No. 94770-8

SUPREME COURT
OF THE STATE OF WASHINGTON

JOHN DOE, Petitioner,

v.

STATE OF WASHINGTON, Respondent.

NOTICE TO THE COURT

John Doe, Petitioner, pro se
Pacific, WA 98047
WashingtonVoices@gmail.com

A. IDENTITY OF PETITIONER

John Doe is petitioner in the above referenced case with a pending Petition for Review before the court.

B. NOTICE TO THE COURT

John Doe filed his petition for review on July 10, 2017. The State of Washington filed its Answer to Doe's petition on September 2, 2017. In accordance with RAP 13.4(d), and given the State of Washington raised no new issues, Doe has no standing to file a Reply to the State's Answer to the Petition for Review. Therefore, Doe will not provide the Court with a Reply.

In addition, Doe wishes to alert the Court of new and significant case law issued post

filing of Doe's Petition for Review, without further argument. The following cases have significance to the issues before the Court in the referenced petition:

Commonwealth v. Muniz, 47 MAP 2016 (Pa. 07/19/2017)
SUPREME COURT OF PENNSYLVANIA
2017.PA.0004889
47 MAP 2016

Millard v. Rankin, Civil Action 13-cv-02406-RPM (D. Colo. 08/31/2017)
United States District Court, Tenth Circuit
2017.DCO.0000728
Civil Action 13-cv-02406-RPM1

Kirby v. State, 34A02-1609-CR-2060 (Ind. App. 08/31/2017)
COURT OF APPEALS OF INDIANA
2017.IN.0001521
34A02-1609-CR-2060

Copies of each referenced case is appended herein. Doe references these cases and urges the Court to consider these when reviewing Doe's Petition for Review, given their recent and significance to the issues before the Court.

Respectfully submitted,

Date: September 26, 2017.

/s/ John Doe
John Doe, pro se Petitioner-Plaintiff

2017.PA.0004889< http://www.versuslaw.com>

COMMONWEALTH OF PENNSYLVANIA, Appellee

v.

JOSE M. MUNIZ, Appellant

No. 47 MAP 2016

Supreme Court of Pennsylvania

July 19, 2017

ARGUED: December 6, 2016

Appeal from the Order of the Superior Court at No. 2169 MDA 2014 dated August 7, 2015 Affirming the Order of the Court of Common Pleas of Cumberland County, Criminal Division, at No. CP-21-CR-0000903-2006 dated October 14, 2014.

SAYLOR, C.J., BAER, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

DOUGHERTY, JUSTICE

We granted discretionary review to determine whether Pennsylvania's Sex Offender Registration and Notification Act (SORNA), 42 Pa.C.S. §§9799.10-9799.41, as applied retroactively to appellant Jose M. Muniz, is unconstitutional under the ex post facto clauses of the United States and Pennsylvania Constitutions.[1] The Superior Court held SORNA's registration provisions are not punishment, and therefore retroactive application to appellant, who was convicted of sex offenses prior to SORNA's effective date but sentenced afterwards, does not violate either the federal or state ex post facto clauses. For the following reasons, we reverse and hold: 1) SORNA's registration provisions constitute punishment notwithstanding the General Assembly's identification of the provisions as nonpunitive; 2) retroactive application of SORNA's registration provisions violates the federal ex post facto clause; and 3) retroactive application of SORNA's registration provisions also violates the ex post facto clause of the Pennsylvania Constitution.

I. Procedural History Related to Current Appeal

On February 7, 2007, after a bench trial in Cumberland County, appellant was convicted of two counts of indecent assault arising out of an incident where he touched the breasts of his girlfriend's twelve-year old daughter.[2] Sentencing was scheduled for May 8, 2007, at which time appellant would have been ordered to register as a sex offender with the Pennsylvania State Police for a period of ten years pursuant to then-effective Megan's Law III. *See* 42 Pa.C.S. §9795.1 (expired). However, appellant failed to appear for his sentencing hearing and absconded until he was apprehended on unrelated charges in Rhode Island in September 2014. N.T., 10/14/14 at 2. During his absence, the General Assembly had replaced Megan's Law III with SORNA. Under SORNA, persons convicted of indecent assault of a person less than thirteen years of age, 18 Pa.C.S. §3126(a)(7), are categorized as Tier III offenders and are required to register as sex offenders for the remainder of their lives.[3] Accordingly, appellant was sentenced to four to fourteen months' imprisonment and ordered to comply with lifetime registration requirements under SORNA. Appellant filed a post-sentence motion seeking application of the ten-year registration period under Megan's Law III, which was the law in place at the time of his offense and conviction, instead of lifetime registration under SORNA. The court denied appellant's motion and he appealed to the Superior Court, claiming retroactive application of SORNA violates the ex post facto clauses of the United States and Pennsylvania Constitutions, and the reputation clause of the Pennsylvania Constitution.[4]

The Superior Court affirmed the ruling of the trial court in a three-page unpublished memorandum opinion. *Commonwealth v. Muniz*, No. 2169 MDA 2014, unpublished memorandum (Pa. Super. filed August 7, 2015). The panel opined *Commonwealth v. Perez*, 97 A.3d 747 (Pa. Super. 2014), directed its holding "the new registration regime pursuant to SORNA is constitutional under the Federal and State Ex Post Facto Clauses." *Muniz*, slip op. at 3, *quoting Perez*, 97 A.3d at 760 (SORNA is not punitive; retroactive application does not violate federal ex post facto clause).[5] The panel further held appellant waived his reputation clause claim by failing to raise it in his post-sentence motion.

Appellant filed a petition for allowance of appeal raising two questions regarding SORNA's "sexual offenses and tier system" provisions set forth at 42 Pa.C.S. §9799.14:

1) Does applying [42 Pa.C.S. § 9799.14] retroactively violate the Federal Constitution?

2) Does applying [42 Pa.C.S. § 9799.14] retroactively violate the Pennsylvania Constitution?

This Court granted review of both questions. *Commonwealth v. Muniz*, 135 A.3d 178 (Pa. 2016).

II. Summary of Arguments and Applicable Standards of Review

Briefly, appellant argues SORNA unconstitutionally increases the length of registration and notification requirements for sex offenders subject to its retroactive application.

Appellant claims despite the General Assembly's declaration SORNA is not to be construed as punitive, the statute's text and structure make clear the legislative objective was to punish. Appellant asserts SORNA is so punitive in purpose and effect that the General Assembly's intent to deem it civil is undermined. Thus, appellant claims, SORNA increases punishment for conduct which occurred before its enactment and such retroactive application violates both federal and state constitutional bans on ex post facto laws; in doing so, appellant argues the Pennsylvania Constitution provides greater protection than the United States Constitution. Appellant argues SORNA is therefore unconstitutional as applied to someone like him whose conviction predated its enactment.[6]

In response, the Commonwealth argues the decision of the United States Supreme Court in *Smith v. Doe*, 538 U.S. 84 (2003), and an analysis of the factors set forth in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), both direct SORNA is not punishment, and thus there can be no ex post facto violation. The Commonwealth focuses on the General Assembly's aim to address the "major public concern" of recidivism among adult sex offenders and indicates SORNA's terms are not excessive given this legislative purpose.[7]

As we consider the parties' arguments in more detail below, we recognize there is a general presumption that all lawfully enacted statutes are constitutional. *Commonwealth v. Lee*, 935 A.2d 865, 876 (Pa. 2007). In addition, as this case presents questions of law, our scope of review is plenary and we review the lower courts' legal determinations *de novo*. *Id.*

III. Ex Post Facto Laws Generally

Before turning to the history of Pennsylvania sex offender laws and the specific provisions of SORNA at issue in this appeal, we first explain the general purpose of ex post facto prohibitions. The central concern in incorporating ex post facto clauses in both federal and state constitutions was to "assure that federal and state legislatures were restrained from enacting arbitrary or vindictive legislation" following the American Revolution. *Miller v. Florida*, 482 U.S. 423, 429 (1987), *citing Calder v. Bull*, 3 U.S. 386, 391 (1798). However, as noted by Chief Justice Chase in *Calder*, the term ex post facto "had been in use long before the Revolution." *Calder*, 3 U.S. at 391. The clauses were thus also directed at the separate concern, relevant here, that individuals are entitled to "fair warning" about what constitutes criminal conduct, and what the punishments for that conduct entail. *Miller*, 482 U.S. at 430; *see also Commonwealth v. Rose*, 127 A.3d 794, 805 (Pa. 2015), *quoting* Wayne R. LaFave, Criminal Law 116, 121 (5th ed. 2010). The United States Supreme Court, in *Weaver v. Graham*, 450 U.S. 24 (1981), succinctly articulated this idea in stating, "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Id.* at 30. Based on both these concerns, Chief Justice Chase set out four categories of laws that violate such prohibitions:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.

Calder, 3 U.S. at 390. Furthermore, "two critical elements" must be met for a criminal or penal law to be deemed ex post facto: "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver*, 450 U.S. at 29 (footnote omitted). As such, "[o]nly those laws which disadvantage a defendant and fall within a *Calder* category are ex post facto laws and constitutionally infirm." *Commonwealth v. Young*, 637 A.2d 1313, 1318 (Pa. 1993) (emphasis in original). The ex post facto clauses of the United States and Pennsylvania Constitutions are implicated here because a holding rendering the effects of SORNA's registration requirements punitive would place the statute into the third *Calder* category: application of the statute would inflict greater punishment on appellant than the law in effect at the time he committed his crimes.

IV. History of Pennsylvania Sex Offender Laws, Applicable Case Law, and SORNA

A. History of Pennsylvania Sex Offender Laws Prior to SORNA

In *Commonwealth v. Williams*, 832 A.2d 962 (Pa. 2003) (*Williams II*), this Court provided a history of Pennsylvania's sex offender registration laws up until the time of that decision:

> In 1995, the General Assembly amended the Sentencing Code by adding Subchapter H, entitled "Registration of Sexual Offenders, " codified at 42 Pa.C.S. §§9791-9799, and generally referred to as "Megan's Law" (hereinafter, "Megan's Law I"). Among other things, Megan's Law I established a procedure for adjudicating certain offenders-namely, those that committed one of the predicate offenses listed in the statute-as "sexually violent predators." The mandated procedure included a post-conviction, pre-sentence assessment by the Board, followed by a hearing before the trial court. At the hearing, the offender was presumed to be a sexually violent predator and bore the burden of rebutting such presumption by clear and convincing evidence. If the individual was adjudicated a sexually violent predator, he was subjected to an enhanced maximum sentence of life imprisonment for the predicate offense, as well as registration and community notification requirements that were more extensive than those applicable to an offender who was not adjudicated a sexually violent predator.
>
> In *Commonwealth v. Williams*, … 733 A.2d 593 ([Pa.] 1999) (*Williams I*), this Court struck down the sexually violent predator provisions of Megan's Law I based upon the conclusion that a finding of sexually violent predator status under that enactment entailed a "separate factual determination, the end result of which is the imposition of criminal punishment, " *i.e.*, increasing the offender's maximum term of confinement above the statutory maximum for the underlying offense. *See id.* … at 603. ... Notably, in view of the punitive nature of the increased maximum prison sentence, the *Williams I* Court invalidated the challenged provisions without reaching the question of whether the enhanced registration and notification requirements constituted criminal punishment. *See id.* … at 602 n.10.
>
> After *Williams I* was decided, the General Assembly passed Megan's Law II, which was signed into law on May 10, 2000. Although the stated legislative policy remained the same as in Megan's Law I, the General Assembly altered the manner in which an individual convicted of a predicate offense was adjudicated a sexually

> violent predator. The critical distinction, for present purposes, is that, under Megan's Law II an offender convicted of an enumerated predicate offense is no longer presumed to be a sexually violent predator. ... Additionally, persons adjudicated to be sexually violent predators are no longer subjected to an automatic increased maximum term of imprisonment for the predicate offense. Instead, they are required to undergo lifetime registration, notification, and counseling procedures; failure to comply with such procedures is penalized by a term of probation or imprisonment.
>
> Under Megan's Law II, any offender convicted of a predicate offense, whether or not he is deemed a sexually violent predator, must: (1) register his current residence or intended residence with the state police upon release from incarceration, parole from a correctional institution, or commencement of an intermediate punishment or probation; (2) inform the state police within ten days of a change in residence; and (3) register within ten days with a new law enforcement agency after establishing residence in another state. State police officials then forward this data, together with fingerprint and photographic information obtained from the sentencing court to the chief of police of the locality where the offender will reside following his change of address or release from prison. For sexually violent predators, the police chief in turn notifies the individual's neighbors, as well as day care operators and school officials within the municipality. The data sent to these recipients includes the offender's name, address, offense, and photograph (if available), as well as the fact that he has been determined by a court to be a sexually violent predator, "which determination has or has not been terminated as of a date certain." The sexually violent predator's name and address, including any subsequent change of address, is also sent to the victim of the offense, until the victim requests that such notification be terminated.
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> * * *
>
> In addition to registration upon release from prison and upon changes of address, sexually violent predators must periodically verify their address with the state police. To accomplish this, the state police send a verification form once every three months to the last residence reported. Upon receipt of this form, the sexually violent predator must appear within ten days at any state police station to submit the completed form and be photographed. The Act also requires a sexually violent predator to attend "at least monthly" counseling sessions in a program approved by the Board, and to pay all fees assessed from such sessions, unless he cannot afford them, in which case they are paid by the parole office. The Board monitors compliance with this requirement; the sexually violent predator must also verify such compliance with the state police as part of the quarterly verification process discussed above.

Williams II, 832 A.2d at 965-68 (internal citations and footnotes omitted).

The General Assembly made further amendments to Megan's Law II with the passage of Act 152 of 2004, commonly referred to as Megan's Law III, which was signed into law on November 24, 2004. *Commonwealth v. Neiman*, 84 A.3d 603, 607 (Pa. 2013). Although this Court struck down that statute on the basis its passage violated the single subject rule, we recognized Megan's Law III made the following substantive legal changes:

> (1) established a two-year limitation for asbestos actions[8]; (2) amended the Crimes Code to create various criminal offenses for individuals subject to sexual offender registration requirements who fail to comply; (3) amended the provisions of the Sentencing Code which govern "Registration of Sexual Offenders"; (4) added the offenses of luring and institutional sexual assault to the list of enumerated offenses which require a 10-year period of registration and established local police notification procedures for out-of state sexual offenders who move to Pennsylvania; (5) directed the creation of a searchable computerized database of all registered sexual offenders ("database"); (6) amended the duties of the Sexual Offenders Assessment Board ("SOAB"); (7) allowed a sentencing court to exempt a lifetime sex offender registrant, or a sexually violent predator registrant, from inclusion in the database after 20 years if certain conditions are met; (8) established mandatory registration and community notification procedures for sexually violent predators; (9) established community notification requirements for a "common interest community"- such as a condominium or cooperative-of the presence of a registered sexually violent predator; (10) conferred immunity on unit owners' associations of a common interest community for good faith distribution of information obtained from the database; (11) directed the Pennsylvania State Police to publish a list of approved registration sites to collect and transmit fingerprints and photographs of all sex offenders who register at those sites; and (12) mandated the Pennsylvania Attorney General to conduct annual performance audits of state or local agencies who participate in the administration of Megan's Law, and, also, required registered sex offenders to submit to fingerprinting and being photographed when registering at approved registration sites.

Id., 84 A.3d at 606-07 (footnotes omitted), *citing* 18 Pa.C.S. §4915; 42 Pa.C.S. §§ 5524.1, 9792, 9795.1(a)(1), 9795.4, 9795.5, 9796, 9798, 9798.1, 9799, 9799.1, 9799.8. Megan's Law III was replaced by SORNA.

B. Case Law Regarding the Constitutionality of Sex Offender Laws

Before reaching the specific provisions of SORNA at issue here, we summarize the reasoning in two pivotal cases, the analysis of which will frame our discussion below: the United States Supreme Court's decision in *Smith*, and this Court's decision in *Williams II*.

i. Smith v. Doe

In *Smith*, the United States Supreme Court determined the registration requirements of Alaska's Sex Offender Registration Act (the Act), which applied to the sex-offender plaintiffs despite the fact they were convicted, sentenced, and released from prison before its passage, were not retroactive punishment prohibited by the federal ex post facto clause. *Smith*, 538 U.S. at 105-06.[9] The High Court summarized the Alaska statute as follows:

> The Alaska law, which is our concern in this case, contains two components: a registration requirement and a notification system. Both are retroactive. The Act requires any "sex offender or child kidnapper who is physically present in the state" to register, either with the Department of Corrections (if the individual is incarcerated) or with the local law enforcement authorities (if the individual is at liberty). Prompt registration is mandated. If still in prison, a covered sex offender must register within 30 days before release; otherwise he must do so within a working day of his conviction or of entering the State. The sex offender must provide his name, aliases, identifying features, address, place of employment, date of birth, conviction information, driver's license number, information about vehicles to which he has access, and

> postconviction treatment history. He must permit the authorities to photograph and fingerprint him.
>
> If the offender is convicted of a single, nonaggravated sex crime, he must provide annual verification of the submitted information for 15 years. If he was convicted of an aggravated sex offense or of two or more sex offenses, he must register for life and verify the information quarterly. The offender must notify his local police department if he moves. A sex offender who knowingly fails to comply with the Act is subject to criminal prosecution.
>
> The information is forwarded to the Alaska Department of Public Safety, which maintains a central registry of sex offenders. Some of the data, such as fingerprints, driver's license number, anticipated change of address, and whether the offender has had medical treatment afterwards are kept confidential. The following information is made available to the public: "the sex offender's or child kidnapper's name, aliases, address, photograph, physical description, description[,] license [and] identification numbers of motor vehicles, place of employment, date of birth, crime for which convicted, date of conviction, place and court of conviction, length and conditions of sentence, and a statement as to whether the offender or kidnapper is in compliance with [the update] requirements … or cannot be located." The Act does not specify the means by which the registry information must be made public. Alaska has chosen to make most of the nonconfidential information available on the Internet.

Smith, 538 U.S. at 90-91 (internal citations omitted). The High Court noted that, although it had not previously considered whether a sex offender statute constituted retroactive punishment forbidden by the federal ex post facto clause, the framework for the inquiry was well established. *Id*. at 92.

> We must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Kansas v. Hendricks*, 521 U.S. 346, 361 … (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Ibid*., *quoting United States v. Ward*, 448 U.S. 242, 248-49 … (1980). Because we "ordinarily defer to the legislature's stated intent, " *Hendricks*, *supra*, at 361, "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Hudson v. United States*, 522 U.S. 93, 100 (1997), *quoting Ward*, *supra*, at 249.

Smith, 538 U.S. at 92.

In determining Alaska's legislature intended to establish a civil, nonpunitive scheme, the Court looked to the text of the statute where the legislature found "'sex offenders pose a high risk of re-offending, ' and identified 'protecting the public from sex offenders' as the 'primary governmental interest' of the law." *Id.*, at 93, *citing* 1994 Alaska Sess. Laws ch. 41, §1. The Court also looked to *Hendricks* where it previously held "an imposition of restrictive measures on sex offenders adjudged to be dangerous is 'a legitimate nonpunitive governmental objective and has been historically so regarded.'" *Smith*, 538 U.S. at 93, *quoting Hendricks*, 521 U.S. at 363. The Court noted the location of the Act's notification provisions in the state's health, safety, and housing code suggested a civil scheme, while the location of the Act's registration provisions in the state's criminal procedure code suggested a penal intent; the Court stated neither factor was dispositive. *Smith*, 538 U.S. at 94. The Court concluded the Act "does not require the procedures adopted to contain any safeguards associated with the criminal process, " and led the Court to "infer that the legislature envisioned the Act's implementation to be civil and administrative." *Id*. at 96. The High Court determined the statute utilized "distinctly civil procedures" and the Alaska legislature therefore "intended a civil, not a criminal sanction." *Id*. (internal quotations and citations omitted).

The High Court then looked to the factors listed in *Mendoza-Martinez* as a framework for determining whether the provisions of the Alaska statute were so punitive in effect as to negate the legislature's intention to identify the scheme as civil. *Id.* at 97. The *Mendoza-Martinez* factors are as follows: "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned[.]" *Mendoza-Martinez*, 372 U.S. at 168-69 (footnotes omitted).

The High Court first determined the Alaska statute's notification provisions did not resemble shaming punishments of the colonial era, which involved more than the dissemination of information, and included either face-to-face shaming in view of other citizens or expulsion from the community. *Smith*, 538 U.S. at 97-98. The Court further found the Alaska statute involved only the dissemination of accurate information about an offender's criminal record, which is already public. *Id*. The Court noted the fact the information is available on the internet did not alter its conclusion, as the purpose of the internet posting was to inform the public rather than shame the offender, and the website did not allow the public to shame offenders by posting comments. *Id*. at 99.

The Court also determined the Act did not impose a physical restraint. *Id*. at 100. The Court found the Act did not make offenders unemployable; even in the absence of this statute, employers could conduct criminal record checks and exclude offenders from employment and those consequences flowed from the offender's conviction rather than the Act's registration and notification provisions. *Id*. at 100-01. The Court noted the argument Alaska's registration system was parallel to the restraint imposed on those on probation or supervised release "has some force, " but ultimately rejected it, holding offenders are "free to move where they wish and to live and work as other citizens, with no supervision." *Id*. at 101. Furthermore, the Court noted although offenders were required to inform authorities of changes to their registration information, they did not need to seek permission to make such changes. *Id.*

Although the State of Alaska conceded its registration statute might deter future crimes, the *Smith* Court held this was not enough to find the law punitive because holding a deterrent purpose automatically renders such sanctions criminal "would severely undermine the Government's ability to engage in effective regulation." *Id*. at 102, *quoting Hudson*, 522 U.S. at 105. The Court further held the registration provisions were not retributive because the duration of the reporting requirement depended on the crime rather than the risk posed by the offender. *Id*. The Court concluded the broad registration categories and corresponding reporting requirements "are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective." *Smith*, 538 U.S. at 102.

The Court then held "[t]he Act's rational connection to a nonpunitive purpose is a '[m]ost significant' factor in our determination that the statute's effects are not punitive." *Id*., *quoting United States v. Ursery*, 518 U.S. 267, 290 (1996). The Court acknowledged both the lower court and Doe conceded the nonpunitive purpose of public safety was valid and rational. *Id*. at 103. The Court further stated even though the Act may not have been narrowly drawn to accomplish that public safety purpose, a "statute is not deemed punitive simply because it lacks a close perfect fit with the nonpunitive aims it seeks to advance." *Id.*

The Court further held the Act was not excessive in its application to all offenders regardless of their future dangerousness as the registration requirements were minor and allowed the public to assess risk based on accurate, public information about offenders' convictions. *Id.* at 104. The Court also held the wide dissemination of the information over the internet was not excessive as the notification system was passive in that an individual must seek out the information, the website warned against using the information in a criminal manner, and making the registry available on the internet was necessary based on the general mobility of the population. *Id*. at 104-05.

The Court also stated two factors-whether the regulation comes into play only on a finding of scienter and whether the behavior to which it applies is already a crime- are of little weight as the Act applied only to past criminal conduct, which is a necessary starting point for targeting the statutory concern of recidivism. *Id.* at 105. The *Smith* Court then concluded the plaintiffs were unable to show the effects of the Alaska statute negated the legislature's intent to establish a civil scheme. The Court held "[t]he Act is nonpunitive, and its retroactive application does not violate the [federal] *Ex Post Facto Clause*." *Id.* at 105-06.

ii. Williams II

In *Williams II*, this Court considered whether the registration, notification, and counseling requirements of Megan's Law II, applicable to sexually violent predators, constituted criminal punishment such that their imposition on the defendants violated their rights to due process under the United States and Pennsylvania Constitutions.[10]*Williams*, 832 A.2d at 964. This Court analyzed the statute's provisions under the same two-level inquiry used by the U.S. Supreme Court in *Smith*. *Id*. at 971. As to the first question, whether the General Assembly's intent was to punish, the *Williams II* Court determined the statute's statement of purpose was clear in that its intent was to identify potential recidivists and avoid recidivism by providing awareness of particular risks to members of the public and providing treatment to offenders. *Id.* at 971-72. The Court stated the statute's purpose was therefore "not to punish, but to promote public safety through a civil, regulatory scheme." *Id*. at 972.

The *Williams II* Court then examined the *Mendoza-Martinez* factors to determine whether the sanctions are "so punitive as to transform what was clearly intended as a civil remedy into a criminal penalty." *Id*., *quoting Ward*, 448 U.S. at 249. The Court first found the registration requirements of Megan's Law II did not directly impose a deprivation or restraint upon sexually violent predators as they "remain free to live where they choose, come and go as they please, and seek whatever employment they may desire." *Id.* at 973, *quoting Femedeer v. Haun*, 227 F.3d 1244, 1250 (10th Cir. 2000). Thus, the Court held it could not find the clearest proof the requirements were "so onerous as to constitute an affirmative disability or restraint." *Williams*, 832 A.2d at 975. The Court further found it was not clear the notification requirements of Megan's Law II were analogous to public shaming, or other historical forms of punishment, as "the disclosure of factual information concerning the local presence of a potentially harmful individual is aimed, not at stigmatizing that individual, but allowing potentially vulnerable members of the public to avoid being victimized." *Id*. at 976.

The Court then found applicability of Megan's Law II does not depend only upon a finding of scienter since some predicate offenses can be committed whether or not the defendant is aware his conduct is criminal, *e.g*., the statute applies to the crime of sexual abuse of children, where the defendant may be convicted despite the good faith belief the child was over eighteen years of age. *Id*. at 977-78. The *Williams II* Court further found since there was a substantial period of incarceration attached to the predicate offenses of rape and involuntary deviate sexual intercourse, [11] the prospects of registration and notification would have little deterrent effect upon a sexually violent predator. *Id*. at 978. The Court also found the measures were not retributive as they do not "require [a sexually violent predator to] 'pay his debt to society, ' through the impositions of fines, restitution, or confinement." *Id*., *quoting Williams v. Illinois*, 399 U.S. 235, 261 (1970) (Harlan, J., concurring).

