IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	**:**	**No. CP-41-CR-0001379-2017**
Appellant	**:**	
vs.	**:**	
	:	
ANDREW ULTSH,	**:**	
Appellee	**:**	**1925(a) Opinion**

OPINION IN SUPPORT OF ORDER IN COMPLIANCE WITH RULE 1925(a) OF THE RULES OF APPELLATE PROCEDURE

This opinion is written in support of this court's order entered on December 13, 2018, which granted the motion to vacate the order for a Sexually Violent Predator (SVP) assessment filed by Appellee Andrew Ultsh and denied the Commonwealth's request to hold an SVP determination hearing in this case.

On April 6, 2018, Appellee pleaded guilty to five counts of Sexual Abuse of Children (Possession of Child Pornography),[1] arising out of conduct that occurred between December 2016 and June 2017. Due to the nature of the images depicted, two counts were graded as felonies of the second degree, and the remaining counts were graded as felonies of the third degree. Appellee was directed to undergo an assessment by the Sexual Offender Assessment Board (SOAB) to determine whether he met the criteria to be designated as an SVP, and sentencing was scheduled for July 24, 2018.

On May 8, 2018, Appellee filed a motion to vacate the order for an SVP assessment.

On June 25, 2018, the Commonwealth filed a praecipe to schedule a hearing to determine Appellee's SVP status. The court scheduled an argument for July 13, 2018.

Following a brief conference with counsel, the court issued an order giving the Commonwealth sixty days within which to file a brief in support of its position and Appellee had 30 days thereafter within which to file a responsive brief. In his motion to vacate, Appellee asserted that in light of the Superior Court's decision in *Commonwealth v. Butler*, 173 A.2d 1212 (Pa. Super. 2017), the court could not hold an SVP hearing. The Commonwealth contended that, in light of the recent enactment of Act 10 of 2018, which made changes to Pennsylvania's Sexual Offender Registration and Notification Act (SORNA), the court could hold an SVP hearing despite the Superior Court's decision in *Butler*. Through Act 29 of 2018, which became effective June 12, 2018, the legislature reenacted Act 10 with minor changes.

In light of the court's decisions in other cases, the court found that it was bound by the *Butler* decision and still could not hold an SVP hearing despite the enactment of Act 10. Therefore, on December 13, 2018, the court granted Appellee's motion, denied the Commonwealth's request for an SVP hearing, and scheduled Appellee's sentencing hearing for January 10, 2019.

Appellee failed to appear for sentencing and a bench warrant was issued for his arrest. Appellee's sentencing hearing was eventually held on March 22, 2019. The court sentenced Appellee to three to ten years' incarceration in a state correctional institution on Count 1, sexual abuse of children-possession of child pornography, a felony of the second degree. Pursuant to the parties' plea agreement, the court imposed concurrent sentences on the remaining counts.

On April 18, 2019, the Commonwealth filed a notice of appeal to the

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[1] 18 Pa. C.S.A. §6312(d).

Pennsylvania Supreme Court.

The sole issue on appeal is whether the court erred in declaring that an SVP hearing and determination are unconstitutional under *Butler* despite the amendments to SORNA.

In support of its request for an SVP hearing, the Commonwealth argued that the changes to SORNA as a result of the passage of Act 10 and Act 29 rendered SORNA non-punitive. The Commonwealth also argued that the type of fact-finding required for an SVP designation was not rooted in the historic jury function. Finally, the Commonwealth asserted that the court should not conduct an unrestrained facial analysis as employed in *Muniz*,[2] but rather a narrowly tailored analysis confined to SORNA as applied to Appellee.

The court rejected the Commonwealth's arguments and found that it was bound to follow both *Muniz* and *Butler*.

A sea change in the law regarding sexual offender registration came on July 19, 2017 when the Pennsylvania Supreme Court decided *Muniz* and held that SORNA constituted punishment and thus could not be applied retroactively.

