapter H does not impose punishment at all.

In any event, any even supposed punishment Subchapter H does impose is not cruel and unusual. Defendant's primary complaint is that lifetime registration is

disproportionate and excessive. As the Superior Court has correctly held, however, such a claim is meritless. *Commonwealth v. Prieto*, 206 A.3d 529, 535 (Pa. Super. 2019); *Commonwealth v. Bricker*, 198 A.3d 371 (Pa. Super. 2018); *Commonwealth v. Strafford*, 194 A.3d 168 (Pa. Super. 2018). As this Court's prior analyses of the *Mendoza-Martinez* factors indicate, it is at best a close call whether sex offender registration provisions constitute punishment at all, let alone cruel and unusual punishment.

D. Subchapter H does not violate *Alleyne* or *Apprendi*.

Lastly, defendant argued that Subchapter H violates *Alleyne* and *Apprendi*. He claimed it required additional fact-finding as to the date of the offense, which determines whether Subchapter H or Subchapter I applies. This argument also rests on the premise that Subchapter H is punishment. Because it is not, *Alleyne* and *Apprendi* are not implicated and the argument fails.

In any case, the date of the offense is not an "element" for *Alleyne* purposes. Because of the *ex post facto* clause, any new criminal punishment is applicable only to crimes committed after its enactment. A judge can of course dismiss charges based on pre-enactment conduct. But the Commonwealth need not prove to a jury that the statute was passed before the crime was committed. Like a statute of limitations claim, that is an issue for resolution by the court, not by the jury. *See,*

e.g., Smith v. United States, 568 U.S. 106, 112 (2013) ("Commission of the crime within the statute-of-limitations period is not an element of the [] offense").

CONCLUSION

Wherefore, the Commonwealth respectfully requests this Honorable Court reverse the August 22, 2022, order of the Court of Common Pleas of Chester County deeming Subchapter H of Act 29 unconstitutional and barring its application to defendant.

Respectfully submitted,

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Appendix

A

OPINION, ROYER, J., 9/27/22

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

Tracy S. Piatkowski, Esquire, Deputy Attorney General, Leslie S. Pike, Esquire, Assistant District Attorney, and Erin P. O'Brien, Esquire, Assistant District Attorney, for the Commonwealth
Aaron Marcus, Esquire, Chief, Appeals Division, Defender Association of Philadelphia, Marni Snyder, Esquire, and Emily Mirsky, Esquire, Assistant Public Defender, Delaware County Public Defendant's Office, Michael Wiseman, Esquire and Arielle Egan, Esquire, for the Defendant

OPINION *SUR* RULE 1925(a)

Before this Honorable reviewing Court is the direct appeal of the Commonwealth from our August 22, 2022 Opinion and Order granting/re-affirming the granting of Defendant's Post Sentence Motion Filed *Nunc Pro Tunc*, which was filed on February 27, 2018, and his Post Sentence Motion to Bar Application of SORNA, which was filed May 18, 2018, both of which were previously granted on July 10, 2018. The Commonwealth filed its Notice of Appeal on September 12, 2022, within thirty (30) days of the docketing of our August 22, 2022 Order, which occurred on August 23, 2022. Consequently, the Commonwealth's appeal is timely. *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.").

The procedural and factual history of this case has been set forth at length in the Opinion *Sur* Rule 1925(a) issued by the former Judge of the Chester County Court of Common Pleas Anthony A. Sarcione on August 30, 2018 and this Honorable reviewing

Court's June 16, 2020 Opinion remanding the matter for reconsideration of Judge Sarcione's July 10, 2018 Order granting in part and denying in part Defendant's Post Sentence Motion Filed *Nunc Pro Tunc*, filed February 27, 2018, and his Post Sentence Motion to Bar Application of SORNA, filed May 18, 2018, in light of evidence to be produced by the Commonwealth that had not been presented to the Court at the original post-sentence motion hearing held July 9, 2018. Because there are two (2) somewhat lengthy and quite detailed documents describing the factual and procedural history of this matter, we will simply refer this Honorable reviewing Court to those documents for a better understanding of the path this case has taken through the courts.

Pursuant to this Honorable reviewing Court's June 16, 2020 directive, we held the requisite hearings on Defendant's above-referenced Post Sentence Motions over the course of three days, June 28, 2021 through June 30, 2021, at which the Commonwealth and the defense produced evidence in support of their respective positions on the constitutionality of SORNA. On August 22, 2022, we issued our Opinion and Order granting/re-affirming the previous granting of Defendant's Post Sentence Motions on July 10, 2018 and again finding SORNA unconstitutional. This timely appeal followed.

On September 12, 2022 the Commonwealth filed a Statement of Jurisdiction outlining the issues it intended to litigate on appeal. Because the Commonwealth set forth its issues in its Statement of Jurisdiction, we did not require the Commonwealth to file a Concise Statement of Errors Complained of on Appeal pursuant to Pennsylvania Rule of Appellate Procedure 1925(b). The issues raised by the Commonwealth on appeal are as follows:

> (1) Whether a person may challenge the constitutionality of a Pennsylvania statute where he does not reside in Pennsylvania and is therefore not subject to the statute's provisions;
>
> (2) Whether the trial court improperly substituted its judgment for that of the Pennsylvania Legislature on a complex policy issue where defendant failed to meet his high burden to prove Subchapter H unconstitutional in that he
>
> (i) failed to prove that the statute clearly, palpably, and plainly violated the Constitution,
>
> (ii) failed to show a scientific consensus to invalidate the Legislature's finding that sex offenders reoffend at a high rate, and
>
> (iii) failed to show that Subchapter H does not protect the public from the danger of recidivist sex offenders in the manner intended by the Legislature; and
>
> (3) Whether Subchapter H is unconstitutionally punitive.

(Cmwlth.'s Statement of Jurisdiction, 9/12/22, at 5, paras. 1-3). Having reviewed the record in the light of the relevant constitutional, statutory and decisional law, we are now prepared to issue the following recommendation with regard to the merits of the Commonwealth's appeal.

