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

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 166 CR 2019
	:	
CHRISTOPHER GRUVER,	:	
Defendant	:	

Criminal Law - Sex Offender Registration and Notification Act (SORNA) - Registration of Sexual Offenders - Constitutional Challenge - Infringement of a Fundamental Right (Reputation) - Irrebuttable Presumption Doctrine - Procedural/Substantive Due Process

1. SORNA's requirement that all convicted sexual offenders register with the Pennsylvania State Police is premised on a legislative finding that "sexual offenders pose a high risk of committing additional sexual offenses and protection of the public from this type of offender is a paramount governmental interest," without any opportunity provided for the offender to challenge this presumed fact or any individual assessment made of the offender's likelihood to reoffend.

2. In this case, Defendant was convicted of indecent sexual assault of a person less than 16 years of age, a Tier II sexual offense under SORNA, and directed as part of his sentence to register with the Pennsylvania State Police for a period of twenty-five years as a convicted sexual offender. Defendant was determined not to be a sexually violent predator.

3. Pursuant to the "irrebuttable presumption doctrine" for evaluating the constitutionality of a statute, a statutory irrebuttable presumption as to a fact in dispute which consequently encroaches upon an interest protected by the due process clause "violates due process if the presumption is deemed not universally true and a reasonable alternative means of ascertaining [the] presumed fact is available."

4. The irrebuttable presumption doctrine while on its face a form of procedural due process analysis, also implicates concepts of substantive due process. To the extent the statute is viewed as creating a presumption, this implicates *process*; however, to the extent the statue creates a statutory rule, this implicates *substance*.

5. The right to reputation is a fundamental right protected under Article I, Section 1 of the Pennsylvania Constitution which can not be abridged without compliance with state constitutional standards of due process.

6. SORNA's presumption that all convicted sexual offenders are highly likely to reoffend is not universally true based on studies accepted by the parties which evidence that not every person, or even the majority of persons, convicted of a sexual offense are

at high risk of committing another sexual offense.

7. Due process requires a meaningful opportunity to be heard and contest the validity of a presumed fact which is not universally true (here, the risk of reoffense), but which is an essential factual predicate for the application of the law to him (here, the requirement of registration).

8. SORNA provides for the assessment of all convicted sexual offenders by the State Sexual Offenders Assessment Board to determine if they should be designated as sexually violent predators. This statutory scheme, already in place, can serve as the basis for assessing the likelihood that an individual convicted of a sexual offense will reoffend.

9. SORNA's requirement that all convicted sexual offenders register with the Pennsylvania State Police and provide personal information, much of which is publicly made available on an Internet website, as well as disseminated to other law enforcement agencies in any jurisdiction where the Defendant resides, is employed or is enrolled as a student, is predicated upon the presumed fact that all sexual offenders are highly likely to reoffend and pose a danger to the public. This presumed fact is not universally true; when combined with the registration and notification requirements of SORNA, infringes upon the Defendant's right to reputation as protected under the Pennsylvania Constitution; and is ascertainable by reasonable alternative means currently in place, namely through the use of assessments now performed by the State Sexual Offenders Assessment Board.

10. SORNA's registration requirements, premised upon the presumption that all sexual offenders pose a risk of recidivating, with no opportunity to rebut the presumption, as applied to Defendant, infringes upon the fundamental right to reputation contained in the Pennsylvania Constitution in violation of state constitutional standards of due process.

11. SORNA's registration requirements premised solely upon Defendant's conviction of a sexual offense, as applied to Defendant – a non-sexually violent predator - violates Defendant's due process rights by relying upon an irrebuttable presumption which is not universally true. The registration and notification requirements of SORNA as applied to the Defendant are unconstitutional and unenforceable and require that such portion of Defendant's sentence directing his compliance with SORNA be vacated.

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COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 166 CR 2019
	:	
CHRISTOPHER GRUVER,	:	
Defendant	:	

Brian B. Gazo, Esquire — Counsel for Commonwealth
Matthew J. Mottola, Esquire — Counsel for Defendant

MEMORANDUM OPINION

Nanovic, P.J., April 22, 2020

Pursuant to Section 9799.15(a)(2) of Subchapter H of the Sentencing Code, entitled "Registration of Sexual Offenders," and generally referred to as the Sex Offender Registration and Notification Act (SORNA), 42 Pa.C.S.A. §§ 9799.10 - 9799.42,[1] Defendant, Christopher Gruver, who was convicted of a Tier II sexual offense, is required to register with the Pennsylvania State Police for a period of twenty-five years. Defendant claims SORNA's registration requirements violate his due process rights under both the federal and state constitutions through the use of an irrebuttable presumption and are unenforceable as applied to him.

PROCEDURAL AND FACTUAL BACKGROUND

On October 18, 2019, Defendant pled guilty to Indecent Sexual Assault[2] of his step-daughter in August 2018. At the time of the assault, Defendant was thirty-eight years of age and the victim fifteen years old. Defendant completed a written "Megan's Law/SORNA Colloquy" on the date of his plea which advised Defendant, *inter alia*, that as a result of his plea to indecent assault he would be required to register with the

Pennsylvania State Police for a period of twenty-five years. (Colloquy, p.1).

Thereafter, on January 17, 2020, Defendant was sentenced to a period of imprisonment of no less than two months nor more than eighteen months in the Carbon County Correctional Facility. At the time of sentencing, Defendant completed and signed the written "Court Notification Pursuant to 42 Pa.C.S.A. § 9799.23" which advised him, *inter alia*, of his classification as a Tier II offender, his duty to register for a period of twenty-five years, and his duty to appear at an approved registration site and to be photographed semi-annually. (Court Notification, paragraphs 1, 2, 6, 15). On page 5 of this form, Defendant's counsel certified that he had explained Defendant's duty to register to him and that he was satisfied Defendant understood this duty. The sentencing order further directed Defendant to comply with the registration and notification requirements of SORNA. At the time of sentencing, Defendant did not challenge or question his duty to register and comply with SORNA.