In light of the decision in *Muniz,* the Superior Court held in *Butler* that the provisions for designating an offender an SVP as set forth in SORNA were unconstitutional. Specifically, the Superior Court held that 42 Pa. C.S.A. § 9799.24 (e) (3) violated both the federal and state constitutions. In *Butler,* defendant's designation as an SVP exposed him to an increased registration requirement from 15 years to life. 42 Pa. C.S.A. § 9799.15 (a) (6). In

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[2]*Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017).

evaluating the constitutional propriety of such a designation, the Superior Court noted that *Muniz* concluded that the registration requirements of SORNA constituted punishment for purposes of the federal and state constitutions. Because the registration requirements constituted punishment, the Superior Court concluded that the facts leading to those requirements needed to be found beyond a reasonable doubt by the factfinder and not by a judge utilizing a clear and convincing burden of proof standard at sentencing. Thus, section 9799.24 (e) (3) was declared unconstitutional and trial courts were directed to no longer hold SVP hearings or designate convicted defendants as SVP's "until our General Assembly enacted a constitutional designation mechanism."

With the passage of Act 10 of 2018 on February 21, 2018 and Act 29 of 2018 on June 12, 2018 ("SORNA II"), the legislature hoped to address the *Muniz* and *Butler* decisions. Rather than alter the SVP designation mechanism, however, the legislature amended other provisions with the goal that SORNA II and its requirements would no longer be considered punitive.

This court found that the legislature did not achieve its intended result.

Through Act 10, the legislature established a "two-track registration program." The legislature slightly amended Chapter 97 Subchapter H of Title 42, and enacted an entirely new Subchapter I. 42 Pa. C.S.A. § 9799.51 et seq. Subchapter I was created to exclusively regulate individuals whose offenses occurred on or after April 22, 1996 and before December 20, 2012. 42 Pa. C.S. §§9799.52. Subchapter H is substantially similar to SORNA, and Subchapter I to a large extent models former Megan's Law II.

In this case, the court looked to Subchapter H, 42 Pa. C.S.A. §§ 9799.10 through 9799.42, in that Appellee committed his offenses between December of 2016 and

June of 2017.

Returning to *Muniz,* in determining whether SORNA was punitive, the Court applied the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) to the facts of the case. *Mendoza-Martinez* has been considered for decades as the established rubric for determining whether a law is punitive or civil in nature.

In applying the well-established rubric, the Court in *Muniz* first determined that the General Assembly's intent in enacting SORNA was twofold. It was intended to comply with federal law and it was intended "not to punish, but to promote public safety through a civil regulatory scheme." Determining that the intent of the General Assembly was to enact a civil scheme, the *Muniz* Court then conducted an analysis of the *Mendoza-Martinez* factors to determine whether SORNA was sufficiently punitive in effect to overcome the General Assembly's stated non-punitive purpose.

First, the Court found that the in-person reporting requirements, for both verification and changes to an offender's registration, to be a direct restraint upon the offender. The Court held that this factor weighed in favor of finding SORNA's effect to be punitive.

Second, in addressing whether the sanction has been historically regarded as punishment, the Court commented that the public internet website utilized by the Pennsylvania State Police broadcasts worldwide, for an extended period of time, the personal identification information of individuals who have served their sentences. The Court noted that this exposes registrants to ostracism and harassment without any mechanism to prove rehabilitation-even through the clearest proof. *Muniz,* citing *Commonwealth v. Perez,* 97 A.3d 750, 765-66 (Donohue, J., concurring).

The Court concluded that this factor weighed in favor of finding SORNA's effect to be punitive because the publication provisions, when viewed in the context of the current Internet-based world, were comparable to shaming punishments and the in-person requirements were more akin to probation.

The Court found the factor of whether the statute comes into play only on a finding of scienter to be of little significance in their inquiry.

The next factor addressed by the Court was whether the operation of the statute promotes the traditional aims of punishment. The Court noted that retribution, in its simplest terms, affixes culpability for prior conduct and that SORNA is applicable only upon a conviction for a predicate offense. The Court noted that the information SORNA allows to be released over the Internet goes beyond otherwise publicly accessible conviction data and included: name, year of birth, residence address, school address, work address, photograph, physical description, vehicle license plate number and description. The Court noted that SORNA increased the length of registration, contained mandatory in-person reporting requirements and allowed for more private information to be displayed online. The Court concluded that SORNA is much more retributive than the previous enacted Megan's Law and that this retributive effect, along with the fact that SORNA's provisions act as a deterrent for a number of predicate offenses, all weighed in favor of finding SORNA punitive.