The *Williams II* Court found the crucial determination of sexually violent predator status under Megan's Law II was not based upon the particular criminal conduct or crime at issue, but instead upon a separate finding of mental abnormality or personality disorder. *Williams II*, 823 A.2d at 978. The Court recognized, however, that whether the behavior to which Megan's Law II applies is already a crime is of little significance in evaluating whether or not the statute is punitive because "application to past criminal conduct is 'a necessary beginning point [where] recidivism is the statutory concern.'" *Id*. at 979, *citing Smith*, 538 U.S. at 105.

Additionally the Court found the sixth *Mendoza-Martinez* factor, whether the act has a rational connection to a nonpunitive purpose, "is a '[m]ost significant' factor in our determination that the statute's effects are not punitive." *Id.* at 979, *quoting Smith*, 538 U.S. at 102. The Court noted there are "grave concerns over the high risk of recidivism among convicted sex offenders, " *id.* at 979, *quoting Smith*, 538 U.S. at 103, and it was significant that most of the notification provisions in Megan's Law II pertained to neighbors of sexually violent predators, social service agencies, schools, and day care centers. *Id.* The Court found concerns about information being placed on the internet to be unwarranted because Megan's Law II information was available to the public only upon request. *Id.* at 980. The Court distinguished Megan's Law II from New Jersey's sex offender statute which specifically authorized online dissemination of offender information. *Id*., citing NJ. STAT. ANN. §§2C:7-12-2C:7-14. The Court concluded the "dissemination of sexually violent predator information to individual members of the public, upon request, appear[ed] to be a reasonable means chosen by the Legislature to serve the legitimate government interest in providing persons who may be affected by the presence of a sexually violent predator with the information they need to protect themselves[.]" *Id.* at 981.

Finally, the Court determined Megan's Law II's registration, verification, and counseling requirements were not sufficiently onerous to be considered punishment based upon alleged excessiveness. *Id*. at 982. Although the Court conceded it was "troubling" that the requirements last for the entire lifetime of the sexually violent predator, and the legislature could avoid excessiveness claims by allowing a sexually violent predator to invoke judicial review to demonstrate he no longer poses a substantial risk, the Court recognized the record did not include any information concerning the successful treatment of sexually violent predators. *Id*. at 982-83. Accordingly, the *Williams II* Court established the registration, notification, and counseling requirements imposed on sexually violent predators under Megan's Law II were not punitive; thus their imposition did not violate the offenders' due process rights. *Id*. at 984.[12]

C. SORNA

The General Assembly enacted SORNA in response to the federal Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248, 42 U.S.C. §§16901-16991, [13] which mandates that states impose on sex offenders certain tier-based registration and notification requirements in order to avoid being subject to a penalty, *i.e.*, the loss of federal grant funding.[14] *In re J.B.*, 107 A.3d 1, 3 (Pa. 2014).

Accordingly, Pennsylvania's General Assembly sought to comply with this federal legislation by providing for "the expiration of prior registration requirements, commonly referred to as Megan's Law [III], 42 Pa.C.S. §§9791-9799.9, as of December 20, 2012, and for the effectiveness of SORNA on the same date." *Id*.

The purposes of SORNA, as stated by the General Assembly, are as follows:

> (1) To bring the Commonwealth into substantial compliance with the Adam Walsh Child Protection and Safety Act of 2006 …
>
> (2) To require individuals convicted or adjudicated delinquent of certain sexual offenses to register with the Pennsylvania State Police and to otherwise comply with this subchapter if those individuals reside within this Commonwealth, intend to reside within this Commonwealth, attend an educational institution inside this Commonwealth or are employed or conduct volunteer work within this Commonwealth.
>
> (3) To require individuals convicted or adjudicated delinquent of certain sexual offenses who fail to maintain a residence and are therefore homeless but can still be found within the borders of this Commonwealth to register with the Pennsylvania State Police.
>
> (4) To require individuals who are currently subject to the criminal justice system of this Commonwealth as inmates, supervised with respect to probation or parole or registrants under this subchapter to register with the Pennsylvania State Police and to otherwise comply with this subchapter. To the extent practicable and consistent with the requirements of the Adam Walsh Child Protection and Safety Act of 2006, this subchapter shall be construed to maintain existing procedures regarding registration of sexual offenders who are subject to the criminal justice system of this Commonwealth.
>
> (5) To 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 geographic radius and determine whether a sexual offender resides within that zip code or radius.
>
> (6) To 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. §9799.10. Furthermore, the General Assembly expressed the legislative findings and declaration of policy supporting SORNA as follows:

> **(a) Legislative findings.-** The General Assembly finds as follows:
>
> (1) In 1995 the General Assembly enacted the act of October 24, 1995 (1st Sp. Sess. P.L. 1079, No. 24), commonly referred to as Megan's Law. Through this enactment, the General Assembly intended to comply with legislation enacted by Congress requiring that states provide for the registration of sexual offenders. The Federal statute, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Public Law 103-322, 42 U.S.C. 14071 *et seq*.), has been superseded by the Adam Walsh Child Protection and Safety Act of 2006 (Public Law 190-248, 120 Stat. 587).
>
> (2) This Commonwealth's laws regarding registration of sexual offenders need to be strengthened. The Adam Walsh Child Protection and Safety Act of 2006 provides a mechanism for the Commonwealth to increase its regulation of sexual offenders in a manner which is nonpunitive but offers an increased measure of protection to the citizens of this Commonwealth.
>
> (3) If the public is provided adequate notice and information about sexual offenders, the community can develop constructive plans to prepare for the presence of sexual offenders in the community. This allows communities to meet with law enforcement to prepare and obtain information about the rights and responsibilities of the community and to provide education and counseling to residents, particularly children.
>
> (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.
>
> (5) Sexual offenders have a reduced expectation of privacy because of the public's interest in public safety and in the effective operation of government.
>
> (6) Release of information about sexual offenders to public agencies and the general public will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems so long as the information released is rationally related to the furtherance of those goals.
>
> (7) Knowledge of whether a person is a sexual offender could be a significant factor in protecting oneself and one's family members, or those in care of a group or community organization, from recidivist acts by such offenders.
>
> (8) The technology afforded by the Internet and other modern electronic communication methods makes this information readily accessible to parents, minors, and private entities, enabling them to undertake appropriate remedial precautions to prevent or avoid placing potential victims at risk.
>
> **(b) Declaration of policy.-** The General Assembly declares as follows:

(1) It is the intention of the General Assembly to substantially comply with the Adam Walsh Child Protection and Safety Act of 2006 and to further protect the safety and general welfare of the citizens of this Commonwealth by providing for increased regulation of sexual offenders, specifically as that regulation relates to registration of sexual offenders and community notification about sexual offenders.

(2)It is the policy of the Commonwealth to require the exchange of relevant information about sexual offenders among public agencies and officials and to authorize the release of necessary and relevant information about sexual offenders to members of the general public as a means of assuring public protection and shall not be construed as punitive.

(3) It is the intention of the General Assembly to address the Pennsylvania Supreme Court's decision in *Commonwealth v. Neiman*, [84 A.3d 603] (Pa. 2013), by amending this subchapter in the act of March 14, 2014 (P.L. 41, No. 19).

42 Pa.C.S. §9799.11(a)-(b).

SORNA's registration provisions are applicable to, *inter alia*, the following individuals: (1) those convicted of a sexually violent offense, [15] on or after the effective date of SORNA, who are residents of Pennsylvania, employed in Pennsylvania, students in Pennsylvania or transients; (2) those who are inmates, on or after the effective date of SORNA, in state or county prisons as a result of a conviction for a sexually violent offense; (3) those who, on or after the effective date of SORNA, are inmates in a federal prison or are supervised by federal probation authorities as a result of a sexually violent offense and have a residence in Pennsylvania, are employed in Pennsylvania, are students in Pennsylvania or transients; and, pertinent to this appeal, (4) those who were required to register under previous versions of Megan's Law and had not yet fulfilled their registration period as of the effective date of SORNA. 42 Pa.C.S. §9799.13.

SORNA classifies offenders and their offenses into three tiers. 42 Pa.C.S. §9799.14. Those convicted of Tier I offenses are subject to registration for a period of fifteen years and are required to verify their registration information and be photographed, in person at an approved registration site, annually. 42 Pa.C.S. §9799.15(a)(1), (e)(1).[16] Those convicted of Tier II offenses are subject to registration for a period of twenty-five years and are required to verify their registration information and be photographed, in person at an approved registration site, semi-annually. 42 Pa.C.S. §9799.15(a)(2), (e)(2).[17]

Those convicted of Tier III offenses are subject to lifetime registration and are required to verify their registration information and be photographed, in person at an approved registration site, quarterly. 42 Pa.C.S. §9799.15(a)(3), (e)(3). The Tier III offenses enumerated in SORNA-including the crime of which appellant was convicted, indecent assault where the individual is less than thirteen years of age-are as follows:

(1) 18 Pa.C.S. §2901(a.1) (relating to kidnapping).

(2) 18 Pa.C.S. §3121 (relating to rape).

(3) 18 Pa.C.S. §3122.1(b) (relating to statutory sexual assault).

(4) 18 Pa.C.S. §3123 (relating to involuntary deviate sexual intercourse).

(5) 18 Pa.C.S. §3124.1 (relating to sexual assault).

(6) 18 Pa.C.S. §3124.2(a.1) [relating to institutional sexual assault].

(7) 18 Pa.C.S. §3125 (relating to aggravated indecent assault).

(8)18 Pa.C.S. §3126(a)(7) (relating to indecent assault [of victim under 13 years of age]).

(9) 18 Pa.C.S. §4302(b) (relating to incest).

(10)18 U.S.C. §2241 (relating to aggravated sexual abuse).

(11) 18 U.S.C. §2242 (relating to sexual abuse).

(12) 18 U.S.C. §2244 [abusive sexual contact] where the victim is under 13 years of age.

(13) A comparable military offense or similar offense under the laws of another jurisdiction or foreign country or under a former law of this Commonwealth.

(14) An attempt, conspiracy or solicitation to commit an offense listed in paragraph (1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12) or (13).

(15) (Reserved).

(16) Two or more convictions of offenses listed as Tier I or Tier II sexual offenses.

42 Pa.C.S. §§9799.14(d).

SORNA also establishes a statewide registry of sexual offenders to be created and maintained by the state police. 42 Pa.C.S. §9799.16(a). The registry contains information

provided by the sexual offender, including: names and aliases, designations used by the offender for purposes of routing or self-identification in internet communications, telephone numbers, social security number, addresses, temporary habitat if a transient, temporary lodging information, passport and documents establishing immigration status, employment information, occupational and professional licensing information, student enrollment information, motor vehicle information, and date of birth. 42 Pa.C.S. §9799.16(b). The registry also contains information from the state police, including the following: physical description of the offender, including a general physical description, tattoos, scars and other identifying marks, text of the statute defining the offense for which the offender is registered, criminal history information, current photograph, fingerprints, palm prints and a DNA sample from the offender, and a photocopy of the offender's driver's license or identification card. 42 Pa.C.S. §9799.16(c).

Not only does SORNA establish a registry of sexual offenders, but it also directs the state police to make information available to the public through the internet. 42 Pa.C.S. §9799.28. The resulting website "[c]ontains a feature to permit a member of the public to obtain relevant information for an [offender] by a query of the internet website based on search criteria including searches for any given zip code or geographic radius set by the user." 42 Pa.C.S. §9799.28(a)(1)(i). The website also "[c]ontains a feature to allow a member of the public to receive electronic notification when [an offender] provides [updated] information [and also allows] a member of the public to receive electronic notification when [an offender] moves into or out of a geographic area chosen by the user." 42 Pa.C.S. §9799.28(a)(1)(ii). The Pennsylvania website must coordinate with the Dru Sjodin National Sex Offender Public Internet Website (https://www.nsopw.gov) and must be updated within three business days of receipt of required information. 42 Pa.C.S. §9799.28(a)(1)(iii), (iv).

In addition to the offender's duty to appear at an approved registration site annually, semi-annually, or quarterly, depending upon the tier of their offense, all offenders are also required to appear in person at an approved registration site within three business days of any changes to their registration information including a change of name, residence, employment, student status, telephone number, ownership of a motor vehicle, temporary lodging, e-mail address, and information related to professional licensing. 42 Pa.C.S. §9799.15(g). Offenders must also appear in person at an approved registration site within twenty-one days in advance of traveling outside the United States and must provide dates of travel, destinations, and temporary lodging. 42 Pa.C.S. §9799.15(i). Furthermore, transients, *i.e.* homeless individuals, must appear in person monthly until a residence is established. 42 Pa.C.S. §9799.15(h)(1).

Offenders who fail to register, verify their information at the appropriate time, or provide accurate information are subject to prosecution and incarceration under 18 Pa.C.S. §4915.1 (failure to comply with registration requirements). 42 Pa.C.S. §9799.21(a).

V. Federal Ex Post Facto Claim

We lead with appellant's federal claim in part because we recognize the General Assembly enacted SORNA in response to federal legislation. We also recognize the United States Supreme Court's decision in *Smith*-which arose out of a federal ex post facto challenge-guides our analysis. The United States Constitution provides: "No State shall ... pass any … ex post facto Law. ..." U.S. Const. art I §10. Our decision regarding violation of this clause depends on a determination of whether SORNA's retroactive application to appellant constitutes punishment. Accordingly, we apply the two-part analysis employed in *Smith* and *Williams II*. We first consider whether the General Assembly's "intent was to impose punishment, and, if not, whether the statutory scheme is nonetheless so punitive either in purpose or effect as to negate the legislature's non-punitive intent." *Williams II*, 832 A.2d at 971. If we find the General Assembly intended to enact a civil scheme, we then must determine whether the law is punitive in effect by considering the *Mendoza-Martinez* factors. *Id*. at 972. We recognize only the "clearest proof" may establish that a law is punitive in effect. *Lee*, 935 A.2d at 876-77. Furthermore, in determining whether a statute is civil or punitive, we must examine the law's entire statutory scheme. *Smith*, 538 U.S. at 92.

A. Intent of General Assembly

Appellant contends although SORNA's stated purpose is to protect the public, the real intent of the General Assembly is to punish offenders. Appellant's Brief at 9. Appellant buttresses this argument by claiming SORNA's statement of purpose implicates "sexual offenders" who are classified solely by their criminal record rather than the class of "sexually violent predators" to whom the former Megan's Law statutes applied, and which required an individualized determination of SVP status. *Id.* at 11. Appellant also points out SORNA is entirely codified under the sentencing section of Pennsylvania's Crimes Code. *Id*. at 12-13. Finally, appellant argues, SORNA vests administrative authority, not with a public safety department, but with the Pennsylvania State Police, a traditional enforcer of criminal laws, and failure to comply with SORNA results in arrest. *Id*. at 13-14.

The Commonwealth concedes SORNA is broader in application than previous Megan's Law statutes, but nevertheless insists the statutes do not differ in purpose, as SORNA explicitly provides the registration requirements shall not be construed as punitive. Commonwealth's Brief at 15-16, *citing* 42 Pa.C.S. §9799.11(b)(2). The Commonwealth further contends since the statutory language regarding purpose is unambiguous further interpretation of legislative intent should be avoided. *Id*. at 16.

"In applying the first element of this test, the sole question is whether the General Assembly's intent was to punish." *Williams II*, 823 A.2d at 971. This is a question of statutory construction and "[w]e must consider the statute's text and its structure to determine the legislative objective." *Smith*, 538 U.S. at 92, *citing Flemming v. Nestor*, 363 U.S. 603, 617 (1960). Furthermore, "considerable deference must be afforded to the intent as the legislature has stated it." *Id.* at 93. The General Assembly specifically stated SORNA "provides a mechanism for the Commonwealth to increase its regulation of sexual offenders in a manner which is nonpunitive but offers an increased measure of protection to the citizens of this Commonwealth." 42 Pa.C.S §9799.11(a)(2). The statute further states "the exchange of relevant information about sexual offenders ... [is] a means of assuring public protection and shall not be construed as punitive." 42 Pa.C.S. §9799.11(b)(2). Furthermore, the first listed purpose of SORNA is "[t]o bring the Commonwealth into substantial compliance with the [federal] Adam Walsh Child Protection and Safety Act of 2006." 42 Pa.C.S. §9799.10(1). Nothing in the expressed purpose, legislative findings, or declaration of policy of SORNA explicitly states the legislature intended the law to do anything other than create a remedial civil scheme to comply with federal legislation and protect the public.

At the same time, we recognize the following aspects of SORNA are troubling and actually cast doubt on the stated legislative intent: the act encompasses a much broader class of offenders than Megan's Law II, and includes relatively minor offenses within its net; the act is codified within the sentencing section of the Crimes Code; and the acts

vests regulatory authority with the state police. However, we note the fact SORNA encompasses a broad class of offenders is a reflection of the legislature's intent to comply with federal sex offender laws for funding purposes. Furthermore, Megan's Law II was also codified completely within the Crimes Code and also vested regulatory authority in the state police. As such, we recognize the General Assembly's intent in enacting SORNA apparently was twofold: to comply with federal law; and, as we stated in *Williams II*, "not to punish, but to promote public safety through a civil, regulatory scheme." *Williams II*, 832 A.2d at 972.

B. *Mendoza-Martinez* Factors

As we have determined the intent of the General Assembly was to enact a civil scheme, we now conduct an analysis of the *Mendoza-Martinez* factors to determine whether SORNA is sufficiently punitive in effect to overcome the General Assembly's stated nonpunitive purpose. *Williams II*, 832 A.2d at 971.

i. Whether the Statute Involves an Affirmative Disability or Restraint

Appellant argues this factor weighs in favor of finding SORNA punitive as SORNA differs from the Alaska statute upheld in *Smith* by requiring quarterly in-person appearances and in-person appearances for any updates to an offender's information. Appellant contends even if he never changes his name, residence, employment, phone number, car, or e-mail address, or goes on vacation, he still must appear a minimum of 100 times over twenty-five years, and for the rest of his life. Appellant's Brief at 18, *citing* 42 Pa.C.S. §9799.15. PACDL contends not only does SORNA impose major, direct disabilities and restraints such as in-person reporting and updating requirements that were not present in the statutes analyzed in *Smith* or *Williams II*, but it also imposes extraordinary secondary disabilities in finding and keeping housing, employment, and schooling, traveling out of state, and increases the likelihood the offender may be subject to violence and adverse social and psychological impacts. PACDL's Brief at 43-45.

The Commonwealth responds by arguing although it is true the Alaska statute did not contain in-person reporting requirements, the *Smith* Court gave great weight to the fact Alaska's statute did "not restrain activities sex offenders may pursue but leaves them free to change jobs or residences." Commonwealth's Brief at 19, *quoting Smith*, 538 U.S. at 100. The Commonwealth further argues our Superior Court, in *Commonwealth v. Woodruff*, 135 A.3d 1045 (Pa. Super. 2016), noted the *Williams II* Court found monthly counseling sessions, which seem more onerous than SORNA's quarterly in-person reporting requirements, did not impose an affirmative disability or restraint under Megan's Law II. Commonwealth's Brief at 20, *citing Woodruff*, 135 A.3d at 1052-53. Although the Commonwealth acknowledges the *Woodruff* panel ultimately found this factor weighed in favor of finding SORNA's scheme to be punitive, the Commonwealth nevertheless contends this Court, in light of its prior holding regarding monthly counseling sessions in *Williams II*, should find this factor to weigh in favor of determining SORNA is nonpunitive. Commonwealth's Brief at 22.

We are substantially aligned with appellant as to this factor. The *Smith* Court found the Alaska statute did not involve an affirmative disability or restraint partly due to the fact it does not require in-person updates. *Smith*, 538 U.S. at 102. We hold this distinction from SORNA is important. *See, e.g.*, *Perez*, 97 A.3d at 753-54 (noting Alaska statute did not require in-person updates and distinguishing SORNA where Perez, a Tier II SORNA offender, was affirmatively required to report fifty times over twenty-five-year period). As stated, appellant, who was retroactively required to register as a Tier III offender under SORNA, is now required to appear in person at a registration site four times a year, a minimum of 100 times over the next twenty-five years, extending for the remainder of his life. *See* 42 Pa.C.S §9799.15(e)(3). In fact, this is the minimum number of times appellant will have to appear in person, and does not account for the times he must appear due to his "free" choices including "moving to a new address or changing his appearance[.]"[18] *See* 42 Pa.C.S. §9799.15(g); *Perez*, 97 A.3d at 754. Furthermore, a homeless offender, referred to in the statute as a "transient, " is required to appear in person monthly, a minimum of 300 times over twenty-five years. *See* 42 Pa.C.S. §9799.15(h)(1). The Commonwealth's argument the *Williams II* Court found more onerous monthly counseling sessions for sexually violent predators were not an affirmative disability or restraint is unpersuasive. The *Williams II* Court based its decision partly on the fact the counseling sessions requirement was designed to "assist the sexually violent predator, who is likely to be impulsive, irresponsible and burdened with poor behavioral controls, from relapsing into sexually predatory behavior." *Williams II*, 832 A.2d at 975 (footnote omitted). Under SORNA, where there has been no finding that individuals subject to the in-person registration requirements are sexually violent predators, subject to needed counseling, the in-person appearances do not constitute counseling in any event. Thus, the reasoning on this point in *Williams II* simply does not apply. As such, we find the in-person reporting requirements, for both verification and changes to an offender's registration, to be a direct restraint upon appellant and hold this factor weighs in favor of finding SORNA's effect to be punitive.

ii. Whether the Sanction Has Been Historically Regarded as Punishment

Appellant also contends the requirements of SORNA closely parallel historical forms of punishment such as probation and parole since the in-person reporting requirements are similar to meeting with a probation officer, and sex offenders also have a reduced expectation of privacy under the statute. Appellant's Brief at 19-20, *citing* 42 Pa.C.S. §9799.11(a)(5). Appellant notes this is a distinct difference from the Alaska statute at issue in *Smith* where the High Court rejected such an argument on the basis the Alaska statute contained no mandatory conditions comparable to probation. Appellant's Brief at 19, *citing Smith*, 538 U.S. at 101. PACDL posits the stated purpose of both probation and SORNA is to promote public safety, both rest on the assumption the individual requires supervision, both are imposed by the trial court at the time of sentencing and are part of the Sentencing Code, both require regular, in-person appearances, and both probationers and registrants must comply or face sanctions. PACDL's Brief at 46-47.[19] PACDL also contends SORNA is similar to shaming punishments and has been recognized as such by other jurisdictions. PACDL argues historical shaming punishments involved the public disclosure of similar information about offenders and SORNA's declaration that all registrants are "sex offenders" and "high risk" is akin to a scarlet letter which the offender has no mechanism to dispute. *Id*. at 47-48.

The Commonwealth contends although SORNA registration may be like some probationary terms, probation takes many forms and can be much more burdensome than SORNA's requirements. Commonwealth's Brief at 24. The Commonwealth also argues should the Court find this factor weighs in favor of finding SORNA punitive, the factor should be given little weight as probation is the least onerous and newest form of traditional punishment. *Id*. at 23-25, *citing Woodruff*, 135 A.3d at 1055. The Commonwealth also contends registration is not similar to shaming as the public display is not for the purpose of ridicule, but instead to inform the public for its own safety. Commonwealth's Brief at 25-26, *citing Kammerer v. State*, 322 P.3d 827, 835-36 (Wyo. 2014).

The United States Supreme Court has distinguished colonial-era public shaming punishments from sex offender registration laws by noting public shaming "involved more

than the dissemination of information" but also "held the person up before his fellow citizens for face-to-face shaming or expelled him from the community." *Smith*, 538 U.S. at 98. The *Smith* Court found the sex offender information disseminated through the Alaska statute is accurate and, for the most part, already public. *Id*. The Court noted the publicity may cause embarrassment or ostracism for the convicted, but found "the publicity and resulting stigma [is not] an integral part of the objective of the regulatory scheme." *Id*. at 99. The Court also stated the fact the information is posted on the internet did not alter its conclusion since the intent of the posting is to inform the public for its own safety, the website itself does not provide the public with a means to shame the offender, and members of the public must affirmatively seek out the information. *Id*.

As stated above, we recognize the significance of the *Smith* Court's decision with regard to its analysis of the Alaska statute. However, *Smith* was decided in an earlier technological environment. The concurring expression by now-Justice Donohue in *Perez* has particular force on this point:

> The environment has changed significantly with the advancements in technology since the Supreme Court's 2003 decision in *Smith*. As of the most recent report by the United States Census Bureau, approximately 75 percent of households in the United States have internet access. Yesterday's face-to-face shaming punishment can now be accomplished online, and an individual's presence in cyberspace is omnipresent. The public internet website utilized by the Pennsylvania State Police broadcasts worldwide, for an extended period of time, the personal identification information of individuals who have served their "sentences." This exposes registrants to ostracism and harassment without any mechanism to prove rehabilitation-even through the clearest proof. In my opinion, the extended registration period and the worldwide dissemination of registrants' information authorized by SORNA now outweighs the public safety interest of the government so as to disallow a finding that it is merely regulatory.

Perez, 97 A.3d at 765-66 (Donohue, J., concurring).

