

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,	:	
	:	
v.	:	No. CR 551-2013
	:	
PATRICK KELLY,	:	
Defendant	:	

Cynthia A. Dyrda-Hatton, Esq.	Counsel for Commonwealth Assistant District Attorney
Amy Carnicella, Esq.	Pennsylvania State Police Assistant Counsel
Brian J. Collins, Esq.	Counsel for Defendant

MEMORANDUM OPINION AND ORDER

Matika, J. - June 27, 2019

I. INTRODUCTION.

This Memorandum Opinion addresses the September 15, 2017 "Defendant's Motion to Bar the Applicability of Sex Offender Registration and/or Petition for Writ of Habeas Corpus" ("Defendant's Motion") filed by Defendant Patrick Kelly ("Defendant" or "Mr. Kelly").

In accordance with the Order that follows this Memorandum Opinion, Defendant's Motion shall be **DENIED**.

II. FACTUAL AND PROCEDURAL BACKGROUND.

A. The Underlying Charges, the January 1, 2011 through December 31, 2012 Timeframe, and Procedure Prior to The September 15, 2017 Defendant's Motion to Bar the Applicability of Sex Offender Registration and/or Petition for Writ of Habeas Corpus.

On May 23, 2013, the Commonwealth filed a Criminal Complaint and Affidavit of Probable Cause against Defendant. Through these documents, the Commonwealth accused Defendant of committing the following acts on or about the time period between January 1, 2011 and December 31, 2012:

- Count 1: Aggravated Indecent Assault of Child
(18 Pa.C.S.A. §3125(b)) [Felony 1];
- Count 2: Aggravated Indecent Assault of a
Complainant Who is Less than 13 Years Old
(18 Pa.C.S.A. §3125(a)(7)) [Felony 2];
- Count 3: Aggravated Indecent Assault of a
Complainant Who is Less than 16 Years Old
(18 Pa.C.S.A. §3126(a)(8)) [Felony 2];
- Count 4: Indecent Assault of a
Person Who is Less than 13 Years Old
(18 Pa.C.S.A. §3126(a)(7)) [Misdemeanor 1]; and
- Count 5: Indecent Exposure
(18 Pa.C.S.A. §3126(a)(7)) [Misdemeanor 1].

On June 5, 2013, Defendant waived a preliminary hearing and each of the five counts set forth above bound over to this Court. See May 23, 2013 Criminal Complaint and Affidavit of Probable Cause

On June 18, 2013, the Commonwealth filed a Criminal Information and charged Defendant with the five crimes delineated above, accusing Defendant in each count of committing said crimes "[b]etween January 1, 2011 and December 31, 2012."

On April 29, 2016, the Commonwealth and Defendant entered into a Stipulation to Amend Criminal Information that both reiterated that the acts underpinning Counts 1 through 5 set forth in the Criminal Information occurred "on or about 2011 through 2012" and memorialized that "[t]he Commonwealth and the Defendant hereby stipulate that the Criminal Information filed in the above captioned matter be amended to include a charge of Indecent assault which is in violation of 18 Pa.C.S.A. § 3126 §§ (a)(1) of the Pennsylvania Crimes Code, making it Count #6." See April 29, 2016 Stipulation to Amend Criminal Information.

This Court, in turn, also on April 29, 2016, and in accordance with proposed order submitted by the Commonwealth and Defendant with the Stipulation to Amend Criminal Information, entered an April 29, 2016 Order of Court that ordered and decreed that the Criminal Information be amended to include as Count 6 a count of Indecent Assault, 18 Pa. C.S.A. § 3126 (a)(1) [Misdemeanor 2]. See April 29, 2016 Order of Court.¹

¹ In what the Court shall treat as a scrivener error in the proposed order submitted by the Commonwealth and Defendant with the