The next factor concerned whether the behavior to which the statute applied was already a crime. The Court concluded that this factor carried little weight in the balance.

The next factor was whether there is an alternative purpose to which the statute may be rationally connected. The Court concluded that there was a purpose other than punishment to which the statute might be rationally connected and that this factor weighed in

favor of finding SORNA to be non-punitive.

The last factor addressed by the Court was whether the statute was excessive in relation to the alternative purpose assigned. In examining SORNA's entire statutory scheme and recognizing that SORNA categorized a broad range of individuals as sex offenders, including those convicted of offenses that do not specifically relate to a sexual act, the Court concluded SORNA's requirements were excessive and over-inclusive in relation to the statute's alternative assigned purpose of protecting the public from sexual offenders.

In balancing all of the factors, the Court noted that four of the five factors to which it gave weight, weighed in favor of finding SORNA to be punitive. The Court concluded that SORNA involved affirmative disabilities or restraints, its sanctions had been historically regarded as punishment, its operation promoted the traditional aims of punishment including deterrence and retribution, and its registration requirements were excessive in relation to its stated non-punitive purposes.

In addressing Pennsylvania's Constitution, the Court added that SORNA's registration and online publication provisions place a unique burden on the right to reputation, which is particularly protected in Pennsylvania. Further, the Court concluded that, in part due to reputation concerns, the state and offender have an interest in the finality of sentencing that is undermined by the enactment of ever more severe registration laws. Concluding that Pennsylvania's ex post facto clause provided even greater protections than its federal counterpart, the Court concluded that SORNA's registration provisions were also unconstitutional under the state clause.

In this case, the Commonwealth argued that the changes enacted in connection with Act 10 and Act 29 were such that SORNA II cannot be considered punitive.

In support of its argument, the Commonwealth referenced the newly established process by which certain individuals may petition for removal from the registry and the provision that some periodic verification reporting requirements may be done remotely as opposed to in person. The Commonwealth also argued that SORNA II was "virtually identical" to Megan's Law II; therefore, the court should find it non-punitive based on *Commonwealth v. Williams* ("*Williams II")*, 832 A.2d 962 (Pa. 2003).

With respect to the Commonwealth's first argument, the changes add a provision that provides a mechanism for some individuals required to register under SORNA II to petition a criminal court for removal or exemption from all or part of the registry after a period of 25 years. 42 Pa. C.S.A. § 9799.15 (a. 2). This allowance applies to Tier III and other lifetime registrants, including sexually violent predators. This court concludes that the process for obtaining an exemption is largely fanciful. The relief that these changes purport to afford are illusory at best.

Tier I and Tier II offenders can never obtain an exemption. Tier III (lifetime) registrants, SVPs, sexually violent delinquent children, and certain individuals who are subject to registration as a result of a conviction from another jurisdiction, may file a petition seeking removal after 25 years of registration. The 25-year period, however, is tolled during the time the petitioner is incarcerated. 42 Pa. C.S.A. §9799.15(c). It also appears that the petitioner must restart the 25-year waiting period if the petitioner is convicted of any offense punishable by more than one year in jail, not just sexually violent offenses. The clock does not begin on the new 25-year period until after the petitioner's release from custody on the new offense. 42 Pa. C.S.A. §9799.15(a.2)(1). Lastly, the offender must be assessed by a member of the Sexual Offender Assessment Board (hereinafter "the Board")

and prove to a court by clear and convincing evidence that he or she is not likely to pose a threat to the safety of any other person. 42 Pa. C.S.A. § 9799.15(a.2)(2), (5). The Board assessor is essentially the Commonwealth's expert witness. The Board sets the standards for the evaluations and the evaluators. 42 Pa.C.S.A. §9799.15(a.2)(2). The Attorney General conducts annual performance audits of the Board. 42 Pa. C.S.A. §9799.38(a).

The court cannot foresee one being designated as an SVP and meeting the established criteria, and 25 years later proving the negative. The sexual offender's 25-year assessment would essentially need to contain conclusions diametrically opposed to or different than the previous assessment.