Furthermore, although the *Smith* Court ultimately rejected the argument Alaska's registration system was like probation because it did not impose mandatory conditions, the High Court nevertheless recognized the argument has "some force" and the argument is therefore even more compelling where SORNA does impose such conditions. *See Id*. at 763 (Donohue, J. concurring), *citing Smith*, 538 U.S. at 101. It is clear the Alaska statute at issue in *Smith* and SORNA are materially different in this regard. As our analysis of the similarity to probation would be nearly identical to Justice Donohue's analysis of the issue in *Perez*, we again quote from her concurring opinion with minimal, bracketed, differences arising out of appellant's status as a Tier III offender:

> In contrast, the mandatory in-person verification requirement in Section 9799.15(e) not only creates an affirmative restraint upon [appellant], requiring him to appear at a designated facility a minimum of [100] times over the next 25 years[, extending for the remainder of his life,] as a Tier [III] offender, but also greatly resembles the periodic meetings with probation officers imposed on probationers. … [B]ecause SORNA differs significantly from the statute at issue in *Smith*, these disparities must be considered.
>
> In [*Williams II*,] the Pennsylvania Supreme Court found that probation has historically been considered a traditional form of punishment. *Williams [II]*, 832 A.2d at 977. Probation entails a set of mandatory conditions imposed on an individual who has either been released after serving a prison sentence, or has been sentenced to probation in lieu of prison time. 42 Pa.C.S. §9754. These conditions can include psychiatric treatment, limitations on travel, and notifying a probation officer when any change of employment or residency occurs. 42 Pa.C.S. §9754(c). Probationers are also subject to incarceration for a violation of any condition of their probation. 42 Pa.C.S. §9771.
>
> Like the conditions imposed on probationers, registrants under SORNA must notify the state police of a change in residence or employment. 42 Pa.C.S. §9799.15(g). Offenders also face incarceration for any non-compliance with the registration requirements. 42 Pa.C.S. §9799.22(a). Furthermore, SORNA requires registrants who do not have a fixed place of work to provide "general travel routes and general areas where the individual works" in order to be in compliance. 42 Pa.C.S. §9799.16. The Supreme Court in *Smith* stated that "[a] sex offender who fails to comply with the reporting requirement may be subjected to criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense." *Smith*, 538 U.S. at 101-02. However, violations for noncompliance with both probation and SORNA registration requirements are procedurally parallel. Both require further factual findings to determine whether a violation has actually occurred. 42 Pa.C.S. §§9771(d), 9799.21. Similarly, but for the original underlying offense, neither would be subject to the mandatory conditions from which the potential violation stems. The parallels between the SORNA registration requirements and probation lead me to conclude that factor two of the [*Mendoza-Martinez*] test leans towards a finding that SORNA is punitive.

See Perez, 97 A.3d at 763-64 (Donohue, J. concurring).

We conclude the weighing process with regard to this *Mendoza-Martinez* factor presents a much closer case than the *Smith* Court's analysis of Alaska's registration statute in 2003. We consider SORNA's publication provisions-when viewed in the context of our current internet-based world-to be comparable to shaming punishments. We also find SORNA and the Alaska statute are materially different in their mandatory conditions such that SORNA is more akin to probation. We therefore hold this factor weighs in favor of finding SORNA's effect to be punitive.

iii. Whether the Statute Comes into Play Only on a Finding of Scienter

Appellant presents no argument on this factor, noting the *Smith* Court did not analyze it because it carried little weight in determining the punitive nature of the Alaska statute. Appellant's Brief at 20, *citing Smith*, 538 U.S. at 105. The Commonwealth agrees with appellant. On the other hand, PACDL argues the question of scienter does weigh in favor of finding SORNA is punitive because registration flows directly from a finding of guilt, which requires a particular mental state. PACDL's Brief at 49, *citing Smith*, 538 U.S. at 105. We recognize that where the concern of a sex offender registration statute like SORNA is protecting the public against recidivism, past criminal conduct is "a necessary beginning point." *Smith*, 538 U.S. at 105. As such, we agree with the *Smith* Court in finding this factor is of little significance in our inquiry. *See id*.

iv. Whether the Operation of the Statute Promotes the Traditional Aims of Punishment

Appellant next argues SORNA operates to promote the traditional aims of punishment-retribution and deterrence. Appellant's Brief at 20. Appellant argues SORNA promotes deterrence much like incarceration and probation do; the prospect of being labeled a sex offender accompanied by registration requirements and the public dissemination of personal information on the internet will deter the commission of sex offenses. *Id*. Appellant further argues SORNA has retributive aspects since it applies only after an individual commits a crime, and the additional punishment for failure to register or provide accurate information, *see* 18 Pa.C.S. §4915.1, is also related to retribution. Appellant's Brief at 21. Appellant contends distribution of private information online also exacts retribution. *Id*. at 21-23. To this point, appellant recognizes the *Smith* Court stated the dissemination of accurate information may properly flow from an offender's conviction, which is a matter of public record. *Id*. at 22. However, appellant notes the information disseminated under SORNA goes beyond conviction data and includes sufficient information to allow members of the public to harass an offender, and thus endanger public safety. *Id*. at 22-23.

PACDL posits SORNA is designed to have deterrent and retributive effects. PACDL notes deterrence is an obvious goal of sex offender registration laws. PACDL's Brief at 50, *citing Commonwealth v. Gehris*, 54 A.3d 862, 878 (Pa. 2012) (Castille, C.J., opinion in support of reversal). PACDL also contends the analysis here is different from that in *Williams II* as SORNA is different from Megan's Law II in significant ways; many SORNA offenses are misdemeanors where lengthy incarceration is unlikely and often impossible, and thus SORNA is the greatest form of deterrence for those crimes. PACDL's Brief at 50-51. As to retribution, PACDL posits registration is imposed automatically upon a conviction regardless of the underlying circumstances or the actual risk an offender may offend again. PACDL's Brief at 49-50. Thus, PACDL argues, SORNA exacts retribution for past crimes without regard to public safety interests. *Id*. at 50.

The Commonwealth acknowledges SORNA has a deterrent purpose and effect. Commonwealth's Brief at 28-29. However, the Commonwealth argues finding SORNA punitive (and thus incapable of retroactive application) would undermine the state's ability to regulate offenders and the risk of recidivism is too great a price to pay. *Id*. at 29, *citing Smith*, 538 U.S. at 102. The Commonwealth cites several studies which state sex offender recidivism rates are difficult to measure and are likely underreported, and as such, recidivism remains a valid legislative concern. Commonwealth's Brief at 29-30. The Commonwealth further contends results of studies may vary because the area is vast and complex; thus courts and legislatures have consistently relied on information demonstrating recidivism is a significant concern for adult offenders. *Id.* at 31, *citing United States v. Irey*, 612 F.3d 1160, 1214-15 (11th Cir. 2010) (citing cases raising concerns over sex offender recidivism). The Commonwealth contends, because of contrasting studies and real recidivism concerns, this Court should be wary of PACDL's contrary conclusions. Commonwealth's Brief at 33.

We are substantially aligned with appellant as to this factor, especially in light of the Commonwealth's concession that SORNA is meant to have a deterrent effect. We agree that the prospect of being labeled a sex offender accompanied by registration requirements and the public dissemination of an offender's personal information over the internet has a deterrent effect. We are also cognizant that "the mere presence of a deterrent purpose" does not "render such sanctions 'criminal'." *Smith*, 538 U.S. at 102. On careful consideration, however, we cannot say there is only a "mere presence" of a deterrent effect embodied in SORNA. *See id*. (emphasis added). Contrary to Megan's Law II, as analyzed in *Williams II*, there is not a "substantial period of incarceration attached to" many of the predicate offenses requiring registration under SORNA, many of which are misdemeanors or carry relatively short maximum terms of incarceration.[20]*Williams II*, 832 A.2d at 978. This includes interference with custody of children, 18 Pa.C.S. §2904, a misdemeanor of the second degree which does not have a sexual component, and yet is a Tier I offense under SORNA. *See* 42 Pa.C.S. §9799.14(b)(3). A conviction under this subsection may not lead to incarceration, but would nevertheless require registration as a sex offender for a fifteen year period. In such a case, and for many other predicate offenses listed in the tier system, SORNA clearly aims at deterrence.[21]

Although we recognize both the High Court in *Smith* and this Court in *Williams II* found sex offender laws generally do not have a retributive purpose, we note there was minimal analysis on this point in either decision. Retribution, in its simplest terms, "affix[es] culpability for prior criminal conduct, " *Hendricks*, 521 U.S. at 362, and in fact, SORNA is applicable only upon a conviction for a predicate offense. We recognize the *Smith* Court stated the dissemination of accurate, public record information, even over the internet, did not alter its conclusion that the Alaska statute did not have a punitive effect. However, the information SORNA allows to be released over the internet goes beyond otherwise publicly accessible conviction data and includes: name, year of birth, residence address, school address, work address, photograph, physical description, vehicle license plate number and description of vehicles. *See* 42 Pa.C.S. §9799.28(b)(1)-(8). Moreover, although the *Williams II* Court determined the dissemination of registration information provided by sexually violent predators under Megan's Law II was necessary to protect the public, the Court expressly stated the public notification and electronic dissemination provisions of that statute "need not be read to authorize public display of the information, as on the Internet." *Williams II*, 832 A.2d at 980. SORNA has increased the length of registration, contains mandatory in-person reporting requirements, and allows for more private information to be displayed online. *Perez*, 97 A.3d at 765 (Donohue, J. concurring). Under the circumstances, we conclude SORNA is much more retributive than Megan's Law II and the Alaska statute at issue in *Smith*, and this increase in retributive effect, along with the fact SORNA's provisions act as deterrents for a number of predicate offenses, all weigh in favor of finding SORNA punitive.

v. Whether the Behavior to which the Statute applies is Already a Crime

Appellant concedes this factor does not carry much weight, but suggests it does weigh in favor of finding the statute punitive. Appellant's Brief at 23, *citing Smith*, 538 U.S. at 105. PACDL notes SORNA applies only after an individual has been convicted of a predicate crime and the registration requirements cannot be waived if the offender poses little or no risk; PACDL concludes this means the factor weighs in favor of finding SORNA is punitive. PACDL's Brief at 51. The Commonwealth responds by contending *Smith* should control here and this factor is of little weight. Commonwealth's Brief at 35, *citing Smith*, 538 U.S. at 105. As with the third *Mendoza-Martinez* factor discussed above, this factor carries little weight in the balance. We again recognize where SORNA is aimed at protecting the public against recidivism, past criminal conduct is "a necessary beginning point." *See Smith*, 538 U.S. at 105.

vi. Whether there is an Alternative Purpose to which the Statute may be Rationally Connected

Appellant concedes this factor weighs in favor of finding SORNA to be nonpunitive as there is a rational connection to public safety and health. Appellant's Brief at 24. PACDL, however, submits SORNA is not rationally related to a nonpunitive purpose. PACDL contends most offenders will not commit another sexual offense, and SORNA therefore produces an illusion of security from stranger perpetrators when the majority of sexual crimes are committed by someone known to the victim. PACDL further argues SORNA diverts law enforcement efforts away from the most serious offenders and from effective methods of crime control and treatment. PACDL's Brief at 51-53.

The Commonwealth reiterates its recidivism-based arguments to conclude SORNA is rationally connected to the goals of public safety and health. Commonwealth's Brief at 35-37. *Amicus* PDAA posits appellant is misguided in asking this Court to second-guess legislative judgment since there is no absolute truth when it comes to the risk posed by sexual offenders. PDAA's Brief at 11-12. PDAA cites studies that have found nearly forty percent of sexual offenders released from prison return to prison within three years for sexual offenses. *Id*. at 12. PDAA also contends any attempt to measure recidivism greatly understates the problem as the wide majority of sexual offenses are never reported. *Id*. at 13-15. PDAA concludes although there is no perfect solution to this problem, as with most policy problems, the General Assembly should be afforded deference in its judgment regarding a complex issue of social policy. *Id*. at 16-17.

We recognize there are studies which find the majority of sexual offenders will not re-offend, and that sex offender registration laws are ineffective in preventing re-offense; we also recognize there are studies that reach contrary conclusions. In this context, we find persuasive PDAA's argument that policy regarding such complex societal issues, especially when there are studies with contrary conclusions, is ordinarily a matter for the General Assembly. *See e.g., Commonwealth v. Hale*, 128 A.3d 781, 785 (Pa. 2015) (where "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. §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. We are also cognizant that the General Assembly legislated in response to a federal mandate based on the expressed purpose of protection from sex offenders. *See* 42 U.S.C. §16901 ("In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this chapter establishes a comprehensive national system for the registration of those offenders ….'). We therefore conclude there is a purpose other than punishment to which the statute may be rationally connected and this factor weighs in favor of finding SORNA to be nonpunitive.

vii. Whether the Statute is Excessive in Relation to the Alternative Purpose Assigned

Appellant notes the *Williams II* Court considered the fact there was no means under Megan's Law II for a judicially-determined sexually violent predator to demonstrate he no longer posed a substantial risk to the community-and thus escape lifetime registration-to be "troubling." Appellant's Brief at 25, *quoting Williams II*, 832 A.2d at 982-83. However, the *Williams II* Court ultimately found the record in that case did not include any information concerning the successful treatment of sexually violent predators to support a finding this effectively permanent requirement was excessive, given the presumption Megan's Law II was constitutional. *Williams*, 832 A.2d at 983. Appellant distinguishes SORNA because it does not require any judicial determination that offenders are sexually violent predators before applying its most severe requirements, and instead subjects all offenders within Tier III to the same reporting requirements as a sexually violent predator under Megan's Law II. Appellant's Brief at 25-26, *citing Williams II*, 832 A.2d at 983. Appellant contends SORNA's terms are excessive in this regard and he will never be able to overcome the presumption there is a high risk he will commit another sexual offense. Appellant's Brief at 25-26.

PACDL also contends SORNA is excessive and significantly over-inclusive as it casts a global net which sweeps into the sex offender registry many minor and non-sexual offenses. PACDL's Brief at 53. PACDL asserts SORNA is ineffective in determining risk as it does not even require a risk assessment; PACDL notes this Court has found imprecision even in risk assessments. *Id*. at 54, *citing Lee*, 935 A.2d at 885.

The Commonwealth responds by contending appellant's excessiveness argument lacks merit as his registration requirements are not as severe as those of a sexually violent predator under SORNA, who must attend monthly counseling sessions and be monitored by the State Sexual Offenders Assessment Board. Commonwealth's Brief at 37-38, *citing Woodruff*, 135 A.3d at 1061. The Commonwealth further notes sexually violent predators are subject to additional public notification procedures and publication on the internet of even more private information, including where they eat, spend time, and engage in leisure activities. Commonwealth's Brief at 38, *citing* 42 Pa.C.S. §§9799.27, 9799.28. The Commonwealth further notes the *Williams II* Court was concerned with excessiveness in the process by which courts determine whether or not an offender is a sexually violent predator rather than the excessiveness of the reporting conditions *per se*. Commonwealth's Brief at 39, *citing Williams II*, 832 A.2d at 982.

Once again, we are aligned with the arguments of appellant and PACDL. The *Williams II* Court observed with regard to Megan's Law II, "if the Act's imprecision is likely to result in individuals being deemed sexually violent predators who in fact do not pose the type of risk to the community that the General Assembly sought to guard against, then the Act's provisions could be demonstrated to be excessive …." *Williams II*, 832 A.2d at 983. Furthermore, "'society has a significant interest in assuring that the classification scheme [of a sex offender registration law] is not over-inclusive.'" *Lee*, 935 A.2d at 883, *quoting Commonwealth v. Maldonado*, 838 A.2d 710, 715 (Pa. 2003). We apply this reasoning here, and we do not analyze excessiveness as applied only to appellant or sexually violent predators, but instead we examine SORNA's entire statutory scheme. *Smith*, 538 U.S. at 92. Moreover, we have already recognized 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. *See, e.g.*, 42 Pa.C.S. §9799.14(b)(1)-(3), (19) (pertaining to: unlawful restraint, 18 Pa.C.S. §2902(b); false imprisonment, 18 Pa.C.S. §2903(b); interference with custody of a child, 18 Pa.C.S. §2904; filing factual statement about alien individual, 18 U.S.C. §2424). Accordingly, we conclude SORNA's requirements are excessive and over-inclusive in relation to the statute's alternative assigned purpose of protecting the public from sexual offenders.

viii. Balancing of Factors

Our review of SORNA under the *Mendoza-Martinez* factors reveals significant differences between Pennsylvania's most recent attempt at a sex offender registration statute and the statutes upheld in *Williams II* and *Smith*. As stated, we have determined four of the five factors to which we have given weight-all except for whether there is an alternative purpose to which the statute may be rationally connected-weigh in favor of finding SORNA to be punitive in effect despite its expressed civil remedial purpose. We conclude SORNA involves affirmative disabilities or restraints, its sanctions have been historically regarded as punishment, its operation promotes the traditional aims of punishment, including deterrence and retribution, and its registration requirements are excessive in relation to its stated nonpunitive purpose. Accordingly, we hold the retroactive application of SORNA to appellant violates the ex post facto clause of the United States Constitution.

VI. State Ex Post Facto Claim

Having found retroactive application of SORNA violates the federal ex post facto clause, we might end our analysis here. *See, e.g., Rose*, 127 A.3d at 798 n.11 (standards applied to determine ex post facto violations under state and federal clauses are comparable; law that violates federal ex post facto clause will be held to violate state clause such that Court "need not separately consider" it); *Commonwealth v. Gaffney*, 733 A.2d 616, 621 (Pa. 1999) (language of federal and state ex post facto clauses "virtually identical, " same concerns shaped them, and "virtually identical standards have applied to determining whether" ex post facto violation has occurred under the two provisions). However, appellant presented a state constitutional challenge, of which we expressly granted review, and the parties and *amici* forwarded developed arguments on this claim. *But see Perez*, 97 A.3d at 766 (state ex post facto claim waived). Moreover, we are cognizant of the difficulties arising in the wake of a decision from this Court based exclusively on federal grounds, which is subsequently appealed to the United States Supreme Court and remanded after a contrary decision regarding the federal constitution; inevitably, a state claim follows and a decision rendered by this Court only after intervening uncertainty and delay. *Compare Pap's A.M. t/d/b/a Kandyland v. City of Erie*, 719 A.2d 273 (Pa. 1998) (striking down nude dancing ordinance on basis of federal First Amendment protections; state constitutional claim not reached), *reversed by City of Erie v. Pap's A.M. t/d/b/a Kandyland*, 529 U.S. 277 (2000) (upholding nude dancing ordinance as content-neutral and not violative of federal free speech protections) *with Pap's A.M. t/d/b/a Kandyland v. City of Erie*, 812 A.2d 591 (Pa. 2002) (nude dancing ordinance violates Pennsylvania Constitution free speech provision). *See also Doe*, 189 P.3d 999 (upon remand from United States Supreme Court, retroactive application of Alaska's sex offender registration law held unconstitutional under state ex post facto clause).

We are also aware our decision that SORNA violates the federal ex post facto clause is a departure from federal case law which has upheld the Adam Walsh Act against federal ex post facto challenges. *See, e.g., United States v. Young*, 585 F.3d 199, 203-06 (5th Circ. 2009) (retroactive application of federal SORNA does not violate federal ex post facto clause); *United States v. May*, 535 F.3d 912, 919-20 (8th Circ. 2008) (same), *cert denied, May v. United States*, 556 U.S. 1258 (2009), *abrogated on other grounds by Reynolds v. United States*, 565 U.S. 432 (2012). Under the circumstances, we consider it salutary to decide appellant's state constitutional challenge, and our approach is not unprecedented. *See Commonwealth v. Kohl*, 615 A.2d 308, 315 (Pa. 1992) ("While we have held that the searches authorized by §1547(a)(2) violate the Federal Constitution, the constitutionality of the searches under Article I, section 8 must be addressed also. We conclude that the searches are impermissible under the Pennsylvania Constitution. The analysis underlying our holding is separate and independent from the analysis undertaken under the Federal Constitution. Therefore, our holding under the Pennsylvania Constitution would remain unchanged should the U.S. Supreme Court resolve the issue contrary to our analysis of the federal constitutional question."). Accordingly, we proceed to determine whether the Pennsylvania Constitution provides even greater ex post facto protections than its federal counterpart by analyzing the following four factors: 1) text of the Pennsylvania constitutional provision; 2) history of the provision, including Pennsylvania case law; 3) related case law from other states; and 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence. *Edmunds*, 586 A.2d at 894-95 (Pa. 1991).[22]

A. Text

The Pennsylvania Constitution provides, in pertinent part: "No ex post facto law ... shall be passed." Pa. Const. art. I §17. It is clear, as the Commonwealth argues, the text of the federal and state constitutions are nearly identical and we have recognized "the same pre-revolutionary-war concerns shaped the ex post facto provisions of the constitutions of Pennsylvania and the United States." *See Young*, 637 A.2d at 1317 n.7. However, "we are not bound to interpret the two provisions as if they were mirror images, even where the text is similar or identical." *Edmunds*, 586 A.2d at 895-96. Moreover, as *amicus* PACDL contends, the different location of the clauses within each document "speaks volumes." PACDL's Brief at 37. The location of Pennsylvania's clause within the Declaration of Rights lends considerable force to the argument it provides even more protection than its federal counterpart. *See Gondelman v. Commonwealth*, 554 A.2d 896, 904 (Pa. 1989) ("those rights enumerated in the Declaration of Rights are deemed to be inviolate and may not be transgressed by government"); *see also* Pa. Const. art. 1, §25 ("To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government and shall forever remain inviolate.").

B. History

Appellant next argues the history of Pennsylvania's ex post facto clause, including relevant case law, also weighs in favor of finding it provides greater protection than its federal counterpart, despite the fact this Court declined to make this distinction in *Gaffney*, 733 A.2d at 616. In *Gaffney*, this Court held the retroactive application of Megan's Law I did not violate the state or federal ex post facto clauses. *Id*. at 621-22. Appellant distinguishes *Gaffney* by noting reputation interests were not at issue because Gaffney's sexual offender registration information was not to be disseminated to the public under that statute. Appellant's Brief at 29, citing *Gaffney*, 733 A.2d at 621. Appellant argues this Court has recognized reputation as a protected interest in other contexts under state law, *see, e.g., Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346, 350 (Pa. 1987), and although the federal constitution does not provide such express protection of reputation rights, this Court recently recognized an individual's right to reputation may be encroached by sex offender registration laws that brand offenders with the "indelible mark of a dangerous recidivist." Appellant's Brief at 29, *quoting J.B.*, 107 A.3d at 17, 19 ("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.").

Moreover, PACDL notes, the Pennsylvania ex post facto clause was adopted ten years prior to its federal counterpart, and Pennsylvania historically took a different approach towards punishment, diverting away from the nationally accepted view of corporal punishment as the norm much earlier than other jurisdictions. PACDL's Brief at 38-39, *citing* Robert R. Tyson, *Essay on the Penal Law of Pennsylvania*, Law Academy of Philadelphia 9-13 (1827). PACDL further argues the most significant difference between federal and state ex post facto case law is this Court has stated the two constitutions "afford separate bases for proscribing ex post facto laws." *Id*. at 39, *citing Lehman v. Pa. State Police*, 839 A.2d 265, 270 n.4 (Pa. 2003) (denial of firearm application based on prior conviction was not punishment and did not violate state or federal ex post facto clauses). Finally, PACDL asserts this Court, in its decisions discussing the ex post facto clause, has stated the seventh *Mendoza-Martinez* factor, excessiveness, may alone be dispositive of a punitive finding in Pennsylvania. PACDL's Brief at 39, *citing Lee*, 935 A.2d at 876 n.24 (excessiveness alone might warrant finding Megan's Law II requirements are punitive); *Williams II*, 832 A.2d at 982-83 (leaving open possibility of excessiveness as determinative factor).

The Commonwealth responds by arguing historical considerations do not distinguish the state clause from its federal counterpart, and that this Court's statements regarding excessiveness standing alone to support a finding a statute has punitive effect do not undermine the United States Supreme Court's expression that no single *Mendoza-Martinez* factor is exhaustive or dispositive. *See Hudson*, 522 U.S. at 101. The Commonwealth also rejects appellant's reputation-based argument by noting *J.B.* was confined to the

unique reputation concerns for juvenile offenders and does not apply to adults who have a higher likelihood of recidivating. Commonwealth's Brief at 46-47.

Although we acknowledge both the state and federal ex post facto clauses were shaped from the same pre-revolutionary war concerns, this Court has nevertheless noted divergence between the clauses in the past, particularly with regard to defining punishment on the basis of excessiveness. *See, e.g., Lee*, 935 A.2d at 876 n.24 ("There is some tension between the *Hudson* language [that no *Mendoza-Martinez* factor is controlling] and our own suggestion in [*Williams II*], which postdated *Hudson* by over five years, that the last *Mendoza-Martinez* factor alone might render Megan's Law unconstitutional provided an adequate showing. We nonetheless suggested in [*Williams II*] and maintain now, if only *arguendo*, that a showing of sufficient excessiveness in Megan's Law II's [Registration, Notification, and Counseling] provisions might warrant a finding that those provisions are punitive."). We further find persuasive in our comparison of the history of the two ex post facto clauses the fact that the Pennsylvania Constitution includes reputation as a fundamental right, s*ee Hatchard*, 532 A.2d at 350, and conclude this factor militates in favor of holding the Pennsylvania clause is even more protective than its federal counterpart.

C. Case Law from Other States

Appellant argues courts in Maryland, Indiana, and Alaska have considered the public's perception and treatment of sex offenders when holding such statutes are unconstitutional under their respective state constitutions, even in the absence of a reputation clause like Pennsylvania's which categorizes reputation as an inherent right. Appellant's Brief at 30-31, *citing Doe v. Dept. of Public Safety & Correctional Services*, 62 A.3d 123, 140 (Md. 2013) (sex offender statute's information dissemination provisions have same effect as public shaming); *Wallace v. State*, 905 N.E.2d 371, 380 (Ind. 2009) (aggressive notification provisions expose registrants to humiliation and ostracism); *Doe*, 189 P.3d at 1011-12 (offenders lost employment and moved out of marital homes due to fear of publication). The Commonwealth responds by arguing the majority of states have adopted the High Court's reasoning in *Smith* to uphold the retroactivity of their registration laws and only seven states have found such retroactive application to be unconstitutional under the ex post facto clauses of their state constitutions. Commonwealth's Brief at 47-48.