With respect to the first issue, concerning Defendant's standing to challenge the constitutionality of SORNA, this Honorable reviewing Court's standard of review is *de novo* and its scope of review is plenary. *Commonwealth v. Alston*, 233 A.3d 795 (Pa. Super. 2020), *appeal denied*, 240 A.3d 106 (Pa. 2020). The Commonwealth first challenged the issue of Defendant's standing in its Motion to Dismiss for Lack of Standing/Mootness which was filed on October 5, 2020. On January 11, 2021 we issued an Order denying the Commonwealth's Motion. In that Order, we explained our reasons

for determining that Defendant had standing to pursue this litigation. We respectfully refer this Honorable reviewing Court to our January 11, 2021 Order for an understanding of our position with respect to this issue and respectfully submit that, for all of the reasons stated therein, the Commonwealth's first issue on appeal has no merit and should, respectfully, be denied and dismissed.

The Commonwealth's second issue, for which, as it involves a challenge to the constitutionality of a statute, the standard of appellate review is *de novo* and its scope of review plenary, *Peake v. Commonwealth*, 132 A.3d 506 (Pa. Cmwlth. 2015), may be broken down into two (2) parts. In the first part, the Commonwealth contends that the undersigned impermissibly substituted its judgment for that of the Pennsylvania Legislature on a complex policy issue. We respectfully submit that this Honorable reviewing Court resolved this issue when it stated in its June 16, 2020 Opinion that "'the General Assembly may enact laws which impinge on constitutional rights to protect the health, safety, and welfare of society,' but . . . 'any restriction is subject to judicial review to protect the constitutional rights of all citizens.'" *Commonwealth v. Torsilieri*, 232 A.3d 567, 575 (Pa. 2020)(*quoting In re J.B.*, 107 A.3d 1, 14 (Pa. 2014)). Thus, a court may "substitute its judgment" for that of the Legislature when the Legislature has enacted unconstitutional legislation. This part of the Commonwealth's second issue has no merit and should, respectfully, be denied and dismissed.

With respect to the second part, whether the Defendant met his burden to establish the unconstitutionality of SORNA, and to the extent that the first part of the Commonwealth's second issue may tie in with this part on the basis that the Court's "substitution [of] its judgment for that of the Pennsylvania Legislature" is only

unconstitutional because the Defendant allegedly failed to meet his burden, we respectfully submit that we have adequately addressed this issue in our August 22, 2022 Opinion and Order granting/re-affirming the granting of Defendant's Post Sentence Motions and finding SORNA to be unconstitutional. This issue has also been addressed in Judge Sarcione's August 30, 2018 Opinion *Sur* Rule 1925(a). We respectfully refer this Honorable reviewing Court to those documents for an explanation of our position that the Defendant did in fact meet his burden of proof, that we properly determined accordingly that SORNA is unconstitutional, and therefore our "substitution" of our judgment for that of the Legislature is constitutional. For all of the reasons set forth in the above-referenced documents, we respectfully submit that the Commonwealth's second issue, both parts one and two and as they intertwine, has no merit and should, respectfully, be denied and dismissed.

With respect to the Commonwealth's third and final issue, challenging our determination that SORNA is unconstitutionally punitive, which is again a challenge to the constitutionality of a statute for which the appellate standard of review is *de novo* and its scope of review plenary, *see Peake, supra*, we respectfully submit that we have adequately addressed this issue in our August 22, 2022 Opinion and Order granting/re-affirming the granting of post-sentence relief to the Defendant and finding SORNA unconstitutional. We would also respectfully submit that this issue was addressed by the Honorable Anthony A. Sarcione in his August 30, 2018 Opinion *Sur* Rule 1925(a). We would respectfully refer this Honorable reviewing Court to those documents for the reasoning behind our determination that Subchapter H of SORNA is unconstitutionally punitive. We further respectfully submit that for all of the reasons set forth in those documents, the

Commonwealth's third issue has no merit and should, respectfully, be denied and dismissed.

Because none of the Commonwealth's issues have any merit, we respectfully recommend that this Honorable reviewing Court deny and dismiss the Commonwealth's appeal and affirm our August 22, 2022 Opinion and Order granting/re-affirming the granting of Defendant's Post Sentence Motions.

BY THE COURT:

9/27/22
Date

Allison Bell Royer, J.

Appendix B

OPINION, ROYER, J., 8/22/21

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

Tracy S. Piatkowski, Esquire, Deputy Attorney General, Leslie S. Pike, Esquire, Assistant District Attorney, and Erin P. O'Brien, Esquire, Assistant District Attorney, for the Commonwealth
Aaron Marcus, Chief, Appeals Division, Defender Association of Philadelphia, Marni Snyder, Esquire, and Emily Mirsky, Esquire, Assistant Public Defender, Delaware County Public Defender's Office, for the Defendant

OPINION

On June 16, 2020 the Honorable Supreme Court of Pennsylvania directed this Court to analyze whether SORNA's irrebuttable presumption that all sex offenders pose a high risk of reoffending sexually is constitutional and to analyze whether Act 29 of SORNA, which is the version in place at this time as well as the time when the trial court issued its Opinion on direct appeal, although not at the time the Defendant committed and was tried and sentenced for the underlying crimes, constitutes criminal punishment by examining five (5) of the seven (7) factors set forth in *Kennedy v. Mendoza-Martinez*, 83 S.Ct. 554 (U.S. D.C./Cal. 1963) governing that determination.[1]

The factual and procedural history of this litigation, as well as the standard of review and applicable law, have been addressed in great detail in the Opinion *Sur* Rule 1925(a) issued by the Honorable Anthony A. Sarcione on August 30, 2018 and the Honorable Pennsylvania Supreme Court's Opinion issued on June 16, 2020 remanding the

[1] The Pennsylvania Supreme Court determined that the last two *Mendoza-Martinez* factors had no bearing on the question of whether SORNA was punitive and therefore did not require that we examine them.

case to the undersigned for the purposes described above. Consequently, we will not reiterate all of the factual, procedural, and legal principles again here but simply refer the reader to those two (2) documents for an understanding of the manner of this case's evolution and the legal standards governing the issues to be considered at present.

Our first task is to evaluate the constitutionality of SORNA's irrebuttable presumption that all sex offenders, regardless of their personal characteristics and circumstances, have a high risk of reoffending sexually. The presumption is found at 42 Pa. C.S.A. § 9799.11(a)(4), entitled "Legislative findings, declaration of policy and scope", which provides, "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." 42 Pa. C.S.A. § 9799.11(a)(4).

