

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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	NO. CR-155-2020
	:	
MARK ANDREW MUMICH,	:	
Defendant	:	
	:	
Brian B. Gazo, Esquire		Counsel for Commonwealth
Assistant District Attorney		
Eric Wiltrout, Esquire		Counsel for Defendant
Chief Public Defender		

**MEMORANDUM OPINION**

Nanovic, P.J. – December 31, 2025

By order dated February 20, 2024, we granted that portion of Defendant's Post-Sentence Motion challenging the constitutionality of the Sexual Offenders Registration and Notification Act's ("SORNA") registration and reporting requirements *as applied* to him and vacated that provision of our sentencing orders directing him to register as a sexual offender and to comply with SORNA. In all other respects, Defendant's Post-Sentence Motion was denied. On appeal by the Commonwealth, the Pennsylvania Supreme Court vacated our February 20, 2024, order and on remand directed we reconsider our decision in light of the Court's decision in Commonwealth v. Torsillieri, 316 A.3d 77 (Pa. 2024). We do so here.

**FACTUAL AND PROCEDURAL BACKGROUND**

At the conclusion of a bench trial held on June 16, 2023, we found Defendant guilty, *inter alia*, of indecent assault of a person less than 13 years of age (18 Pa.C.S.A.

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§3126(a)(7)), a felony of the third degree.<sup>1</sup> Thereafter, following the completion of a sexual offenders assessment by the State Sexual Offenders Assessment Board (see 42 Pa.C.S.A. §9799.58(a)) in which it was determined that Defendant did not meet the criteria to be classified as a sexually violent predator under SORNA, Defendant was sentenced to an aggregate period of imprisonment in a state correctional institution of not less than nine months nor more than three years. Because Defendant was convicted of at least one of the enumerated offenses in SORNA, Defendant was also directed to comply with the registration and reporting requirements of SORNA.<sup>2</sup>

Defendant timely filed a Post-Sentence Motion on September 28, 2023, challenging, *inter alia*, the constitutionality of SORNA's registration and reporting requirements *as applied* to him. (Motion for Reconsideration of Sentence, ¶'s 23-30). Following a hearing held on December 22, 2023, we granted Defendant's Post-Sentence Motion limited to this one challenge and otherwise denied the Motion. (See order dated

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<sup>1</sup> In addition to this conviction, Defendant was also found guilty of violating Sections 3126(a)(1) (indecent assault without consent), 3126(a)(2) (indecent assault by forcible compulsion), 3126(a)(8) (indecent assault of a person less than 16 years of age by a person four or more years older and neither married to the other), 6301(a)(i) (corruption of minors), and 3127(a) (indecent exposure to person less than 16 years of age) of the Crimes Code.

<sup>2</sup> At the time of sentencing, we incorrectly applied the registration and reporting requirements of Subchapter H of SORNA, 42 Pa.C.S.A. §§9799.10-9799.42, which treats Defendant's conviction of indecent assault of a person less than 13 years of age as a Tier III sexual offense, 42 Pa.C.S.A. §9799.14(d)(8), and requires lifetime registration. 42 Pa.C.S.A. §9799.15(a)(3). Subchapter H applies to sexual offenders who commit their offenses on or after December 20, 2012. 42 Pa.C.S.A. §9799.11(c); Torsilieri, 316 A.3d at 81.

Because the underlying offenses of which Defendant was convicted occurred between 2007 and 2010, Subchapter I of SORNA 42 Pa.C.S.A. §§ 9799.51-9799.75, which applies to sexual offenders who commit their offenses on or after April 22, 1996, but before December 20, 2012, should have been applied. 42 Pa.C.S.A. §§ 9799.53 (Definition of a "sexually violent offense," (1)(i)), 9799.55(a)(1)(i)(A); Torsilieri, 316 A.3d at 81. Under Subchapter I, the period of registration for indecent assault graded as a misdemeanor of the first degree or higher is ten years. This correction in the applicable subchapter of SORNA was recognized and acknowledged in Footnote 2 of our Memorandum Opinion dated February 26, 2024. See also Commonwealth v. LaCombe, 234 A.2d 602 (Pa. 2020) (holding retroactive application of subchapter I of SORNA was not punitive or an unconstitutional *ex post facto* violation).

February 20, 2024). A Memorandum Opinion explaining the reasoning for why the Motion was granted was filed on February 26, 2024.