Although many states have adopted the reasoning of the *Smith* Court in upholding their sex offender registration statutes under both state and federal ex post facto clauses, we do not find this controlling. The Pennsylvania Constitution differs from the constitutions in those states-as well as the United States Constitution - in its treatment of, *inter alia*, the right to reputation. *See J.B.*, 107 A.3d at 16 ("This Court has recognized that the right to reputation, although absent from the federal constitution, is a fundamental right under the Pennsylvania Constitution.") (citations omitted). We further find persuasive the fact that courts in Maryland, Indiana and Alaska, which have held retroactive application of sex offender registration laws violate ex post facto clauses under their state constitutions, have also found harm to the reputations of offenders to be a factor in their constitutional analysis, even in the absence of a constitutional provision like Pennsylvania's to give special protection to that interest. *See Doe v. Dept. of Public Safety*, 62 A.3d at 140; *Wallace*, 905 N.E.2d at 380; *Doe v. State*, 189 P.3d at 1011-12. We conclude this *Edmunds* prong weighs in favor of holding Pennsylvania's ex post facto clause provides more protection than the federal clause.

D. Policy Considerations

Appellant argues policy considerations weigh in favor of finding greater protections in the Pennsylvania Constitution as the state has an interest in the finality of sentencing and individuals have an interest in understanding the regulatory outcome of guilty pleas and criminal convictions. Appellant's Brief at 31. Appellant further argues adult sex offenders have been found to recidivate at a rate of only 13% and public policy should favor the 87% of sex offenders who will never offend again, and provide security in the knowledge that no new penalties or regulations will be imposed after they have been convicted and sentenced. *Id*. at 31, *citing J.B*., 107 A.3d at 17. In addition, PACDL again forwards reputation-based arguments to support the position public policy weighs in favor of finding greater protection in Pennsylvania's ex post facto clause. PACDL's Brief at 40-41. The Commonwealth contends appellant's argument regarding low recidivism rates relies on statements from *J.B.* regarding adult recidivism rates which have been rebutted. Commonwealth's Brief at 29-30, 49. The Commonwealth further argues although reputation is a constitutionally protected right in Pennsylvania, it may be constrained, just like other rights, upon a qualifying criminal conviction and policy factors weigh in favor of protecting the public from sex offenders. *Id*. at 50-51.

As previously stated, we recognize there is conflicting evidence regarding recidivism rates of adult sex offenders, and therefore we do not base our determination regarding this prong of the *Edmunds* analysis on this aspect of the relevant policy considerations. *See e.g., Hale*, 128 A.3d at 785 (where "substantial policy considerations" are involved "such matters are generally reserved … to the General Assembly"). However, we do find persuasive appellant's argument that both the state and offenders have an interest in the finality of sentencing, as well as the claim the Pennsylvania Constitution's special treatment of the right to reputation justifies greater protections under the Pennsylvania ex post facto clause. *See Commonwealth v. Russo*, 934 A.2d 1199, 1212 (Pa. 2007) (public policy considerations unique to Pennsylvania may suggest federal doctrines are inconsistent with Pennsylvania Constitution).

E. Summary of *Edmunds* Analysis

To summarize, we find the following to be consequential to our analysis of the relative protections afforded by the state and federal ex post facto clauses: the right to be free from ex post facto laws is an "inherent" and fundamental Article I right under the Pennsylvania Constitution; this Court has previously recognized, in *Lee*, *Lehman*, and *Williams II*, there is some divergence between the state and federal ex post facto clauses; SORNA's registration and online publication provisions place a unique burden on the right to reputation, which is particularly protected in Pennsylvania; other states have also found the retroactivity of registration laws unconstitutional under their state constitutions, partly due to reputation concerns; and both the state and offender have an interest in the finality of sentencing that is undermined by the enactment of ever-more severe registration laws. For those reasons, we find Pennsylvania's ex post facto clause provides even greater protections than its federal counterpart, and as we have concluded SORNA's registration provisions violate the federal clause, we hold they are also unconstitutional under the state clause.

VII. Conclusion

We reverse the Superior Court's decision affirming appellant's judgment of sentence, and vacate that portion of the sentence requiring appellant to comply with SORNA.

Jurisdiction relinquished.

Justices Baer and Donohue join the opinion and Justices Todd and Wecht join Parts I through IV and VII of the opinion.

Justice Wecht files a concurring opinion in which Justice Todd joins.

Chief Justice Saylor files a dissenting opinion.

Justice Mundy did not participate in the consideration or decision of this case.

CONCURRING OPINION

WECHT JUSTICE

I agree that the retroactive application of Pennsylvania's Sex Offender Registration and Notification Act ("SORNA") violates Article I, Section 17 of the Pennsylvania Constitution. I do not agree that "Pennsylvania's *ex post facto* clause provides even greater protections than its federal counterpart." *See* Opinion Announcing the Judgment of the Court ("OAJC") at 55.

The Pennsylvania Constitution prohibits the General Assembly from enacting *ex post facto* laws, one type of which are laws that retroactively increase the punishment for a particular crime. *See Calder v. Bull*, 3 U.S. 386, 390 (1798); *Commonwealth v. Kalck*, 87 A. 61, 62 (Pa. 1913). To determine whether a specific law inflicts a punishment, this Court traditionally has used the United States Supreme Court's intent-effects test. *See Smith v. Doe*, 538 U.S. 84, 92-102 (2003) (applying the intent-effects test in the *ex post facto* context); *Lehman v. Pa. State Police*, 839 A.2d 265, 271-74 (2003) (same). Under that framework, as the lead opinion explains, we first determine whether the General Assembly meant to impose a punishment. *Smith*, 538 U.S. at 92. If so, our inquiry ends there. But if the General Assembly instead sought to create a civil (non-punitive) regulatory scheme, we turn to *Smith*'s second prong, under which we consider whether the law is "so punitive either in purpose or effect as to negate [the legislature's] intention to deem it civil." *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980) (internal quotation marks omitted)). In making this assessment, the seven *Mendoza-Martinez*[1] factors serve as "useful guideposts, " *Hudson v. United States*, 522 U.S. 93, 99 (1997), but they are "neither exhaustive nor dispositive." *Ward*, 448 U.S. at 249.

The lead opinion begins its analysis of SORNA using the intent-effects framework and concludes that the General Assembly intended to create a non-punitive statutory scheme. *See* OAJC at 27-29. The lead opinion then goes on to find that SORNA's punitive effect is so overwhelming that it negates the General Assembly's intent. *See* OAJC at 29-45. Because I agree with both of these conclusions, I also agree that SORNA (as applied to Muniz) violates Article I, Section 17 of the Pennsylvania Constitution.[2]

Rather than stop here, the lead opinion goes one step further and concludes that the *ex post facto* clause of the Pennsylvania Constitution provides greater protection than its federal counterpart. As I explore in more detail below, there is little textual or historical support for this conclusion, and this Court's Article I, Section 17 decisions make the lead opinion's reasoning even less tenable. Thus, I simply would reiterate here what this Court has said many times before: the United States Supreme Court's interpretation of the federal *ex post facto* clause is entirely consistent with our understanding of Pennsylvania's clause. *See Commonwealth v. Young*, 637 A.2d 1313, 1317 n.7 (Pa. 1993).

To determine whether a particular provision of the Pennsylvania Constitution protects individual liberty to a greater extent than an analogous clause in the United States Constitution, we must evaluate: (1) the text of the Pennsylvania constitutional provision; (2) the history of the provision, including Pennsylvania case law; (3) related case law from other states; and (4) policy considerations, including unique issues of state and local concern. *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991).

I. Text

In addressing the first *Edmunds* factor, we must compare the text of Article I, Section 17 of the Pennsylvania Constitution with that of Article I, Section 10 of the United States Constitution.[3] The former provides that "[n]o *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed." Pa. Const. art. I, § 17. Similarly, the latter directs that "[n]o State shall . . . pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts . . . ." U.S. Const. art. I, § 10. In other words, as the lead opinion observes, the current text of Article I, Section 17 is nearly identical to its federal counterpart. OAJC at 49.

Of course, identical language alone does not necessarily indicate identical meaning. *Edmunds*, 586 A.2d at 895-96 ("[W]e are not bound to interpret the two [constitutional] provisions as if they were mirror images, even where the text is similar or identical."). So a thorough examination of the history of the two provisions is necessary.

II. History

To say that the rejection of *ex post facto* laws is of early lineage would be an understatement. A presumption against such legislation was recognized in both the Napoleonic Code and the Roman law codification of the Emperor Justinian. *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990) (Scalia, J., concurring) ("The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.") (citing, *inter alia*, Justinian Code, Book 1, Title 14, § 7 and 1 Code Napoleon, Prelim. Title, Art. I, cl. 2 (B. Barrett trans. 1811)). And the great authorities on British common law considered *ex post facto* laws to be void in and of themselves. 1 William Blackstone, Commentaries on the Laws of England *46 (stating that *ex post facto* laws are "cruel and unjust"); *Calder*, 3 U.S. at 391 (discussing the similar views of Blackstone's successor, Richard Wooddeson). The Framers, too, had little regard for *ex post facto* laws. Madison considered them to be "contrary to the first principles of the social compact and to every principle of sound legislation, " The Federalist No. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961), and Hamilton described them as "the favorite and most formidable instruments of tyranny." The Federalist No. 84, at 512 (Alexander Hamilton) (Clinton Rossiter ed., 1961).[4]

Both the historical record and the Constitution's text show that the other delegates to the Constitutional Convention shared Madison and Hamilton's hostility to *ex post facto* laws. Sure, some of the delegates opposed Sections 9 and 10 of Article I. But they did so on the belief that *ex post facto* laws were so unmistakably void that explicitly prohibiting them would "impl[y] an improper suspicion" of the legislature. *See* Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127, 1157-58 (1987) (quoting James Madison's notes from the Federal Convention of 1787). In the end, those views did not prevail. The convention's final draft included two *ex post facto* clauses-a testament to the fact that the Framers "viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment." *Fletcher v. Peck*, 10 U.S. 87, 137-38 (1810).

After the ratification of the United States Constitution, the citizens of this Commonwealth adopted the Pennsylvania Constitution of 1790. That charter, much like the United States Constitution, included a clause forbidding the enactment of *ex post facto* laws. As this Court has said in the past, the "same pre-revolutionary-war concerns" that influenced the Framers of the United States Constitution also shaped Pennsylvania's *ex post facto* clause. *See Commonwealth v. Gaffney*, 733 A.2d 616, 621 (Pa. 1999); OAJC at 51.

The 1790 *ex post facto* clause was a bit more concise than the present-day version. It provided simply that "[n]o *ex post facto* law, nor any law impairing contracts, shall be made." Pa. Const. of 1790, art. IX, § 17. Later, the delegates to the Constitutional Convention of 1873 proposed (and the electorate approved) minor revisions to that language-substituting the verb "passed" in the place of the word "made" and adding the phrase "the obligation of" before the word "contracts." These changes are modest, and they seem to reflect little more than a desire to mirror language used in the United States Constitution.

Indeed, records from the 1873 Convention reveal that the amended clause's resemblance to the federal *ex post facto* clause was no coincidence. *See* 5 Debates of the Convention to Amend the Constitution of Pennsylvania 631 (1873) (remarks of Charles R. Buckalew, suggesting that the clause "was intended to follow the language of the Constitution of the United States, " and questioning whether some words "were dropped out by accident"); *id.* (remarks of Thomas MacConnell, chairman of the Committee on the Bill of Rights, agreeing that the clause should "conform[ ] to the national Constitution"); *id.* (another delegate, Wayne MacVeagh, correctly predicting that "the desire to harmonize this instrument with the Constitution of the United States will prevail"). The same records confirm that the delegates were familiar with the prevailing judicial interpretation of the United States Constitution's *ex post facto* clause. 3 Debates of the Convention to Amend the Constitution of Pennsylvania 28, 30 (1873) (discussing various judicial decisions, including *Calder v. Bull*). Yet, the

Convention vetoed a proposal to expand the scope of our clause beyond the limits that courts had established. 5 Debates of the Convention to Amend the Constitution of Pennsylvania 313-14 (1873) (rejecting a provision that would have barred all retroactive legislation, whether civil or criminal).

Despite this compelling evidence that Pennsylvania's *ex post facto* clause means the same thing that the federal clause does, the lead opinion concludes that this *Edmunds* factor "militates in favor of holding the Pennsylvania clause is even more protective than its federal counterpart." OAJC at 52. Citing an *amicus* brief authored by the Defender Association of Philadelphia and the Pennsylvania Association of Criminal Defense Lawyers, the lead opinion finds that the "location of Pennsylvania's clause within the Declaration of Rights lends considerable force to the argument it provides even more protection than its federal counterpart." *Id.* at 48. As I understand it, the gist of *amici's* argument on this point is that Pennsylvania's *ex post facto* clause must reach further than the federal cause because it falls within our charter's enumerated "rights reserved and retained by the people, " whereas "[t]he federal clause is not contained within the Bill of Rights." Brief for Defender Association & PACDL at 37.

Amici's theory bases too much upon too little. The reason that the federal clause does not appear in the Bill of Rights is that the clause predates the Bill of Rights.[5] In any event, I fail to see why the Bill of Rights-a collection of amendments that did not limit the power of state governments until after the ratification of the Fourteenth Amendment-would have been a more logical home for a provision that restricts the legislative power of the states. If anything, the presence of a substantive restriction on state police powers in Article I underscores that the Framers regarded the prohibition on *ex post facto* laws as an important "bulwark in favor of personal security and private rights." The Federalist No. 44, at 301 (James Madison) (Clinton Rossiter ed., 1961).

The lead opinion also asserts that this Court has "noted divergence between" the state and federal *ex post facto* clauses in the past. OAJC at 51. Specifically, the lead opinion highlights language from *Commonwealth v. Lee*, 935 A.2d 865 (Pa. 2007), which suggests that the seventh *Mendoza-Martinez* factor, standing alone, could justify the conclusion that a sanction is punitive. *Id.* at 876 n.24 (stating in *dicta* that "a showing of sufficient excessiveness in Megan's Law II's [registration, notification, and counseling] provisions might warrant a finding that those provisions are punitive"). The lead opinion evidently views this to be in conflict with the United States Supreme Court's oft-quoted warning that "no one [*Mendoza-Martinez*] factor should be considered controlling as they 'may often point in differing directions.'" *Hudson*, 522 U.S. at 101 (quoting *Mendoza-Martinez*, 372 U.S. at 169). In my view, however, there is little tension between these two instructions.

As an initial matter, I fail to see how a court could ever conclude that a particular sanction is "excessive in relation to the *alternative purpose* assigned" (the seventh factor) without first identifying some "*alternative purpose* to which [the sanction] may rationally be connected" (the sixth factor). *Mendoza-Martinez*, 372 U.S. at 168-69. The fact that the seventh factor logically cannot stand alone renders academic any debate about whether that factor would be sufficient in isolation.

More importantly, the United States Supreme Court's *ex post facto* jurisprudence does not foreclose the possibility that a facially non-punitive law might constitute punishment *solely* because it is excessive relative to its regulatory aim. The principle that "no one [*Mendoza-Martinez*] factor should be considered controlling, " *Hudson*, 522 U.S. at 101, does not mean that the *Mendoza-Martinez* framework is an exercise in arithmetic, or that at least two of the seven factors must be present before a law can be deemed punitive. Rather, it simply reminds courts to consider all seven of the factors before reaching a conclusion, since some factors may outweigh others, depending upon the particular statute at issue. In this regard, the Court has emphasized that the seven factors "are all relevant to the inquiry, " that they are "neither exhaustive nor dispositive, " and that they are "useful guideposts." *Mendoza-Martinez*, 372 U.S. at 169; *Ward*, 448 U.S. at 249; *Smith*, 538 U.S. at 97; *see* Erin Murphy, *Paradigms of Restraint*, 51 Duke L.J. 1321, 1349 (2008) (observing that *Smith*'s second prong "is not applied according to any precise mathematical formulation, . . . and at various times the courts have emphasized particular factors over others.").

Contrary to the lead opinion's suggestion that our decisions indicate "divergence between the clauses, " OAJC at 51, I believe that this Court has gone to great lengths to align our own *ex post facto* jurisprudence with decisions from the United States Supreme Court. For example, prior to *Smith*, we analyzed *ex post facto* challenges using the Third Circuit Court of Appeals' three-prong *Artway*/*Verniero*[6] test. After the United States Supreme Court adopted the intent-effects test in *Smith*, however, we did the same-announcing that we would abandon the *Artway*/*Verniero* test "[i]n order to promote consistency." *Lehman*, 839 A.2d at 271.

Nor should we ignore that this Court consistently has relied upon federal precedent when resolving state *ex post facto* claims, *see e.g.*, *Young*, 637 A.2d at 1317 (citing *Calder*, 3 U.S. at 390, and *Collins v. Youngblood*, 497 U.S. 37, 40-51 (1990)); *Commonwealth v. Duffy*, 96 Pa. 506, 513 (Pa. 1880) (defining "*ex post facto* laws" consistent with Justice Chase's definition in *Calder*); *Kalck*, 87 A. at 62 (noting that the rule announced in *Calder* remains unchanged), occasionally even going so far as to suggest that the resolution of an "appellant's federal *ex post facto* claim disposes of his state claim as well." *Young*, 637 A.2d at 1317 n.7; *accord Commonwealth v. Fisher*, 741 A.2d 1234, 1238 (Pa. 1999) ("Our interpretation of the state constitutional prohibition against *ex post facto* laws has been consistent with the United States Supreme Court's interpretation of the federal prohibition, and therefore the analysis of Appellant's federal *ex post facto* claim encompasses his state claim.").[7]

III. Related Case Law from Other States

The next *Edmunds* factor involves consideration of related case law from other jurisdictions. Ordinarily, this includes a survey of states that have adopted federal constitutional standards, states that have departed from federal constitutional standards, and the reasons given for each adoption or departure. Yet, Muniz's entire argument on this *Edmunds* factor consists of quotations from three state courts that have "expressed concern regarding the public's perception and treatment of offenders." Brief for Muniz at 30 (quoting the Maryland, Alaska, and Indiana high courts). The lead opinion finds these expressions persuasive, and concludes that this *Edmunds* factor suggests Pennsylvania's *ex post facto* clause provides more protection than its federal analogue. Respectfully, I disagree.

When a statute is challenged on state constitutional grounds, most state high courts apply federal *ex post facto* doctrine (including the four categories from *Calder*, the intent-effects test from *Smith*, and the seven useful guideposts from *Mendoza- Martinez*).[8] Even among the state courts that have struck down retroactive sex-offender registration laws on *ex post facto* grounds-a cross section that one would expect to skew in favor of finding more robust state constitutional protections-most have remained loyal to the United States Supreme Court's *ex post facto* jurisprudence. *See e.g.*, *Doe v. State*, 111 A.3d 1077, 1090 (N.H. 2015) (holding that the New Hampshire Constitution and the United States Constitution "afford the same protection against *ex post facto* laws"); *Starkey v. Oklahoma Dept. of Corr.*, 305 P.3d 1004, 1019 (Okla. 2013) (adopting "the analytical framework used in *Smith v. Doe*"); *State v. Letalien*, 985 A.2d 4, 14 (Me. 2009) (holding that "the *ex post facto* clauses of the Maine and United States Constitutions are interpreted similarly and are coextensive"); *Commonwealth v. Baker*, 295 S.W.3d 437, 442 (Ky. 2009), *cert. denied*, 559 U.S. 992 (2010) (treating the *ex post facto* clauses of the Kentucky and United States Constitutions as one and the same and applying *Smith*'s intent-effects test); *Doe v. State*, 189 P.3d 999, 1007 (Alaska 2008) (holding that the United States Supreme Court's "intent-effects test provides an appropriate analytical framework" under the Alaska Constitution).

As always, there are a few exceptions. In 2013, a plurality of the Court of Appeals of Maryland held that the *ex post facto* clause of that state's constitution affords Marylanders more protection than Article I, Section 10 of the United States Constitution does. *Doe v. Dept. of Pub. Safety & Corr. Servs.*, 62 A.3d 123, 130-37 (Md. 2013). The court's departure from federal law was prompted by a very specific doctrinal glitch that arose from two nineteenth century Supreme Court cases. In the first of those cases, *Kring v. Missouri*, 107 U.S. 221 (1883), the Supreme Court defined *ex post facto* laws to include legislation that "alters the situation of a party to his disadvantage." *Id.* at 235. And in the second case, *Thompson v. Utah*, 170 U.S. 343 (1898), the Court held that a particular retroactive law violated the *ex post facto* clause because it deprived criminal defendants of "a substantial right." *Id.* at 352.

The language used in *Kring* and *Thompson* caused considerable confusion. Some state courts, like the Court of Appeals of Maryland, for example, seemed to read *Kring* and *Thompson* as alternatives to *Calder*'s four categories of *ex post facto* laws. *See Anderson v. Dept. of Health & Mental Hygiene*, 528 A.2d 904, 909 (Md. 1987) (stating that the *ex post facto* clause "embraces consequences affecting substantial rights if they 'disadvantage the offender'"); *State v. Rowe*, 181 A. 706, 709 (N.J. Sup. 1935) (listing six categories of *ex post facto* laws). Other courts continued to adhere to the Supreme Court's suggestion that the *ex post facto* clause does not turn on whether the defendant has suffered some sort of "disadvantage." *See Dobbert v. Florida*, 432 U.S. 282, 293 (1977) ("Even though it may work to the disadvantage of a defendant, a procedural change is not *ex post facto*.").[9]

Eventually, the Supreme Court disavowed both *Kring*'s "disadvantage" standard and *Thompson*'s focus on "substantial rights, " explaining that both approaches deviated from the original meaning of the term *ex post facto*. *Collins*, 497 U.S. at 50-52 (overruling *Kring* and *Thompson*). Despite this clarification, the Maryland Court of Appeals (or at least a plurality of the judges on the court) continues to adhere to the now-abandoned "disadvantage" standard as a matter of state constitutional law. *Doe*, 62 A.3d at 132-33. In so holding, the plurality repudiated aspects of the court's earlier *ex post facto* decisions, some of which treated the state and federal clauses as coterminous. *See e.g.*, *Sec'y, Dept. of Pub. Safety & Corr. Servs. v. Demby*, 890 A.2d 310, 327 (Md. 2006) ("We have held that the *ex post facto* clause in the Maryland Declaration of Rights has the same meaning as the federal clause."); *Khalifa v. State*, 855 A.2d 1175, 1189 (Md. 2004) ("The *Ex Post Facto* Clauses of the United States Constitution and Maryland Declaration of Rights have been viewed generally to have the 'same meaning' and are thus to be construed in *pari materia*.").

Unlike the Maryland Court of Appeals, this Court has acknowledged that references in our prior decisions to laws that either implicate "substantial rights" or "disadvantage" a defendant "should not be read so as to enlarge the *Calder* categories beyond their meaning at the time of the adoption of the Constitution." *Young*, 637 A.2d at 1317-18; *see Fisher*, 741 A.2d at 1238 ("[T]he Constitution does not prohibit every retrospective law that alters a party's situation to his disadvantage."). Thus, the Maryland court's departure from the prevailing federal constitutional standards provides no basis for this Court to follow suit.

The Supreme Court of Indiana is another tribunal that has diverged from United States Supreme Court precedent. Although the *Smith* intent-effects test is the "appropriate analytical framework for analyzing *ex post facto* claims under the Indiana Constitution, " courts in that state do not subscribe to the view that *only the clearest proof* of a statutory scheme's punitive effect can negate the legislature's assertedly non-punitive intent. *Compare Smith*, 538 U.S. at 92 ("Because we ordinarily defer to the legislature's stated intent, . . . only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."), *with*

Wallace v. State, 905 N.E.2d 371, 398 n.7 (Ind. 2009) ("[O]ur standard of review for challenges to the constitutionality of a statute has never included a clearest proof element."). Unlike the Supreme Court of Indiana, however, this Court has embraced *Smith*'s "clearest proof" requirement. *Lehman*, 839 A.2d at 272 ("[O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty."); *cf. Stilp v. Commonwealth*, 905 A.2d 918, 939 (Pa. 2006) ("[A] legislative enactment will not be deemed unconstitutional unless it clearly, palpably, and plainly violates the Constitution.").

The lead opinion is not swayed by the number of states that have adopted federal constitutional standards for purposes of their own *ex post facto* clauses. According to the lead opinion, the Pennsylvania Constitution warrants unique treatment because, unlike some other state constitutions, ours protects the right to reputation. OAJC at 52-53. Along these lines, the lead opinion finds persuasive the fact that a few state high courts-in holding that retroactive sex-offender registration laws violate *ex post facto* principles-have "found harm to the reputations of offenders to be a factor in their constitutional analysis." *Id*. Those courts have done so, the lead opinion continues, "even in the absence of a constitutional provision like Pennsylvania's to give special protection to [reputation] interest[s]." *Id.*

In my view, the fact that our state Constitution protects reputational rights (Pa. C . Art. 1, § 1) has little bearing on the question before us. As explained, the onst [10] critical inquiry for purposes of the *ex post facto* clause, as we have understood it for more than two centuries, is whether the law at issue constitutes "punishment." Harm to reputation *may* help us to answer that question, but only because public ridicule and vilification of those who commit crimes historically has been (and sometimes still is) used as form of punishment. *See Smith*, 538 U.S. at 97 ("Some colonial punishments indeed were meant to inflict public disgrace. Humiliated offenders were required 'to stand in public with signs cataloguing their offenses.'") (quoting Adam Jay Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 Mich. L. Rev. 1179, 1226 (1982)); *Gaffney*, 733 A.2d at 620 (distinguishing sex-offender registries from the colonial-era punishments of "shame" and "ignominy" described in Nathaniel Hawthorne's *The Scarlet Letter* (1850)). This is why, as the lead opinion notes, some courts will discuss a law's impact on an offender's reputation even in the absence of an explicit constitutional right to reputation. But it is not a reason to depart from federal constitutional standards, which already require courts to consider such concerns. *See e.g., Mendoza-Martinez*, 372 U.S. at 168 (holding that courts must analyze both whether a sanction "has historically been regarded as a punishment" and whether it "will promote the traditional aims of punishment").