On January 24, 2020, Defendant filed a post-sentence motion wherein he raised for the first time his challenge to the constitutionality of SORNA's registration requirement on the basis of the "Irrebuttable Presumption Doctrine," namely, that SORNA created an irrebuttable presumption that all sexual offenders are highly likely to reoffend – the underlying basis for SORNA's registration requirements – and that this presumption and the registration requirements imposed as a consequence impinge on his fundamental right to reputation as protected under the Pennsylvania Constitution. Defendant's Post-Sentence Motion referenced a number of studies finding generally that the rate of recidivism for an adult sexual offender is substantially below forty percent. (Post-Sentence Motion, paragraphs 25-27). There being no request for

hearing, following a briefing period during which both the Commonwealth and Defendant submitted briefs in support of their respective positions, argument was held on April 17, 2020.[3]

DISCUSSION

In general, SORNA identifies select, specific offenses from the Pennsylvania Crimes Code and Title 18 of the United States Code, mostly sexual in nature, and classifies these into one of three tiers: Tier I, Tier II and Tier III. 42 Pa.C.S.A. § 9799.14(a). Individuals convicted of a Tier I offense are required to register with the Pennsylvania State Police for a period of fifteen years; those in Tier II, twenty-five years; and those in Tier III, for life. 42 Pa.C.S.A. § 9799.15(a). Prior to sentencing, an individual convicted of any offense enumerated in SORNA is required to be assessed by a member of the State Sexual Offenders Assessment Board to determine if the individual should be classified as a sexually violent predator and, following the issuance of a report and upon praecipe of the District Attorney, a hearing is held to determine whether the individual is a sexually violent predator. 42 Pa.C.S.A. § 9799.24. In accordance with 42 Pa.C.S.A. § 9799.24(a), Defendant was evaluated by the State Sexual Offender Assessment Board and determined not to be a sexually violent predator.

The provisions of SORNA apply to individuals who committed a sexually violent offense[4] on or after December 20, 2012 (SORNA's effective date), for which they were convicted. 42 Pa.C.S.A. § 9799.11(c). As part of its legislative findings, the General Assembly found that

> (4) Sexual offenders pose a high risk of committing additional sexual offenses and protection of the public from this type of offender is a paramount governmental interest [,]

42 Pa.C.S.A. § 9799.11(a)(4), and that

> (7) Knowledge of whether a person is a sexual offender could be a significant factor in protecting oneself and one's family members, or those in care of a group or community organization, from recidivist acts by such offenders.

42 Pa.C.S.A. § 9799.11(a)(7). An avowed purpose of Subchapter H is to, *inter alia*,

> (1) [ ] bring the Commonwealth into substantial compliance with the Adam Walsh Child Protection and Safety Act of 2006 (Public Law 109-248, 120 Stat. 587)[,]

42 Pa.C.S.A. § 9799.10(1), to

> (5) [ ] provide a mechanism for members of the general public to obtain information about certain sexual offenders from a public Internet website and to include on that Internet website a feature which will allow a member of the public to enter a zip code or a geographic radius and determine whether a sexual offender resides within that zip code or radius[,]

42 Pa.C.S.A. § 9799.10(5), and to

> (6) [ ] provide a mechanism for law enforcement entities within this Commonwealth to obtain information about certain sexual offenders and to allow law enforcement entities outside this Commonwealth, including those within the Federal Government, to obtain current information about certain sexual offenders.

42 Pa.C.S.A. § 9799.10(6).

A statute is presumed to be constitutional, unless and until it is shown to "clearly, palpably, and plainly violate[ ] the Constitution." Nixon v. Commonwealth, Dep't. of Pub. Welfare, 839 A.2d 277, 286 (Pa. 2003). It is further presumed that the intent of the General Assembly in enacting the statute is not to violate the Constitution of the United States or of this Commonwealth. Commonwealth v Jezzi, 208 A.3d 1105, 1110

(Pa.Super. 2019) (citation omitted); *see also* 1 Pa.C.S.A. § 1922(3) (Presumptions in ascertaining legislative intent). These presumptions, while not absolute, are inherent in the standard by which the constitutionality of a statute is evaluated.

Absent a conflicting provision of the Constitution, if the substance of a statute relates to a legitimate interest of government, the importance of the state's interest and the means by which that interest is advanced will be balanced against the constitutional value of the individual interest at stake and will generally favor the government when subjected to a substantive due process analysis. Peake v. Commonwealth, Dep't of Human Services, 132 A.3d 506, 518 (Pa.Cmwlth. 2015) (*en banc*).[5] Where a fundamental private right or constitutionally protected individual interest is not at issue, a statute which is rationally (*i.e.*, arguably) related to a legitimate end of government will be upheld. Heller v. Doe, 509 U.S. 312, 333, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). "Review for rationality is highly deferential to the legislature, and the burden rests with the challenger to negate every possible basis for the law." 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). Moreover, "where the legislative judgment is drawn in question, [the inquiry] must be restricted to the issue whether any state of facts either known or which could reasonably be assumed, affords support for [the legislation]." United States v. Carolene Products Co., 304 U.S. 144, 154, 58 S.Ct. 778, 784, 82 L.Ed. 1234 (1938).[6]

In contrast, where the statute in question restricts certain individual rights and liberties explicitly or implicitly (*e.g.*, the right to privacy encompassed within the concept of "liberty") guaranteed under the Constitution, including those binding on the states by

virtue of the Fourteenth Amendment's Due Process Clause,[7] the law must be necessary or narrowly tailored to promote a compelling or overriding public interest to withstand constitutional scrutiny. Plyler v. Doe, 457 U.S. 202, 216-217, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982).[8, 9] Under this strict scrutiny standard of review, "the burden is on the government to demonstrate that the law is narrowly tailored to achieve a compelling governmental interest." D.C. v. School Dist. of Philadelphia, 879 A.2d 408, 419 (Pa.Cmwlth. 2005) (citation omitted); *see also* Whitewood, 992 F.Supp.2d at 424-25, cited with approval in Zauflik, 104 A.3d at 1118.