On March 15, 2024, the Commonwealth appealed our order of February 20, 2024, to the Pennsylvania Superior Court, which by Order dated September 18, 2023, transferred the appeal to the Pennsylvania Supreme Court, citing 42 Pa.C.S.A. §722(7). On January 22, 2025, the Pennsylvania Supreme Court vacated our February 20, 2024, order granting the Post-Sentence Motion and remanded the case to the trial court “for reconsideration in light of the Court's decision in Torsilieri and to ascertain and consider the applicable SORNA subchapter.” By order dated January 29, 2025, we initially scheduled the matter for argument on May 19, 2025, subsequently rescheduled to June 13, 2025, and directed the parties to brief the two issues identified in the Supreme Court's remand order of January 22, 2025.

At the argument held on June 3, 2025, because the briefs submitted did not directly address the issues raised in the Supreme Court's remand order, and to avoid any misunderstanding of what issues needed to be briefed, we directed the Defendant and the Commonwealth to file briefs within 60 days and 90 days, respectively, on the following two issues: (1) to identify, ascertain and analyze what is the applicable SORNA subchapter governing the notification and registration requirements specific to Defendant's convictions; and (2) what is the effect and applicability of the Supreme Court's decision in Torsilieri on our determination that, as applied to [Defendant], SORNA violates his right to reputation guaranteed under the Due Process Clause of the Pennsylvania Constitution by creating an irrebuttable presumption that he is at “high risk

of committing additional sexual offenses" solely because of his convictions of indecent assault. (See June 4, 2025, order).<sup>3</sup> Defendant's brief was lodged on August 1, 2025, and the Commonwealth's on August 27, 2025.

### DISCUSSION

At issue in Torsilieri was whether the irrebuttable presumption in Subchapter H of SORNA, 42 Pa.C.S.A. §§9799.10-9799.42 – that those convicted of sexual offenses pose a high risk of committing additional sexual offenses (see 42 Pa.C.S.A. §9799.11(a)(4)) – violates an adult sexual offender's right to reputation protected by Article 1, Section 1 of the Pennsylvania Constitution without due process. In In re J.B., 107 A.3d 1 (Pa. 2014), the Court determined the presumption set forth in Subchapter H violates the due process rights of juvenile sexual offenders.

To determine whether the irrebuttable presumption in Subchapter H of SORNA applied to adult sexual offenders as a class was unconstitutional, the Court in Torsilieri applied the irrebuttable presumption doctrine for testing the constitutionality of a statute pursuant to which a party claiming an irrebuttable presumption is unconstitutional must establish three factors: (1) the existence of a presumption that impacts an interest protected by the Due Process Clause; (2) a presumption that is not universally true; and (3) the existence of reasonable alternatives to ascertain the presumed fact. Torsilieri, 316 A.3d at 90.<sup>4</sup> Only the second of these prongs was at issue – whether the presumption

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<sup>3</sup> See Citizens of Upper Woodmont Group v. Upper Yoder Township Zoning Hearing Board, 290 A.3d 1283, \*9 (Pa.Cmwlth. 2022) (Non-Precedential Decision) (discussing the scope of the trial court's review on remand).

<sup>4</sup> This approach to reviewing the constitutionality of an irrebuttable presumption differs from the manner in which a substantive due process challenge involving a fundamental private right or constitutionally protected individual interest is typically analyzed under strict judicial scrutiny, with "the burden [ ] on the government to demonstrate that the law is narrowly tailored to achieve a compelling governmental interest" and that there are no less restrictive means available

is universally true – as the other two were not in serious dispute or deemed satisfied. Torsilieri, 316 A.3d at 97 n.13.<sup>5</sup> When a presumption “is not necessarily or universally true, in fact, and when the State has reasonable alternative means of making the crucial determination,” a defendant is constitutionally entitled to an opportunity to present evidence to rebut the presumption. Torsilieri, 316 A.3d at 98 (citing and quoting Vlandis v. Kline, 412 U.S. 441, 452, 93 S.Ct. 2230, 37 L.Ed. 2d 63 (1973)).

As part of its analysis, the Torsilieri Court recognized that the presumption at issue was one created by the state legislature predicated on specific Legislative Findings (42 Pa.C.S.A. §9799.11(a)) and a Declaration of Policy (42 Pa.C.S.A. §9799.11(b), (c)). To rebut SORNA's legislative findings, inclusive of that in Section 9799.11(a)(4) – that convicted sexual offenders pose a higher risk of committing additional sexual crimes after release than non-sexual offenders – and undermine the legislative policy determinations based on such findings, notwithstanding that “the ‘necessarily or universally true, in fact’ standard seemingly demands that the presumption be true throughout a class, without

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to achieve that goal. D.C. v. School Dist. of Philadelphia, 879 A.2d 408, 419 (Pa.Cmwth. 2005) (citation omitted); see also Whitewood v. Wolf, 992 F.Supp. 2d 410, 425 (M.D. Pa. 2014), cited with approval in Zauflik v. Pennsbury School District, 104 A.3d 1096, 1118 (Pa. 2014).