Given these points, the case law from other jurisdictions does not convince me that the lead opinion's interpretation of the Pennsylvania Constitution is warranted. To the contrary, the experiences of our sister courts persuade me that we should err on the side of restraint when considering a departure from federal constitutional standards. *Compare Miller v. State*, 584 S.W.2d 758, 762 (Tenn. 1979) (holding that the *ex post facto* clause of the Tennessee Constitution extends beyond the limits of its federal counterpart), *with State v. Pruitt*, 510 S.W.3d 398, 416 (Tenn. 2016) ("There is simply nothing in the text of our constitution nor in our history that supports the *Miller* Court's holding that the meaning of '*ex post facto*' in Tennessee is more expansive than the definition provided by Justice Chase in 1798.").

IV. Policy Considerations

Muniz's discussion of *Edmunds*' policy prong is quite limited; he merely asserts that the Commonwealth "has an interest in the finality of sentencing." Brief for Muniz at 31. Muniz does not explain why this alleged interest supports the view that

Pennsylvania's *ex post facto* clause prohibits laws other than those which constitute "punishment." Nor does he clarify why sentencing finality is an interest unique to Pennsylvania. (Surely, every state would have a similar "interest" in the finality of criminal sentences.) And to make matters worse, Muniz has not even bothered to discuss the *ex post facto* clause's "application within the modern scheme of Pennsylvania jurisprudence." *Edmunds*, 586 A.2d at 901.

In short, Muniz's argument here "falls short of the kind of searching inquiry required" to justify a departure from federal *ex post facto* precedent, *Commonwealth v. Russo*, 934 A.2d 1199, 1212 (Pa. 2007), and the lead opinion does not supply any pertinent policy concerns that Muniz may have overlooked.

V. Conclusion

Neither Muniz nor the lead opinion offer much to undermine the perception that- as the text and history of our Constitution seem to require, as those who wrote it seemed to expect, and as our past cases have all suggested-the state and federal *ex post facto* clauses are coterminous. Nonetheless, as the lead opinion's thorough analysis makes clear, OAJC at 27-45, applying the federal *ex post facto* standards also leads to the conclusion that SORNA is punitive and cannot be applied retroactively. Thus, I join parts I-IV and VII of the lead opinion, and otherwise concur in the result.

Justice Todd joins this concurring opinion.

DISSENTING OPINION

SAYLOR, CHIEF JUSTICE

I agree with the analysis pertaining to those factors taken from *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554 (1963), that are either of little weight or indicate that Pennsylvania's Sex Offender Registration and Notification Act ("SORNA") is not punitive. As to the other factors, although I recognize the significant burdens on offenders under SORNA, my reasoning closely tracks that developed in *Commonwealth v. Williams*, 574 Pa. 487, 832 A.2d 962 (2003) ("*Williams II*"), and *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140 (2003). Accordingly, I respectfully dissent, as I believe that SORNA does not impose punishment and, thus, does not violate either the federal or state constitutions' *ex post facto* clauses.

Regarding the first *Mendoza-Martinez* factor, SORNA may be perceived as imposing some minimal restraint or disability insofar as it requires offenders to appear in person to satisfy the reporting provisions. However, this Court has distinguished such minor impositions from those that effectuate a direct restraint or deprivation on the activities of the individual in the nature of imprisonment. *See Williams II*, 574 Pa. at 507, 832 A.2d at 974 (observing that the source cases cited by *Mendoza-Martinez* concerned

direct deprivations or restraints, rather than ones that operated as secondary effects (citing *Mendoza-Martinez*, 372 U.S. at 168 n.22, 83 S.Ct. at 567 n.22)); *id.* (characterizing registration as a "potential collateral restraint"). In comparison, the monthly counseling sessions at issue in *Williams II* effectuated a greater restraint, mandating not only an in-person appearance, but that the offender remain and receive therapeutic treatment. Nonetheless, they were not viewed as "so onerous as to constitute an affirmative disability, " even apart from the notion that this mandate was intended to rehabilitate sexually violent predators. *Id.* at 508, 832 A.2d at 974-75. The Opinion Announcing the Judgment of the Court ("OAJC") emphasizes that the counseling requirement was justifiable on rehabilitation grounds, but does not similarly acknowledge that the purpose behind in-person reporting is to assist the public in discovering reliable and verifiable information to protect itself from potential recidivists, *see* 42 Pa.C.S. §9799.10(5), a goal just as meritorious as rehabilitating an offender.

Further, the OAJC reasons that the finding by the *Smith* Court that the Alaska statute there did not require in-person updates constitutes an "important" distinction, which in turn led the Supreme Court to conclude, in part, that the statute was not punitive. OAJC, *slip op.* at 31. Critically, the Supreme Court did not premise its analysis on this observation; rather, it merely corrected an error in the facts relied upon by the reviewing court. *See Smith*, 538 U.S. at 101, 123 S.Ct. at 1151. Thus, I would not find that SORNA imposes the kind of affirmative restraint or disability suggestive of a punitive effect.

As to the second factor, assessing whether the sanction has been historically regarded as punishment, I am unpersuaded by the OAJC's primary shaming rationale, *i.e.*, that the "technological environment" has so changed that posting information on the internet results in a punishment. OAJC, *slip op.* at 34. Undoubtedly, internet access in private homes has grown in the years since the *Smith* decision; however, focusing on that narrow metric diminishes the central reasoning that the Supreme Court employed in finding that worldwide internet access to offender registry information did not constitute punishment, as well as overlooks internet accessibility available at that time in other places, such as public libraries and workplaces.[1] *See Smith*, 538 U.S. at 104-05, 123 S.Ct. at 1153-54 (observing that the internet data system was "passive, " requiring an individual to "seek access to the information"); *State v. Petersen-Beard*, 377 P.3d 1127, 1134 (Kan.) ("*Smith* did not base its conclusion on some old-fashioned, dial-up modem/floppy disk notion of the World Wide Web; nor did it consider accessing offender information on the Internet [as] nothing more than a walk to the courthouse to thumb through publicly available paper files. *Smith*'s rationale withstands the more recent development of a mobile, smartphone Internet."), *cert. denied*, __U.S.__, 137 S.Ct. 226 (2016); *see also Kammerer v. State*, 322 P.3d 827, 834-36 (Wyo. 2014). The Court further highlighted that making the registration system "easily accessible" comported with concerns pertaining to our highly mobile society. *Smith*, 538 U.S. at 105, 123 S.Ct. at 1153-54 (citing Donna D. Schram & Cheryl Darling Milroy, Community Notification: A Study of Offender Characteristics and Recidivism 13 (1995) (explaining that over one-third of recidivist sex offenses in the State of Washington occurred in jurisdictions different from where the previous offense took place)).

Regarding the comparison to probation conditions that the OAJC proffers, *see* OAJC, *slip op.* at 35-36 (quoting *Perez*, 97 A.3d at 763-64 (Donohue, J., concurring)), registration and reporting are the only required conditions imposed on registrants, albeit ones that may be viewed as onerous. *See* 42 Pa.C.S. §§9799.15, 9799.19, 9799.23(b), 9799.25. This is markedly different in both scope and nature from the litany of mandated probation provisions, which may include the following: reporting to an assigned probation officer; permitting home inspections; dispossessing firearms; maintaining employment; remaining in Pennsylvania; living in a specified residence or facility; refraining from visiting certain places; paying restitution and/or other costs; remaining at home during certain hours; reporting all arrests or citations; receiving approval to move; testing at random for drugs and alcohol; submitting to fingerprinting, photographing, and DNA sampling; complying with supervision assessments; yielding to individual or family counseling, medical or psychiatric treatment, and inpatient treatment; and acceding to any other special conditions imposed by the court. *See, e.g., id.* §9754(c); County of Allegheny, Adult Probation Rules, https://www.alleghenycourts.us/criminal/adult_probation/rules.aspx. Thus, I disagree that SORNA's requirements materially parallel the wide-ranging restrictions and oversight that demarcate probation as a historically recognized punishment. To the degree that there are coextensive aspects, they do not constitute the "clearest proof" of punishment so as to override the Legislature's stated non-punitive intent. *Smith*, 538 U.S. at 92, 123 S.Ct. at 1147 (quoting *Hudson v. United States*, 522 U.S. 93, 100, 118 S.Ct. 488, 493 (1997)).

In terms of the scienter factor, I agree that past criminal conduct is "a necessary beginning point, " OAJC, *slip op.* at 37 (quoting *Smith*, 538 U.S. at 105, 123 S.Ct. at 1154), and thus, this factor is of little weight.

Pertaining to the traditional aims of punishment, I agree with the parties that SORNA operates in some respect as a deterrent. *See, e.g.*, Brief for Commonwealth at 28-29. As the OAJC acknowledges, however, deterrence alone is an insufficient basis to find a sanction to be punishment. *See* OAJC, *slip op.* at 39 (citing *Smith*, 538 U.S. at 102, 123 S.Ct. at 1152); John F. Stinneford, *Punishment Without Culpability*, 102 J. Crim. L. & Criminology 653, 679 (2012) ("[W]hen the Supreme Court says that a statute's purpose is punitive, it really means retributive. . . . [N]either a purpose to deter, incapacitate, nor to rehabilitate can transform a putatively civil statute into a criminal one. Only a retributive purpose can." (footnote omitted)); *Hudson v. United States*, 522 U.S. 93, 102, 118 S.Ct. 488, 494 (1997) ("We have . . . recognized that all civil penalties have some deterrent effect." (citations omitted)).

As for the OAJC's retribution analysis, its reliance on *Kansas v. Hendricks*, 521 U.S. 346, 117 S.Ct. 2072 (1997), appears to directly conflict with the reasoning of the Court: "The Act's purpose is not retributive because it does not affix culpability for prior criminal conduct. Instead, such conduct is used solely for evidentiary purposes . . .." *Id.* at 362, 117 S.Ct. at 2082; *see also* Sandra G. Mayson, *Collateral Consequences and the Preventative State*, 91 Notre Dame L. Rev. 301, 333 (2015) (suggesting that sanctions based on judgments of culpability should be viewed as punitive, while others premised on a judgment of risk, such as sex offender registration, should be classified as collateral non-punishments). Additionally, the *Smith* Court's reasoning on this point is instructive, given that the information disclosed under Alaska's statute is nearly identical to that provided by an offender pursuant to SORNA, with the only exception appearing to be school addresses. *Compare* Alaska Stat. §12.63.010(b)(1-2), *with* 42 Pa.C.S. §9799.28(b)(1-8); *see also Smith*, 538 U.S. at 90, 123 S.Ct. at 1145-46 (listing the information disclosed via the Alaska statute). Notably, the *Smith* Court further explained that "[a]ny number of government programs might deter crime without imposing punishment" and "[t]o hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' . . . would severely undermine the Government's ability to engage in effective regulation." *Smith*, 538 U.S. at 102, 123 S.Ct. at 1152 (citations omitted).

Additionally, I do not regard registration imposed on predicate offenses lacking substantial terms of imprisonment as suggestive of punitiveness, since SORNA's tiered categories reflect the Legislature's judgment of the seriousness of the underlying conviction relative to future dangerousness. *See Petersen-Beard*, 377 P.3d at 1136 (observing that the differentiation between types of sex offenses in determining the frequency of in-person reporting, while burdensome, did not indicate a punitive effect); *Smith*, 538 U.S.

at 102, 123 S.Ct. at 1152 ("The broad categories, . . . and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and this is consistent with the regulatory objective.").

Moreover, as the OAJC seemingly acknowledges, with one exception (*i.e.*, Appellant's conviction for indecent assault without consent, *see* 18 Pa.C.S. §3126(a)(1)), those predicate offenses that implicate only a short prison sentence, or none at all, or otherwise do not contain a sexual component, are not presently at issue, since Appellant's conviction for indecent assault against a minor less than 13 years in age, *see* 18 Pa.C.S. §3126(a)(7), requires lifetime registration and quadrennial reporting as a tier III offender. *See* OAJC, *slip op.* at 39 n.20. In this respect, I have significant reservations with the assertion that "each and every predicate offense is relevant" to assessing whether SORNA's reporting requirements for Appellant's underlying offenses constitute punishment.[2] *Id.* It seems to me that such an approach is not mandated by the relevant authority and is in substantial tension with standing jurisprudence.[3]

From my perspective, to the extent that the Supreme Court has directed that *ex post facto* challenges are to examine a statute "on its face, " *see Mendoza-Martinez*, 372 U.S. at 169, 83 S.Ct. at 568, that command does not require a reviewing court to assess every predicate criminal conviction and associated potential sanctions. The varied registration time periods and reporting frequencies, applicable to the different tiers, may result in divergent conclusions relative to the *Mendoza-Martinez* factors, particularly the excessiveness inquiry, as well as the ultimate disposition, when compared to distinct offenses. *See, e.g.*, *supra* note 3. Instead, the "on its face" view appears intended to avoid addressing the particularities of statutory implementation, *see Seling v. Young*, 531 U.S. 250, 263, 121 S.Ct. 727, 735 (2001) ("[T]he civil nature of a [statutory] scheme cannot be altered based merely on vagaries in the implementation of the authorizing statute."), rather than a reference to the conventionally understood notion of a "facial" challenge, *see Smith*, 538 U.S. at 106, 123 S.Ct. at 1154 (Thomas, J., concurring) ("I . . . reiterate that 'there is no place for [an implementation-based] challenge' in our *ex post facto* jurisprudence. . . . [T]he determination whether a scheme is criminal or civil must be limited to the analysis of the obligations actually created by statute." (quoting *Seling*, 531 U.S. at 273, 121 S.Ct. at 740 (Thomas, J., concurring in judgment))).[4] *Cf.* Todd W. Wyatt, Comment, *Double Jeopardy and Punishment: Why an As Applied Approach, As Applied to Separation of Powers Doctrines, Is Unconstitutional*, 24 Seattle U. L. Rev. 107, 111 (2000) (contending that an as-applied approach to punishment determinations would permit the executive branch to render a statute unconstitutional via the manner that it is implemented). In this respect, I am of the view that the present matter is limited to reviewing the requirements imposed on Appellant by virtue of the offenses for which he was convicted, *i.e.*, the two counts of indecent assault.

Accordingly, I do not read *Mendoza-Martinez* or its progeny as entirely eviscerating the long-standing preference for as-applied challenges, *see* Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 Wm. & Mary Bill Rts. J. at 658 ("[T]he law strongly favors as-applied challenges . . .."), or as diminishing other limitations on constitutional challenges. As to the latter, it appears that searching SORNA's provisions for any potential constitutional infringement, regardless of applicability to Appellant, conflicts with the requirements of standing, which mandate the complainant be adversely affected by the statutory provisions he seeks to challenge. *See Am. Booksellers Ass'n, Inc. v. Rendell*, 332 Pa. Super. 537, 554, 481 A.2d 919, 927 (1984). Thus, Appellant is limited to contesting only those aspects of SORNA implicated by his actual convictions. *See Van Doren v. Mazurkiewicz*, 695 A.2d 967, 972 n.7 (Pa. Cmwlth. 1997) (explaining that, although petitioner could challenge registration requirements under a prior sex offender statute, he could not contest other provisions that were not triggered by his conviction); *Mink v. Suthers*, 482 F.3d 1244, 1253 (10th Cir. 2007) ("[M]ere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue . . .." (internal quotation marks and citation omitted)).

As a final observation relative to the "on its face" review, to the degree that the reporting requirements of SORNA could be found unconstitutional relative to certain predicate offenses, those provisions may be severed from the constitutional portions of the statute. *See Williams II*, 574 Pa. at 527, 832 A.2d at 986 (severing, as excessive, the life imprisonment penalty for failure to comply with reporting requirements of Megan's Law II); 1 Pa.C.S. §1925. Accordingly, I would limit review to Appellant's convictions and the applicable SORNA registration and reporting requirements.

On the whole, in light of the tiered reporting scheme, the lack of retributive effect, and the disclosure of information in line with that addressed in *Smith*, I am of the view that SORNA's application to Appellant's conviction does not operate to promote the traditional aims of punishment.

Next, I agree with the OAJC that the already-a-crime factor is of little significance, since prior criminal conduct is a prerequisite to SORNA's application. *See Smith*, 538 U.S. at 105, 123 S.Ct. at 1154.

In assessing whether there is an alternative purpose to which the statute may be rationally connected, my view largely comports with that of the OAJC, *i.e.*, that there is plainly a rational connection between SORNA and public safety and health. Further, I similarly acknowledge that there is a growing body of evidence suggesting that the recidivist premise for sex offender registration laws may not be as settled as once believed. Nonetheless, it seems evident that these types of policy judgments are best directed to the legislative branch. *See Seebold v. Prison Health Servs., Inc.*, 618 Pa. 632, 653, 57 A.3d 1232, 1245 (2012) ("[W]e have often recognized the superior tools and resources available to the Legislature in making social policy judgments, including comprehensive investigations and policy hearings."). I also emphasize that SORNA's "rational connection to a nonpunitive purpose is a '[m]ost significant' factor in our determination that the statute's effects are not punitive." *Smith*, 538 U.S. at 102, 123 S.Ct. at 1152 (quoting *United States v. Ursery*, 518 U.S. 267, 290, 116 S.Ct. 2135, 2148 (1996)). Accordingly, this factor strongly weighs in favor of finding that the statute does not impose punishment.

Relative to the final factor -- whether the statute is excessive in relation to the alternative purpose assigned -- I agree in part with the OAJC that, as applied to a few of the offenses, there is a significant concern of over-inclusiveness, given that the crimes do not relate to any particular sexual act by their terms. *See* OAJC, *slip op.* at 45 (citing 18 Pa.C.S. §2902 (unlawful restraint); §2903 (false imprisonment); §2904 (interference with custody of child)); *see also supra* note 3.[5] However, as discussed previously, this matter does not implicate any of those crimes. Nonetheless, I do share with the OAJC some concern that there is no provision to allow a lifetime registrant to demonstrate that he is no longer a risk to others. Thus, as to this factor, there is at least a minimal indication of punitiveness. Based on the *Mendoza-Martinez* factors, which I view as almost uniformly suggesting a non-punitive effect, I would conclude that SORNA's registration requirements do not constitute punishment and do not violate the federal *ex post facto* clause.[6]

As for the state constitution, I agree with the OAJC to the extent that it generally finds a broader protection for reputational interests than offered by the federal constitution. *See* Pa. Const. art. I, §1. However, my view diverges from the notion that SORNA operates punitively with respect to Appellant's reputation. As Justice Wecht explains in his concurring opinion, the impact of the law in this regard is already subsumed in considering whether the sanction is historically regarded as punishment and whether it promotes the traditional aims of punishment. *See* Concurring Opinion, *slip op.* at 15 (quoting *Mendoza-Martinez*, 372 U.S. at 168, 83 S.Ct. at 567). As discussed above, the manner in which factual information is made accessible pursuant to SORNA has been rejected as constituting the type of harassment or embarrassment that reflects colonial era shaming punishments. *See Smith*, 538 U.S. at 98, 123 S.Ct. at 1150 ("Any initial resemblance to early punishments is . . . misleading. . . . [P]ublic shaming, humiliation, and banishment . . . involved more than the dissemination of information."). Thus, I remain unpersuaded that the Pennsylvania Constitution's broader general protection of reputation interests results in the finding that SORNA is punishment.

Notes:

[1] Article I, Section 10 of the United States Constitution provides, in pertinent part: "No State shall … pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." U.S. Const., art. I, §10.

Article I, Section 17 of the Pennsylvania Constitution provides: "No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed." Pa. Const., art. I, §17.

[2] *See* 18 Pa.C.S. §§3126(a)(1) (person is guilty of indecent assault if he has indecent contact with the complainant for purpose of arousing sexual desire in himself or complainant, without complainant's consent), 3126(a)(7) (complainant less than 13 years of age).

[3] Appellant's seven year absence from the Commonwealth is of no moment. SORNA applies retroactively to any individual serving a sentence for a sexual offense or any individual who had not completed their registration period under prior registration statutes as of SORNA's effective date of December 20, 2012. 42 Pa.C.S. §9799.13. Had appellant been sentenced in 2007 and subject to registration under Megan's Law III, he would not have completed his ten-year registration period when SORNA became effective and thus his ten-year registration period would have been converted to a term of lifetime registration.

[4] Pa. Const. art. I §1 ("All men … have certain inherent and indefeasible rights, among which are those of … protecting property and reputation. ...").

[5] The panel did not explain that, in *Perez*, the Superior Court did not actually reach the merits of the state constitutional claim, holding instead it was waived for failure to present an analysis under *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991). *See Perez*, 97 A.3d at 760.

[6] The Defender Association of Philadelphia and the Pennsylvania Association of Criminal Defense Lawyers (hereinafter referred to jointly as PACDL) filed an *amicus curiae* brief supporting appellant. *Amicus* briefs in support of appellant were also filed by The Association for the Treatment of Sexual Abusers, Assessment and Treatment Alternatives and the Joseph J. Peters Institute, The Collateral Consequences Resource Center, and The Social Science Scholars; these policy based briefs focused on studies which opined recidivism by sex offenders is overstated and sex offender registration is ineffective and may also be counterproductive. The Pennsylvania District Attorneys Association (PDAA) filed an *amicus* brief in support of the Commonwealth.

[7] The Commonwealth also claims appellant waived his argument that SORNA violates the reputation clause of the Pennsylvania Constitution. We note the Superior Court correctly concluded the issue was waived because it was not raised in appellant's post-sentence motion, and appellant has not raised an independent reputation clause claim before this Court. *See* Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal."). However, appellant does include reputation-based concerns in his analysis of Pennsylvania's ex post facto clause, and whether it provides greater protection than its federal counterpart; appellant presented almost identical reputation-based arguments in his *Edmunds* analysis before the Superior Court as well. To the extent reputation-based concerns support appellant's claim that SORNA's provisions are punishment and retroactive application is a violation of Pennsylvania's ex post facto clause, we consider them only in that limited context.

[8] The inclusion of this subsection provided the basis for the *Neiman* Court's decision to strike down the statute as being in violation of the single subject rule. *Neiman*, 84 A.3d at 610-13.

[9] The Supreme Court of Alaska later found the retroactive application of the Act unconstitutional under the ex post facto clause of the Alaska state constitution. *See Doe v. State*, 189 P.3d 999 (Ak. 2008).

[10] *Williams II* arose out of the Commonwealth's appeal from two orders of the Court of Common Pleas of Erie County, which struck down certain portions of Megan's Law II as violative of the due process clauses of the United States and Pennsylvania Constitutions; the ex post facto clauses were not at issue. However, the central question in *Williams II*, as in this appeal, was whether certain provisions of Megan's Law 11 constituted punishment. *Williams II*, 832 A.2d at 968-69.

[11] 18 Pa.C.S. §§3121, 3123.

[12] The *Williams II* Court also weighed whether Megan's Law II's penalties for non-compliance, which subjected sexually violent predators to a possible term of life imprisonment, constituted punishment. *Williams II*, 832 A.2d at 985. The Court found these penalties must be considered punitive and unconstitutional as the new offense proceeds "directly from the Act's enforcement provisions" and "such measures are manifestly in excess of what is needed to ensure compliance[.]" *Id.* at 985-86.

[13] The federal regime is also referred to as the "Jacob Wetterling, Megan Nicole Kanka, and Pam Lychner Sex Offender Registration and Notification Program, " 42 U.S.C. §16902, or more simply as "federal SORNA." *See, e.g., United States v. Roberson*, 752 F.3d 517, 518 (1st Cir. 2014); *Commonwealth v. Nase*, 104 A.3d 528, 532 (Pa. Super.

2014).

[14] The federal statute provides: "For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under subpart 1 of part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3750 et seq.)." 42 U.S.C. §16925(a).

[15] A sexually violent offense is defined as "[a]n offense specified in section 9799.14 (relating to sexual offenses and tier system) as a Tier I, Tier II or Tier III sexual offense." 42 Pa.C.S. §9799.12.

[16] The Tier I offenses enumerated in SORNA are as follows: 18 Pa.C.S. §2902(b) (relating to unlawful restraint); 18 Pa.C.S. §2903(b) (relating to false imprisonment); 18 Pa.C.S. §2904 (relating to interference with custody of children); 18 Pa.C.S. §2910 (relating to luring a child into a motor vehicle or structure); 18 Pa.C.S. §3124.2(a) (relating to institutional sexual assault); 18 Pa.C.S. §3126(a)(1) (relating to indecent assault); 18 Pa.C.S. §6301(a)(1)(ii) (relating to corruption of minors); 18 Pa.C.S. §6312(d) (relating to sexual abuse of children); 18 Pa.C.S. §7507.1 (relating to invasion of privacy); 18 U.S.C. §1801 (relating to video voyeurism); 18 U.S.C. §2252(a)(4) (relating to certain activities relating to material involving the sexual exploitation of minors); 18 U.S.C. §2252A (relating to certain activities relating to material constituting or containing child pornography); 18 U.S.C. §2252B (relating to misleading domain names on the internet); 18 U.S.C. §2252C (relating to misleading words or digital images on the internet); 18 U.S.C. §2422(a) (relating to coercion and enticement); 18 U.S.C. §2423(b) (relating to transportation of minors); 18 U.S.C. §2423(c) (relating to engaging in illicit sexual conduct in foreign places); 18 U.S.C. §2424 (relating to filing factual statement about alien individual); 18 U.S.C. §2425 (relating to use of interstate facilities to transmit information about a minor); a comparable military offense or similar offense under the laws of another jurisdiction or foreign country or under a former law of this Commonwealth; an attempt, conspiracy or solicitation to commit any of the above offenses; and a conviction for a sexual offense in another jurisdiction or foreign country (continued…) that is not set forth in this section, but nevertheless requires registration under a sexual offender statute in the jurisdiction or foreign country. 42 Pa.C.S. §9799.14(b).