Unlike the initial procedure for designating an individual as an SVP, there is no express statutory authority giving the petitioner the right to call expert witnesses in support of the petition for exemption. 42 Pa. C.S.A. §9799.15(a.2)(4)("The petitioner and the district attorney shall be given notice of the hearing and an opportunity to be heard, the right to call witnesses and the right to cross-examine witnesses."); Compare 42 Pa. C.S.A. §9799.24(e)(2)("The individual and district attorney shall be given notice of the hearing and an opportunity to be heard, the right to call witnesses, the right to call expert witnesses and the right to cross-examine witnesses.")

In fact, the time limits for holding a hearing are such that there will be no time for anyone to gather information to challenge the Board's assessment, let alone obtain an expert witness to do so. The court must order an assessment upon receipt of the petition and send the order to the Board within 10 days of the entry. 42 Pa. C.S.A. §9799.15(a.2)(2),(3). The Board has 90 days from receipt of the order to conduct the assessment and submit a written report to the court, the district attorney and the attorney for the petitioner. Within

120 days of the filing of the petition, however, the court must hold a hearing to determine whether to exempt the petitioner. As a practical matter then, the hearing must be held within 20 days of the issuance of the Board's assessment.

Finally, despite registering and leading a law-abiding life for 25 years, the petitioner is still presumed to be an SVP and must prove otherwise by clear and convincing evidence. The court notes that placing the burden on the defendant to show that he or she was not an SVP by clear and convincing evidence was one of the reasons that Megan's Law I was found unconstitutional. *Commonwealth v. (Donald Francis) Williams (Williams I)*, 733 A.2d 593, 603 (Pa. 1999).

Without an SVP designation, Appellee cannot avail himself of these procedures as he is a Tier I registrant and the duration of his registration obligation does not exceed 25 years.

As to the law establishing periodic verification reporting requirements to be done remotely as opposed to in person, it allows the Pennsylvania State Police to set up a "telephonic verification system" which would permit Tier II and Tier III registrants, after three years of in-person compliance, to call the Pennsylvania State Police to complete all but one of their semiannual or quarterly verifications, provided the registrant has not been convicted of an offense punishable by imprisonment of more than one year during the three-year period of in-person compliance. 42 Pa. C.S.A. § 9799.25 (a.1) – (a.2). This allowance is not available to Tier I offenders or SVPs. This allowance is also not available for updates or changes to required information nor is it available for individuals experiencing homelessness.

This court concluded that the changes were not sufficient to overcome the reasoning and conclusions of *Muniz* that SORNA is punitive. The changes give a misleading

impression and do not overcome the concerns set forth by the Justices in *Muniz.* The concerns of the Justices regarding one's reputation have been essentially ignored by the legislature.

The legislature did not address any of the Superior Court's concerns in *Butler*.

Appellee's convictions for Sexual Abuse of Children (Possession of Child Pornography) should only require him to register annually for 15 years as a Tier I sexual offender. 42 Pa. C.S.A. §9799.14(b)(9). If, however, Appellee were designated as an SVP, he would be required to register quarterly for life and have additional registration requirements. Despite the Superior Court in *Butler* declaring that the SVP designation process was unconstitutional and directing the lower courts to no longer hold SVP hearings or designate defendants as an SVP "until our General Assembly enacts a constitutional designation mechanism," the legislature amended SORNA without changing the SVP designation mechanism.

Under the present version of Act 29, the designation mechanism remains set forth under 42 Pa. C.S.A. § 9795.24. It is identical to the designation mechanism which the Pennsylvania Superior Court declared unconstitutional in *Butler.* The statute still directs the court to conduct a hearing and designate an offender as an SVP if the Commonwealth has proven such by clear and convincing evidence. 42 Pa. C.S.A. § 9795.24 (e) (3). It still does not require proof beyond a reasonable doubt nor provide the right to a determination by a jury.

The Commonwealth argued that the designation mechanism set forth in Act 10 and Act 29 is outside the prohibition set forth in *Butler* for several reasons.