Finally, and again on April 29, 2016, Defendant entered a guilty plea stipulation to the "added" Count 6, Indecent Assault, 18 Pa. C.S.A. § 3126 (a)(1) [Misdemeanor 2]. See April 29, 2016 Stipulation. As part of the guilty plea stipulation, the Commonwealth dismissed the remaining counts, Count 1 through Count 5, identified *supra*. In effectuating the guilty plea, Defendant completed a written "Megan's Law / SORNA Colloquy" wherein he acknowledged that he understood the duties that would be imposed upon him as a result of the guilty plea.² This included Defendant's understanding that as a result of his guilty plea, he would be "subject to the provisions of Title 42 Pa.C.S.A. § 9799.10 et. seq. entitled 'Registration of Sexual Offenders' which is Pennsylvania's version of 'Megan's Law / SORNA'" and that he would be required to register with the Pennsylvania State Police for a period of fifteen years. See "Megan's Law / SORNA Colloquy."

Stipulation to Amend Criminal Information, the accusation constituting Count 6 states that Defendant, "[o]n or about May 23, 2013" - as opposed to the "on or about 2011 through 2012" time period referenced throughout the Stipulation to Amend Criminal Information - "did have indecent contact with the complainant, or did cause the complainant to have indecent contact with the actor, or did intentionally cause the complainant to come into contact with seminal fluid, urine or feces for the purpose of arousing sexual desire in the actor or the complainant, the person does so without the complainant's consent." See April 29, 2016 Order of Court. As indicated *supra*, the Commonwealth filed the Criminal Complaint and Affidavit of Probable Cause against Defendant on May 23, 2013.

² See generally 42 Pa.C.S.A. § 9799.10 et. seq. "SORNA" serves an acronym for "Sexual Offender Registration and Notification Act."

During the verbal guilty plea colloquy, Defendant acknowledged that he committed the Indecent Assault to which he pleaded guilty from January 1, 2011 through December 31, 2012 and as part of his guilty plea, he had to register as a sex offender for fifteen years pursuant to SORNA. Defendant testified under questioning from the Commonwealth:

MS. HATTON: Your Honor, this is based upon the affidavit of probable cause of Detective Jack Soberick. Detective Soberick of the Lansford Police Department was assigned to investigate complaints of a sexual assault that had occurred between an adult male, at that time age 27, and a female, at that time age six. ***The assault was allegedly to have occurred spanning the timeframe of 2011 and 2012.*** The Defendant in this matter was Patrick Kelly, at that time age 27. And the female is known as S.K. She was age six at that time. It is the Defendant's child.

The allegation, Your Honor, was that he had touched her genital area with his finger. This occurred, Your Honor, at not only a house in which the Defendant had resided in Lansford, but also at another house where he had resided with his mother.

THE COURT: Mr. Kelly, are those facts essentially correct and sufficient to meet the elements of the crime that you are here to plead guilty to?

THE DEFEDANT: Yeah.

THE COURT: I am sorry?

THE DEFENDANT: Yes.

THE COURT: You do understand, Mr. Kelly, that when it does come time for sentencing, regardless of the outcome of the evaluation, there is going to be a

minimum 15-year reporting requirement pursuant to Megan's Law, do you understand that?

THE DEFENDANT: Yes.

THE COURT: Attorney Collins has gone over that with you?

THE DEFENDANT: Yes.

See Transcript of Proceedings, April 29, 2016 at 4, 8 (emphasis added).³

Following an assessment conducted by the Sexual Offender Assessment Board ("SOAB"), SOAB found Defendant not to be a sexually violent predator.

³ The Court notes that, while under oath during the April 29, 2016 plea proceedings, Defendant advised the Court of his glowing satisfaction with the services of his counsel, Brian J. Collins, Esq. In particular, Defendant testified:

THE COURT: Mr. Kelly, are you satisfied with the services of Attorney Collins?

DEFENDANT: Very much sir.

THE COURT: Okay. Is there anything that I have asked Attorney Collins in regards to this case, and in particular this proceeding, that you do not feel you have received sufficient answers to?

DEFENDANT: There is nothing he wouldn't do. He is a good attorney.

THE COURT: You are satisfied then?