[17] The Tier II offenses enumerated in SORNA are as follows: 18 Pa.C.S. §3011(b) (relating to trafficking in individuals); 18 Pa.C.S. §3122.1(a)(2) (relating to statutory sexual assault); 18 Pa.C.S. §3124.2(a.2) and (a.3) (relating to institutional sexual assault in schools or child care centers); 18 Pa.C.S. §3126(a)(2), (3), (4), (5), (6) or (8) (relating to indecent assault when victim is over 13 years of age); 18 Pa.C.S. §5902(b.1) (relating to prostitution and related offenses); 18 Pa.C.S. §5903(a)(3)(ii), (4)(ii), (5)(ii) or (6) (relating to obscene and other sexual materials and performances); 18 Pa.C.S. §6312(b) and (c); 18 Pa.C.S. §6318 (relating to unlawful contact with minor); 18 Pa.C.S. §6320 (relating to sexual exploitation of children); 18 U.S.C. §1591 (relating to sex trafficking of children by force, fraud or coercion); 18 U.S.C. §2243 (relating to sexual abuse of a minor or ward); 18 U.S.C. §2244 (relating to abusive sexual conduct) where the victim is 13 years of age or older but under 18 years of age; 18 U.S.C. §2251 (relating to sexual exploitation of children); 18 U.S.C. §2251A (relating to selling or buying children); 18 U.S.C. §2252(a)(1), (2) or (3); 18 U.S.C. §2260 (relating to production of sexually explicit depictions of a minor for importation into the United States); 18 U.S.C. §2421 (relating to transportation generally); 18 U.S.C. §2422(b); 18 U.S.C. §2423(a); a comparable military offense or similar offense under the laws of another jurisdiction or foreign country or under a former law of this Commonwealth; and an attempt, conspiracy or solicitation to commit any of the above offenses. 42 Pa.C.S. §9799.14(c).

[18] We are cognizant that restrictions on housing also arise from different statutes, such as 42 U.S.C. §13663(a), which prohibits Tier III offenders, like appellant, from residing in federally subsidized housing.

[19] PACDL also notes other jurisdictions have held sex offender registration laws are similar to probation. PACDL's Brief at 46, *citing Doe v. Dep't of Pub. Safety & Corr. Serv.*, 62 A.3d 123 (Md. 2013); *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009); *Doe*, 189 P.3d 999.

[20] SORNA predicate offenses that may be graded as misdemeanors under Pennsylvania law are as follows: interference with custody of children, 18 Pa.C.S. §2904; luring a child into a motor vehicle or structure, 18 Pa.C.S. §2910; indecent assault, 18 Pa.C.S. §3126(a)(1)-(6), (8); invasion of privacy, 18 Pa.C.S. §7507.1(b); and obscene and other sexual materials and performances, 18 Pa.C.S. §5903(a)(3)(ii), (4)(ii), (5)(ii), (6). SORNA predicate offenses that may have a maximum incarceration term of two years or less under federal law are as follows: video voyeurism, 18 U.S.C. §1801; misleading domain names on the internet, 18 U.S.C. §2252B; and abusive sexual conduct, 18 U.S.C. §2244.

[21] We recognize interference with custody of children is not an example on all fours with the present situation, as appellant is a Tier III offender and, in any event, many of the other minor offenses listed in the tier system do include sexual components. However, the *Smith* Court made clear we must examine the law's entire statutory scheme when determining whether a statute is truly civil or creates instead a punitive effect. *Smith*, 538 U.S. at 92. Thus, each and every predicate offense is relevant to our analysis.

[22] We note the Adam Walsh Act-pursuant to which SORNA was enacted - anticipates the possibility that state compliance with the federal mandate might violate a state's constitution, and provides for the possibility that a penalty for noncompliance might not apply in such situations. *See* 42 U.S.C. §16925(b)(1) ("When evaluating whether a jurisdiction has substantially implemented this subchapter, the Attorney General shall consider whether the jurisdiction is unable to substantially implement this subchapter because of a demonstrated inability to implement certain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court."). Our analysis on state grounds averts the "consultation" procedure intended to determine whether compliance with the federal legislation might violate a state's own constitution: "In considering whether compliance with the requirements of this subchapter would likely violate the jurisdiction's constitution or an interpretation thereof by the jurisdiction's highest court, the Attorney General shall consult with the chief executive and chief legal officer of the jurisdiction concerning the jurisdiction's interpretation of the jurisdiction's constitution and rulings thereon by the jurisdiction's highest court." *See* 42 U.S.C. §16925(b)(2). In the event the state's constitution is violated by compliance, the federal statute allows for "reasonable alternative procedures or accommodations" such that the state might avoid reduced federal funding. 42 U.S.C. at §16925(b)(3). Parenthetically, we recognize the federal statute does not expressly require retroactivity but instead authorizes the Attorney General to specify such applicability. *See* 42 U.S.C. §16913(d) ("The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter[.]"). We further note the Attorney General has promulgated national guidelines which require states to include retroactive application as part of the federal SORNA

requirements; thus the noncompliance provisions are implicated here. *See* 73 FR 38030-01 at 38046-47 (July 2, 2008) ("Accordingly, a jurisdiction will be deemed to have substantially implemented the SORNA standards with respect to sex offenders whose predicate convictions predate the enactment of SORNA or the implementation of SORNA in the jurisdiction's program if it registers these sex offenders, when they fall within any of the three classes described above, in conformity with the SORNA standards".)

[1] *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

[2] I would resolve this case on state constitutional grounds, and decline to address Muniz's claim that SORNA also violates the *ex post facto* clause of the United States Constitution. The lower federal courts disagree as to whether sex-offender registration laws violate the federal *ex post facto* clause, and the United States Supreme Court may accept review of one such dispute in the coming months. *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016), *petition for cert. filed*, 2016 WL 7335854 (U.S. Dec. 14, 2016) (No. 16-768); *see Snyder v. Does #1-5*, 580 U.S.__, 137 S.Ct. 1395 (U.S. Mar. 27, 2017) (inviting the Acting Solicitor General to file a brief expressing the views of the United States). Under these circumstances, I would simply hold that SORNA violates Article I, Section 17 of the Pennsylvania Constitution-a determination for which this Court is the final arbiter. *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached."); *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("[S]tate courts are the ultimate expositors of state law.").

[3] The United States Constitution has two provisions that prohibit *ex post facto* laws: one that restricts Congress (Article I, Section 9) and one that applies to the several states (Article I, Section 10).

[4] The Framers' hostility toward *ex post facto* laws grew from the British Parliament's practice of enacting "bills of attainder" and "bills of pains and penalties, " some of which would retroactively declare innocent acts to be criminal, while others would simply increase the punishment for past offenses. *Calder*, 3 U.S. at 389 (stating that the *ex post facto* clause "very probably arose from the knowledge . . . that the Parliament of Great Britain claimed and exercised a power to pass such laws"). Parliament justified these laws by insisting that they were necessary to preserve "the safety of the kingdom." *Id.*

[5] It is important to remember that the original Constitution purposely did not enumerate individual rights, since some delegates worried that such a list would be construed to deny the public any unexpressed rights. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980).

[6] *See Artway v. Att'y Gen. of N.J.*, 81 F.3d 1235 (3d Cir. 1996); *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997).

[7] In at least one later case, the Court did undertake an *Edmunds* analysis, and discerned no basis to conclude that the standards applicable to federal *ex post facto* challenges are inadequate to safeguard the Pennsylvania constitutional right. *Gaffney*, 733 A.2d at 622 ("Appellant has failed to present any compelling reason for our departure from the standards appropriate for determining whether an *ex post facto* violation pursuant to the federal constitution has occurred and we find no independent reasons for doing so."); *accord Commonwealth v. McElhenny*, 478 A.2d 447, 450 (Pa. Super. 1984) (rejecting the argument that Article I, Section 17 of the Pennsylvania Constitution provides greater protection than the corresponding federal provision, and noting that Pennsylvania courts "have, generally, interpreted the Pennsylvania clause coterminously with the Federal clause").

[8] *See e.g., Riley v. N.J. Parole Bd.*, 98 A.3d 544, 552 (N.J. 2014) ("The New Jersey *Ex Post Facto* Clause is interpreted in the same manner as its federal counterpart."); *Rew v. Bergstrom*, 845 N.W.2d 764, 795 (Minn. 2014) ("[W]e can discern no principled reason, textual or otherwise, to treat the prohibition on *ex post facto* laws in the Minnesota Constitution any differently than its federal counterpart[.]"); *People v. Earl*, 845 N.W.2d 721, 725 n.1 (Mich. 2014) (treating the Michigan Constitution's *ex post facto* clause as coextensive with its federal counterpart); *State v. Harris*, 414 S.W.3d 447, 449 (Mo. 2013) ("The Missouri Constitution's ban on *ex post facto* laws is coextensive with the United States Constitution's ban on *ex post facto* laws."); *In re Interest of J.R.*, 762 N.W.2d 305, 316 (Neb. 2009) (construing Nebraska's *ex post facto* clause "to provide no greater protections than those guaranteed by the federal Constitution"); *People ex rel. Birkett v. Konetski*, 909 N.E.2d 783, 800 (Ill. 2009) ("[T]he *ex post facto* clause in the Illinois Constitution does not provide greater protection than that offered under the United States Constitution."); *Kellar v. Fayetteville Police Dept.*, 5 S.W.3d 402, 405 (Ark. 1999) ("We have been given no reason why we should interpret Arkansas's *ex post facto* clause in a manner contrary to the *ex post facto* clause in the United States Constitution.").

[9] *See also Murphy v. Kentucky*, 465 U.S. 1072, 1073 (1984) (White, J., dissenting from denial of *certiorari*) (citing conflicting lower court decisions concerning the *ex post facto* clause's application to retroactive evidentiary and procedural rules).

[10] If anything, the very existence of a reputation clause suggests that the drafters of our constitution believed that the right was not protected sufficiently by other provisions of the Declaration of Rights.

[1] Employing the OAJC's source (via now-Justice Donohue's concurring opinion in *Commonwealth v. Perez*, 97 A.3d 747, 765-66 (Pa. Super. 2014) (Donohue, J., concurring)), the United States Census Bureau indicates that over 61 million American households, or about 54%, had internet access at the time *Smith* was decided. *See* United States Census Bureau, Computer and Internet Use in the United States: 2003, at 2 (2005) *https://www.census.gov/prod/2005pubs/p23-208.pdf*. From my perspective, the increase to approximately 75% of households is not materially significant in categorizing the registration requirements as punishment.

[2] In accord with my understanding of the proper approach to *ex post facto* reviews, as discussed further herein, the obligations imposed pursuant to Appellant's tier I designation are properly subject to examination, but only as compared to the actual predicate offense that triggered those requirements.

[3] Nonetheless, I agree that there appears to be some disconnect between those offenses that do not have a direct sexual element and requiring registration as a sex offender. *See* OAJC, *slip op.* at 39. However, as discussed hereinafter, resolution of such a claim must be addressed within the confines of a case implicating those crimes.

[4] Generally, a facial challenge asserts that the statute cannot be applied to any set of facts in a constitutional manner. *See* Alex Kreit, *Making Sense of Facial and As-Applied*

Challenges, 18 Wm. & Mary Bill Rts. J. 657, 657 (2010).

[5] The OAJC includes within its non-sexual offenses designation 18 U.S.C. §2424, pertaining to the filing of a factual statement about an alien individual. However, a review of that federal statute reveals that it relates to housing a person "for the purpose of prostitution, or for any other immoral purpose . . .." *Id.* Thus, I disagree that there is no sexual component.

[6] Although the *Mendoza-Martinez* factors are the prevailing framework for determining the punitive effect of a statutory enactment, a number of scholars and jurists have expressed significant reservations with their use relative to assessing collateral consequence laws, such as SORNA. *See* David A. Singleton, *What Is Punishment?: The Case for Considering Public Opinion Under Mendoza-Martinez*, 45 Seton Hall L. Rev. 435, 442 (2015); Mayson, *Collateral Consequences and the Preventative State*, 91 Notre Dame L. Rev. at 332-33. Specifically, one commentator explains that the factors are too deferential to legislatures (given the *ex post facto* clause's role in safeguarding liberty), are highly subjective and manipulable, and rely in part on circular logic (*e.g.*, a finding that a sanction is a historical form of punishment effectively resolves the initial punishment query without need to consider the other factors). *See* Singleton, *What Is Punishment?*, 45 Seton Hall L. Rev. at 443-44.

Commentators and jurists have also proposed alternative tests to determine whether a sanction is punitive. *See, e.g.*, Aaron Xavier Fellmeth, *Civil and Criminal Sanctions in the Constitution and Courts*, 94 Geo. L.J. 1, 41 (2005) ("[A] measure having the systemic effect of deterring or punishing a forbidden act should . . . always be considered criminal . . ., while a measure having the systemic effect of providing remediation to a party allegedly injured by an act or omission of the defendant should always be considered a civil one."); Mayson, *Collateral Consequences and the Preventative State*, 91 Notre Dame L. Rev. at 333 (suggesting that collateral consequences should be conceived of as falling along a "punishment-prevention spectrum . . . according to whether they claim primary authorization from a judgment of culpability [(punishment)] or a judgment of risk [(prevention)]"); *Smith*, 538 U.S. at 112, 123 S.Ct. at 1157 (2003) (Stevens, J., dissenting) ("The sanctions [are criminal if they] (1) constitute a severe deprivation of the offender's liberty, (2) are imposed on everyone who is convicted of a relevant criminal offense, and (3) are imposed only on those criminals."). However, the United States Supreme Court has offered no indication that it is contemplating abandoning the *Mendoza-Martinez* model, and the parties here do not advocate for any such change.

Nonetheless, I emphasize that, although collateral consequences, of whatever form, may not be deemed punishment for constitutional or other purposes, such a determination is made despite the seemingly widespread recognition that they are not simply benign to those who are subject to them. *See* Sandra G. Mayson, *Collateral Consequences and the Preventive State*, 91 Notre Dame L. Rev. at 303-04 ("[C]ourts have reached a defensible result in declining to [categorize collateral consequences as punishment]. Where they have erred is in assuming that, as mere regulation, [collateral consequences] are benign. On the contrary, laws that restrict certain people's liberty on the basis of their perceived propensity to commit future crimes raise both moral and constitutional concerns. Predictions of future crime are highly inaccurate; they tend to track stereotypes, and factors used as proxies for future risk both reflect and perpetuate race and class inequality. More fundamentally, predictive restraint contravenes the liberal ideal that the state may not preemptively restrain people who are responsible actors to stop them from committing future crimes."). However, "'punitive' in the experiential sense of the word" does not equate to punishment for purposes of invalidating a legislative enactment on constitutional grounds, which ultimately appears to be reflected in the *Mendoza-Martinez* framework. *Id.* at 334.

2017.DCO.0000728< http://www.versuslaw.com>

DAVID MILLARD, EUGENE KNIGHT, ARTURO VEGA, Plaintiffs,

v.

MICHAEL RANKIN, in his official capacity as Director of the Colorado Bureau of Investigation, Defendant.

Civil Action No. 13-cv-02406-RPM

United States District Court, D. Colorado

August 31, 2017

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR ENTRY OF JUDGMENT

RICHARD P. MATSCH, SENIOR DISTRICT JUDGE.

Plaintiffs are registered sex offenders under the Colorado Sex Offender Registration Act ("SORA"), C.R.S. §§ 16-22-101, *et seq.* In this civil action brought pursuant to 42 U.S.C. § 1983 they seek declaratory and injunctive relief, claiming that continuing enforcement of the requirements of SORA against them violates their rights under the Eighth and Fourteenth Amendments to the United States Constitution. Defendant is the Director of the Colorado Bureau of Investigation ("CBI"), the state agency responsible for maintaining the centralized registry of sex offenders and providing information on a state web site.

After consideration of the evidence submitted at trial and the written arguments of counsel the Court now enters the following findings of fact, conclusions of law, and order.

The Colorado Sex Offender Registration Act

Registration Requirements

SORA requires a person convicted of unlawful sexual behavior or another offense, the underlying factual basis of which involves unlawful sexual behavior, to register with the state as a sex offender. C.R.S. § 16-22-103. SORA defines unlawful sexual behavior to include a wide range of offenses, and its registration requirements apply to both adult and juvenile offenders. *See City of Northglenn v. Ibarra*, 62 P.3d 151, 156-57 (Colo. 2003); *see also* C.R.S. § 16-22-102(3) (defining "conviction") and § 16-22-102(9) (defining "unlawful sexual behavior").

The Registration Process

A person required to register must register with the local law enforcement agency in each jurisdiction in which the person resides. C.R.S. § 16-22-108(1)(a)(I). Registration is required to be done in person at the person's local law enforcement agency by completing a standardized registration form and paying any registration fee imposed by the local law enforcement agency. C.R.S. § 16-22-108(7).

All persons required to register must reregister at least annually and any time they change addresses or names; certain specified offenders are required to reregister quarterly. C.R.S. § 16-22-108(1)(b), (c), and (d).[1]

[1] A person required to register who has been convicted of a "child sex crime" is further required to register "all e-mail addresses, instant-messaging identities, or chat room identities prior to using the address or identity, " as well as any changes of such addresses or identities. C.R.S. § 16-22-108(2.5)(a) and (3)(g). "Child sex crime" encompasses many offenses; as relevant here, it includes sexual assault on a child as provided in C.R.S. § 18-3-405, as well as "criminal attempt, conspiracy, or solicitation to commit any of the specified acts." C.R.S. § 16-22-108(c).

Failure to comply with the registration requirements is a criminal offense. C.R.S. § 18-3-412.5.

A standardized form prescribed by the CBI is used for registration. C.R.S. § 16-22-109. By statute, information required by the form includes (but is not limited to) the registrant's name (including all legal names and aliases used), date of birth, address, and place of employment; and all e-mail addresses, instant-messaging identities, and chat room identities to be used by the person if the person is required to register that information pursuant to section 16-22-108(2.5) (persons convicted of "child sex crimes"). C.R.S. § 16-22-109(1).

The Sex Offender Registry and CBI's Authority to Release Registry Information

The CBI serves as official custodian of all registration forms and other documents associated with sex offender registration. It is required to maintain a statewide central registry-known as the sex offender registry-of persons required to register under SORA. C.R.S. § 16-22-110(1). The registry is required to provide certain information, at a minimum, to all criminal justice agencies with regard to all registered persons. C.R.S. § 16-22-110(2).

The CBI is also authorized to provide to members of the public, upon request and payment of any fees assessed for search, retrieval, and copying, "the name, address or addresses, and aliases of the registrant; the registrant's date of birth; a photograph of the registrant, if requested and readily available; and the conviction resulting in the registrant being required to register pursuant to this article." C.R.S. § 16-22-110(6)(f). The CBI may inform someone requesting a criminal history check whether the person being checked is on the sex offender registry; members of the public may also request a list of all persons on the registry. C.R.S. § 16-22-110(b) and (c).

With respect to the public availability of such information, SORA states:

> The general assembly hereby recognizes the need to balance the expectations of persons convicted of offenses involving unlawful sexual behavior and the public's need to adequately protect themselves and their children from these persons, as expressed in section 16-22-112(1). The general assembly declares, however, that, in making information concerning persons convicted of offenses involving unlawful sexual behavior available to the public, it is not the general assembly's intent that the information be used to inflict retribution or additional punishment on any person convicted of unlawful sexual behavior or of another offense, the underlying factual basis of which involves unlawful sexual behavior.

C.R.S. § 16-22-110(6).

The CBI's Internet Posting of Sex Offender Information

SORA also requires the CBI to post on the State of Colorado's internet homepage a link to "a list containing the names, addresses, and physical descriptions of certain persons and descriptions of the offenses committed by said persons." C.R.S. § 16-22-111(1). The "certain persons" whose information must be posted on the State's website include persons convicted of being sexually violent predators; persons convicted as an adult of two or more felony offenses involving unlawful sexual behavior; persons convicted of a crime of violence as defined in section C.R.S. § 18-1.3-406; and persons required to register because they were convicted of a felony as an adult, but who fail to register as required.[2]

For such persons, the physical description posted on the State's website "shall include, but need not be limited to, the person's sex, height, and weight, any identifying characteristics of the person, and a digitized photograph or image of the person." C.R.S. § 16-22-111(1). Section 16-22-111(1.5) further provides:

> In addition to the posting required by subsection (1) of this section, the CBI may post a link on the state of Colorado homepage on the internet to a list, including but not limited to the names, addresses, and physical descriptions of any person required to register pursuant to section 16-22-103, as a result of a conviction for a felony. A person's physical description shall include, but need not be limited to, the person's sex, height, weight, and any other identifying characteristics of the person.

Pursuant to C.R.S. § 16-22-111(2)(a), the CBI has authority to determine whether a person has failed to register as required, and if so, to post information concerning that person on the State's internet site. In addition, if a local law enforcement agency files criminal charges against a person for failure to register as a sex offender, that agency is required to notify the CBI, which is required to post the information concerning the person on the internet. C.R.S. § 16-22-111(2)(b).

Local Law Enforcement Agencies' Publication of Sex Offender Information

SORA also authorizes local law enforcement agencies to post on their websites certain information about registered sex offenders, if the offender falls within one of the categories described in § 16-22-112(2)(b). SORA disclaims any legislative intent to impose punishment through the public release of such information:

> The general assembly finds that persons convicted of offenses involving unlawful sexual behavior have a reduced expectation of privacy because of the public's interest in public safety. The general assembly further finds that the public must have access to information concerning persons convicted of offenses involving unlawful sexual behavior that is collected pursuant to this article to allow them to adequately protect themselves and their children from these persons. The general assembly declares, however, that, in making this information available to the public, as provided in this section and section 16-22-110(6), it is not the general assembly's intent that the information be used to inflict retribution or additional punishment on any person convicted of unlawful sexual behavior or of another offense, the underlying factual basis of which involves unlawful sexual behavior.

C.R.S. § 16-22-112(1).

The Process for Removal of Information from the Registry and/or Internet

SORA allows some but not all registrants to petition for removal from the registry and/or have the CBI remove their information from the State's internet site. C.R.S. § 16-22-113. Certain persons required to register may file a petition with the court that issued the judgment for the conviction that required registration to discontinue that requirement or internet posting, or both. Such a petition may be filed after a period of five, ten, or twenty years after discharge from incarceration or other completion of all sentencing requirements; the length of the applicable period depends on the statutory classification of the sex offense for which the registrant was convicted. C.R.S. § 16-22-113(1)(a)-(c). Persons convicted of certain offenses are subject to SORA's registration requirements for the rest of their lives. C.R.S. § 16-22-113(3).[3]

As to juveniles, SORA provides procedures for a person to petition to discontinue the duty to register, to have the CBI discontinue posting on the internet, and also to be removed from the sex offender registry itself:

(e) Except as otherwise provided in subparagraph (II) of paragraph (b) of subsection (1.3) of this section, if the person was younger than eighteen years of age at the time of commission of the offense, **after the successful completion of and discharge from a juvenile sentence or disposition**, and if the person prior to such time has not been subsequently convicted or has a pending prosecution for unlawful sexual behavior or for any other offense, the underlying factual basis of which involved unlawful sexual behavior and the court did not issue an order either continuing the duty to register or discontinuing the duty to register pursuant to paragraph (b) of subsection (1.3) of this section. Any person petitioning pursuant to this paragraph (e) may also petition for an order removing his or her name from the sex offender registry. **In determining whether to grant the order, the court shall consider whether the person is likely to commit a subsequent offense of or involving unlawful sexual behavior**. The court shall base its determination on recommendations from the person's probation or community parole officer, the person's treatment provider, and the prosecuting attorney for the jurisdiction in which the person was tried and on the recommendations included in the person's presentence investigation report. In addition, the court shall consider any written or oral testimony submitted by the victim of the offense for which the petitioner was required to register….

C.R.S. § 16-22-113(1)(e) (emphasis added).

Plaintiffs' Sex Offense Adjudications, Registration Requirements, and Evidence of Harm

David Millard

David Millard pleaded guilty to second degree sex assault on a minor in 1999, resulting in a sentence of 90 days jail work release and eight years probation. His plea agreement required him to register as a sex offender for ten years after completing probation. While on probation, he successfully completed sex offense specific treatment. His probation was never revoked or extended, and he completed his period of probation in October 2007. Since beginning his probation he has not been accused of committing any type of crime or engaging in any type of inappropriate sexual conduct. He is eligible to petition to be removed from the sex offender registry in October 2017.

Mr. Millard has registered as required since his conviction, and has never been charged with failure to register. Registration forms provided to him by his local law enforcement agency for the past two years have required-and he has provided-disclosure of his email addresses. Because Mr. Millard was convicted of a felony sex offense as an adult, his information appears on the list of registered sex offenders that members of the public may obtain from the CBI on request; and that information as well as a photograph are on the CBI website.

Mr. Millard has worked for Albertsons for 14 years, since 2003. He disclosed on his employment application that he had a felony conviction and said that he would "explain in person, " but he was not asked about his answer at that time and Albertsons did not do a background check. Because a requirement of his probation was to disclose his offense to his employer, he told his boss he was convicted in 1999 of second degree sexual assault. His boss did not ask for more details, but a condition of continued employment was that there be no problems and that no one find out about the conviction.

As a result, Mr. Millard has lived in fear of discovery and losing his job. That fear increased in approximately 2005, when according to Mr. Millard's testimony the publication of his sex offender status began to include a photograph, making his identity more accessible through the internet. He was not permitted to access the internet during his probationary period. After completing probation he Googled his name and was shocked to discover that multiple websites-both publicly-run and private, commercial sites-displayed his information, including his picture, the offense for which he was convicted, his address, and a description of body scars as further identification. One website had incorrect information about him that he was able to have removed, but only after approximately six months. The availability and extent of the public information caused Mr. Millard to live in fear of discovery, loss of his job, and retaliation through harm to himself or his family.

In 2015, a customer discovered Mr. Millard on a sex offender website and reported the discovery to Albertsons' human relations department, resulting in an internal investigation. A fellow employee spread the information to other employees in the store. As a result, Mr. Millard was transferred to another store where the information had not become known. He has been specifically advised by his employer that he will lose his job if the information about him being a registered sex offender becomes known at the new store. Thus, even though his employer has been supportive, discovery by a customer or fellow employee is a constant concern for him given the ready availability of the information on the internet.