Whether an irrebuttable presumption is constitutional involves a three-part test. An irrebuttable presumption is unconstitutional where (a) 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). Our analysis of these three factors leads us to conclude that SORNA's irrebuttable presumption does not pass constitutional muster.

Article I, Section 1 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 (Pa. 2014).

SORNA's irrebuttable presumption concerning sex offenders' heightened future dangerousness as a cohort indisputably encroaches upon a person's fundamental right to reputation under Article I, Section 1 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, and does so without any consideration of individual characteristics and circumstances. 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 an offender's successful re-entry into society and maintenance of a law-abiding lifestyle. (6/29/21, Ex. D-7; Affid. of Professor Elizabeth J. Letourneau, Ph.D., at 10, para. 13 (*citing* research by

the National Institute of Justice)). The Commonwealth suggests that offenders would experience these stigmas anyway by virtue of their public record convictions for sex offenses alone. The Commonwealth also suggests that every offender, whether guilty of committing a sexual offense or some other type of offense, experiences the same stigmas as a result of their convictions. However, non-sexual offenders are not placed on a public registry or subject to public notification about almost every aspect of their personal lives, even if their offense were a serious violent crime. We do not place murderers on a registry, nor do we place offenders such as those convicted of Aggravated Assault or other violent crimes on a registry, regardless of how many times or how egregiously they offend. No matter what their propensity for violence may be, we do not label them or publish to the world that they are at "high risk" of committing additional violent offenses. The special stigma associated with the registry requirement is the express accusation in the legislative findings that everyone convicted of a sexual offense presents a "high risk" of sexually reoffending. This strongly implies that even though one has been convicted and served his or her sentence, one remains a serious threat to society. Virtually all aspects of his or her personal life must be reported to the State and much of it publicized to the entire world, who can access this information without knowing or caring about any specific offender in particular. It is this designation, this "scarlet letter" of "high risk", that distinguishes the heightened stigma sexual offenders experience, and hence their greater marginalization, from that stigma merely associated with the fact of conviction that would otherwise be present in the absence of a registry and from that which is arguably experienced by non-sexually offending populations. *See In re J.B.*, 107 A.3d 1, 16 (Pa. 2014)("[T]he common view of registered sex offenders is that they are particularly dangerous and more likely to

reoffend than other criminals."). The public declaration based on the faulty premise that all sexual offenders are dangerous high-risk recidivists compounds the isolation and ostracism experienced by this demographic and sorely diminishes 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 overbroad 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,[2] *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. §§ 9799.14(b)(2), 9799.15(a)(1); the offense of Interference with Custody of Children (18 Pa. C.S. § 2904),[3]

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[2] 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 of the statute. *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), *cert. denied*, *Pennsylvania v. Muniz*, 138 S.Ct. 925 (U.S. Pa. 2018), *abrogated on other grounds by Commonwealth v. Santana*, 266 A.3d 528 (Pa. 2021), *superseded by statute on other grounds*, *Commonwealth v. Lacombe*, 234 A.3d 602 (Pa. 2020), *superseded by statute on other grounds*, *In re H.R.*, 227 A.3d 316 (Pa. 2020).

[3] Even though Act 29 removes parents, guardians, and other "lawful custodian[s]" from the ambit of the registry, the offense itself still does not require that the offender commit a sexual crime in order to be convicted.

see 42 Pa. C.S. §§ 9799.14(b)(3), 9799.15(a)(1); and the offense of Kidnapping (18 Pa. C.S. § 2901(a.1))(a Tier III, Lifetime Registration offense), *see* 42 Pa. C.S. §§ 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 and the fact that these crimes do not require sexual offending for culpability. For all of the above reasons, we find that SORNA's irrebuttable presumption that all sex offenders pose a high risk of reoffending sexually encroaches on an interest protected by the Due Process Clause, namely, the constitutional right to reputation in Pennsylvania.

Moving onto 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. Of the two experts retained by the defense to opine on the issue (the third, James J. Prescott, J.D., Ph.D., was retained to discuss the efficacy of SORNA's registration and notification provisions on sexual recidivism), Dr. R. Karl Hanson (6/28/21, Ex. D-2, at 6, para. 10; Declaration of R. Karl Hanson at 6, para. 10) asserted that research has shown that 80% to 85% of sexual offenders do not reoffend sexually and Dr. Letourneau asserted that "methodologically rigorous research studies" indicate that 80% to 95% of sex offenders will not reoffend sexually. (6/29/21, Ex. D-7 at 7, para. 9 [Affid. of Prof. Elizabeth J. Letourneau, Ph.D., at 7, para. 9). Further, both Dr. Letourneau and Dr. Prescott cited to New York research showing that 95% of all sexual offenses are committed by first-time offenders not recidivists. (6/29/21, Ex. D-7 at 2-3, para. d [Affid. of Prof. Elizabeth J. Letourneau, Ph.D., at 2-3, para. d; 6/29/21; 6/29/21, Ex. D-9, Appx. A, at 15).

In response to the defense experts, the Commonwealth presented the expert report and testimony of Dr. Richard McCleary, Ph.D. (*See* 6/30/21, Ex. C-9). Dr. McCleary's report in large part attacked the methodology of all of the research showing a low rate of sexual reoffending by sex offenders or otherwise showing the inefficacy of SORNA's registration and notification requirements. In other words, Dr. McCleary opined that all research yielding an outcome different from that of the Commonwealth's position was fatally methodologically flawed and unreliable. Dr. McCleary's blanket denunciation of all research contrary to the Commonwealth's position in this case, in our opinion, materially detracts from his credibility. The research discussed by Drs. Hanson, Letourneau, and Prescott was conducted by well-respected experts in the field, including, but not limited to, Drs. Hanson, Letourneau, and Prescott's own research. As Dr. Hanson noted, "There is no study that is perfect. Studies are not like that. . . . Almost all studies can be improved in particular ways." (Remand Hearing Transcript, 6/28/21, N.T. 32). This is why studies are peer-reviewed and subject to the efforts of other researchers to replicate their results. As all studies have flaws that can be improved upon by further research, Dr. McCleary's criticism of the science opposing the Commonwealth's position can be applied with equal fervor to the studies cited by the Commonwealth in support of its position, suggesting *de facto* that we can rely on none of the scholarship in this area of the law, a proposition that is inimical to both common sense and the obligations of the judiciary. We are not persuaded by Dr. McCleary's opinion that the pitfalls endemic to the human component of science render all of the research critical of SORNA unreliable and untrustworthy.