In the case *sub judice*, Defendant contends SORNA's Tier II registration provisions adversely impact his reputation, a fundamental right protected under Article I, Section 1 of the Pennsylvania Constitution.[10] As a matter of law, Defendant's characterization of the right to reputation as a fundamental right is undoubtedly correct. In In re J.B., 107 A.3d 1 (Pa. 2014), our Supreme Court specifically noted that "the right to reputation, although absent from the federal constitution, is a fundamental right under the Pennsylvania constitution." *Id.* at 16; cf. Paul v. Davis, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) (holding mere injury to reputation, even if defamatory, does not constitute the deprivation of a liberty or property interest).

As a question of fact, although no testimony was taken on the issue, and notwithstanding the stigmatizing consequences conviction of a sexual offense alone will have on a defendant's reputation, we believe it appropriate to take judicial notice that a statute which labels every sexual offender at "a high risk of committing additional sexual offenses" and places "protection of the public from this type of offender [as of] paramount governmental interest," 42 Pa.C.S.A. §9799.11(a)(4); requires the defendant

to register with the Pennsylvania State Police as a Tier II offender for a period of twenty-five years and to notify the Pennsylvania State Police within three business days of any change in his housing, schooling or employment during this period, 42 Pa.C.S.A. §§ 9799.15(2) ,9799.15(g); inputs detailed personal information about the defendant gained through the registration process into a statewide registry maintained by the Pennsylvania State Police and makes much of this information publicly available on an Internet website, 42 Pa.C.S.A. §§ 9799.16(a)-(b), 9799.28(a)-(b); makes this information available to any jurisdiction where the defendant resides, is employed or is enrolled as a student, and any jurisdiction where the defendant has terminated his residence, employment or enrollment, 42 Pa.C.S.A. § 9799.18(a)(1)-(2); provides such information to the relevant district attorney, the chief law enforcement officer, and the probation and parole office where the defendant resides, is employed, or is enrolled as a student, 42 Pa.C.S.A. § 9799.18(a)(4)-(6); and requires that if the defendant moves to another state, he must comply with the registration requirements of that state, 42 Pa.C.S.A. § 9799.23(a)(3), impairs reputation, a fact acknowledged by the Commonwealth at argument. *See also,* In re J.B., 107 A.3d at 16-17.

Rather than pursue a "strict scrutiny" substantive due process challenge to SORNA's registration requirement, Defendant has elected to challenge the requirement on a procedural due process basis, under the "irrebuttable presumption doctrine," claiming due process entitles him to an individualized assessment and pre-deprivation hearing to determine whether he is in fact at high risk to reoffend before he can be required to register. Under this doctrine, an irrebuttable presumption which encroaches upon an interest protected by the due process clause "violate[s] due process [if] the

presumption is deemed not universally true and a reasonable alternative means of ascertaining that presumed fact [is] available." Commonwealth, Dep't. of Transp., Bureau of Driver Licensing v. Clayton, 684 A.2d 1060, 1063 (Pa. 1996). Specifically, as applied to this case, Defendant contends that SORNA's registration requirements violate sexual offenders' due process rights by utilizing the irrebuttable presumption that all sexual offenders "pose a high risk of committing additional sexual offenses," 42 Pa.C.S.A. § 9799.11(a)(4), because that presumption is not universally true and a reasonable alternative means currently exists for determining which sexual offenders are likely to reoffend. SORNA relies upon the basic fact of conviction of a sexual offense to justify the presumed fact - that all persons convicted of a sexual offense are at high risk of reoffense - with no opportunity to rebut this presumption.

To support his position, Defendant relies heavily upon the Pennsylvania Supreme Court's decision in In re J.B., 107 A.3d 1 (Pa. 2014). At issue in In re J.B. was the constitutionality of the provisions of SORNA[11] *as applied to juveniles*.[12] In re J.B., 107 A.3d at 2. On this issue, the Supreme Court held only that "the application of SORNA's current lifetime registration requirements, upon adjudication of specified offenses violates juvenile offenders' due process rights by utilizing an irrebuttable presumption." *Id.* at 19-20.

In reaching this decision, the Supreme Court had a stipulated record from the trial court evidencing that "recidivism rates for juvenile sex offenders are far lower than the recidivism rates of adult sexual offenders and, instead, are comparable to non-sexually offending juveniles," 107 A.3d at 10, and that "[w]hile adult sexual offenders have a high likelihood of reoffense, juvenile sexual offenders exhibit low levels

of recidivism (between 2-7%), which are indistinguishable from the recidivism rates for non-sexual juvenile offenders, who are not subject to SORNA registration." 107 A.3d at 17. The Court noted research studies in the record which suggested that "many of those who commit sexual offenses as juveniles do so as a result of impulsivity and sexual curiosity, which diminish with rehabilitation and general maturation," 107 A.3d at 17, and that these studies supported the recent holdings of the United States Supreme Court on the qualitative differences between children and adults which have constitutional significance and, under certain circumstances, require that the two classes (*i.e.*, juveniles and adults) be treated differently. Three specific distinctions were delineated by the United States Supreme Court, which our Supreme Court found to be "particularly relevant in the area of sexual offenses, where many acts of delinquency involve immaturity, impulsivity, and sexual curiosity rather than hardened criminality, or in the words of the United States Supreme Court, 'irretrievable depravity'." 107 A.3d at 19.