Mr. Millard has been forced to change residences. Shortly after his conviction, a representative of the Arapahoe County Sheriff's Department came to his apartment complex and informed the leasing office that Mr. Millard was a registered sex offender. He was not permitted to renew his lease and was required to move.

He was not asked about his background or sex offender status before he applied to move into his next apartment. In 2005, Channel 7, a Denver television station, ran an "investigative report" on a news program that filmed leasing agents saying no felons were tenants at certain apartment complexes, but admitting that they did not do background checks on rental applications. The reporter then identified felons who were living in the complex. The program placed a primary emphasis on sex offenders. Mr. Millard learned of the Channel 7 program when a fellow tenant asked him if he knew there were a lot of sex offenders at the complex, and told him about the Channel 7 program. Mr. Millard watched the Channel 7 News report and saw his name come on the screen among a list of sex offenders living at the complex. Shortly after the Channel 7 story aired, a letter was posted on his door requiring him to move from the complex within thirty days.

Mr. Millard moved into his mother's home, where he lived for several years. During that period he filled out some 200 or more rental applications, without success. He finally found another apartment, which he obtained after fully disclosing and explaining his background and conviction.

Mr. Millard ultimately was able to purchase the house where he now lives. But he remains subject to periodic visits by Denver Police officers to confirm the accuracy of his registered address. If he is not home when they visit, they leave prominent, brightly-colored "registered sex offender" tags on his front door notifying him that he must contact the DPD.

On one occasion a DPD officer hung a tag on his door even though Mr. Millard had spoken with the officer by telephone and explained he was at work and would not be

home at the time of the visit. Mr. Millard was so concerned about the risk of discovery that he asked for time off work to go home to remove the tag, which displeased his boss. In following up from that incident, two DPD officers came to his house, banged noisily on the door, and loudly told Mr. Millard, in front of and in earshot of watching neighbors, that they were there to do a sex offender home check. Mr. Millard's previously-cordial neighbors have since avoided him and become less friendly.

Mr. Millard's experiences from public awareness that he is a registered sex offender have left him in fear of retribution. On one occasion he walked out of his mother's house and two persons walking by remarked "there's that f-ing sex offender." His car was "keyed" and burglarized. Because of the fear and anxiety about his safety in public Mr. Millard does little more than go to work, isolating himself at his home.

Eugene Knight

Eugene Knight was charged with two counts of sexual assault on a child in 2006, based on conduct occurring in September 2005 when he was eighteen years old. A plea bargain resulted in his conviction for attempted sexual assault on a child. He was sentenced to eight years supervised probation and a 90-day jail sentence. The conditions of his probation sentence required him to participate in offense-specific treatment at a contractor-owned sex offender treatment entity called Sexual Offender Resource Services. The treatment prescribed for him included requiring him to undergo periodic polygraphs and other tests[4] as determined by his therapist. Because he could not afford to pay the costs of these tests, his probation was revoked and he was sentenced to two years imprisonment, including presentence confinement time. He was paroled in November 2009 and discharged from parole in April or May 2011. Mr. Knight's parole was never revoked. He is not eligible to petition to be removed from the sex offender registry until 2021.

Since his 2006 conviction, Mr. Knight has not been accused of any other sex offense or sexually inappropriate conduct. The only crime of which he has been accused since 2006 was a 2013 charge for failure to register as a sex offender. The charge was mistaken and was ultimately dismissed, but only after he endured the indignity, inconvenience, expense, and anxiety of being arrested, having to post bond, and making two court appearances over some two months.

Because Mr. Knight was convicted of a felony sex offense as an adult, his information appears on the list of registered sex offenders that members of the public may obtain from the CBI on request; and that information as well as a photograph are on the CBI website. Mr. Knight's information on the CBI's website and sex offender registry states that he was convicted of "sexual assault on a child" in violation of C.R.S. § 18-3-405, even though his conviction was for attempted sexual assault on a child. That error from the CBI website has been carried over to at least one privately-operated website.

Mr. Knight describes his family role as "full-time father." He has two children, who were in kindergarten and third grade at the time of this trial. He testified that he does not work outside the home because he has had difficulty finding a job that pays enough to offset the costs of child care. One job application, at Home Depot, was rejected because, he was told, a background check came back "red-flagged." He does not know whether this rejection was because of his sex offender status or because of other matters on his record. Because the mother of his children is employed full time, Mr. Knight cares for the children during the day and takes them to and from school.

In September 2014 Mr. Knight received a letter from the principal of his children's school informing him that she and Denver Public Schools (DPS) had become aware of his status as a registered sex offender, and that he "is in violation of Denver Public Schools Board of Education Policy KFA, which prohibits, among other things, disruption of teaching or administrative operations, and the creation of an unsafe/threatening environment for our students and staff members." The letter stated that effective immediately, and for the duration of the 2014-15 school year, Mr. Knight was barred from entering the grounds of his children's school and all other DPS schools and facilities. It informed him that for daily drop-off and pick-up he would be required to remain on the sidewalk outside the school, and the children would be accompanied to and from the school building by a paraprofessional. It also stated that if Mr. Knight failed to follow these directives, DPS security and/or the Denver Police Department would be asked to intervene. DPS sent similar letters to Mr. Knight for the 2015-16 and 2016-17 school years.

This exclusion from his children's school is solely because he is a registered sex offender. Neither DPS nor anyone else has ever accused Mr. Knight of any conduct allegedly disrupting school operations or creating an unsafe or threatening school environment. Other than one occasion, Mr. Knight has not been inside his children's school since receiving this letter. The arrangement allowed by the school has proven inconvenient and on numerous occasions the school has not lived up to its obligations to escort his children to him, resulting in ongoing difficulties for Mr. Knight and his children. The bar has also interfered with his ability to attend school events, and has caused concerns and confusion for his children about why he cannot go into their school building like other parents.

Arturo Vega

At age 15, Arturo Vega was adjudicated a juvenile offender for conduct occurring when he was 13 years old. He pleaded guilty to third degree sexual assault and was sentenced to probation with the condition that he reside in a juvenile treatment facility. He did not understand the sex offender registration requirements.

Mr. Vega's probation was revoked and he was sentenced to serve two years at the Division of Youth Corrections at Lookout Mountain where he was required to participate in sex offender treatment. He testified without contradiction-and therefore it is undisputed-that he did attend and complete treatment as required, including sex offender treatment and anger management classes. His sentence was not extended or modified because of any claimed failure to attend or complete treatment. Mr. Vega was released from Lookout Mountain in May or June 2000, and was on parole for approximately a year. He also attended required therapy while on parole.

Mr. Vega was convicted of a misdemeanor for failure to register in September 2001, for which he was fined, and he did then register as a juvenile sex offender. Because he was adjudicated a sex offender as a juvenile, he does not appear on the CBI website, but his registration information-including his name, address, and physical description including scars, marks and tattoos-is on the list of sex offenders that the public can obtain from the CBI. Although a criminal background check does not show Mr. Vega's underlying juvenile adjudication, his presence on the sex offender registry-for failure to register as a sex offender-does.

Mr. Vega has experienced employment difficulties. He has maintained employment with a furniture installation contractor, but during that employment he has been asked to leave and/or prevented from being able to work at certain government and other facilities that require background checks. There is no evidence establishing that any of these

employment difficulties were specifically as a result of Mr. Vega's conviction for failure to register as a sex offender, rather than other charges that would also appear in a more general background check of Mr. Vega's record.[5]

Mr. Vega made two attempts to be removed from the sex offender registry by submitting petitions to the sentencing court pursuant to C.R.S. § 16-22-113(1)(e), set forth above. A statutory condition is the successful completion of and discharge from a juvenile sentence. *Id.* These petitions to the Jefferson County District Court in 2006 and 2012 were heard and denied by magistrates. He did not appeal.

SORA provides two conditions for granting a juvenile offender's petition: (1) "successful completion and discharge from a juvenile sentence or disposition" and (2) that he "has not been subsequently convicted or has a pending prosecution for unlawful sexual behavior or any other offense, the underlying factual basis of which involved unlawful sexual behavior." C.R.S. § 16-22-113(1)(e). It further states that "[i]n determining whether to grant the order, the court shall consider whether the person is **likely to commit** a subsequent offense of or involving unlawful sexual behavior…." C.R.S. § 16-22-113(1)(e) (emphasis added). The statute does not explicitly assign or define a burden of proof, nor does it establish a standard for the court to apply in determining whether to grant a petition to deregister. The Colorado Court of Appeals has observed that "the statute appears to leave to the discretion of the trial court the ultimate decision of whether to grant a petition requesting discontinuation of sex offender registration, as well as the factors to consider in making that decision." *People v. Carbajal*, 312 P.3d 1183, 1190 (Colo.App. 2012).

At the hearings on both of Mr. Vega's petitions in 2006 and 2012, it was not disputed that he had successfully completed his juvenile sentence and had been discharged from confinement at the Department of Youth Corrections and from his subsequent period of parole. It was also undisputed that Vega had committed no additional sex offenses.

In applying the statutory requirement that the court consider "whether the person is **likely** to commit a subsequent offense of or involving unlawful sexual behavior, " the respective magistrates put the burden on Mr. Vega to prove, by a preponderance of the evidence, a negative: that he was **not likely** to commit such an offense. *See, e.g.*, Ex. L at 824:17-24 (magistrate stating that she did "not believe, based on your testimony today, that you have learned enough from your treatment that I can find even by a preponderance of the evidence that you would be, at this point in time, unlikely to commit a subsequent offense….").

Both magistrates held that Mr. Vega had failed to submit specific information that is not required by statute and, in Mr. Vega's case, was-and always will be-impossible for him to provide. That is, both magistrates required proof not only of the statutory requirement that Mr. Vega had successfully completed his "sentence or disposition" (which was not in dispute) but also that he had "successfully" completed a program of sex offender treatment while serving his sentence. Mr. Vega testified at both hearings that he had completed such treatment. No contrary evidence was presented to either magistrate. Despite this undisputed testimony, both magistrates expressed skepticism about whether he had really completed treatment and whether it had been "successful" based on an undefined standard applied by the magistrate. *See, e.g., Id.* at 0824:5-6.

In the June 2012 hearing, the magistrate made proof of successful completion of treatment a **condition** of the petition being granted, **in addition** to requiring Mr. Vega to prove he was not likely to commit another sex offense: "[Y]ou're going to have to show in some form or fashion, not only that you're not going to reoffend but that you successfully completed treatment and your sentence." Ex. M at 0911:7-9. In December 2012, the same magistrate again appeared to make proof of successful treatment an absolute condition of deregistration, even though that is not in the statute. Ex. N at 0964:3-4 ("[W]ithout being able to make that finding, I do not believe I can grant the petition for removal from registry."). The magistrate was informed that Mr. Vega's record at Lookout Mountain has been destroyed in conformity with a standard practice. She suggested that if Mr. Vega were to enroll in and successfully complete another course of offense specific treatment, that would likely change the outcome. *Id.* at 966:3-7. This at least implicitly added an additional term to Mr. Vega's sentence or disposition, even though the evidence was undisputed that he had already completed it.

Non-Party Witnesses

At trial, Plaintiffs presented testimony from non-party witnesses concerning their experiences resulting from their or an acquaintance's appearance on the sex offender registry. This evidence was not rebutted. Such evidence of the actual adverse consequences of sex offender registration requirements is relevant to Plaintiffs' Eighth Amendment claim and the determination whether SORA's actual effects, as distinguished from its stated intent, are punitive. It also corroborates Plaintiffs' expressed fears and concerns about the potential consequences they face from public reaction to them as registered sex offenders.

It suffices to say, without recounting the details of their testimony here, [6] that these witnesses established that registered sex offenders and their families and friends face a known, real, and serious threat of retaliation, violence, ostracism, shaming, and other unfair and irrational treatment from the public, directly resulting from their status as registered sex offenders, and regardless of any threat to public safety based on an objective determination of their specific offenses, circumstances, and personal attributes.

Analysis

Plaintiffs do not argue that SORA is facially invalid, but rather assert that SORA's sex offender registration requirements, as applied to them, violate the Eighth Amendment's proscription against cruel and unusual punishment and the Fourteenth Amendment's requirements of procedural and substantive due process. *See United States v. Pruitt*, 502 F.3d 1154, 1171 (10th Cir. 2007) ("An as-applied challenge concedes that the statute may be constitutional in many of its applications, but contends that it is not so under the particular circumstances of the case").

I. Eighth Amendment

A. Punishment

Analysis of Plaintiffs' Eighth Amendment claim first requires the Court to determine whether SORA's sex offender registration requirements are "punishment" within the meaning of the prohibition of cruel and unusual punishments in the Eighth Amendment. Case law considering this issue has arisen almost entirely in the context of challenges to the retroactive application of sex offender registration requirements under federal or state prohibitions against ex post facto laws.

In *Smith v. Doe*, 538 U.S. 84 (2003), the Supreme Court employed an "intent-effects" analytical framework to determine whether Alaska's sex offender registration statute was punitive. The Court stated that it would first consider whether the legislative intent was to impose punishment; if so, "that ends the inquiry." *Id.* at 92. If the intent was to enact a statutory scheme that is civil and non-punitive, however, the Court stated that it must further examine whether the statutory scheme is so punitive in purpose or effect as to negate the legislative intention to deem it "civil." *Id.* In making the "effects" analysis, the Court considered five of the seven factors employed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963):

> The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: [1] has been regarded in our history and traditions as a punishment; [2] imposes an affirmative disability or restraint; [3] promotes the traditional aims of punishment; [4] has a rational connection to a nonpunitive purpose; or [5] is excessive with respect to this purpose.

Smith v. Doe, 538 U.S. at 97. The two additional factors considered in *Kennedy* were [6] whether the statute's requirements come into play only on a finding of scienter; and [7] whether the behavior to which it applies is already a crime. *Kennedy*, 372 U.S. at 168-69. The *Smith* Court held that the effects of the Alaska version of SORA were non-punitive, and therefore retroactive application of the law did not violate the Ex Post Facto Clause of the United States Constitution.

In the Ninth Circuit opinion that preceded *Smith v. Doe*, *Doe I v. Otte*, 259 F.3d 979 (9th Cir. 2001), holding the Alaska statute punitive **in effect**, the court included the following paragraph:

> Not only do the Alaska statute's registration provisions impose an affirmative disability, but its notification provisions do so as well. By posting the appellants' names, addresses, and employer addresses on the internet, the Act subjects them to community obloquy and scorn that damage them personally and professionally. For example, the record contains evidence that one sex offender subject to the Alaska statute suffered community hostility and (Image Omitted) damage to his business after printouts from the Alaska sex offender registration internet website were publicly distributed and posted on bulletin boards.

Id. at 987-88.

In reversing in *Smith v. Doe*, Justice Kennedy for the majority wrote:

> ... These facts do not render Internet notification punitive. The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender. Widespread public access is necessary for the efficacy of the scheme, and the attendant humiliation is but a collateral consequence of a valid regulation.
>
> The State's Web site does not provide the public with means to shame the offender by, say, posting comments underneath his record. An individual seeking the information must take the initial step of going to the Department of Public Safety's Web site, proceed to the sex offender registry, and then look up the desired information. The process is more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality. The Internet makes the document search more efficient, cost effective, and convenient for Alaska's citizenry.

Smith v. Doe, 538 U.S. at 99. The Court also stated, in distinguishing the requirement of *Kansas v. Hendricks*, 521 U.S. 346 (1997), for an individual assessment of dangerousness, that in the context of the Alaska sex offender statute the state could "dispense with individual predictions of future dangerousness and allow the public to assess the risk" based on the information provided about registrants' convictions. *Smith v. Doe*, 538 U.S. at 104.

In her dissent, Justice Ginsburg wrote:

> ... And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation. However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation.

Id. at 117 (footnote omitted). Citing to the respondents' brief she observed that John Doe I had completed a treatment program, had subsequently remarried, established a business and had been granted custody of a minor daughter on a court's determination that he had been successfully rehabilitated. *Id.* at 117. The case was decided in the district court on motions for summary judgment and apart from Justice Ginsburg's reference there is no explanation of what may have been evidentiary support for the parties' respective arguments.

Applying the same analytical framework to other states' laws or under state constitutional provisions, a number of courts have reached a conclusion different from the Supreme Court's in *Smith v. Doe*. The Alaska Supreme Court, considering the same statute before the Supreme Court in *Smith v. Doe*, held that the act was so punitive in purpose or effect as to overcome the legislature's civil intent, and therefore violated the Alaska Constitution. *Doe v. State*, 189 P.3d 999 (2008). *See also, e.g., Does v. Snyder*, 834 F.3d 696 (6th Cir. 2016) (Michigan's sex offender registration act retroactively imposed punishment and therefore violated Ex Post Facto Clause of United States Constitution); *State v. Letalien*, 985 A.2d 4 (Me. 2009) (retroactive application of Maine registration statute violated both Maine and United States Constitutions' Ex Post Facto Clauses); *Doe v. State*, 111 A.3d 1077 (N.H. 2015) (effects of New Hampshire sex offender registration provisions were punitive; retroactive application violated New Hampshire Constitution); *Starkey v. Okla. Dept. of Corrections*, 305 P.3d 1004 (Okla. 2013) (Oklahoma sex offender registration statute was punitive; retroactive application of its provisions violated the Oklahoma Constitution).[7]

Defendants assert that SORA has been "determined in Colorado" to be non-punitive, citing *U.S. v. Davis*, 352 Fed. App'x 270 (10th Cir. 2009) (unpublished). But *Davis*, a non-binding unpublished decision involving a case arising in Oklahoma, considered the federal Sex Offender Registration and Notification Act, 18 U.S.C. § 2250. *Id.* at 271-72. And although panels of the Colorado Court of Appeals have declined to find SORA's provisions to be punitive, those cases have not engaged in the "intent-effects" analysis used by the United States Supreme Court, and the Colorado Supreme Court has not addressed the question. *See, e.g., People in the Interest of J.O.*, 383 P.3d 69, 73-74 (Colo.App.

2015) (discussing non-punitive purpose of registration requirements, with no discussion of effects); *People v. Carbajal*, 312 P.3d at 1189 (same). Therefore the issue has not been "determined in Colorado."

In *Shaw v. Patton*, 823 F.3d 556 (10th Cir. 2016), the court had an evidentiary record from a bench trial on the claim that application of the Oklahoma statute to the plaintiff who moved from Texas where he had been convicted of a sex offense was in violation of the Ex Post Facto clause. The appellate panel determined that there was no violation because it was not retroactive punishment. Only two provisions of the statute were considered: (1) the requirements for reporting, and (2) the restrictions on residency and loitering within 2, 000 or 500 feet, respectively, of a school, playground, park or child care center. *Id.*, 823 F.3d at 559.

The plaintiff made an as-applied-to-him challenge so the court only considered those requirements as they affected him. *Id.* at 560-61. The appellate court's review of the district court's application of the intent-effects test was *de novo*. *Id.* The opinion was that these reporting and residency requirements did not sufficiently resemble banishment and probation. *Id.* at 563-65. It was different from probation in that there was no active supervision and mere reporting did not include other common requirements of probationary sentence. *Id.*

The court discussed banishment at some length, citing to a number of treatises describing banishment as it has been used historically. *Id.* at 566-68. The appellate judges viewed banishment as complete expulsion from a community, normally a geographical area. Shaw was only prohibited from residing in those areas within the geographical limits but he was free to enter the same areas. The court did not address loitering, holding that the argument had been forfeited by failing to present it to the district court. *Id.* at 577.

The *Shaw* opinion was narrowly drawn based on an evidentiary record. There were 26 endnotes. In note 11 the court rejected the contention that Shaw was being "shamed" by the disclosure of personal information on the internet by relying on Justice Kennedy's statement in *Smith*. *Id.* at 563 n.11. In the last note, the court said that because this was an as-applied challenge the court's conclusion is limited to Mr. Shaw's circumstances. *Id.* at 577 n.26.

Applying the analysis called for by the Supreme Court, this Court first concludes that the **intent** of SORA is non-punitive. Plaintiffs do not dispute the legislative statements of intent in C.R.S. §§ 16-22-110(6) and 16-22-112(1).[8]

Weighing the factors considered in *Smith v. Doe* leads to the conclusion that SORA's **effects** on these Plaintiffs are plainly punitive, negating the legislative intent.

Justice Kennedy's words ring hollow that the state's website does not provide the public with means to shame the offender when considering the evidence in this case. He and his colleagues did not foresee the development of private, commercial websites exploiting the information made available to them and the opportunities for "investigative journalism" as that done by a Denver television station adversely affecting Eugene Knight. The justices did not foresee the ubiquitous influence of social media.

The Colorado General Assembly's disavowal of any punitive intent is an avoidance of any responsibility for the results of warning the public of the dangers to be expected from registered sex offenders. The register is telling the public-- DANGER - STAY AWAY. How is the public to react to this warning? What is expected to be the means by which people are to protect themselves and their children?

As shown by the experience of these plaintiffs and the experience of others who have testified, the effect of publication of the information required to be provided by registration is to expose the registrants to punishments inflicted not by the state but by their fellow citizens.

The fear that pervades the public reaction to sex offenses-particularly as to children-generates reactions that are cruel and in disregard of any objective assessment of the individual's actual proclivity to commit new sex offenses. The failure to make any individual assessment is a fundamental flaw in the system.

In setting out the factors to be considered in determining whether a sanction is penal or regulatory in nature, in *Kennedy v. Mendoza*-Martinez, Justice Goldberg noted that banishment was a weapon in the English legal arsenal for centuries, but that "it was always 'adjudged a harsh punishment even by men who were accustomed to brutality in the administration of criminal justice.'" *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168 n.23 (citing 4 Blackstone's Commentaries *377 and quoting Maxey, Loss of Nationality: Individual Choice or Government Flat [*sic*-Fiat]?, 26 Albany L. Rev. 151, 164 (1962)).

Public shaming and banishment are forms of punishment that may be considered cruel and unusual under the Eighth Amendment. *See Smith v. Doe*, 538 U.S. at 109 (Souter, J., concurring). Other courts considering this factor have found that sex offender registry statutes are sufficiently analogous to shaming to warrant a finding that this factor weighs in favor of finding a punitive effect. *See, e.g., Does v. Snyder*, 834 F.3d at 701-03; *Doe v. State*, 189 P.3d at 1012; *Doe v. State*, 111 A.3d at 1097; *see also Smith*, 538 U.S. at 116 (Ginsburg, J., dissenting). Further, as the Sixth Circuit observed, a sex offender registration act that requires regular reporting to law enforcement in person, for which failure to comply is a crime punishable by imprisonment, also resembles the punishment characteristics of parole or probation. *Does v. Snyder*, 834 F.3d at 703.

The observations of these other courts apply here. The record in this case reflects that maintaining the sex offender registry, requiring internet publication of information on the registry, and permitting republication of the information by private websites have effects that are analogous to the historical punishment of shaming and further resemble and threaten to result in effective banishment. All three Plaintiffs have experienced these effects in varying degrees. Mr. Millard's experiences are particularly illustrative, where he has suffered the indignity of being unable to find housing despite hundreds of applications, has been forced to move because of a TV news story focusing on sex offenders in apartment housing, and, after finally managing to purchase his own home, has continued to suffer the indignity of loud public visits from the police and placement of bright markers on his door announcing his sex offender status to the neighborhood.

Other evidence shows that these experiences are not isolated or unusual and that Plaintiffs' experiences, fears, and anxieties are not exaggerated or imagined. One witness called by Plaintiffs, Richard Gillit, is an Englewood City Councilman. He testified about Englewood's efforts to enact and enforce municipal "distancing" requirements which, by prohibiting registered sex offenders from residing within a certain distance from schools, parks, and daycare centers, effectively bar registered sex offenders from living in

most of the city. *See Ryals v. City of Englewood,* 364 P.3d 900 (Colo. 2016) (holding that Englewood's ordinance, which was estimated to make 99% of the city off-limits to qualifying sex offenders, is not preempted by state law). *See also id.*, 364 P.3d at 914-15 (Hood, J., concurring in part and dissenting in part; discussing the domino effect of upholding such local laws, giving "the remaining metro-area cities … every incentive to pass residency bans in order to prevent sex offenders from moving into their communities"). Mr. Gillit also testified about his own incorrect public reference to one registered sex offender as a "sexually violent predator" based on information he saw on a private website. This evidenced the random vulnerability of registered sex offenders to false accusations, innuendo, and public humiliation based on either mistaken or intentional spreading of information and, given normal human foibles, misinformation.

Another witness-not a registered sex offender herself-testified that she was subjected to harassment and shunning from her neighbors, in the form of letters, emails, personal visits, and Facebook posts, after she agreed to allow a registered sex offender to reside in her home. The pressure was so intense that it ultimately led her to sell her house and move, even though her acquaintance had moved out. A third witness, a teacher at a parochial school, testified to pressure she received from her employer-a Roman Catholic archdiocese-after a parent recognized and reported her as the **spouse** of a registered sex offender. Her husband had never been to the school, much less accused of any threatening conduct. Officials of the archdiocese, when meeting with this witness, questioned whether she should continue teaching there, and even questioned whether she should remain married to her husband. All of these witnesses further demonstrated the significant and ubiquitous consequences faced by registered sex offenders and their families and associates.

This Court also agrees with the Sixth Circuit's observations concerning SORA's resemblance to parole or probation in its requirements of frequent in-person reporting, enforced by potential criminal punishment. *See Does v. Snyder*, 834 F.3d at 703.

In addition, in Colorado certain offenders are required to disclose and register "all e-mail addresses, instant-messaging identities, or chat room identities prior to using the address or identity, " as well as any changes of such addresses or identities. C.R.S. § 16-22-108(2.5)(a) and (3)(g). This furthers the ability of state and local authorities to monitor private aspects of a registered sex offender's life and, consequently, chills his or her ability to communicate freely. Mr. Millard has been subjected to this requirement, even though there is no evidence that the crime for which he was convicted involved the use of the internet or social media, or that there is any objective danger of his doing so.