The Commonwealth's main opposition to the defense experts' opinions regarding sexual offenders' low rate of sexual recidivism is the "dark figure" of sexual crimes. The "dark figure" of sexual offending refers to the difference between the number of sexual offenses that occur but are never reported and those that are known to the authorities. (Remand Hearing Transcript, 6/28/21, N.T. 96). The Commonwealth argues that if the "dark figure" of sexual recidivism is considered, the amount of reoffending by sexual offenders is much higher than that which is observed and leaves the defense's conclusions regarding the low rate of recidivism among sexual offenders unacceptably downwardly skewed.

Both parties discussed a report by researchers Nicholas Scurich and Richard S. John entitled *The Dark Figure of Sexual Recidivism*, in which Scurich and John tried to develop a statistical model to determine the magnitude of the underreporting of sex offenses. In attempting to create this model, Scurich and John presumed that recidivism risk is a constant that does not change over time. In his expert report and testimony, Dr. Hanson demonstrated that this assumption is not supported by the data. (*See* 6/28/21, Ex D-2). Dr. Prescott echoed Dr. Hanson's assertion. (*See* Remand Hearing Transcript, 6/29/21, N.T. 216). Dr. Prescott testified that Scurich and John used a set of hypotheticals based on only four (4) studies and made assumptions with respect to the values of the variables used to measure the data from these four (4) studies, thereby allowing differing results based upon the assumptions employed. (Remand Hearing Transcript, 6/29/21, N.T. 203-06). As Dr. Hanson testified,

> There are no findings in that study. It is a statistical model based on certain assumptions. If you follow those assumptions, you get that result. I do not agree with the

assumptions. They [sic] are two fundamental areas of disagreement.

Their model assumes recidivism risk is a constant that does not change over time. This assumption is not supported by the data. Recidivism does change over time.

They also assume that most individuals who do reoffend do so rarely, once in a while. They also have no category for no recidivism. So they don't create a category of people who do not reoffend, so to speak.

So if you look at the undetected rates, think about three groups. So going forward—you can have three behaviors:

One, you cannot reoffend. That's one. You can just not reoffend and you wouldn't influence the recidivism statistics because you are not reoffending.

If you offend a lot, if you do it again and again and again, even if the detection rate for offense is low eventually you will get caught. You will just keep going. If you offend once in a while, like once every 5 years or once every 10 years or just once, you may or may not get caught. And it's that group that is moving that undetected figure.

So if that group of low rate offenders is large, most of them, then you will get numbers like the ones Scurich and John have. If that group is small, you will get numbers that are very close to the observed number.

We don't know how big that is. It could be middle, small, or big. And because we don't know that number we do know that the observed rates underestimate the true rates, but we don't know how much. We don't know by how much.

. . .

Scurich and John make an implication. They do not directly state it and they do not support in that their assumptions are correct, but they make the implication that the recidivism rates are very, very high. That would not be generally accepted in the professional community, scientific community.

(Remand Hearing Transcript, 6/28/21, N.T. 98-99).

There is a "dark figure" of unreported offenses applicable to all crimes. (Remand Hearing Transcript, 6/28/21, N.T. 96). The scope of that "dark figure" as it concerns sexual crimes is speculative. There is no hard data demonstrating the rate of unreported sexual offenses. There is no hard data demonstrating that the rate of unreported sexual offenses is significantly higher than that regarding unreported crimes in general. As Dr. Hanson testified, we simply do not know; the data is not there and therefore measurements cannot be made with any certainty. Finally, we do not invade the liberties of citizens based on crimes for which there is no proof. Similarly, we do not restrain people's liberties based on future conduct that has not yet occurred. SORNA, as written, does both of these things.

The bottom line, as the defense experts have demonstrated, is that 80% to 95% of all sex offenders will not reoffend. Consequently, we find that SORNA's irrebuttable presumption that all sex offenders pose a high risk of sexual recidivism is not universally true. Thus, SORNA violates the second prong of the test for determining the constitutional validity of an irrebuttable presumption.[4]

Moving onto the third prong of the test for determining the constitutional validity of an irrebuttable presumption, namely, whether reasonable alternatives exist for

[4] In a different context, in *Commonwealth, Department of Transportation, Bureau of Driver Licensing v. Clayton*, 684 A.2d 1060 (Pa. 1996), the Pennsylvania Supreme Court determined that a regulation that provided for the suspension of one's operating privileges for a period of one year based on a single epileptic episode without affording the licensee the opportunity to present medical evidence to prove his or her competency to drive violated due process because it utilized an unconstitutional irrebuttable presumption that one epileptic seizure rendered all persons unsafe to operate a motor vehicle for one year. The Court thus determined that applying the presumption to epileptics as a cohort was improper because the symptoms of epilepsy varied among people. *Id.* Similarly to *Clayton, supra*, one's risk of reoffending is not the same as another's because every person is an individual with individual characteristics and circumstances that affect their probability of committing another crime. Accordingly, the presumption of future dangerousness should not be applied to sex offenders as a cohort, because the individual members of the cohort do not share the same propensity for recidivism.

determining the presumed fact, it is beyond peradventure that the answer is in the affirmative. The defense Exhibits identify several risk assessment tools, including Dr. Hanson's Static-99 and Static-99R, that 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. (6/28/21, Ex. D-2, Declaration of R. Karl Hanson; 6/29/21, Ex. D-7, Affid. of Professor Elizabeth J. Letourneau, Ph.D.; 6/29/21, Ex. D-9, Expert Report of James J. Prescott, J.D., Ph.D.). 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.[5] (*Id.*). The experts 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 post a risk of sexual recidivism, where such resources are most needed and would be most effective in promoting the goals of public protection ad safety as well as rehabilitation.