DEFENDANT: Yes.

See Transcript of Proceedings, April 29, 2016 at 6.

On July 5, 2016, this Court sentenced Defendant to a period of incarceration and parole for committing Indecent Assault during the January 1, 2011 through December 31, 2012 timeframe. In conjunction with the sentencing, Defendant completed a "Sentencing Colloquy - Walsh Law Offense" form and received notification that if he elected to file a post-sentence motion, he needed to do so no later than ten days after the imposition of sentence. As it had done during the April 29, 2016 plea proceedings, the Court advised Defendant that he would have to register for a fifteen year period as a sex offender.

B. The September 15, 2017 Defendant's Motion to Bar the Applicability of Sex Offender Registration and/or Petition for Writ of Habeas Corpus.

On September 15, 2017, Defendant filed Defendant's Motion in which he requests "that this Court grant the instant Petition finding registration inapplicable to Petitioner or issue a Writ of Habeas Corpus because the application of sexual offender registration violates due process, and registration of a person whose offense occurred prior to SORNA is not mandated or controlled by any operable law." See Defendant's Motion, Prayer for Relief.

In support of this request for relief, Defendant's Motion alleges:

"8. SORNA applied retroactively to any individual convicted of a sexual offense after its enactment. SORNA retroactively applied to Petitioner and imposed a

registration requirement to an offense which, when committed, did not require registration.

9. Pursuant to SORNA, the offense to which Petitioner pled and was sentenced was converted from a non-registerable offense to a fifteen (15) year registration period. 42 Pa.C.S.A. §9799.14(b) (Tier I Sexual Offenses).

10. Since Petitioner was convicted after SORNA's effective date, it was, by its language, made applicable to his offense.

11. On July 19, 2017, in Commonwealth v. Muniz, ___ A.3d ___, 2017 WL 3173066 (Pa. July 19, 2017), five Justices of the Pennsylvania Supreme Court held that SORNA's 'registration provisions constitute punishment' under Article 1, Section 17 of the Pennsylvania Constitution - Pennsylvania's *Ex Post Facto* Clause.

12. SORNA expressly provides for the expiration of all prior versions of Megan's Law. 42 Pa.C.S. §9799.41 ('The following provisions shall expire on December 20, 2012'). Those prior versions of the law are not revived by the Muniz decision. No other statutory provision exists which can currently obligate Petitioner to register as a sexual offender in Pennsylvania.

13. The retroactive application of SORNA also violates Pennsylvania's Due Process Clause because it creates an irrefutable presumption of dangerousness, denying Petitioner the fundamental right of reputation. Pa.Const. Art. I, §1; Pa. Const. Art. I, §11.

14. This Court has the authority to hear the instant Petition and issue a Writ barring registration requirements. See, e.g., Commonwealth v. Giannantonio, 114 A.3d 429, 433 (Pa.Super. 2014) (addressing a petition for habeas corpus to determine the applicability of SORNA); Commonwealth v. Miller, 787 A.2d 1036, 1038 (Pa.Super. 2001) (accepting review over 'writ of habeas corpus petition in the York County Court of Common Pleas 'to test the assertion of the Commonwealth that he is subject to the registration requirements of Megan's Law').

See Defendant's Motion at ¶¶ 8-14.

On November 27, 2018, this Court conducted a hearing with respect to Defendant's Motion and requested that the Commonwealth and Defendant submit briefs addressing issues pertinent thereto.

III. DISCUSSION.

A. Commonwealth v. Muniz and the Unconstitutionality of the Retroactive Application of SORNA Registration Requirements.

Broadly speaking, Defendant's Motion rests in part upon the tandem underpinnings that (1) SORNA's sexual offender registration requirements cannot constitutionally be applied retroactively to criminal offenses that occurred prior to the December 20, 2012 effective date of SORNA and (2) Defendant's criminal offenses all occurred prior to December 20, 2012. Accordingly, Defendant contends, he cannot constitutionally be required to register as a sexual offender under SORNA.