The validity of the three-pronged “irrebuttable presumption” analysis has been questioned by some. In 3 Ronald D. Rotunda and John E. Nowak, *Treatise on Constitutional Law, Substance and Procedure* §17.6 (5<sup>th</sup> Edition 2012), the authors opine that “[b]y masking substantive decisions in procedural language, the Supreme Court, in the irrebuttable presumption cases, confused due process and equal protection analysis,” and that “[i]t now seems readily apparent that these cases actually rest on an equal protection rationale, for the objectionable portion of each law was the way in which it classified individuals.”

<sup>5</sup> Specifically, in Footnote 13 the Court in Torsilieri stated the following:

As to the first prong, the parties do not meaningfully dispute that the right to reputation is protected by the due process clause and that the designation as a sexual offender, based upon a presumption of posing a high risk of recidivism, impacts one's right to reputation. See *In re J.B.*, 107 A.3d at 16 (making this finding with respect to juvenile offenders). Additionally, while we need not reach the third prong of the analysis based upon our resolution of the second prong, we note that, in *In re J.B.*, we found the third prong satisfied, as SORNA already provided for individualized assessment of adult sexual offenders as sexually violent predators and juvenile offenders as sexually violent delinquent children. *Id.* at 19.

Commonwealth v. Torsilieri, 316 A.3d 77, 97 n.13 (Pa. 2024).

exception," Torsilieri, 316 A.3d at 98, the Court held "a viable challenge to legislative findings and related policy determinations can be established by demonstrating a consensus of scientific evidence where the underlying legislative policy infringes constitutional rights." Torsilieri, 316 A.3d at 83. Specifically, to find the irrebuttable presumption in SORNA not universally true, the Court stated Torsilieri "must establish a *consensus* of scientific evidence rebutting the presumption *as to the class of adult sexual offenders* (that they are at high risk of reoffending)." Torsilieri, 316 A.3d at 98. In other words, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision-maker." Torsilieri, 316 A.3d at 91 (citing and quoting Vance v. Bradley, 440 U.S. 93, 111, 99 S.Ct. 939, 59 L.Ed. 2d 171 (1979)). The Court defined a "consensus" as "a generally accepted opinion or general agreement regarding a proposition," to which no reputable disagreement exists among experts. Torsilieri, 316 A.3d at 99. Absent such universal consensus, the Court defers to the General Assembly's findings on the issue. Commonwealth v. Muniz, 164 A.3d 1189, 1217 (Pa. 2017).

Because the validity of the legislature's legislative findings in SORNA contain a factual component, the Court noted that unlike the constitutionality of legislation in general, which presents a pure question of law for which the scope of review is plenary and the standard of review *de novo*, the specific constitutional inquiry before it "constitutes a mixed question of fact and law, with emphasis on the ultimate legal conclusion of whether the irrebuttable presumption is unconstitutional." Torsilieri, 316 A.3d at 86.

Quoting from its decision in Warehime v. Warehime, 761 A.2d 1138, 1146 n.4 (Pa. 2000) (Saylor, J., concurring), the Court further observed that “[m]ixed questions differ in terms of the degree to which the legal versus the factual aspects predominate,” while recognizing at the same time that “legislation carries with it a strong presumption of constitutionality, which will not be overcome unless legislation is ‘clearly, palpably and plainly’ in violation of the Constitution.” Torsilierj, 316 A.3d at 86.