We need not rely only upon Defendant's experts, however. In the case of *In re J.B.*, 107 A.3d 1 (Pa. 2014), the Pennsylvania Supreme 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 assessments for committed

[5] This aim may be reasonably inferred from SORNA's stated purpose of protection of the community from sexual victimization. *See also Taylor v. Pennsylvania State Police*, 132 A.3d 590 (Pa. Cmwlth. 2016)("[A] primary purpose of SORNA is to inform and warn law enforcement and the public of the potential danger of those registered as sexual offenders.").

adjudicated juveniles, juveniles being a population whose character traits have been recognized as changeable and not fully ingrained (logically making the prediction of risk, we suggest, more difficult than that which can be expected with respect to adults, whose character traits, it has been noted, are supposedly more fixed), who are nearing their twentieth birthdays, to ascertain whether continued involuntary civil commitment is necessary. *In re J.B.*, 107 A.3d at 19. Indeed, Act 29, promulgated after *J.B., supra*, provides for an individualized risk assessment for adult sexual offenders, albeit only twenty-five (25) years after the deprivation, a period frequently, perhaps closer to always, representing the most productive years of one's life; this "opportunity" for exemption thus is illusory and offers no real relief to an offender. Still, this provision demonstrates that the Legislature recognizes that individualized risk assessments are available and viable for determining which sexual offenders pose a high risk of sexual recidivism for SORNA purposes.[6] It is no great leap from the application of alternative risk assessment tools to the populations and under the circumstances described above to conclude that the application of individualized risk assessments via a pre-deprivation hearing for all sexual 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

[6] It is of no moment that all sexual offenders undergo a sexually violent predator assessment to determine whether they must register for life as SVP's even if their particular offense(s) does/do not call for lifetime registration; to the extent that these individualized assessments address the question of future dangerousness, unless an offender has a mental abnormality or personality disorder making him or her likely to engage in subsequent predatory sexual offenses, the question of future dangerousness has no impact on the average offender with respect to whether he or she must register and/or for how long. The bulk of the population of sexual offenders have no way to effectively contest pre-deprivation the assumption that they are high-risk dangerous recidivists and to have evidence to the contrary of this assumption impact the decision of whether and for how long they must register. The deprivation occurs and they have no opportunity for relief for at least twenty-five (25) years, based on an irrebuttable presumption that is not universally applicable. It is a due process violation.

and reducing sexual reoffending than the draconian public shaming/warning procedures, currently in place for all adult sexual offenders subject to Subchapter H regardless of risk.

SORNA's irrebuttable presumption that all sex 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 offenders who do pose a risk to society and to reduce the amount of sexual reoffending generally. Finally, SORNA encompasses offenders whose crime(s) may lack any sexual component to them whatsoever and who, *ipso facto*, may be unlikely to commit an actual sexual offense at any time in the future, again making the irrebuttable presumption not universally applicable. For all of these reasons, we conclude that SORNA's registration and notification provisions, which directly derive from the application of its unconstitutional irrebuttable presumption to all sex offenders and even those whose offenses cannot be considered "sexual", are constitutionally infirm.

The Commonwealth has argued that the fact that the amendments to SORNA include an opportunity for some offenders to petition to 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. As we discussed above, 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. 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 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 conclude 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 has also suggested 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 ignores the fact that individuals are presumed innocent until they are found guilty by proof beyond a reasonable doubt. In certain sexual offense trials, facts can be murky and most often there are no independent eyewitnesses. The trial itself gives a criminal defendant no effective opportunity to contest future dangerousness; that is not at issue in the guilt determination phase. There exists no pre-deprivation procedure, but instead an automatic public proclamation that this person is now and forever (or its functional equivalent) to be the worst of the worst, a high risk dangerous and incorrigible likely recidivist sexual predator who must be relegated to the margins of society. The accused may sincerely and strongly embrace the notion of his or her innocence throughout the trial, which may yet result in an acquittal. If he or she is acquitted,

the skewed label is not applied, and the attendant reflexive consequences of that label will not be experienced. It is only once a guilty verdict as to a past offense or offenses 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 or after the trial. Neither prosecutors nor judges are able to forestall its application based on the facts of the case, the individual characteristics of the defendant, or for any reason.

For all of the foregoing reasons, we conclude that SORNA's irrebuttable presumption of future dangerousness is constitutionally infirm. Accordingly, the registration and notification provisions attendant to the presumption are fatally flawed, as they are directly premised on this unconstitutional presumption.

The second and last subject we were directed by the Pennsylvania Supreme Court to examine is whether SORNA's registration and notification requirements constitute criminal punishment notwithstanding the Legislature's stated purpose of enacting a non-punitive civil regulatory scheme. In order to accomplish this, we must, per the High Court, evaluate five (5) of the seven (7) *Mendoza-Martinez*[7] factors governing the determination as to whether SORNA's registration and notification requirements constitute punishment. The five (5) factors we must evaluate are (a) whether the requirements involve an affirmative disability or restraint; (b) whether they have been historically regarded as punishment; (c) whether their operation will promote the traditional aims of punishment—retribution and deterrence; (d) whether an alternative purpose to which they may be

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

rationally connected is assignable for them; and (e) whether the requirements appear excessive in relation to the alternative purpose assigned.

We will proceed to analyze whether Act 29's registration and notification provisions involve an affirmative disability or restraint. We note that in *Commonwealth v. Lacombe*, 234 A.3d 602 (Pa. 2020), the Pennsylvania Supreme Court held that Subchapter of SORNA did not impose any direct affirmative disability or restraint but only minor and indirect restraints and disabilities because the Subchapter only required non-SVP offenders to report in person annually to maintain an updated photograph, rather than quarterly; offenders were no longer required to appear in person to report changes to information; and the majority of offenders were only subject to a ten (10) year reporting requirement. Based on these changes in Subchapter I, the *Lacombe, supra* Court determined that analysis of this first factor weighed in favor of a finding that the registration and notification provisions of SORNA, as they relate to Subchapter I, were non-punitive. Ultimately, the Pennsylvania Supreme Court upheld the constitutionality of SORNA with respect to Subchapter I. *Id.* However, the requirements of Subchapter I are somewhat less onerous than those in Subchapter H. *Commonwealth v. Elliott*, 249 A.3d 1190 (Pa. Super. 2021), *appeal denied*, 263 A.3d 241 (Pa. 2021). Consequently, an analysis of whether the registration and notification requirements of Subchapter H impose an affirmative disability or restraint has not been foreclosed by *Lacombe, supra*. Neither has the question of whether Subchapter H of SORNA is constitutional.