First, the Commonwealth argued that the legislative findings as to the policy

of these amendments were specifically meant “to address” the decisions in *Butler*, as well as in *Commonwealth v. Muniz,* 164 A.3d 1889 (Pa. 2017). 42 Pa. C.S.A. § 9799.51 (b) (4). *Muniz* held that the sex offender requirements under SORNA constituted punishment for *ex post facto* purposes. The Commonwealth submitted that the express legislative purpose of these amendments enjoy a strong presumption of constitutionality that should not justify the court “usurping the legislative power.”

This argument, however, misses the point. This court is bound by the pronouncement in *Butler* which is crystal clear. A mechanism to determine one’s SVP status which permits the court to do so on a clear and convincing standard is unconstitutional and the court may not hold a hearing to determine such. While *Butler* was based on a different statute, it is a distinction without a difference. Neither Act 10 nor Act 29 changed the SVP designation mechanism in any respect. The underlying issue in *Muniz* was whether the registration requirements constituted punishment. Because the *Muniz* court concluded that the registration requirements constituted punishment and an SVP designation increases that punishment, the mechanism to declare one an SVP was deemed unconstitutional. *Butler*, 173 A.3d at 1217-1218. It is only logical to conclude that despite the “changes” enacted by the legislature, if those changes do not alter the punitive nature of the statue, the SVP mechanism remains improper, ineffective and unconstitutional. The mandated charge to the lower courts, including this court, is to no longer hold hearings until a constitutional designation mechanism is enacted by the General Asssembly. *Id*. at 1218. According to *Butler*, a constitutional designation mechanism requires proof beyond a reasonable doubt and the choice of a jury as the fact-finder. Specifically, the *Butler* Court stated:

since our Supreme Court has held that SORNA registration

> requirements are punitive or a criminal penalty to which individuals are exposed, then under *Apprendi* and *Alleyne*, a factual finding, such as whether a defendant has a "mental abnormality or personality disorder that makes [him or her] likely to engage in predatory sexually violent offenses[,]" 42 Pa.C.S.A. § 9799.12, that increases the length of registration must be found beyond a reasonable doubt by the chosen fact-finder. Section 9799.24(e)(3) identifies the trial court as the finder of fact in all instances and specifies clear and convincing evidence as the burden of proof required to designate a convicted defendant as an SVP. Such a statutory scheme in the criminal context cannot withstand constitutional scrutiny.

Id. at 1217-1218.

While this court appreciates the separation of powers, it would not and could not ignore the directive of the higher courts simply because the legislature announced that it has "addressed" such.

The Commonwealth next argued that the fact-finding required for an SVP designation was not rooted in the historic jury function. In support of this, the Commonwealth relied on the United States Supreme Court decision in *Oregon v. Ice*, 555 U.S. 160 (2009) and the California Supreme Court decision in *People v. Mosely*, 344 P.3d 788 (Ca. 2015). The Commonwealth argued that the *Ice* decision was binding and supported the conclusion that, even if the registration requirements for an SVP constitute punishment, the court may nevertheless engage in judicial fact-finding. This argument is contrary to the holdings in *Muniz* and *Butler*.

The Pennsylvania Supreme Court in *Muniz* held that the registration requirements constituted punishment and the provisions in the statute at issue were unconstitutional under the *ex post facto* clauses of both the state and federal constitutions. *Butler* found that because an SVP designation increases an individual's registration requirements and the registration requirements constituted punishment, an SVP designation

had to be proven beyond a reasonable doubt to the factfinder, judge or jury, chosen by the parties.

While the *Ice* decision is binding regarding the federal right to a jury trial, *Ice* is not binding with respect to state constitutional issues. Furthermore, the decision in *Ice* related to the imposition of consecutive sentences, and not registration requirements or SVP designations. Therefore, the court found it was also factually distinguishable.

The California court decision in *People v. Mosely*, which relied on *Ice* to determine that judicial fact-finding was acceptable for determining if an offender had to register in that state, clearly is not binding on Pennsylvania courts. Moreover, *Mosely* is also distinguishable. In addition to finding that sex offender registration and residency requirements were not sentencing matters in which, historically, the jury played any traditional role at common law, the California Supreme Court in *Mosely* found that the registration provisions did not constitute punishment, and even if the residency requirement[3] constituted punishment, it was severable from the other registration requirements.