In *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), the Pennsylvania Supreme Court "declared SORNA unconstitutional, because it violates the *ex post facto* clauses of both the United States and Pennsylvania Constitutions." See *Commonwealth v. Muniz*, 164 A.3d 1189 (2017).

In summarizing the *Muniz* opinion, the Pennsylvania Superior Court has noted that:

The *Muniz* court determined SORNA's purpose was punitive in effect, despite the General Assembly's

stated civil remedial purpose. Therefore, a retroactive application of SORNA to past sexual offenders violates the *ex post facto* clause of the United States Constitution. SORNA also violates the *ex post facto* clause of the Pennsylvania Constitution because it places a unique burden on the right to reputation and it undermines the finality of sentences by enacting increasingly severe registration law.

See *Commonwealth v. Rivera-Figueroa*, 174 A.3d 674, 677 (2017)

(internal citations omitted).

"The *Ex Post Facto* Clause of the United States Constitution is contained in Article 1, §10, which provides: 'No State shall... pass any Bill of Attainder, *ex post facto* Law or Law impairing the Obligation of Contracts...' See *Commonwealth v. Rose*, 127 A.3d 794, 797-798 (Pa. 2015) quoting U.S. Const. Art. I, 10.

The *ex post facto* clauses in the Pennsylvania and the United States Constitutions contain virtually identical language and stand governed by comparable interpretive standards.

The federal *ex post facto* prohibition:

"forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.' Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation."

See *Commonwealth v. Rose*, 127 A.3d at 798 (citations omitted).

"Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed" remains subject to the *ex post facto* prohibition. See *Calder v. Bull*, 3 U.S. 386, 391 (1798).

A law must meet two conditions to be deemed *ex post facto*. "[I]t must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." See *Commonwealth v. Rose*, 127 A.3d at 798. See also *Commonwealth v. Kizak*, 148 A.3d 854, 858-859 (Pa.Super. 2016) (*Ex post facto* analysis focuses upon when subject statute enacted as opposed to its effective date).

"The touchstone of [a] Court's inquiry is whether a given change in law presents a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.'" See *Peugh v. United States*, 133 S.Ct. 2072, 2082 (2013) (citation omitted).

"The question when a change in the law creates such a risk 'is a matter of degree'; the test cannot be reduced to a 'single formula.'" See *Id.* at 2082. "Almost from the outset, we have recognized that central to the *ex post facto* prohibition is a concern for 'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.'" See *Commonwealth v. Rose*, 127 A.3d at 799 (citation omitted).

As a substantive as opposed to a procedural regimen, SORNA "created a substantive [as opposed to procedural] rule that retroactively applies in the collateral context, because SORNA punishes a class of defendants due to their status as sex offenders and creates a significant risk of punishment that the law cannot impose." See *Commonwealth v. Rivera-Figueroa*, 174 A.3d at 678 (internal citations omitted).

In response to *Commonwealth v. Muniz*, and the Superior Court's subsequent decision in *Commonwealth v. Butler*, 173 A.2d 1212 (Pa.Super. 2017) (holding certain sexually violent predator provisions to be constitutionally infirm), the Pennsylvania General Assembly, on February 21, 2018 passed Acts 10 and 18 of 2018. "The express purpose of these legislative enactments was, *inter alia*, to '[p]rotect the safety and general welfare of the people of this Commonwealth by providing for registration, community notification and access to information regarding sexually violent predators and offenders who are about to be released from custody and will live in or near their neighborhood[,]' and to cure SORNA's constitutional defects by 'address[ing] [*Muniz* and *Butler*], See 42 Pa.C.S.A. § 9799.51(b)(1)(4).'" See *Commonwealth v. Wood* ___ A.3d ___ (Pa.Super. 2019), 2019 WL 1595871 at *8 (application of SORNA to sexual offenders for offenses committed before its effective date

violates the *ex post facto* clauses of the United States Constitution and Pennsylvania).