As posited by the Pennsylvania Supreme Court, the operative question is not whether sex offenders are more likely to commit a new sex crime than other members of the general public who have never been convicted of a crime, but “whether sex offenders commit new sex crimes at a higher rate than those who commit non-sexual offenses and then commit a second offense that is a sex crime, thereby justifying the legislature’s differential treatment.” Torsilierj, 316 A.3d at 87, 98. “[T]he meaningful statistical measure is whether the percentage of those who have committed a sexual offense and go on to commit a second sexual offense – the group SORNA targets – is higher than the percentage of those who first commit a non-sexual offense followed by second, sexual offense.” Torsilierj, 316 A.3d at 99. “[W]hat constitutes a low or high rate of recidivism is ultimately a value judgment regarding the degree of sexual reoffending society wishes to tolerate, and, as such, a matter of public policy, which is reserved for the legislature.” Torsilierj, 316 A.3d at 86-87. “To overturn the legislative presumption that sex offenders are more likely as a group to commit new sex offenses, we must conclude there is a universal consensus that this presumption is wrong. There cannot be a mere disagreement among experts; there must be clear and indisputable evidence for us to

take this extraordinary step, as the General Assembly made a considered policy choice that sex crimes are uniquely abhorrent to the victims and society, and relying on the presumption that, as a group, those who commit such crimes are more likely to commit another crime of a sexual nature." Torsilieri, 316 A.3d at 99. Ultimately, the Court held Torsilieri did not meet his evidentiary burden of demonstrating a consensus of scientific evidence that sexual offenders as a group are no more likely to commit additional sexual crimes than non-sexual offenders as a group sufficient to rebut the legislative presumption.

Unlike Torsilieri, our February 20, 2024, order granting Defendant's challenge to the constitutionality of SORNA's registration and reporting requirements *as applied to him*, and the rationale behind that order set forth in our February 26, 2024, Memorandum Opinion, did not hold SORNA as a whole to be unconstitutional and is not inconsistent with the Supreme Court's decision in Torsilieri. To the contrary, the Supreme Court in Torsilieri denied Torsilieri's challenge because Torsilieri's evidence "focus[ed] on individual variation within those convicted of sexual offenses and submitt[ed] that Subchapter H is unconstitutional because it fails to take into account individualized recidivism risk," rather than addressing the sexual recidivism rate of one class – that of convicted adult sexual offenders as a whole – relative to the recidivism rate of another class – that of adults convicted of a non-sexual offense, who subsequently commit a sexual offense.

In contrast, a challenge to the constitutionality of a statute, *as applied*, focuses on the individual characteristics and circumstances of a specific party affected by its

application, here Defendant. It is not, as in Torsillieri, which challenged the constitutionality of SORNA as written, a comparison of the relative rate of committing a new sexual offense between two different classes: the class of convicted adult sexual offenders and the class of convicted adult non-sexual offenders. As explained in Commonwealth v. Muhammad:

[t]here are two types of constitutional challenges, facial and as-applied. Commonwealth v. Brown, 26 A.3d 485, 493 (Pa. Super. 2011). A facial attack tests a law's constitutionality based on its text alone without considering the facts or circumstances of a particular case. Id. The court does not look beyond the statute's explicit requirements or speculate about hypothetical or imaginary cases. Germantown Cab Company v. Philadelphia Parking Authority, 651 Pa. 604, 206 A.3d 1030, 1041 (2019). An as-applied attack on a statute is more limited. It does not contend that a law is unconstitutional as written, but that its application to a particular person under particular circumstances deprives that person of a constitutional right. Brown, 26 A.3d at 493. "[W]hile as-applied challenges require application of the ordinance to be ripe, facial challenges are different, and ripe upon mere enactment of the ordinance." Philadelphia Entertainment & Development Partners v. City of Philadelphia, 594 Pa. 468, 937 A.2d 385, 392 n. 7 (2007).

241 A.3d 1149, 1155 (Pa.Super. 2020).

Under Subchapter I of SORNA, solely as a consequence of a defendant's conviction of one of the sexually violent offenses enumerated in Section 9799.55 – here Defendant's conviction of indecent assault graded as a felony of the third degree – Defendant was determined to “pose a high risk of engaging in further offenses even after being released from incarceration or commitments,” and required to register as a sexual offender with the Pennsylvania State Police for a period of 10 years. 42 Pa.C.S.A. §§ 9799.53 (Definition of a “sexually violent offense”), and 9799.55(a)(1)(i)(A). The statutory presumption in Subchapter I is identical to that in Subchapter H, such that solely by virtue

of a defendant's conviction of a sexually violent offense (the basic fact), the defendant is conclusively presumed to pose a high risk of committing a new sexual offense (the presumed fact), the legislature's justification for SORNA's registration and reporting requirements with the resulting stigma to the defendant's fundamental right to reputation as protected under the Pennsylvania Constitution. Under Subchapter I, Defendant was given no opportunity to question or to be heard on the presumed fact, no consideration was given to his individual characteristics or the circumstances surrounding the offense, and no individual assessment of his likelihood of reoffending was conducted.