> First, children have a "'lack of maturity and an underdeveloped sense of responsibility,'" leading to recklessness, impulsivity, and heedless risk-taking. *Roper*, 543 U.S. at 569, 126 S.Ct. 1183. Second, children "are more vulnerable … to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. *Ibid*. And third, a child's character is not as "well-formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]." Id. at 570, 125 S.Ct. 1183.

Miller v. Alabama, 567 U.S. 460, 471, 132 S.Ct. 2455, 2464, 183 L.Ed.2d 407 (2012) (declaring unconstitutional mandatory life imprisonment without parole for crimes committed as a juvenile) (alterations in original).

Not only did the Court in In re J.B. not decide the issue in this case, it drew a sharp distinction between juveniles and adults and based its decision on that distinction. In doing so, based on the data before it, the Court acknowledged that there exists a high likelihood of reoffense by adult sexual offenders and cited to Commonwealth v. Lee, 935 A.2d 865, 885 (Pa. 2007) (observing in regard to adult sexual offenders that "[t]here is little question that the threat to public safety and the risk of recidivism among sex offenders is sufficiently high to warrant careful record-keeping and continued supervision."). In re J.B., 107 A.3d at 18. The Court further commented on the distinct treatment long afforded juveniles under Pennsylvania law in recognition of the fundamental differences between juveniles and adults and juveniles' amenability to rehabilitation, 107 A.3d at 18, and the effects of registration on juveniles - including depression, isolation from society and an increased risk of other criminal acts, 107 A.3d at 10 - and how "SORNA's automatic registration removes the juvenile judges' ability to consider the rehabilitative prospects of individual juvenile sexual offenders." 107 A.3d at 18.

At first glance, In re J.B. might be read to conclude that because adult sexual offenders are at high risk of reoffense, the statutory presumption is valid as to this class of offenders and, therefore, requiring all convicted adult sexual offenders to register comports with procedural due process.[13] But, deciding the issue on classification – *i.e.*, adults versus juveniles - is a question of substantive due process, not procedural due process, and does not track the breadth of the statutory presumption which classifies all – not a subset of - sexual offenders solely on the basis of conviction as posing a high risk of reoffense, the determinative factor underlying the requirement of

registration. *See* 42 Pa.C.S.A. § 9799.11(a)(4); In re J.B., 107 A.3d at 16-17 ("SORNA registration requirements, premised upon the presumption that all sexual offenders pose a high risk of recidivating, impinge upon juvenile offenders' fundamental right to reputation as protected under the Pennsylvania Constitution.").

Procedural due process guarantees the fairness of the decision-making process (or procedure) by which government takes or deprives a person of life, liberty or property, not the substance of the law in question; notice and an opportunity for hearing being the hallmark of procedural due process. Clayton, 684 A.2d at 1064; *see also* Fuentes v. Shevin, 407 U.S. 67, 97, 92 S.Ct. 1983, 2002, 32 L.Ed.2d 556 (1972) (due process functions to "prevent unfair and mistaken deprivations").[14] In contrast, the substance of the law – the rule in issue – is the topic of substantive due process. Whether the irrebuttable presumption doctrine is a test of procedural or substantive due process is unclear and, in any event, need not be decided in its application. Clayton, 684 A.2d at 1064.[15] As delineated in In re J.B., analysis under the "irrebuttable presumption doctrine" requires consideration of: (1) whether the affected individual has asserted an interest protected by the due process clause that is encroached by an irrebuttable presumption; (2) whether the presumption is not universally true, and (3) whether a reasonable alternative means exists for ascertaining the presumed fact. In re J.B, 107 A.3d at 16.

As previously discussed, SORNA's registration requirements implicate an interest in reputation, a fundamental right under the Pennsylvania Constitution which applies to all convicted sexual offenders. The proven fact - that Defendant has been convicted of a sexual offense - and the presumed fact - that he is at high risk of

committing additional sexual offenses - appear from the face of the statute and as applied to Defendant to not be universally true.[16] While sexual offenders as a class may indeed pose a high risk of committing additional sexual offenses, a legislative finding clearly within the prerogative of the General Assembly to make,[17] it does not follow that every person, or even the majority of individuals, convicted of a sexual offense are at high risk of reoffense. For instance, in In re J.B, the Court made reference to an extensive, meta-analysis of sixty-three studies involving 11,200 children which found a sexual recidivism rate of 7.09% compared to 13% for adults. *Id*. at 17;[18] *see also* Commonwealth v. Muniz, 164 A.3d 1189, 1216 (Pa. 2017) (referencing studies finding nearly forty percent of sexual offenders released from prison return to prison within three years for sexual offenses). Here, the parties stipulated that the likelihood of a convicted sexual offender reoffending is between five and forty percent, meaning that between sixty and ninety-five percent do not reoffend.