"Specifically, our General Assembly modified Subchapter H's registration requirements for those offenders convicted of committing offenses that occurred on or after SORNA's effective date of December 20, 2012." See *Commonwealth v. Wood*, 2019 WL 1595871 at *8. "The General Assembly also added Subchapter I to Title 42, Part VII, Chapter 97 [which] sets forth the registration requirements that apply to all offenders convicted of committing offenses on or after Megan's Law I effective date (April 22, 1996), but prior to SORNA's effective date. *Commonwealth v. Wood*, 2019 WL 1595871 at *8.⁴

B. Defendant's Motion Must Be Denied as Untimely Filed under Pennsylvania's Post Conviction Relief Act.

Under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. § 9541, et seq., "[t]he action established in this subchapter shall be the sole means of obtaining collateral relief and encompasses all other common law and statutory remedies for the same purpose that exist when this subchapter takes effect,

⁴ A challenge to the constitutionality of Acts 10 and 29 currently stands pending before the Pennsylvania Supreme Court. See *Commonwealth v. Lacombe*, 35 MAP 2018 (Pa. 2018).

including habeas corpus and coram nobis." See 42 Pa.C.S.A. § 9542.⁵
See also 42 Pa.C.S.A. § 9543.

Under the PCRA any petition for post-trial relief must be filed within one year of the date of judgment of sentence becomes final unless the petition falls within any of three enumerated exceptions. The PCRA states in part:

"§ 9545. Jurisdiction and proceedings.

(b) Time for filing petition.—

(1) Any petition under this subchapter, including a second or subsequent petition, shall be filed within one year of the date the judgment becomes final, unless the petition alleges and the petitioner proves that:

(i) the failure to raise the claim previously was the result of interference by government officials with the presentation of the claim in violation of the Constitution or laws of this Commonwealth or the Constitution or laws of the United States;

(ii) the facts upon which the claim is predicated were unknown to the petitioner and could not have been ascertained by the exercise of due diligence;
or

⁵ Because PCRA relief can be afforded only to those convicted under the laws of Pennsylvania, the Court reject's Defendant's contention that *Commonwealth v. Giannantonio* and *Commonwealth v. Miller*, each of which involved defendants convicted in federal court, afford this Court jurisdiction in the absence of Defendant's failure to comply with the PCRA's filing deadlines or to fall within an exception thereto. See 42 Pa.C.S.A. § 9543 (PCRA relief available only when the "...petitioner has been convicted of a crime under the laws of this Commonwealth..."); *Commonwealth v. Giannantonio*, 114 A.3d 429 (Pa.Super. 2014); *Commonwealth v. Miller*, (Pa.Super. 2001).

(iii) the right ascertained is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively.

(2) Any petition invoking an exception provided in paragraph (1) shall be filed within one year of the date the claim could have been presented.

(3) For purposes of this subchapter, a judgment becomes final at the conclusion of direct review, including discretionary review in the Supreme Court of the United States and the Supreme Court of Pennsylvania, or at the expiration at the time for seeking the review.

(4) For purposes of this subchapter, 'government officials' shall not include defense counsel, whether appointed or retained."

See 42 Pa.C.S.A. § 9545.

This Court sentenced Defendant on July 5, 2016. Defendant did not appeal his conviction, rendering his sentence final on August 5, 2016 upon expiration of the time in which review could be sought. See 42 Pa.C.S.A. § 9545(b)(3); *Commonwealth v. Brown*, 767 A.2d 576 (Pa.Super. 2001) (judgment becomes final thirty days after sentence in the absence of intervening direct appeal). Defendant's Motion, filed on September 15, 2017, over one year from August 5, 2016, does not satisfy the one-year filing deadline set forth in the PCRA.