As in Torsilieri, we do not believe the first and third prong of the analysis adopted by our Supreme Court for challenging the constitutionality of an irrebuttable presumption is in issue, but rather the second prong: whether the presumption is universally true. As to this prong, as applied to Defendant, at the hearing held on December 22, 2023, Defendant presented testimony from Dr. Barry Zakireh, an expert in the field of forensic psychosexual psychology, specifically, as it relates to risk assessments, sex offender recidivism, and the treatment of sexual offenders. Dr. Zakireh is a former member of the State Sexual Offenders Assessment Board where he served for approximately 18 years and conducted close to 2,500 sexually violent predator assessments of sexual offenders. He is intimately familiar with the methodology used by the Sexual Offenders Assessment Board in conducting evaluations of sexual offenders.

Dr. Zakireh testified that the gold standard for evaluating the risk of recidivism for a sexual offender is the Static-99-R assessment. This assessment tool is an evidence-based actuarial measure of a subject's relative risk for sexual offense recidivism founded


on statistical and actual studies which follow offenders and focus on recidivism. It empirically assesses an offender's risk for sexual recidivism based on ten statistically validated risk factors. According to Dr. Zakireh, the Static-99-R actuarial approach is more reliable and less subjective than that used by the State Sexual Offenders Assessment Board in evaluating whether a sexual offender is a sexually violent predator.

Dr. Zakireh conducted a Static-99-R risk assessment of Defendant. In this assessment, Defendant scored a 1, which, according to Dr. Zakireh, corresponds to a sexual recidivism rate of 3% within five years following release or while in the community. We found the methodology Dr. Zakireh employed to assess Defendant's risk of committing a new sexual offense to be valid and generally accepted among experts in the field of forensic psychosexual evaluations and the results of that assessment to be credible. No contrary testimony or evidence was presented by the Commonwealth. Consequently, based on the evidence presented at the hearing held on December 22, 2023, we found the 3% risk of sexual recidivism specific to Defendant within five years following his release or while in the community rebutted the irrebuttable presumption in Subchapter I of SORNA, 42 Pa.C.S.A. §9799.51(a)(2), that Defendant is at a high risk of engaging in future sexual offenses and that this presumption and the registration and reporting requirements imposed as a consequence, without any opportunity for Defendant to question or challenge the merits of the presumption as applied to him, unconstitutionally impinge on his fundamental right to reputation as protected under the Pennsylvania Constitution.

## CONCLUSION

As directed by our Supreme Court on remand, we find Subchapter I of SORNA to be the applicable SORNA subchapter on Defendant's challenge to the constitutionality of SORNA as applied to him. We also find – having reviewed the Supreme Court's Torsilieri decision decided on May 31, 2024, after our February 20, 2024, order granting, in part, Defendant's Post-Sentence Motion – that the Court's holding in Torsilieri, that the irrebuttable presumption that adult sexual offenders pose a high risk of committing additional sexual offenses found in Subchapter H does not violate due process, was premised on a challenge to the constitutionality of this presumption as applied to a class (*i.e.*, adult sexual offenders) and does not preclude a finding that the identical presumption in Subchapter I may be found to be unconstitutional *as applied* to a specific sexual offender. For the Court's convenience, a copy of our Memorandum Opinion dated February 26, 2024, which we incorporate herein, and which provides greater detail and further explanation for our February 20, 2024, Order, is attached as Appendix A to this Opinion.

BY THE COURT:

  
\_\_\_\_\_ P.J.

# APPENDIX "A"

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

 ORIGINAL

COMMONWEALTH OF PENNSYLVANIA

v.

NO. CR-155-2020

MARK ANDREW MUMICH,  
Defendant

Brian B. Gazo, Esquire  
Assistant District Attorney  
Paul J. Levy, Esquire

Counsel for Commonwealth  
Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J. – February 26, 2024

Defendant, Mark Andrew Mumich, challenges the constitutionality of the Sexual Offenders Registration and Notification Act ("SORNA"), 42 Pa.C.S.A. §§9799.10-9799.75, contending that, as applied to him, SORNA violates his right to reputation guaranteed under the Due Process Clause of the Pennsylvania Constitution by creating an irrebuttable presumption that he is at "high risk of committing additional sexual offenses" arising solely from the fact of his conviction of indecent assault, 18 Pa.C.S.A. §3126. For the reasons which follow, we sustain Defendant's challenge.