It is precisely because of SORNA's breadth of application to all sexual offenders - regardless of age and regardless of gender or other limiting factors - and the knowledge that while all sexual offenders as a class may pose a high risk of reoffense relative to the general population a significant number are unlikely to reoffend, coupled with the punitive effect of registration, Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017) (holding application of the registration requirements of SORNA to sexual offenders whose offenses occurred before SORNA's enactment constituted retroactive punishment prohibited by the federal and state *ex post facto* clauses), that procedural due process requires a separate assessment of an individual's likelihood to reoffend before that person can be deprived of a fundamental right having punitive

consequences. Due process requires a meaningful opportunity to be heard and contest the validity of a presumed fact which is not universally true (here, the risk of reoffense), but which is an essential factual predicate for the application of the law to him (here, the requirement of registration). In contrast, where no presumed fact is at issue, "due process does not require the opportunity to prove a fact that is not material to the State's statutory scheme." *Cf.* Connecticut Dept. of Public of Safety v. Doe, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2nd 98 (2003) (holding that Connecticut's requirement that every person convicted of a sexual offense be required to register on a state run sex offender registry did not violate procedural due process by denying defendant a hearing to establish that he was not a sexually dangerous person since the requirement to register was based upon the fact of conviction and not upon a presumption that the person was currently dangerous or at a high risk of reoffense). For purposes of the irrebuttable presumption doctrine, the question is not one of classifications or whether one or more groups of individuals within a class have a higher or lower risk of reoffense than the others, but whether it can fairly be said that the presumption is not equally true to all within its ambit. *See also*, Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of the government.").

As to the third factor, whether a reasonable alternative means exists for ascertaining the presumed fact that sexual offenders are at a high risk of reoffense, in In re J.B., the Supreme Court found that because individualized risk assessment was already provided for in other provisions of SORNA, such means could also be used as a reasonable alternative means of determining which juvenile offenders posed a high risk

to recidivate. 107 A.3d at 19. Likewise, since SORNA provides for individualized assessment of all sexual offenders convicted of a Tier I, II or III offense by the State Sexual Offenders Assessment Board for designation of sexually violent predators, 42 Pa.C.S.A. §9799.24, a similar process could be utilized to assess which adult sexual offenders are at high risk to recidivate.[19]

CONCLUSION

The absence of any opportunity under SORNA for a convicted sexual offender to challenge the presumption that he is at high risk of reoffense represents an unconstitutional irrebuttable presumption which, in conjunction with the resulting consequences – the requirement to register, the damage to reputation (a fundamental right under the Pennsylvania Constitution), and the punitive effect - violates Defendant's right to due process.[20]

BY THE COURT:

_____

P.J.

[1] In Commonwealth v. Butler, No. 25 WAP 2018, 2020 WL 1466299 (upholding the constitutionality of the procedure set forth in 42 Pa.C.S.A. § 9799.24(e)(3) to determine whether an individual convicted of a sexual offense should be classified as a sexually violent predator), the Pennsylvania Supreme Court briefly summarized the division of SORNA into two subchapters as follows:

> Following our decision in [Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017)] and the Superior Court's decision in the present case, the General Assembly passed Act 10 of 2018, which divided SORNA into two subchapters. Subchapter H [, 42 Pa.C.S.A. §§ 9799.10 - 9799.42,] is based on the original SORNA statute and is applicable to offenders, like appellee, who committed their offenses after the December 20, 2012 effective date of SORNA [, thus addressing the *ex post facto* issue raised in Muniz]; Subchapter I [, 42 Pa.C.S.A. §§ 9799.51 - 9799.75,] is applicable to offenders who committed their offenses prior to the effective date of SORNA and to whom the Muniz decision directly applied. The only relevant change with regard to SVPs under Subchapter H is the addition of a provision allowing SVPs, and other lifetime registrants, to petition for removal from the registry after 25 years. *See* 42 Pa.C.S.A. §§ 9799.15(a.2). The General Assembly later passed Act 29 of 2018, which replaced Act 10 but made no relevant changes to Subchapter H regarding the statutory scheme applicable to SVPs. . . .

Id. at *6 n.11.

[2] 18 Pa.C.S.A. § 3126(a)(8) (Indecent Assault of a Person Less than Sixteen Years of Age). At the

same time, Defendant also pled guilty to an unrelated charge of corruption of minors (18 Pa.C.S.A. § 6301(a)(1)(i)) pertaining to furnishing alcohol to his step-daughter, a minor at the time, on another occasion.

[3] No hearing was held on Defendant's Post-Sentence Motion, however, at the time of argument counsel reached agreement on several stipulations, including that the rate of recidivism for adult sexual offenders committing another sexual offense varies between five to forty percent as found in different studies, and is high relative to the recidivism rates for juvenile sexual offenders.

[4] A "sexually violent offense" is defined in SORNA as any Tier I, Tier II or Tier III sexual offense committed on or after December 20, 2012, for which the individual was convicted. 42 Pa.C.S.A. § 9799.12 (Definition of "sexually violent offense"). Indecent Assault of a Person Less than 16 Years of Age (18 Pa.C.S.A. § 3126(a)(8)) is a Tier II offense. *See* 42 Pa.C.S.A. § 9799.14(c)(1.3).

[5] Where the law in question is equally applicable to all persons, review as to the substance of the law is under the Due Process Clause. If the law creates classifications of individuals, restricting or regulating benefits or burdens differently between each class, review will be under the Equal Protection Clause. The essence of equal protection under the law is that like persons in like circumstances will be treated similarly and that people of different types or subject to different circumstances will not be treated as if they were the same. Commonwealth v. Jezzi, 208 A.3d 1105, 1112 (Pa.Super. 2019).