We further note that in *Commonwealth v. Butler*, 226 A.3d 972 (Pa. 2020), the Pennsylvania Supreme Court found that the registration, notification and counseling requirements applicable to sexually violent predators involved an affirmative disability or

restraint and thus weighed in favor of a finding that SORNA constituted criminal punishment, because sexually violent predators were required to report to the Pennsylvania State Police quarterly and to report changes in their registration information. The Pennsylvania Supreme Court though ultimately held that the reporting, notification and counseling requirements with respect to sexually violent predators did not constitute punishment. *Id.* Although Subchapter H is more burdensome when compared to Subchapter I, as far as Subchapter H concerns offenders who do not qualify as sexually violent predators it is somewhat less burdensome in terms of registration and notification provisions than it is with respect to sexually violent predators, as non-SVP offenders need only report in person annually after three (3) years of quarterly in-person reporting if they meet certain conditions while SVPs must report in person four times per year for the rest of their lives, the reduction in the burden lessens but does not remove the punitive effect of registration and notification upon non-SVP offenders. Most notably, SVPs are provided with an effective pre-deprivation procedure before they are declared sexually violent predators who must register for life regardless of the title of their offense.

Subchapter H of Act 29 retains the obligation of Tier III registrants to appear in person before the Pennsylvania State Police quarterly each year for verification purposes as well as to appear in person to update his or her registration information whenever any changes are made, such as to residence, employment, vehicle owned, appearance, etc. 42 Pa. C.S.A. §§ 9799.15(e), (g); 9799.16(c)(4). Under the Act 29 amendments, the registrant's number of in-person appearances may be reduced to once per year after three (3) years of quarterly reporting if certain conditions are met. 42 Pa.

C.S.A. § 9799.25(a.1). If the registrant qualifies for the reduced in-person reporting, the remaining three (3) quarterly reports per year may be made telephonically. 42 Pa. C.S.A. § 9799.25(a.1). However, whether in-person or otherwise, a Tier III registrant must report to the Pennsylvania State Police and surrender a significant amount of personal information for the registry, much of which will be published on the Internet, for the rest of his or her life. Depending on the offense committed, the minimum amount of time a defendant must be on the registry, determined by the title of the offense and not any of the offender's personal characteristics or circumstances, is fifteen (15) years, as opposed to the ten (10) year maximum for most of the offenders under Subchapter I.

A Tier III offender, such as the Defendant *sub judice*, must report to the Pennsylvania State Police four (4) times per year for the rest of his or her life, whether in-person or telephonically. He or she will have to continue to verify his or her personal information and life circumstances with the Pennsylvania State Police every three (3) months and will have to update his or her registration information, whether in-person or telephonically during that period every time a change in his or her life circumstances occur, including residence, employment, education, vehicle used, and appearance. The onus under Act 29 is reduced, but the reduction is largely cosmetic. Registrants are on *de facto* probation for the entirety of their lives, with the regulation, control and sundering of privacy that such status entails. They cannot change addresses 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. They cannot change their appearance in any way without telling the police. Nor can they take a new job without reporting it to the police.

This data, along with the rest of the personal aspects of their lives, is disseminated to the world via the Internet, accessible to anyone by plugging a geographic area into the registry; no knowledge of the Defendant's name is necessary. The burden on all registrants is still oppressive, notwithstanding that, after three (3) years of compliance, the in-person aspect of the reporting requirements for Tier II and III offenders may be somewhat reduced if certain conditions are met. Similarly, as we discussed earlier, the post-deprivation procedure that requires registrants to wait twenty-five (25) years before the opportunity to ever contest the fact of future dangerousness that may be availed by some is illusory and akin to no post-deprivation process at all. Tier I offenders, who are required to register for fifteen (15) years, will never be able to challenge their status as high-risk dangerous offenders. Likewise, Tier II offenders who must register for twenty-five (25) years, will find this provision useless. For Tier III offenders, they will have to bear the added stigma of the label high-risk dangerous offender during the most productive years of their lives with no opportunity to avoid the prejudice that comes with this distinction and no opportunity to address it before the deprivation of their constitutional right to reputation for a time period that could easily extend beyond the maximum sentence for a given offense.

The Act 29 amendments to SORNA do not meaningfully reduce the palpable onus to any offender under Subchapter H and thus we find that the first factor of the *Mendoza-Martinez* inquiry imposes affirmative disabilities and restraints on offenders that weigh in favor of a finding that SORNA's registration and notification requirements are punitive in effect, despite the Legislature's intent to create with SORNA a non-punitive regulatory scheme to protect the public and reduce the number of sex offenses committed.

Turning to the second factor we have been directed to examine, whether the registration and notification policies of SORNA have historically been regarded as punishment. In *Lacombe*, *supra* the Pennsylvania Supreme Court held that the registration and notification provisions of SORNA have historically been regarded as punishment, a finding that the Court recognized weighs in favor of a determination that SORNA's registration and notification provisions are punitive, notwithstanding the Legislature's intent to effectuate a civil regulatory scheme. We are bound by this determination.[8]

Moving on to the third factor we are required to examine, specifically, whether the operation of SORNA's registration and notification provisions will promote the traditional aims of punishment—retribution and deterrence, we find that this factor weighs in favor of the conclusion that SORNA is punitive. Unlike Subchapter I in *Lacombe, supra*, where the Pennsylvania Supreme Court determined that deterrence was not affected by the registration and notification provisions of SORNA because the crimes for which the offenders had to register already occurred, i.e., Subchapter I looks backward instead of forward, Subchapter H of SORNA does have a deterrent effect because the registration and notification provisions of SORNA are not incurred until a crime has been committed. Persons who are considering whether to commit a sexual offense may be deterred from doing so by the obligations to register and the knowledge that one's personal information will be broadcast to the world via the Internet, thereby working a significant detriment to the individual's reputation and privacy by the resultant additional stigma associated with

[8] In addition, we note that the provisions of SORNA are located in the Crimes Code and there are serious criminal penalties associated with one's failure to comply. These facts support the conclusion that the second factor weighs in favor of a determination that SORNA is punitive.

being placed on the sex offender registry. Thus, while *Lacombe, supra* concluded that this factor was not entitled to much weight in the punitive analysis because it did not promote deterrence, the *Lacombe, supra* Court's reasoning and decision in this respect is distinguishable and therefore not controlling as to Subchapter H.