Finally, neither *Ice* nor *Mosely* addressed the burden of proof. Those cases only addressed the right to a jury trial. *Butler*, on the other hand, is a binding Pennsylvania case which held that the SVP designation mechanism was unconstitutional, because it did not require proof beyond a reasonable doubt. 173 A.3d 1218 ("In sum, we are constrained to hold that section 9799.24(e)(3) of SORNA violates the federal and state constitutions because it increases the criminal penalty to which a defendant is exposed without the chosen fact-finder making the necessary factual findings beyond a reasonable doubt.").

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[3] The California statute prohibits any person for whom registration is required from residing within 2,000 feet of any public or private school, or park where children regularly gather.

The Commonwealth further argued that the court's analysis should be narrowly construed to the statute and those subject to its provisions "as opposed to the sort of unrestrained facial analysis employed in *Muniz.*" This analysis not only relies on the dissent in *Muniz* but ignores the clear fact that this court must adhere to the decisions of its higher courts.

For centuries, the doctrine of *stare decisis* has been a bedrock of legal jurisprudence. It is a Latin phrase that literally means "to stand on the decisions." This is a doctrine of following the rules rendered in previous judicial decisions. As the United States Supreme Court clearly noted in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992),

> The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. With Cardozo, we recognize that no judicial system can do society's work if it eyed each issue afresh in every case that raised it. See B. Cardozo, The Nature of the Judicial Process, 149 (1921). Indeed, the very concept of the rule of law underlying our own constitution requires such continuity over time that a respect for precedent is, by definition, indispensable. See Powell, Stare Decisis and Judicial Restraint, 1991 Journal of Supreme Court History 13, 16. At the other extreme, a different necessity would make itself felt if a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed.

Id. at 854.

The Commonwealth also argued that Act 29 Subchapter H is "virtually identical" to Megan's Law II; therefore, the court should find it is non-punitive based on *Commonwealth v. Williams* ("*Williams II")*, 832 A.2d 962 (Pa. 2003). The court could not agree with the Commonwealth's argument. While the provisions regarding SVP assessments may be "virtually identical," the provisions regarding the information an offender is required to register and the availability of that information via the Internet are vastly different.

Under Megan's Law II, an offender initially only had to register his or her current or intended residences within 10 days. 42 Pa. C.S.A. §9795.2(A)(1)(Purdon 2000).[4] Megan's Law II was then amended to include the registration of one's employment and enrollment as a student, in addition to one's residence. 42 Pa. C.S.A. §9795.2(A)(1) (Purdon 2002).[5]

In comparison, SORNA II requires an individual to register nearly every aspect of their life. An individual must provide the following information:

> (1) Primary or given name, including an alias used by the individual, nickname, pseudonym, ethnic or tribal name, regardless of the context used and any designations or monikers used for self-identification in Internet communications or postings.
>
> (2) Designation used by the individual for purposes of routing or self-identification in Internet communications or postings.
>
> (3) Telephone number, including cell phone number, and any other designation used by the individual for purposes of routing or self-identification in telephonic communications.
>
> (4) Valid Social Security number issued to the individual by the Federal Government and purported Social Security number.
>
> (5) Address of each residence or intended residence, whether or not the residence or intended residence is located within this Commonwealth and the location at which the individual receives mail, including a post office box. If the individual fails to maintain a residence and is therefore a transient, the individual shall provide information for the registry as set forth in paragraph (6).
>
> (6) If the individual is a transient, the individual shall provide information about the transient's temporary habitat or other temporary place of abode or dwelling, including, but not limited to, a homeless shelter or park. In addition, the transient shall provide a list of places the transient eats, frequents and engages in leisure activities and any planned destinations, including those outside this Commonwealth. If the transient changes or adds to the places listed under this paragraph during a monthly period, the transient shall list these when registering as a transient during the next monthly period. In addition, the transient shall provide the place the transient receives mail, including a post office box. If the transient has been designated as a sexually violent predator, the transient shall state

[4] Act 18 of 2000.
[5] Act 127 of 2002.