None of the PCRA's exceptions to its one-year filing deadline apply in the instant case. Neither Commonwealth nor Defendant has

presented any evidence to the Court - or has even suggested - that either "government interference," as required by the exception provided at 42 Pa.C.S.A. § 9545(b)(1(i), or "new facts," as required by the exception provided at 42 Pa.C.S.A. § 9545(b)(1(ii), exist in this matter. Additionally, the Pennsylvania Supreme Court has not yet held that *Commonwealth v. Muniz* applies retroactively in the collateral context, precluding Defendant from successfully invoking the "constitutional right" exception provided at 42 Pa.C.S.A. § 9545(b)(1(iii). See *Commonwealth Murphy*, 180 A.3d 402, 405-406 (Pa.Super. 2018) (because Pennsylvania Supreme Court has not yet held that *Commonwealth v. Muniz* applies retroactively in the collateral context, a defendant cannot rely on *Commonwealth v. Muniz* to satisfy the timeliness exception).⁶

Because Defendant's Motion has been untimely filed under the PCRA, and because Defendant fails to satisfy any exceptions to the one-year filing deadline, this Court **DENIES** Defendant's Motion.

⁶ Because its facts involve a timely filed PCRA petition, and because this Court cannot confer precedential value upon *per curiam* decisions of the Pennsylvania Supreme Court, Defendant's reliance upon *Commonwealth v. Polzer* for the proposition that *Commonwealth v. Muniz* applies retroactively in the collateral context. See *Commonwealth v. Thompson*, 985 A.2d 928, 937 (Pa. 2009) ("This would fly in the face of the Court's frequent, clear, and unequivocal statements that the legal significance of *per curiam* decisions is limited to setting out the law of the case" and "...*per curiam* orders have no *stare decisis* effect.").

C. Defendant's Motion Fails on the Merits Insofar as Defendant Credibly Has Admitted His Criminal Conduct Occurred After the December 20, 2012 Effective Date of SORNA.

Even had Defendant timely filed a PCRA petition or satisfied one of the exceptions to the PCRA's one-year filing requirement, this Court would find that Defendant's Motion fails on the merits.

Defendant contends in his January 9, 2019 Defendant's Brief in Support of Removal from SORNA Registration ("Defendant's Brief in Support") that, in this matter, "[t]he issue then becomes one of fact and not law." See Defendant's Brief at [un-numbered] 4. Defendant submits that "[w]hat this Honorable Court must decide is whether the offense to which Patrick Kelly plead occurred prior to December 20, 2012," that "[t]he Commonwealth and Defendant agree that the criminal information cites the date range for the offense as beginning on January 1, 2011 and ending on December 31, 2012," and that "[t]his Honorable Court must determine whether or not the offense occurred anytime from December 20, 2012 to December 31, 2012." See Defendant's Brief in Support at [un-numbered] 4.

As set forth *supra*, Defendant, in both the Stipulation to Amend Criminal Information and April 29, 2016 verbal guilty plea colloquy, submitted to the factual averments that his criminal conduct continued for the duration of the 2012 calendar year, thereby conceding that such criminal conduct occurred, at least in

part, subsequent to the December 20, 2012 effective date of SORNA. The Court found Defendant to be credible and earnest at the time of his April 29, 2016 guilty plea.

The Court finds Defendant's April 29, 2016 testimony during his verbal guilty plea colloquy to be more credible and reliable than the testimony of Tracy Montanye ("Ms. Montanye") presented by Defendant during the November 27, 2018 hearing in this matter for the proposition that Defendant's last contact with S.K. would have been December 18, 2012. Similarly, the Court finds Defendant's April 29, 2016 testimony during his verbal guilty plea colloquy to be more credible and reliable than the testimony of his mother, Susan Kelly - offered at the November 27, 2018 hearing for the proposition that Defendant's last possible conduct with S.K would have been December 16, 2012.

The Court will not upset the credible April 29, 2016 testimony of Defendant based upon the November 27, 2018 testimony of Ms. Montanye, (1) who Defendant contends testified on November 27, 2018 in a fashion inconsistent with testimony that she offered during a January 28, 2013 custody contempt proceeding and (2) who Defendant has characterized as a liar who may have lied on November 27, 2018. See Defendant's Brief in Support at [un-numbered] 5 (characterizing Ms. Montanye's testimony on these two different occasions as "inconsistent" and contending that she "lied on one

of these occasions"). The Court will not upset the credible April 29, 2016 testimony of Defendant based upon the November 27, 2018 testimony of Susan Kelly, finding the latter to be less credible based upon the susceptibility to testify in the current self-interest of Defendant to avoid SORNA registration requirements.