Retribution is promoted by the imposition of additional and in some cases lifelong burdens of registration and notification, resulting in the additional stigma of being considered a high-risk, dangerous, incorrigible sex offender of whom citizens must always be wary. Marking someone as a dangerous recidivist has the retributive effects of built-in public shaming and marginalization. They are comparable to a long probationary tail, an extended period of supervision and government control over one's personal life which is a component of criminal punishment and, like a sentence, carries a degree of retribution. The difference, of course, is that probationary tails have end dates for compliant offenders.

Thus, while *Lacombe, supra* determined that this factor was not entitled to much weight with respect to Subchapter I because the registration and notification provisions of Subchapter I did not provide a deterrent effect, we find that the registration and notification provisions of Subchapter H provide both retributive and deterrent effects that warrant a different conclusion from that espoused in *Lacombe, supra.* Based on our analysis of this third factor, we find that SORNA's registration and notification procedures do promote the twin aims of criminal punishment, that is, retribution and deterrence, and therefore weigh, in equal importance with the other factors we are required to consider, in favor of the conclusion that SORNA is punitive.

The fourth factor we are required to examine is whether an alternative purpose to which registration and notification provisions may be rationally connected is assignable for them. The Pennsylvania Supreme Court has determined, going back to *Muniz*, *supra*, that SORNA's registration and notification requirements are rationally connected to a purpose independent of public shaming and deterrence, namely, the purpose of promoting public safety and health. *See Lacombe*, *supra* (regarding Subchapter I); *Butler*, *supra* (regarding registration, notification and counseling provisions applicable to SVP's); *Muniz*, *supra* (regarding Subchapter H). The High Court concluded that this factor weighs in favor of a determination that SORNA's registration and notification requirements were non-punitive.

While there is unquestionably a valid purpose to SORNA that is unrelated to its punitive effects, the defense provided evidence indicating that the relationship between SORNA's registration and notification requirements and the public protection aspect of SORNA are not rationally related. Dr. Letourneau discussed multiple studies demonstrating that the registration and notification procedures of SORNA do not appreciably reduce the rate of recidivism, hinder rehabilitation by impairing housing, employment, and pro-social relationship prospects, divert community resources from the offenders who could most benefit, i.e., those who have a high likelihood of reoffending, are very costly to maintain, and result in the bargaining down of registrable offenses to non-registrable ones, all of which jeopardize the public safety and welfare purpose espoused by the Legislature. (6/29/21, Ex. D-7, Affid. of Professor Elizabeth J. Letourneau, Ph.D.). Dr. Prescott reinforced Dr. Letourneau's conclusions with research demonstrating that the

community notification procedures of SORNA do not aid the protection of the public because their detrimental effects, as enhanced by the denotation that registrants are all incorrigible, highly dangerous sexual recidivists, impair offenders' abilities to successfully reintegrate into society. (6/29/21, Ex. D-9, Expert Report of James J. Prescott, J.D., Ph.D.). Dr. Hanson, whose Declaration was largely directed towards the question of the recidivism rate of sexual offenders, reinforced the conclusions of Drs. Letourneau and Prescott in his opinion that SORNA's failure to discriminate between the risk levels of sex offenders wastes resources that could more effectively be applied to reduce the recidivism risk of offenders who are actually at high risk of committing subsequent sex offenses, imposes unnecessary burdens on individuals who are already unlikely to reoffend, and thereby impedes the public safety portion of the purposes of SORNA as set forth in the legislative preamble. (6/28/21, Ex. D-2, Declaration of R. Karl Hanson). While the Commonwealth's expert, as we mentioned earlier, criticized as incompetent the procedures by which all studies yielding conclusions contrary to the Commonwealth's position were conducted, particularly objecting to the defense's alleged use of "null findings", or results that do not carry statistical significance, to support its conclusions that registration and notification policies do not improve recidivism rates or public safety, the defense experts credibly explained that null findings are valid bases for interpretation when a researcher is looking to determine whether a particular study group is similar or different from another, particularly when multiple studies on the same subject repeatedly show the same null finding. (*See* Remand Hearing Transcript, 6/28/21, N.T. 196 [Testimony of Dr. Hanson; "Null findings make sense if you have a clear expectation of one group is supposed to be different than another group."]). As Dr. Letourneau testified in response to the question of

whether she agreed with Dr. McCleary's statement that no conclusions may be drawn from null findings,

> A. I disagree. As I said earlier, I would never rely on a single study or even two or three studies to form a strong opinion. All studies have their limitations. When you get to the body of research that now fails to find any impact of registration on sexual recidivism, I find that many of my—all of my peers that I'm aware of find that convincing. This is a policy that simply fails to achieve its meaning.
>
> Q. He says that it is more realistic and reasonable to attribute the null finding to a flawed and weak design. Do you agree with that statement and why?
>
> A. I disagree with that statement. The point of science is to build a body of evidence around a specific question. And if you have something that is supposed to reduce sexual recidivism and most of the research fails to find that it reduces sexual recidivism, then that is a body of evidence. It is not nothing, which I think is what Dr. McCleary is arguing.
>
> Again, if it was a single study or two or even a small handful that found null results, we might be able to argue, well, maybe a different kind of schema would have a different effect. But we've seen multiple studies from multiple states with different policies come up with the same finding, which is that it's not related to sexual recidivism.
>
> Q. And if you decided to now look more into this particular research, meaning the effectiveness of SORN laws, would you expect to find different results?
>
> A. I mean, you expect to find—in any body of research you expect to find a smattering of different results, but as the number of studies accrue and the number of publications accrue, you know, the best case scenario is you start to see a coherent message. And the message here is that this is a policy that does not result in reducing sexual recidivism.

(Remand Hearing Transcript, 6/29/21, N.T. 66-67). Dr. Prescott reinforced Drs. Hanson and Letourneau's opinions regarding the significance of null findings when asked to respond to Dr. McCleary's criticism on direct examination.