[6] In contrast to this standard for substantive review under the Due Process Clause, under equal protection the question is whether the classification has a rational relationship to any legitimate governmental interest or objective. Dallas v. Stanglin, 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989). "Further, a legislature that creates these categories need not actually articulate at any time the purpose or rationale supporting its classification." Heller v. Doe, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (citations and quotation marks omitted). "Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.*

[7] These rights include, but are not necessarily limited to, the following: (1) the fundamental guarantees of the Bill of Rights, including freedom of association implied by the First Amendment; (2) the right to engage in interstate travel; (3) the right to vote; (4) the right to fair proceedings before a deprivation of personal liberty (although this is somewhat unclear); (5) the right to privacy which includes some rights to freedom of choice in sexual matters; and (6) the right to freedom of choice in marriage. 2 Ronald D. Rotunda and John E. Nowak, Treatise on Constitutional Law, Substance and Procedure §14.6(a)(ii) n.3 (5th Edition 2012).

[8] Similarly, if the law uses a classification that regulates or limits the exercise of a fundamental right or civil liberty by only one class of persons, strict review of the classifications under the equal protection guarantee involves a determination of whether the legislature's classification is necessary to promote a compelling or overriding governmental interest. As stated by the Pennsylvania Supreme Court in D.P. v. G.J.P., 146 A.3d 204 (Pa. 2016), "[T]he inquiries per the Due Process and Equal Protection Clauses are distinct but overlapping: pursuant to the former, the government's infringement on fundamental rights must be necessary to advance a compelling state interest, whereas under the latter it is the classification inherent in the statute which must be necessary to achieve that interest." *Id.* at 210.

[9] The standard of review under the Equal Protection Clause for a constitutional challenge was set forth by the Pennsylvania Supreme Court in Commonwealth v. Bell, 516 A.2d 1172 (Pa. 1986):

> Equal protection analysis recognizes three types of governmental classification, each of which calls for a different standard of scrutiny. The appropriate standard. . . is determined by examining the nature of the classification and the rights thereby affected. In the first type of case, where the classification relates to who may exercise a fundamental right or is based on a suspect trait such as race or national origin, strict scrutiny is required. When struct scrutiny is employed, a classification will be invalid unless it is found to be necessary to the achievement of a compelling state interest.
>
> The second type of case involves a classification which, although not suspect, is either sensitive or important but not fundamental. Such a classification must serve an

> important governmental interest and be substantially related to the achievement of that objective.
>
> The third type of situation involves classifications which are neither suspect nor sensitive or rights which are neither fundamental nor important. Such classifications will be valid as long as they are rationally related to a legitimate governmental interest.

Id. at 1177-78 (citations omitted). *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (outlining the "traditional indicia of suspectness" as whether the class is "saddled with disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process"); Whitewood v. Wolf, 992 F.Supp.2d 410, 426-27 (M.D.Pa. 2014) (discussing the criteria for evaluating whether a class qualifies as suspect or quasi-suspect).

Moreover,

> under the rational basis test, if any state of facts can be envisioned to sustain the classification, equal protection is satisfied. . . . [C]ourts are free to hypothesize reasons why the legislature created the particular classification at issue and if some reason for it exists, it cannot be struck down, even if the soundness or wisdom in creating the distinction is questioned.

Commonwealth v. Jezzi, 208 A.3d at 1113 (quoting Commonwealth v. Albert, 758 A.2d 1149, 1153 (Pa. 2000)).

[10] Article I, Section 1 of the Pennsylvania Constitution states:

> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Pa. Const. Art. I, §1.

[11] Although SORNA has been amended since In re J.B. was decided, the amendments do not affect the issues before the court.

[12] In Peake v. Commonwealth of Pennsylvania, Dep't. of Human Services, 132 A.3d 506 (Pa.Cmwlth. 2015) (*en banc*), the Court noted that there are two types of constitutional challenges, facial and as-applied.

> A facial attack tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case. An as-applied attack, in contrast, does not contend that a law is unconstitutional as written but that its application to a particular person under particular circumstances deprived that person of a constitutional right.

Id. at 516-517 (quoting United States v. Marcavage, 609 F.3d 264, 273 (3d. Cir. 2010)). In In re J.B., the Pennsylvania Supreme Court found SORNA's registration requirement unconstitutional as applied not to a specific or particular person or persons, but to juvenile offenders as a class.

In order to sustain a facial challenge, it need not be shown that there is no set of circumstances under which the statute would be valid; rather, a statute will be found to be facially unconstitutional if a substantial number of its potential applications are unconstitutional. Peake, 132 A.3d at 517. Under this standard, known as the "plainly legitimate sweep" test, a statute may be invalidated "for vagueness or for overbreadth *even if it is possible the statute may be applied lawfully in some circumstances*." Peake, 132 A.3d at 518 (citing and quoting Commonwealth v. Ickes, 873 A.2d 698, 702 (Pa. 2005)) (emphasis in original). "An overbroad statute violates substantive due process by depriving a person of a constitutionally protected interest through means which are not rationally related to a valid state objective because they 'sweep unnecessarily broadly.'" Peake, 132 A.3d at 519 (citing and quoting Pennsylvania Medical Society v. Foster, 608 A.2d 633, 636 (Pa.Cmwlth. 1992) (*en banc)*). An irrebuttable presumption which is not necessarily true is unnecessarily broad and may be facially unconstitutional under the "plainly legitimate sweep" standard. Peake, 132 A.3d at 521.

While a facial challenge to the irrebuttable presumption in SORNA might be made, it has not been

made here, nor has the Attorney General been notified of such a challenge. *Cf.* Kepple v. Fairman Drilling Co., 615 A.2d 1298, 1303 (Pa. 1992) (citing Pa.R.C.P. No. 235 and Pa.R.A.P. 521) (party waives ability to mount facial challenge to constitutionality of statute if it fails to notify Attorney General of its intent to do so). *But see* Commonwealth v. Balog, 672 A.2d 319, 321 (Pa.Super. 1996) (holding that in a criminal case no notice to the Attorney General of a constitutional challenge to a statute needs to be given at the trial court level), *appeal denied*, 681 A.2d 176 (Pa. 1996).