The Court accordingly finds that, even if Defendant had timely filed Defendant's Motion within the one-year PCRA deadline, or even if the Pennsylvania Supreme Court ultimate should rule that *Commonwealth v. Muniz* applies in the collateral context thereby affording Defendant a "constitutional right" exception to the one-year PCRA deadline, Defendant's Motion would fail insofar as his criminal conduct occurred in part after the December 20, 2012 SORNA effective date and lacks in part the unconstitutional retroactive application of SORNA to Defendant that has been ruled impermissible in *Commonwealth v. Muniz*.

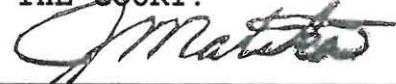
For this reason, the Court also **DENIES** Defendant's Motion.⁷

⁷ The Court declines to substantively address Defendant's contention that SORNA *in its entirety* violates the Pennsylvania Constitution and the United States Constitution. See generally Defendant's Supplemental Brief in Support of Removal from SORNA Registration ("Defendant's Supplemental Brief"). Defendant has noted that the Court of Common Pleas of Chester County has found SORNA facially unconstitutional on various grounds. See generally Defendant's Supplemental Brief in Support; *Commonwealth v. Torsilieri*, No. 15-CR-1570 (C.C.P. Chester 2016). The Chester County Court of Appeals ruling in *Commonwealth v. Torsilieri* currently stands before the Pennsylvania Supreme Court on appeal. See *Commonwealth v. Torsilieri*, 37 MAP 2018 (Pa. 2018).

IV. CONCLUSION.

For the foregoing reasons, Defendant's Motion to Bar the Applicability of Sex Offender Registration and/or Petition for Writ of Habeas Corpus shall be **DENIED**.

BY THE COURT:



Joseph J. Matika, J.

2019 JUN 28 A 10:07

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

v.

PATRICK KELLY,
Defendant

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:
: No. CR 551-2013
:
:
:

Cynthia A. Dyrda-Hatton, Esq.

Counsel for Commonwealth
Assistant District Attorney

Amy Carnicella, Esq.

Pennsylvania State Police
Assistant Counsel

Brian J. Collins, Esq.

Counsel for Defendant

ORDER OF COURT

AND NOW, this 27th day of June, 2019, upon consideration of

- the September 15, 2017 "Defendant's Motion to Bar the Applicability of Sex Offender Registration and/or Petition for Writ of Habeas Corpus,"

- the January 7, 2019 "Brief in Opposition to Defendant's Motion to Bar the Applicability of Sex Offender Registration and/or Petition for Writ of Habeas Corpus" filed by the Commonwealth of Pennsylvania,

- the January 9, 2019 "Defendant's Brief in Support of Removal from SORNA Registration,"

- the January 10, 2019 "Defendant's Supplemental Brief in Support of Removal from SORNA Registration,"

- the January 16, 2019 "Commonwealth's Reply Brief in Opposition to Defendant's Assertion that SORNA is Unconstitutional,"

- the February 4, 2019 "Defendant's Reply Brief in Support of Removal from SORNA Registration,"

- the March 8, 2019 "Commonwealth's Reply Brief in Opposition to the Assertion that Defendant Should not Have to Register as a Sex Offender,"

upon consideration of the November 27, 2019 hearing thereon, and upon comprehensive review of this matter, it is hereby **ORDERED and DECREED** that Defendant's Motion to Bar the Applicability of Sex Offender Registration and/or Petition for Writ of Habeas Corpus filed by Defendant Patrick Kelly is **DENIED**.

BY THE COURT:



Joseph J. Matika, J.

2019 JUN 26 A 10:07