FACTUAL AND PROCEDURAL BACKGROUND

On June 16, 2023, Defendant was convicted of indecent assault of his minor daughter during the period between 2007 and 2010.<sup>1</sup> As a result of this conviction, a

<sup>1</sup> Specifically, Defendant was convicted of one count each of violating Section 3126(a)(1) (indecent assault without consent), Section 3126(a)(2) (indecent assault by forcible compulsion), Section 3126(a)(7) (indecent assault of a person less than 13 years of age), and Section 3126(a)(8) (indecent assault of a person less than 16 years of age) with

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sexual offenders assessment by the state Sexual Offenders Assessment Board ("SOAB") was court ordered to determine whether Defendant should be classified as a sexually violent predator under SORNA. 42 Pa.C.S.A. §§9799.24(a), 9799.58(a). In its report dated September 1, 2023, the Board concluded Defendant did not meet the criteria for a sexually violent predator. (N.T., 12/22/23, Petitioner's Exhibit No. 1 (Sexually Violent Predator Assessment)). On September 18, 2023, Defendant was sentenced to an aggregate period of imprisonment of not less than nine months nor more than three years in a state correctional institution. As part of this sentence, as a Tier III offender under Revised Subchapter H of SORNA, Defendant was required to comply with the registration and reporting requirements of SORNA for life. See 42 Pa.C.S.A. §§9799.14(d)(8), 9799.15(a)(3).<sup>2</sup>

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Defendant being four or more years older than the complainant and neither married to the other). Defendant was also convicted of one count of violating 18 Pa.C.S.A. §6301(a)(i) (corruption of minors) and one count of violating 18 Pa.C.S.A. §3127(a) (indecent exposure to person less than 16 years of age).

<sup>2</sup> SORNA was enacted on December 20, 2011, became effective on December 20, 2012, and provided for the expiration of the prior registration requirements imposed by Megan's Law, 42 Pa.C.S.A. §§9791-9799.9, as of December 20, 2012. Through Acts 10 and 29 of 2018, the General Assembly divided Subchapter H of SORNA into a Revised Subchapter H and Subchapter I. Subchapter I addresses sexual offenders who committed an offense on or after April 29, 1996, but before December 20, 2012. See 42 Pa.C.S.A. §§9799.51-9799.75. Revised Subchapter H applies to sexual offenders who committed an offense on or after December 20, 2012. See 42 Pa.C.S.A. §§9799.10-9799.42. While Revised Subchapter H requires lifetime registration for a person convicted of violating 18 Pa.C.S.A. §3126(a)(7), one of the offenses of which Defendant was convicted, because the offenses of which Defendant was convicted occurred after April 22, 1996, but before December 20, 2012, Revised Subchapter I is the controlling subchapter for prescribing the registration period for Defendant's convictions of indecent assault and provides for a period of registration of ten years. 42 Pa.C.S.A. §9799.55(a)(1)(i)(A). Accordingly, were it not for our sustaining Defendant's challenge to the constitutionality of SORNA generally as applied to him, we would reduce Defendant's period of registration under SORNA from lifetime to ten years. Though not raised in Defendant's post-sentence motion, this issue has not been waived since constitutional challenges to SORNA implicating the legality of sentence are not waivable. Commonwealth v. Thorne, 276 A.3d 1192, 1196 (Pa. 2022). Additionally, we note that in Commonwealth v. Lacombe, 234 A.3d 602, 605-06 (Pa. 2020), our Supreme Court determined that Subchapter I is "non-punitive and does not violate the constitutional prohibition against *ex post facto* laws."

On September 28 2023, Defendant filed a timely Motion for Reconsideration of Sentence limited to challenging the constitutionality of SORNA contending, *inter alia*, that SORNA as applied to him violates his right to reputation guaranteed under the Due Process Clause of the Pennsylvania Constitution by creating an irrebuttable presumption that he is at "high risk of committing additional sexual offenses," arising solely on the basis of his conviction of an enumerated sexual offense in SORNA without notice and an opportunity to be heard on this presumed fact, with no consideration of his individual characteristics, and with no individual assessment of his likelihood of reoffending having been conducted.<sup>3</sup> A hearing on Defendant's Motion was held on December 22, 2023.

At this hearing, the only testimony presented was that of Defendant and Dr. Barry Zakireh, an expert in the field of forensic psychosexual psychology, specifically, as relevant to these proceedings, related to risk assessments and treatment of sexual offenders, who was called by Defendant. (N.T., 12/22/23, pp. 22, 29). Dr. Zakireh completed a Static-99-R assessment of Defendant and determined Defendant is at a low risk for sexual recidivism. (N.T., 12/22/23, pp. 30-31, 34-35, 50).<sup>4</sup> The Static-99-R assessment is an actuarial measure of a subject's relative risk for sexual offense recidivism based on statistical and actual studies which follow offenders and focus on

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<sup>3</sup> Article I, Section 1 of the Pennsylvania Constitution, Pennsylvania's due process clause, provides, "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."