[13] In In re J.B., the Court noted its intent to apply the irrebuttable presumption doctrine as described in Commonwealth, Dep't of Transp., Bureau of Driving Licensing v. Clayton, 684 A.2d 1060 (Pa. 1996) and D.C. v. Sch. Dist. of Philadelphia, 879 A.2d 408 (Pa.Cmwlth. 2005). 107 A.2d at 15-16. In Clayton, the Court noted that "since competency to drive is the paramount factor behind the instant regulations, any hearing which eliminates consideration of that very factor is violative of *procedural due process*," 684 A.2d at 1065 (emphasis added), and, in D.C. the Court held that Section 2134(c) of the Public School Code of 1949, 24 P.S. § 21-2134(c), which prohibited the return to the regular classroom of students adjudicated delinquent or convicted of specified underlying offenses represented an unconstitutional irrebuttable presumption and violated *procedural due process* under Clayton. 879 A.2d at 420 (emphasis added).

[14] Under the Federal Constitution, the guarantee of procedural due process is only applicable where there exists deprivation of an interest in "life, liberty or property," from which reputation is excluded. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972).

[15] Section 9799.11(a)(4) of SORNA, 42 Pa.C.S.A. § 9799.11(a)(4), as interpreted by the Pennsylvania Supreme Court in In re J.B., 107 A.3d at 14, creates an irrebuttable presumption that a convicted sexual offender is dangerous and required to register. When characterized as a presumption, this implicates *process*; however, as a statutory rule, this implicates *substance*. In Clayton, the Pennsylvania Supreme Court succinctly summarized the dilemma by noting "[t]he presumption, it seems, is the *substance* of the statute or regulation at issue, which presumption necessarily implicates *process* given its conclusiveness." Clayton, 684 A.2d at 1064 (emphasis in original). Concluding that it was unwise and of no benefit to decide whether the analysis of an irrebuttable presumption is solely one of substantive or procedural due process, the Court held that the precedent for the "irrebuttable presumption doctrine" set forth in Bell v. Burson, 402 U.S. 535, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971) was still valid, was directly on point in the matter before the Court in Clayton, and was dispositive. *Id.* at 1064. Similarly, our Supreme Court's recognition of the "irrebuttable presumption doctrine" in In re J.B. and the analysis required is valid precedent, is directly on point for the same statute at issue, and is dispositive as to the analysis we apply.

[16] Further evidence that the presumption is not universally true is inherent in SORNA's distinction between those classified as sexually violent predators and those not so classified. All adults who have committed and been convicted of a Tier I, II or III sexual offense are subject to assessment to determine if they should be classified as a sexually violent predator, defined as a Tier I, II or III sexual offender who "due to a mental abnormality or personality disorder" is "likely to engage in predatory sexually violent offenses." 42 Pa.C.S.A. §§ 9799.12 (Definition of "sexually violent predator"), 9799.24(a). Classification as a sexually violent predator reflects a finding that the individual is highly likely to reoffend due a mental abnormality or personality disorder with commensurate heightened public safety concerns and poses a greater danger than a person such as Defendant who underwent the same assessment but was determined not to meet the criteria for designation as a sexually violent predator. *Cf.* In the Interest of A.C., 991 A.2d 884 (Pa.Super. 2010) (upholding the constitutionality of 42 Pa.C.S.A. § 6403 providing for "the [involuntary] civil commitment of sexually violent delinquent children who, due to a mental abnormality or personality disorder, have serious difficulty in controlling sexually violent behavior and thereby pose a danger to the public.").

Of further relevance to the constitutionality of the statutory presumption, "SORNA categorizes a broad range of individuals as sex offenders subject to its provisions, including those convicted of offenses that do not specifically relate to a sexual act." Commonwealth v. Muniz, 164 A.3d 1189, 1218 (Pa. 2017). *See, e.g.,* 42 Pa.C.S.A. § 9799.14(b)(1) – (3), (19), (d) (1) pertaining to: unlawful restraint, 18 Pa.C.S.A. § 2902(b); false imprisonment, 18 Pa.C.S.A. § 2903(b); interference with custody of a child, 18 Pa.C.S.A. § 2904; filing factual statement about alien individual, 18 U.S.C. § 2424; and kidnapping, 18 Pa.C.S.A. §

2901(a.1). In doing so, SORNA's registration requirements are "excessive and over-inclusive" in relation to the type of risk to the community that the General Assembly sought to guard against. *See* Commonwealth v. Butler, No. 25 WAP 2018, 2020 WL 1466299 *5.

[17] In Commonwealth v. Muniz, 164 A.3d 1189 (Pa. 2017), the Court acknowledged that sex offender recidivism rates are difficult to measure with different studies reaching contrary conclusions and that the setting of policy with respect to such complex societal issues was a proper legislative function. On this point, the Court stated:

> [W]here "substantial policy considerations" are involved "such matters are generally reserved…. to the General Assembly." The General Assembly made legislative findings 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." 42 Pa.C.S.A. § 9799.11(a)(4). Although there are contrary scientific studies, we note there is by no means a consensus, and as such, we defer to the General Assembly's findings on this issue.

Id. at 1217 (citation and quotation marks omitted).