> whether he is in compliance with section 9799.36 (relating to counseling of sexually violent predators). The duty to provide the information set forth in this paragraph shall apply until the transient establishes a residence. In the event a transient establishes a residence, the requirements of section 9799.15(e) (relating to period of registration) shall apply.
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> (7) Temporary lodging. In order to fulfill the requirements of this paragraph, the individual must provide the specific length of time and the dates during which the individual will be temporarily lodged.
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> (8) A passport and documents establishing immigration status, which shall be copied in a digitized format for inclusion in the registry.
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> (9) Name and address where the individual is employed or will be employed. In order to fulfill the requirements of this paragraph, if the individual is not employed in a fixed workplace, the individual shall provide information regarding general travel routes and general areas where the individual works.
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> (10) Information relating to occupational and professional licensing, including type of license held and the license number.
>
> (11) Name and address where the individual is a student or will be a student.
>
> (12) Information relating to motor vehicles owned or operated by the individual, including watercraft and aircraft. In order to fulfill the requirements of this paragraph, the individual shall provide a description of each motor vehicle, watercraft or aircraft. The individual shall provide a license plate number, registration number or other identification number and the address of the place where a vehicle is stored. In addition, the individual shall provide the individual's license to operate a motor vehicle or other identification card issued by the Commonwealth, another jurisdiction or a foreign country so that the Pennsylvania State Police can fulfill its responsibilities under subsection (c)(7).
>
> (13) Actual date of birth and purported date of birth.

42 Pa. C.S.A. §9799.16(b).

Furthermore, the individual must appear in-person at an approved registration site within three business days whenever there is any addition, commencement, change or termination related to the individual’s name; residence; employment; enrollment as a student; telephone number; motor vehicle; temporary lodging; email address, instant message address or any other designations used in Internet communications and postings; and occupational and professional licensing. 42 Pa. C.S.A. §9799.15(g).

Megan's Law II contained no provision with respect to transients or international travel. Under SORNA II, transients must appear in-person monthly until the transient establishes a residence, and an individual must appear in-person no less than 21 days in advance of traveling outside of the United States. 42 Pa. C.S.A. 9799.15(h), (i).

Under Megan's Law II, no information was available worldwide via the Internet. Instead, the information was only available to the general public upon request. 42 Pa. C.S.A. §9798(d). In fact, in finding Megan's Law II non-punitive, the Court in *Williams II* specifically held that the provision for dissemination of the requested information by electronic means should not be construed as a public display of the information over the Internet. The Court stated:

> The provision allowing for dissemination of the requested information by "electronic means," 42 Pa.C.S. § 9798(d), has raised similar concerns. However, this provision need not be read to authorize public display of the information, as on the Internet. In context, it merely indicates that, once a specific request is lodged, compliance can be accomplished electronically. It is thus unlike New Jersey's statute which specifically authorizes dissemination of sex offender information to the public over the Internet. See N.J. Stat. Ann. §§ 2C:7–12–2C:7–14. Accordingly, we construe the section at issue as only authorizing electronic transmission (for example, by email or fax machine) to an individual who lodges a specific request for the data, and not electronic display of the data to the general public.

Williams II, 832 A.2d at 980.

Under SORNA II, the following information is publicly available via an Internet website:

> (1) Name and aliases.
> (2) Year of birth.
> (3) Street address, municipality, county, State and zip code of residences and intended residences. In the case of an individual convicted of a sexually violent offense, a sexually violent predator or a sexually

violent delinquent child who fails to establish a residence and is therefore a transient, the Internet website shall contain information about the transient's temporary habitat or other temporary place of abode or dwelling, including, but not limited to, a homeless shelter or park. In addition, the Internet website shall contain a list of places the transient eats, frequents and engages in leisure activities.

(4) Street address, municipality, county, State and zip code of any location at which an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is enrolled as a student.

(5) Street address, municipality, county, State and zip code of a fixed location where an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is employed. If an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is not employed at a fixed address, the information shall include general areas of work.

(6) Current facial photograph of an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child. This paragraph requires, if available, the last eight facial photographs taken of the individual and the date each photograph was entered into the registry.

(7) Physical description of an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child.

(8) License plate number and a description of a vehicle owned or operated by an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child.