<sup>4</sup> Specifically, Defendant scored 1 on the Static-99-R range corresponding to a sexual recidivism rate of 3% within five years following release or while in the community. (N.T., 12/22/23, Petitioner's Exhibit No. 2 (Forensic Psychosexual Evaluation Summary, p. 3)).

recidivism. (N.T., 12/22/23, pp. 31, 64-66; Petitioner's Exhibit No. 2 (Forensic Psychosexual Evaluation Summary p. 3)). A Static-99-R evaluation empirically assesses an offender's risk for sexual recidivism based on well-known risk factors for reoffending. (N.T., 12/22/23, p. 64). This test has been widely used across North America and Europe for the past two decades and is considered the gold standard for evaluating the risk of recidivism for a sexual offender. (N.T., 12/22/23, pp. 31-32, 66).

As testified to by Dr. Zakireh, Pennsylvania is the only state in this country that does not utilize the Static-99-R test for sentencing purposes or to determine whether a sexual offender is a sexually violent predator. (N.T., 12/22/23, pp. 51, 53-55, 62). Instead, in assessing sexual offenders, the SOAB uses a structured approach requiring an evaluator to consider the fourteen statutorily enumerated factors in Sections 9799.24(b) and 9799.58(b) of SORNA, and any additional factor the evaluator deems necessary. (N.T., 12/22/23, pp. 55-57). This approach relies on the evaluator's judgment in weighing and combining factors, as compared to the Static-99-R's actuarial approach, and is hence more subjective. (N.T., 12/22/23, pp. 64-66).

### DISCUSSION

As explained in Commonwealth v. Muhammad:

[t]here are two types of constitutional challenges, facial and as-applied. Commonwealth v. Brown, 26 A.3d 485, 493 (Pa. Super. 2011). A facial attack tests a law's constitutionality based on its text alone without considering the facts or circumstances of a particular case. Id. The court does not look beyond the statute's explicit requirements or speculate about hypothetical or imaginary cases. Germantown Cab Company v. Philadelphia Parking Authority, 651 Pa. 604, 206 A.3d 1030, 1041 (2019). An as-applied attack on a statute is more limited. It does not contend that

a law is unconstitutional as written, but that its application to a particular person under particular circumstances deprives that person of a constitutional right. Brown, 26 A.3d at 493. "[W]hile as-applied challenges require application of the ordinance to be ripe, facial challenges are different, and ripe upon mere enactment of the ordinance." Philadelphia Entertainment & Development Partners v. City of Philadelphia, 594 Pa. 468, 937 A.2d 385, 392 n. 7 (2007).

241 A.3d 1149, 1155 (Pa.Super. 2020). A party challenging the constitutionality of a statute must meet the high burden of demonstrating that the statute "clearly, palpably, and plainly violates the Constitution." In re J.B., 107 A.3d 1, 14 (Pa. 2014).

In In re J.B., the Pennsylvania Supreme Court determined that the Legislative finding appearing in Section 9799.11(a)(4) of SORNA that "[s]exual 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" creates an irrebuttable presumption that such a person is a high risk of reoffense, which in turn forms the rationally related basis for SORNA's reporting and registration requirements, with both the presumed fact and the requirement of registration negatively impacting juvenile offender's fundamental right to reputation as protected under the Pennsylvania Constitution. In re J.B., 107 A.3d at 14, 19-20.<sup>5</sup> A sexual offender is one who commits an enumerated offense requiring registration. See 42 Pa.C.S.A. §§9799.12 (definition of "sexual offender"), 9799.53 (definition of "offender"). Because SORNA provides no meaningful opportunity to challenge this presumption and given recent United States Supreme Court decisions

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<sup>5</sup> While the Legislative finding reviewed by the Supreme Court in In re J.B. is that found in Revised Subchapter H, the same Legislative finding appears in Subchapter I. See 42 Pa.C.S.A. §9799.51(a)(2).

declaring children to be constitutionally different from adults, the Court in In re J.B., 107 A.3d at 18-19, held SORNA unconstitutional and unenforceable as applied to juveniles as a class. This holding was restricted to juvenile offenders only. Nevertheless, the reasoning and logic of J.B. is applicable to the instant proceedings.