[18] These percentages as indicated measure the percentage of individuals who have committed a first offense who then commit a second offense. The percentage is likely much higher when compared to the percentage of individuals in the general population at large who commit a sexual offense. In other words, if hypothetically the likelihood of an adult individual in the general population committing a sexual offense for the first time is one percent, when compared to the recidivism rate of those who have previously committed a sexual offense, the rate of reoffense is thirteen times greater than that in the general population.

[19] Although we have concluded that the irrebuttable presumption doctrine governs this case, a traditional substantive due process analysis would likely yield the same result as illustrated by Commonwealth, Dept. of Transp., Bureau of Traffic Safety v. Slater, 462 A.2d 870 (Pa.Cmwlth. 1983). At issue in Slater was the constitutionality of a state regulation, 67 Pa.Code § 71.3, which provided for a one-year suspension of a school bus driver's license if the driver had an established medical history or clinical diagnosis of diabetes mellitus requiring use of insulin or any other hypoglycemic medication, regardless of whether the driver's diabetes was under control and the driver was determined by a qualified physician to be able to drive safely. As argued by the driver in Slater, Section 71.3 treated all persons with a medical history or clinical diagnosis of diabetes mellitus for whom insulation or other hypoglycemic medication was prescribed as a class of individuals susceptible to health risks greater than those found in the average population and, therefore, at higher risk for unsafe driving, and created an irrebuttable presumption that all drivers within this class represented a safety hazard whose licenses should be suspended without any individualized assessment of their ability to drive safely.

After a lengthy review of the irrebuttable presumption doctrine and its application, the Court concluded that the doctrine masked substantive decisions in procedural language and failed to confront the true underlying issue, which more often than not involved a question of equal protection. Because of this, the Court found "no reason to deviate from traditional equal protection and due process analysis even where one has constitutionally challenged a statutory presumption." Slater, 462 A.2d at 880-81. Since Slater's interest in maintaining his driver's license was found by the Court to be a protectable property interest, albeit not a fundamental right, the Court held that under traditional equal protection analysis the rational basis test was to be applied and that pursuant to such analysis "government action will be upheld if the means employed [is] rationally related to the end to be achieved." 462 A.2d at 874. The Court further noted that "classifications by a legislature, when examined under the rational basis standard are presumed to be valid," that "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," and that, given the presumption of validity "the government need not present 'empirical proof' or 'factual support for its assumption.'" 462 A.2d at 876 (citations and quotation marks omitted). *See also* Heller v. Doe, 509 U.S. at 320 ("A State . . . has no obligation to produce evidence to sustain the rationality of a statutory classification. A legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. A statute is presumed constitutional, and the burden is on the one attacking the legislative

arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record.") (citations and quotation marks omitted). Since the driver in Slater presented no evidence to refute the Regulation's underlying presumption and since it was rational for the government to conclude that "persons with certain physical conditions represent an increased safety risk; a risk that should not be tolerated, given the highly increased potential for tragedy, should a school bus accident occur," the Court held that the Regulation was rationally related to a legitimate state purpose, complied with the requirements of equal protection, and was not unconstitutional as creating an irrebuttable presumption. 462 A.2d at 875-76, 881.

Similarly here, SORNA creates a classification of individuals (*i.e.*, those convicted of a sexual offense), through a legislative finding finds that this class presents a greater risk of reoffending than exists in the general population, and raises the irrebuttable presumption that all sexual offenders pose this risk and should therefore be required to register. However, unlike in Slater, the requirements of registration implicate a fundamental right, reputation, which thereby places the burden on the Commonwealth to demonstrate that the law is narrowly tailored to achieve a compelling governmental interest. D.C. v. School Dist. of Philadelphia, 879 A.2d at 419. The Commonwealth in this case has presented no evidence to meet its burden and made no argument to support the belief that SORNA is narrowly tailored to achieve a compelling governmental interest.

[20] In Commonwealth v. Torsilieri, CP-15-CR-1570-2016 (Chester County 2018), the Chester County Court of Common Pleas found that the registration and notification requirements of SORNA were unconstitutional both facially and as applied on a number of grounds, including under the irrebuttable presumption doctrine, and vacated that portion of defendant's sentence which required him to register as a sex offender. On July 13, 2018, the Commonwealth filed an appeal to the Pennsylvania Supreme Court, docketed at 37 MAP 2018, pursuant to 42 Pa.C.S. § 722(7) (relating to the Supreme Court's exclusive jurisdiction of appeals from final orders of the court of common pleas in matters where the court of common pleas has held, *inter alia*, a statute unconstitutional). *See* Commonwealth v. Torsilieri, 2019 WL 3854450 (Pa.Super. 2019) n.5. At the time of argument before this court, counsel advised the court that argument on this appeal before the Supreme Court was held in December 2019, with no decision made to date.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	
	:	
v.	:	No. 166 CR 2019
	:	
CHRISTOPHER GRUVER,	:	
Defendant	:	

Brian B. Gazo, Esquire — Counsel for Commonwealth
Matthew J. Mottola, Esquire — Counsel for Defendant

ORDER OF COURT

AND NOW, this 22nd day of April, 2020, upon consideration of Defendant's Post-Sentence Motion filed on January 24, 2020 requesting that Defendant not be required to register as a sex offender pursuant to the Sex Offender Registration and Notification Act ("SORNA"), 42 Pa.C.S.A. §§ 9799.10 - 9799.42, review of the parties' briefs in support of their respective positions, following argument thereon, and in accordance with our Memorandum Opinion of this same date, it is hereby

ORDERED and DECREED that the Motion is granted. The registration and notification requirements of SORNA as applied to the Defendant are hereby declared unconstitutional and unenforceable and that portion of Defendant's sentence requiring him to comply with these requirements is hereby vacated.

BY THE COURT:

_____

P.J.