> Q. I wanted to ask you about his null finding critique. On page 37 he says that although the defendant's experts habitually interpret null findings as evidence—I'm sorry. I'll go slower, your Honor.
>
> Although the defendant's experts habitually interpret null findings as evidence that SORN laws do not work, their interpretations violate widely accepted methodological rules. What do you take that to mean?
>
> A. I mean, traditional statistical inference or hypothesis testing is trying to essentially determine whether an estimate of an effect or a relationship differs from zero. And sometimes the relationship is so close to zero that it's difficult to know whether or not it's zero or maybe just very close to zero. And in any particular study his point is well taken.
>
> And you can often find studies out there where people say it's not that I'm showing you evidence of no effect. It's that there is no evidence of any effect. If we're given the setup of this study I was able to test this and I cannot say whether or not there is an effect that is different from zero or not. That said, it is not the case that a null finding teaches us nothing.
>
> Q. What can it teach us?
>
> A. Well, you know, realize that when you have a null finding what you have is an estimate that's essentially pretty close to zero. And it's so close to zero that you can't rule out that it is zero. So in economics we oftentimes call this a tightly bound zero. We can't say it's zero but we can say statistically that it can't be far away from zero. And once you have multiple studies that consistently find that you start to have more and more statistical power, more and more observations, more and more attempts to see whether it's different from zero and never being able to find that it is not zero. Slowly with the accretion of evidence you can feel more and more confidant.

(Remand Hearing Transcript, 6/29/21, N.T. 194-96).

We find these testimonies concerning the utility of null findings credible and logical. If numerous studies on the same subject yield the conclusion that the comparison of the subject groups shows no difference between them, then it may reasonably be inferred that there is no measurable or statistically significant difference between them. As the defense experts testified, the confidence level increases with the accrual of more studies showing the same result.

Accordingly, based on the evidence of scientific and academic consensus presented, we find that SORN laws do not have the effect on recidivism and public safety anticipated by the Legislature, and that they are not rationally related to the purposes for which they were enacted. Thus the fourth factor we have been directed to analyze weighs in favor of a determination that SORNA is punitive.

The fifth and final factor this Court is required to consider is whether the requirements appear excessive in relation to the alternative purpose assigned. Our analysis of this factor yields the same conclusion reached with respect to the preceding four factors: SORNA's registration and notification requirements are excessive in relation to its non-punitive purpose of protecting public safety. SORNA's registration and notification policies are based on the title of the offense, not the personal characteristics and circumstances of the offender. They do not take into consideration the actual risk of any particular defendant to reoffend in the future. The title of the offense bears little relationship to the question of whether a person subject to registration will recidivate. (*See* 6/28/21, Ex. D-2, Declaration of R. Karl Hanson, at 12-13 ["Although there are clear differences in the moral seriousness of sexual crimes, the seriousness of the offense is

largely unrelated to the likelihood of recidivism."]). As we have discussed above, SORNA does not function as intended and is not effective at promoting public safety. It diverts resources away from offenders who could most benefit from them. Finally, SORNA catches in its net offenders who have committed crimes with no sexual component to them. It is unconstitutionally overbroad and excessive. For all of these reasons, we find that the fifth factor, whether SORNA is excessive in relation to its alternative, non-punitive purpose, weighs in favor of a finding in the affirmative and the conclusion that SORNA's registration and notification provisions are punitive in effect, overriding the Legislature's attempted creation of a civil regulatory scheme.

As all of the factors we have been asked to review weigh in favor of the conclusion that SORNA, as amended by Act 29, remains punitive, we find that SORNA is unconstitutional. Because SORNA constitutes punishment, it violates *Alleyne*[9] and *Apprendi;*[10] results in a criminal sentence in excess of the statutory maximums; offends Federal and State proscriptions against cruel and unusual punishment; and breaches the separation of powers doctrine, as discussed in Judge Sarcione's August 30, 2018 Opinion *Sur* Rule 1925(a).

Because we find that SORNA is unconstitutional as a legislative scheme in both its use of a constitutionally infirm irrebuttable presumption and the punitive effects of its registration and notification provisions, as well as in its application to this Defendant, who has a strong support structure, is educated, is working, is an excellent candidate for

[9] *Alleyne v. United States*, 133 S.Ct. 2151 (U.S. Va. 2013).
[10] *Apprendi v. New Jersey*, 120 S.Ct. 2348 (U.S. N.J. 2000).

rehabilitation, and is highly unlikely to reoffend, as we also discussed in Judge Sarcione's August 30, 2018 Opinion *Sur* Rule 1925(a), to the extent that it needs to be reiterated here, Defendant's Supplemental Post Sentence Moton Filed Nunc Pro Tunc, filed February 27, 2018, is, and/or remains, granted.[11]

[11] The Adam Walsh Child Protection and Safety Act provides that each State may evaluate the constitutionality of its State enactments and if it finds a provision unconstitutional, the provision can be stricken without the loss of Federal funds. *In re J.B.*, 107 A.3d 1 (Pa. 2014). The Act imposes general registry requirements but does not mandate enactment of any particular statutory scheme by a State. *Bill v. Noonan*, 2019 WL 2400676 (Pa. Cmwlth. 2019).

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

Tracy S. Piatkowski, Esquire, Deputy Attorney General, Leslie S. Pike, Esquire, Assistant District Attorney, and Erin P. O'Brien, Esquire, Assistant District Attorney, for the Commonwealth
Aaron Marcus, Chief, Appeals Division, Defender Association of Philadelphia, Marni Snyder, Esquire, and Emily Mirsky, Esquire, Assistant Public Defender, Delaware County Public Defender's Office, for the Defendant

ORDER

AND NOW, this 22nd day of August 2022, in response to the June 16, 2020 directive of the Pennsylvania Supreme Court, after reviewing the record established June 28, 29, and 30 of 2021, and post-hearing submissions of the Commonwealth and the Defendant, it is hereby **ORDERED AND DECREED** that Defendant's Supplemental Post Sentence Motion Filed Nunc Pro Tunc, filed February 27, 2018, is and/or remains **GRANTED** on the grounds that SORNA is unconstitutional both facially and as applied to this Defendant on the bases that it employs an irrebuttable presumption that is not universally applicable and because its punitive nature offends *Alleyne* and *Apprendi*; results in a criminal sentence in excess of the statutory maximums; violates Federal and State proscriptions against cruel and unusual punishment; and breaches the separation of powers doctrine.

BY THE COURT:

Allison Bell Royer, J.