When examining whether a statutory irrebuttable presumption violates due process, the question is whether the statute's acknowledgment of one fact conclusively presumes the truth of another with the presumed fact forming the basis of infringing on a constitutionally protected interest or denial of benefits. In re J.B., 107 A.3d at 14-15. An irrebuttable presumption is unconstitutional when it (1) 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. Muhammad, 241 A.3d at 1155. We review each of these elements below.

#### **Constitutionally Protected Interest**

The first prong of this analysis requires that we determine whether, as applied to Defendant, SORNA encroaches on his due process rights. In Muhammad, the Court recognized that the right of reputation is a right protected by Article 1, Section 1 of the Pennsylvania Constitution. 241 A.3d at 1158. (citing R. v. Department of Public Welfare, 636 A.2d 142, 149 (Pa. 1994)). Further, the Court asserted that there is no doubt that registering as a sex offender relies on the presumption that the person registering is a dangerous adult and will likely commit another sexual offence. Id. The consequence is that "[t]his mark of disgrace profoundly affects [a person's] ability to obtain employment,

education, and housing, which in turn impedes [a person's] ability to function as a productive member of society." Id.; see also In re J.B., 107 A.3d at 16-17. Despite this profound effect on a person's life, SORNA does not provide those who are subject to registration an opportunity to rebut the statutory presumption. Id. In Muhammad, the Court expressly found appellant was denied any serious opportunity to challenge the presumption that she was a danger to reoffend. 241 A.3d at 1158-59. For the same reasons expressed in J.B. and Muhammad, as applied to Defendant, SORNA's irrebuttable presumption that Defendant poses a high risk of recidivating impinges upon his fundamental right to reputation as protected under the Pennsylvania Constitution.

#### Universality

The second prong focuses on whether the presumption is universally true. Defendant's expert, Dr. Barry Zakireh, conducted a Static-99-R assessment of Defendant and determined Defendant was at low risk of committing a sexual offense in the future. While we need not accept Dr. Zakireh's evaluation, we found Dr. Zakireh to be credible and his methodology of conducting this evaluation utilizing the Static-99-R test to be valid and generally accepted among experts in the field of forensic psychosexual evaluations. Moreover, Dr. Zakireh was clearly familiar with the methodology used by the SOAB in conducting evaluations of sexual offenders having served as a member of the SOAB for approximately 18 years and conducted close to 2,500 sexually violent predator assessments of sexual offenders. (N.T., 12/22/23, p. 21). As between the ten statistically validated risk factors covered under Static-99-R and the scoring criteria applied to these

factors versus the approach taken by the SOAB, Dr. Zakireh opined that the Static-99-R test's statistical approach is superior and more reliable in evaluating an offender's risk of reoffending. (N.T., 12/22/23, pp. 58, 60, 64). Not only did Dr. Zakireh's evaluation convincingly rebut the conclusive presumption of recidivism under SORNA as to Defendant - which, at some level, was also rebutted by the SOAB's conclusion Defendant is not a sexually violent predator - the Commonwealth offered no evidence to the contrary.

### **Reasonable Alternative Means**

The third prong of the irreputable presumption test "requires examination of whether reasonable alternatives exist to determine whether [Defendant] is a high risk to commit additional sexual offenses in the future." Muhammad, 241 A.3d at 1159. In Muhammad, the Court recognized that the SOAB has "identified a variety of 'actuarial instruments' that are available and preferable for determining risk assessments" which "should be routinely used because they can help distinguish between low-risk and high-risk offenders." Id. The Muhammad Court also pointed out that the "SOAB itself could perform an individualized assessment, similar to the tests it performs to determine whether individuals are SVPs." Id. As is apparent from Dr. Zakireh's testimony, the Static-99-R test is a reasonable alternative actuarial instrument available to determine the risk that sexual offenders pose to society and one used routinely in all other states to assess the risk of a sexual offender to reoffend.

**CONCLUSION**

In accordance with the above, we hold that SORNA is unconstitutional as applied to Defendant in that it creates an irrebuttable presumption that his convictions of indecent assault make him a high risk to commit additional sexual offenses in the future. Such presumption, as applied to Defendant, is not true and clearly, palpably and plainly violates his constitutional right to reputation. Accordingly, we have vacated that provision of our sentencing orders directing him to register as a sexual offender and to comply with SORNA. Otherwise, the sentences imposed shall remain in full force and effect.

BY THE COURT:



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P.J.