(9) Offense for which an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is registered under this subchapter and other sexually violent offenses for which the individual was convicted.

(10) A statement whether an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is in compliance with registration.

(11) A statement whether the victim is a minor.

(12) Date on which the individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent delinquent child is made active within the registry and date when the individual most recently updated registration information.

(13) Indication as to whether the individual is a sexually violent predator, sexually violent delinquent child or convicted of a Tier I, Tier II or Tier III sexual offense.

(14) If applicable, indication that an individual convicted of a sexually violent offense, a sexually violent predator or a sexually violent

delinquent child is incarcerated or committed or is a transient.

42 Pa. C.S.A. §9799.28(b).

The frequency of verification also changed. Megan's Law II required SVPs to verify their information quarterly whereas all other offenders (including lifetime registrants) were required to verify their information annually. 42 Pa.C.S.A. §9796. Under SORNA II, Tier I offenders appear annually, Tier II offenders appear semiannually, and Tier III offenders and SVPs appear quarterly to verify their information. 42 Pa. C.S.A. §9799.15(e). Therefore, an SVP designation increases the frequency of in-person verification of all offenders except Tier III offenders under SORNA II.

Quite frankly, the court cannot fathom how the Commonwealth can categorize as "virtually identical" such vastly different provisions of Megan's Law II and SORNA II. It appears that the Commonwealth may be comparing SVP obligations between the two statutes instead of the increase in obligations that occur as a result of the SVP designation as compared to the obligations of an individual without such a designation or the increase in registration requirements and the changes in the Internet availability of information between the two statutes.

The Commonwealth does not fare any better with an "as applied" analysis when the court considers SORNA II applying the proper tier designation in this case. Sexual abuse of children in violation of 18 Pa. C.S.A. §6312(d) is a Tier I offense. 42 Pa. C.S.A. §9799.14(b)(9).

The Court in *Muniz* found SORNA constituted punishment due to the increase in the information required to be provided, the availability of that information on the Internet, the increase in the duration and frequency of in-person reporting, and the lack of any avenue

of relief from these requirements.

SORNA II added provisions for telephonic verification for individuals convicted of Tier II and Tier III offenses and the theoretical possibility of exemption from the requirements of Subchapter H for individuals convicted of Tier III offenses, SVPs, sexually violent delinquent children and certain individuals who are subject to registration as the result of a conviction from another jurisdiction or foreign county. 42 Pa. C.S.A. §§9799.15(a.2); 9799.25(a.1). SORNA II did not alter the information required to be provided, the availability of that information on the Internet for individuals convicted of Tier I or Tier II offenses, the in-person reporting requirements for individuals convicted of Tier I offenses or SVPs, or the mechanism for designating individuals as SVPs. In other words, for individuals convicted of a Tier I offense, SORNA did not change. Therefore, *Muniz* still applies.

Moreover, the registration requirements of an individual convicted of a Tier I offense will always increase in duration if the individual is designated an SVP, even if the individual eventually successfully petitions for an exemption. An individual convicted of a Tier I offense must register for 15 years. 42 Pa. C.S.A. §9799.15(a)(1). An SVP must register for life but may petition for exemption after 25 years. 42 Pa. C.S.A. §9799.15(a)(6), (a.2). Life and 25 years are both longer than 15 years. Since there will always be an increase in the duration of a Tier I offender's registration requirements if the individual is designated an SVP, *Butler* still applies.

The Commonwealth, to its credit, was passionate, thorough and lengthy in its effort to designate Appellee as an SVP. Indeed, Appellee may merit such a designation. But, and despite the Commonwealth's protestations to the contrary, there was no question in this

court's opinion, that SORNA II remained punitive, the few changes made by the legislature were illusory at best, the legislature had not enacted a constitutional SVP designation mechanism, and the court was bound by the decisions of the higher courts and would not and could not hold an SVP hearing and engage in judicial fact-finding with a clear and convincing burden of proof. Perhaps the Pennsylvania Supreme Court will alter this analysis when it rules on the appeal in *Butler*, but until that time this court is required to follow both

Muniz and *Butler*.

DATE: _____________ By The Court,

____
Marc F. Lovecchio, Judge

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