This is a significant incursion: the Supreme Court has recognized First Amendment protection of internet communications because cyberspace-the "vast democratic forums of the Internet"-and social media in particular, are "the most important places … for the exchange of views…." *Packingham v. North Carolina*, __ U.S. __, 137 S.Ct. 1730, 1735 (2017) (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997)). While *Packingham* involved a First Amendment challenge and this case does not, Justice Kennedy writing for the majority noted parenthetically that "the troubling fact that the law imposes **severe restrictions on persons who already have served their sentence and are no longer subject to the supervision of the criminal justice system** is … not an issue before the Court." *Id.*, 137 S.Ct. at 1737 (emphasis added). That observation is significant here.

SORA's registration requirement does not sweep as broadly in prohibiting the **use** of the internet and social media as the law struck down in *Packingham*, but it does something the North Carolina law did not. By requiring certain offenders to register email addresses and other internet identities, SORA provides law enforcement a supervisory tool to keep an eye out for registered sex offenders using email and social media. That is one more restrictive and intrusive provision that resembles the supervisory aspects of parole and probation, and complements and continues the state's comprehensive supervision of registered sex offenders even after they are released from the express provisions of their parole or probation. That aspect of SORA is a "severe restriction" like the provisions in *Packingham*. It also distinguishes SORA from the Alaska law considered in *Smith v. Doe*, in which the Court concluded that the registration provisions were not similar to probation because they did not call for ongoing supervision.[9]

These similarities to historical forms of punishment weigh in favor of finding that SORA's effects are punitive.

SORA also imposes affirmative disabilities or restraints that are greater than those deemed "minor and indirect" by the Supreme Court in *Smith*. There, the Court expressly noted that the law under consideration did not have an in-person reporting requirement, and further stated that the record contained "no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred." *Smith*, 538 U.S. at 100.

Here, Plaintiffs are subject to in-person reporting requirements for as long as they remain on the registry, and Mr. Vega's experience demonstrates that even the theoretical ability to petition to deregister can be illusory. Having to report to law enforcement every time one moves, as well as at regular time intervals, is hardly a "minor or indirect" restraint, especially when failure to do so is punishable as a crime and also may subject the registrant to in-person home visits and public humiliation by over-zealous, malicious, or at least insensitive law enforcement personnel. The evidence in this case demonstrates that the very real restraints on Plaintiffs' abilities to live, work, accompany their children to school, and otherwise freely live their lives are not simply a result of the crimes they committed, but of their placement on the registry and publication of their status.

This factor weighs in favor of finding that SORA's effects are punitive. *See also Does v. Snyder*, 534 F.3d at 703-04; *Doe v. State*, 111 A.3d at 1094-95; *State v. Letalien*, 985 A.2d at 18; *Starkey*, 305 P.3d at 1022.

Another factor is whether SORA promotes traditional aims of punishment-"retribution and deterrence." *Mendoza-Martinez*, 372 U.S. at 168. SORA avows public safety as its purpose, disclaiming any intent to inflict "retribution or additional punishment." C.R.S. § 16-22-112(1). Defendant Rankin, however, acknowledged at trial as Director of the CBI that the registry has multiple purposes: to enhance public safety, to provide an investigative tool for law enforcement, and "there's also a deterrent effect of having the information available…." Trial Trans., 11/14/2016 at 10:7-8. He elaborated that this deterrent effect of the registry is both his own opinion and the official policy position of the CBI, and that the potential for deterrence applies to potential first-time offenders as well as potential re-offenders. *Id.* at 15:15-17:6. The CBI website also states that the registry's goals are "Citizen/Public Safety; Deterrence of sex offenders for committing similar crimes; and Investigative tool for law enforcement." CBI Sex Offender Registry website, "Goals of the Sex Offender Registry"; viewable at: https://apps.colorado.gov/apps/dps/sor/information.jsf (accessed August 30, 2017). It is thus undisputed that the registry promotes deterrence, a traditional aim of punishment.

In addition, SORA requires offenders to register based only on their conviction for a past action, and based on a statutory classification of the offense and not on an

individualized assessment of an offender's level of dangerousness. Such a scheme "begins to look far more like retribution for past offenses" than a public safety regulation. *Doe v. State*, 111 A.3d at 1094 (quoting *Com. v. Baker*, 295 S.W.2d 437, 444 (Ky. 2009)). It therefore "strains credulity to suppose that the Act's deterrent effect is not substantial, or that the Act does not promote community condemnation of the offender, both of which are included in the traditional aims of punishment." *Id.* (quoting *Wallace v. State*, 905 N.E.2d 371, 382 (Ind. 2009)).

This factor weighs in favor of finding that SORA's effects are punitive.

Courts considering whether there is a rational connection to a non-punitive purpose have uniformly determined that there is at least some rational connection between sex offender registration requirements similar to Colorado's and the avowed regulatory purpose of public safety. *See, e.g., Doe v. State*, 111 A.3d at 1099-1100; *Wallace*, 905 N.E.2d at 382-83. Plaintiffs here do not argue the contrary. This factor weighs against finding a punitive effect.

The Court is also to consider whether the registration scheme imposed by SORA "appears excessive in relation to the alternative purpose assigned, " *Mendoza-Martinez*, 372 U.S. at 169; that is, "whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith*, 538 U.S. at 105.

Colorado's law imposes quarterly or annual registration requirements, for five, ten, or twenty years before a petition to deregister may be filed, or for life with no chance to deregister. These requirements are based on the statutory level of the offense for which a person is convicted. No consideration is given, before these requirements are imposed or at any time before deregistration is permitted, to an individual's relative level of risk to the community. There is no opportunity for an individual to shorten the length of his registration period or reduce the frequency of these requirements even if he is able to submit convincing evidence that he is completely rehabilitated and poses no danger to public safety. Likewise, the information made available to the public is based on the level of statutory offense for which one is convicted, again without any determination of a specific individual's potential risk. Similarly, SORA's requirements for disclosure and registration of internet identities are based solely on statutory classifications of an offender's conviction, and are not tied to past abuse of the internet.

These sweeping registration and disclosure requirements-in the name of public safety but not linked to a finding that public safety is at risk in a particular case-are excessive in relation to SORA's expressed public safety objective. *See Doe v. State*, 111 A.3d at 1100 ("If in fact there is no meaningful risk to the public, then the imposition of such requirements becomes wholly punitive."); *see also Wallace*, 905 N.E.2d at383-84; *Smith v. Doe*, 538 U.S. at 117 (Ginsburg, J., dissenting).

Consideration of SORA's application to Plaintiffs' particular experiences, as summarized above, demonstrates this point. Application of unalterable registration requirements and time periods with no possibility of considering their individual circumstances is arbitrary and excessive.

This factor favors treating SORA as punitive.

If a sanction is not linked to a showing of scienter, it is less likely to be intended as a punishment. *Wallace*, 905 N.E.2d at 381. SORA's registration requirements apply to a variety of offenses, but most require a finding that the offender acted "knowingly." *See, e.g.*, C.R.S. §§ 18-3-402, -404, -405. Although not a significant factor, it weighs in favor of finding that SORA is punitive.

SORA also imposes its registration requirements for behavior that is already a crime. As Justice Souter stated in *Smith*,

> The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior (Image Omitted) convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.

Smith, 538 U.S. at 109 (Souter, J., concurring). Other courts have considered this factor and found it indicates a punitive effect. *See Doe v. State*, 189 P.3d at 1015; *Wallace*, 905 N.E.2d at 382; *Letalien*, 985 A.2d at 22; *Doe v. State*, 111 A.3d at 1099; *Starkey*, 305 P.3d at 1028. This Court agrees.

In summary, all but one of the seven factors weighs in favor of a conclusion that SORA's effects are punitive. These punitive effects are sufficient to overcome the stated regulatory, non-punitive intent of the Act.

B. Cruel and Unusual

Most cruel and unusual punishment cases-those not involving what is deemed to be an "inherently barbaric" punishment such as torture-consider whether a punishment is disproportionate to the crime. This approach is based on the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Graham v. Florida*, 560 U.S. 48, 59 (2010) (quoting *Weems v. United States*, (Image Omitted) 217 U.S. 349, 367 (1910)).

Defendant's closing argument does not address the question whether, if sex offender registration is punishment, it is disproportionate or otherwise constitutionally unsound. Defendant asserts only that SORA's registration requirements are not punishment, and therefore do not fall within the Eighth Amendment's proscription against cruel and unusual punishment.

The registration requirements imposed by SORA, coupled with the actual and potential effects of being required to register, are not merely akin to historical punishments, as discussed above. As shown by the evidence in this case, SORA's requirements, as applied to Plaintiffs, subject them to additional punishment beyond their sentences through the pervasive misuse and dissemination of information published by the CBI. Defendant has offered no evidence that any Plaintiff presents an objective threat to society, such as a material risk of recidivism. Yet Plaintiffs have been and continue to be subjected to actual and potential dangers of ostracism and shaming; effective banishment and shunning in the form of limitations on their abilities to live and work without fear of arbitrary and capricious eviction, harassment, job relocation, and/or firing; significant restriction on familial association; and actual and potential physical and mental abuse by members of the public who for whatever reason become aware of their status as a registered sex

offender. They are also subject to exposure by local law enforcement agencies making checks of their residences, as happened with Mr. Millard.

All of these are foreseeable consequences of the registry. Indeed, the CBI acknowledges the risk of public harassment and worse by placing a warning on its website that information obtained there is not to be used for improper purposes.[10] Thus, a convicted offender is knowingly placed in peril of additional punishment, beyond that to which he has been sentenced pursuant to legal proceedings and due process, at the random whim and caprice of unknowable and unpredictable members of the public. This risk continues for the entire time a sex offender is on the registry, and perhaps even beyond that if he is fortunate enough to eventually deregister.

This ongoing imposition of a known and uncontrollable risk of public abuse of information from the sex offender registry, in the absence of any link to an objective risk to the public posed by each individual sex offender, has resulted in and continues to threaten Plaintiffs with punishment disproportionate to the offenses they committed. Where the nature of such punishment is by its nature uncertain and unpredictable, the state cannot assure that it will ever be proportionate to the offense. SORA as applied to these Plaintiffs therefore violates the Eighth Amendment.

SORA as applied to Mr. Vega has resulted in unconstitutional disproportionate punishment for an additional reason. The requirement that Mr. Vega undergo offense specific treatment while in custody was part of the sentence imposed for his juvenile adjudication. As such, it was part of his punishment. The undisputed evidence, at the de-registration hearings in state court and in this Court, is that Mr. Vega completed that treatment as well as serving his entire sentence of confinement and parole. But the magistrates who heard both his petitions to de-register required him to submit evidence other than his uncontradicted testimony that he had completed treatment, even though the state had destroyed the only records by which Mr. Vega could meet this burden of proof. The state court's refusal to grant de-registration, absent either meeting this impossible burden or completing additional treatment, effectively gave Mr. Vega the choice of an adding additional treatment to his already-completed sentence, or remaining on the sex offender registry indefinitely. Imposing such punitive conditions was disproportionate to Mr. Vega's conviction.

I. Fourteenth Amendment

A. Procedural Due Process.

An alleged violation of the procedural due process required by the Fourteenth Amendment prompts a two-step inquiry: (1) whether the plaintiff has shown the deprivation of an interest in "life, liberty, or property" and (2) whether the procedures followed by the government in depriving the plaintiff of that interest comported with "due process of law." *Elliott v. Martinez*, 675 F.3d 1241, 1244 (10th Cir. 2012) (citing *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

Mr. Vega has established a procedural due process violation. There is no legitimate dispute that being required to continue sex offender registration indefinitely is a deprivation of Mr. Vega's liberty. The procedures followed by the state in considering his petitions did not comport with basic principles of fundamental fairness-that is, they did not afford him due process.

SORA requires a court weighing a deregistration petition to "consider" whether it is "likely" that the petitioner will re-offend. The reasonable interpretation of this requirement is that the court, to deny a petition, must find that a subsequent sex offense is **likely**. Had the legislature intended to place the burden on petitioners to prove a subsequent offense is **not** likely, it could easily have said so, but did not.[11] Further, it would make no sense for the statute to require the court to "consider" whether a petitioner is likely to re-offend, but nevertheless leave the court with unbridled discretion to deny a petition without finding that likelihood based on the evidence.

The magistrates hearing both petitions placed the burden on Mr. Vega to prove that another offense was **not** likely. They did so both in general and specifically by requiring him to prove, other than through his own testimony, that he had "successfully" (as defined by the magistrate) completed offense specific treatment. That burden is not consistent with the statute, imposed a vague and subjective standard, and further reversed the long-standing "usual and well known general rule … that the burden of proof lies upon him who substantially asserts the affirmative of an issue." *Gertner v. Limon Nat'l Bank*. 257 P. 247, 253 (Colo. 1927). This reversal of the burden of proof was plainly material, given the second magistrate's observation that it was a close case. *See* Ex. N at 963:17-20 (stating that "this is one of those cases that … I am on the fence on").

The magistrates compounded the unfairness by requiring Mr. Vega to prove this negative fact by providing evidence (beyond his own unrebutted testimony) that he had completed offense specific treatment, even though the state had destroyed the records by which Mr. Vega would have been able to make that proof. And finally, the magistrate in the 2012 hearing actually made proof of completion of treatment a **condition** of granting the petition, a condition that does not appear in the statute and that Mr. Vega could not meet. *See, e.g.*, Ex, M at 909:10-16; Ex. N at 964:1-4.

This Kafka-esque procedure, which was played out not once but twice, deprived Mr. Vega of his liberty without providing procedural due process. The unrefuted evidence was that Mr. Vega had discharged his sentence and had not been convicted of or have pending against him any other relevant pending prosecutions. Defendant in this case has not identified any evidence supporting a conclusion that Mr. Vega was "likely" to commit another sex offense, and neither magistrate made that finding. Other than the magistrates' subjective opinions that Mr. Vega did not appear to have learned sufficiently from his offense specific treatment, there was no evident basis to deny the petition. Accordingly, Mr. Vega was denied his liberty interest in being freed from the burdens of the restrictions imposed on registered sex offenders, even though he complied with all statutory requirements for deregistration. Therefore he was not afforded due process.

Mr. Millard and Mr. Knight have not argued or presented evidence supporting a claim that any procedures followed by the government deprived them of a protected liberty interest without due process of law.

B. Substantive Due Process.

The Due Process Clause "guarantees more than fair process." *Seegmiller v. LaVerkin City*, 528 F.3d 762, 766 (10th Cir. 2008) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997)).

All of the plaintiffs assert that the restrictions on their liberty imposed on them as registered sex offenders constitute a violation of the "substantive due process" protection implicit in the Fourteenth Amendment. The Supreme Court has, at times, referred to that concept as constitutional protection against arbitrary governmental actions that are so contrary to the concept of individual autonomy, but has never clearly distinguished between procedural and substantive due process. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Court distinguished between the abuse of executive power-requiring it to be that which "shocks the conscience"-and other action which is considered to be "fundamentally unfair." The fundamental right to be protected must be "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty." *Seegmiller*, 528 F.3d at 767 (quoting *Chavez v. Martinez*, 538 U.S. 760, 775 (2003)).

In this case, Plaintiffs argue that SORA as applied to them deprives them of rights to privacy and liberty, including privacy expectations in the personal information about them that is made publicly available through SORA, but would not be available (either at all or as readily as is possible under SORA); and liberty interests in living, working, associating with their families and friends, and circulating in society without the burdens imposed by SORA. Mr. Vega extends this argument to the greater expectation of privacy a juvenile offender has in his records. He asserts that even though his juvenile adjudication for the underlying sex offense is not shown on his general criminal history that is publicly available, his adult conviction for failure to register is public, thus making his status as a sex offender public as well and defeating his right to privacy in his juvenile adjudication.

Plaintiffs contend that it is not merely the fact of registration and maintenance of the registry that deprives them of their privacy and liberty, but the widespread dissemination of their personal information that is permitted and even encouraged through the CBI website and private entities who republish the information, which then has the common and foreseeable adverse consequences of such publication that-as shown by the record in this case and discussed above-are inflicted on registered sex offenders and those with whom they associate.

The cases concerning limitations on punitive damage awards by juries illustrate the difficulty in determining what may be a fundamentally unfair procedure in deprivation of property, violating substantive due process. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and cases cited therein.[12] But those cases do establish that infliction of punishment cannot be purely arbitrary. The Court recognized that even if procedures used for determining a punitive damages award may be reasonable and subject to judicial review, when an award can be fairly characterized as "grossly excessive" in relation to a state's interests in punishment and deterrence, it may "enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." *Id.*, 517 U.S. at 568. Justice Breyer explained:

> This constitutional concern, itself harkening back to the Magna Carta, arises out of the basic unfairness of depriving citizens of life, liberty, or property, through the application, not of law and legal processes, but of arbitrary coercion…. Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself….
>
> Legal standards need not be precise in order to satisfy this constitutional concern…. But they must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior….

Id. at 587-88 (Breyer, J., concurring) (citations omitted).

Here, the plaintiffs have shown that the punitive aspects of Colorado's sex offender registration scheme enter the "zone of arbitrariness" that violates the due process guarantee of the Fourteenth Amendment. There is a rational relationship between the registration requirements and the legislative purpose of giving members of the public the opportunity to protect themselves and their children from sex offenses. But what the plaintiffs have shown is that the public has been given, commonly exercises, and has exercised against these plaintiffs the power to inflict punishments beyond those imposed through the courts, and to do so arbitrarily and with no notice, no procedural protections and no limitations or parameters on their actions other than the potential for prosecution if their actions would be a crime.

Relief

Plaintiffs' Fourth Amended Complaint seeks both declaratory relief and a permanent injunction prohibiting enforcement of SORA against them and dissemination of information regarding their registrations pursuant to SORA. The parties have not addressed the relief sought either at trial or in post-trial submissions.

A party seeking a permanent injunction must prove: (1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest. *Sw. Stainless, LP v. Sappington*, 582 F.3d 1176, 1191 (10th Cir. 2009). The trial court is vested with "necessarily broad" discretion in making this determination.

Plaintiffs have submitted no evidence or argument whatsoever to meet their burden of proof on factors (2) through (4), and Defendant has had no opportunity or reason to submit contrary evidence and arguments. Under these circumstances, permanent injunctive relief has no support in the record and only declaratory relief is appropriate.

Order

Based on the foregoing, it is

ORDERED that judgment shall enter declaring that the Colorado Sex Offender Registration Act, C.R.S. §§ 16-22-101, *et seq.*, as applied to Plaintiffs David Millard, Eugene Knight, and Arturo Vega, violates the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution; it is

FURTHER ORDERED that judgment shall enter declaring that the Colorado Sex Offender Registration Act, C.R.S. §§ 16-22-101, *et seq.*, as applied to Plaintiff Arturo Vega, violates procedural due process requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution; it is

FURTHER ORDERED that judgment shall enter declaring that the Colorado Sex Offender Registration Act, C.R.S. §§ 16-22-101, *et seq.*, as applied to Plaintiffs David Millard, Eugene Knight, and Arturo Vega, violates substantive due process requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution; and it is

FURTHER ORDERED that Plaintiffs as prevailing parties shall be entitled to an award reasonable attorney's fees as part of the costs, to be determined by the Court pursuant to 42 U.S.C. § 1988(b).

Notes:

[1] Persons required to reregister on a quarterly basis include, among others, those guilty of certain felony sexual assaults and sexual assault on a child. C.R.S. § 16-22-108(d)(II).

[2] Juvenile offenders do not appear on the website, even if they are later convicted of failure to register. However, juvenile offenders do appear on the list of registered sex offenders that members of the public may obtain from the CBI on request, as discussed above.

[3] Persons subject to the lifetime registration requirement include, among others, those convicted of being a sexually violent predator; those convicted as adults of sexual assault on a child, sexual assault on a client by a psychotherapist, incest; and adults convicted of multiple sex offenses. *Id.*

[4] Mr. Knight testified that the polygraphs, which cost $250 to $300 per test, were required approximately quarterly, and that additional expenses included group and individual therapy sessions and a line of other tests that-purportedly-monitor and measure a man's sexual deviancy level. One such required test was the penile plethysmograph, which has been found to be so "exceptionally intrusive in nature and duration" as to implicate substantive due process concerns when imposed as a requirement of employment or supervised release. *See, e.g., U.S. v. Weber*, 451 F.3d 552, 562-69 (9th Cir. 2006). One judge opined that "the Orwellian procedure [is] always a violation of the personal dignity of which prisoners are not deprived." *Id.* at 570 (Noonan, J., concurring). Mr. Knight never underwent a plethysmograph and the validity of that requirement is not at issue in this case. That it was part of his required "treatment" nevertheless exemplifies the extent to which sex offenders are subject to extreme invasions of their personal liberty and privacy.

[5] A background check for Mr. Vega would also show alcohol-related driving charges, assault and threat, disturbing the peace, and damaged property.

[6] Some of these witnesses' experiences are summarized below.

[7] The Court recognizes that the decisions of these courts and others involved statutes that had varying provisions not identical with Colorado's SORA. Michigan's SORA, for example, considered in *Does v. Snyder*, included residency restrictions not appearing in Colorado's SORA. These courts' analysis of the relevant factors is nevertheless persuasive authority in analyzing whether SORA is punitive.

[8] As the Court has noted previously, the Colorado General Assembly implicitly recognized that registration is punitive to at least some degree: SORA permits courts to exempt a person who was younger than eighteen years of age at the time of the commission of the offense from the registration requirements if it determines that registration "would be *unfairly* punitive." C.R.S. § 16-22-103(5)(a) (emphasis added). The use of "unfairly" suggests that at least some level of punishment is intended-just not an "unfair" level. The Court cannot conclude, however, that this reference overcomes the expressly-stated non-punitive intent.

[9] *Packingham* also reflects an apparent evolution in the mindset of Justice Kennedy, who authored the majority opinions in both *Smith v. Doe* and *Packingham*. In *Smith*, decided in 2003, Justice Kennedy downplayed the punitive effect of statutory internet notification provisions, finding their "purpose and the principal effect" were "to inform the public for its own safety, not to humiliate the offender"; and that the internet simply makes a public records search "more efficient, cost effective, and convenient" for citizens. *Smith*, 538 U.S. at 99. In 2017, in addition to noting that restrictions on internet use are a "severe restriction, " Justice Kennedy recognized that the internet and social media websites "can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard." *Packingham*, 137 S.Ct. at 1737. That being the case, the power provided by the internet works both ways: not only to provide citizens a convenient and inexpensive means to identify and locate convicted sex offenders, but also to provide a citizen the means, if so inclined, to quickly and efficiently disseminate information about a sex offender to other members of the public with the intent to harass or humiliate. The record in this case casts serious doubt on Justice Kennedy's conclusions in *Smith* that the "principal effect" of putting sex offender data on the internet is merely informational, and not humiliation.

[10] The CBI website states: "The use of the sex offender registry information to harass, endanger, intimidate, threaten or in any way seek retribution on an offender through illegal channels is prohibited. Any person who engages or participates in such acts may be charged criminally." CBI website, "Public Notice and User Agreement"; viewable at: https://apps.colorado.gov/apps/dps/sor/search-agreement.jsf (accessed August 30, 2017).

[11] Indeed, a recent amendment to § 16-22-113 demonstrates the legislature's ability to impose a burden of proof, in cases involving convictions arising from human trafficking. *See* C.R.S. § 16-22-113(1)(a.5) (effective September 1, 2017) (providing that a court "shall not issue an order discontinuing the petitioner's duty to register unless the petitioner has at least established by a preponderance of the evidence that at the time he or she committed the offense of human trafficking for sexual servitude, he or she had been trafficked by another person….").

[12] This line of cases was not cited in the arguments of counsel.

2017.IN.0001521< http://www.versuslaw.com>

Douglas Kirby, Appellant-Petitioner,

v.

State of Indiana, Appellee-Respondent.

No. 34A02-1609-CR-2060

Court of Appeals of Indiana

August 31, 2017

Appeal from the Howard Superior Court The Honorable George A. Hopkins, Judge Trial Court Cause No. 34D04-1001-FD-11

ATTORNEY FOR APPELLANT Alan D. Wilson Kokomo, Indiana

ATTORNEYS FOR APPELLEE Curtis T. Hill, Jr. Attorney General of Indiana Michael Gene Worden Deputy Attorney General Indianapolis, Indiana

Bradford, Judge.

Case Summary

[¶1] On November 5, 2010, Appellant-Petitioner Douglas Kirby pled guilty to one count of Class D felony child solicitation. Kirby was sentenced to eighteen months on probation, which he successfully completed. Under the terms of his probation, Kirby was granted explicit permission to enter school property for the purpose of observing his son's school activities. He was also required to register as a sex offender for a term of ten years. Kirby's conviction was thereafter reduced to a Class A misdemeanor. Despite the reduction in his sentence, the requirement that he register as a sex offender remained in place.

[¶2] On July 1, 2015, the Unlawful Entry Statute[1] ("the Statute") went into effect. The Statute makes it a Level 6 felony for individuals convicted of certain crimes to enter onto school property. It is undisputed that the Statute applies to Kirby.

[¶3] Kirby filed an amended petition for post-conviction relief ("PCR") on June 20, 2016.[2] Following an evidentiary hearing, the post-conviction court denied Kirby's amended PCR petition. Kirby appealed, arguing that the post-conviction court erred in denying his amended PCR petition because the Statute (1) is unconstitutional as applied to him because it amounts to retroactive punishment in violation of the Ex Post Facto Clause contained in the Indiana Constitution ("the Ex Post Facto Clause"); (2) violates his due process interest in the care, custody, and control of his son; and (3) is unconstitutionally vague. Review of the facts and circumstances of this case convince us that as applied to Kirby, the Statute is unconstitutional as it constitutes a retroactive punishment in violation of the Ex Post Facto Clause. We therefore reverse the judgment of the post-conviction court as to the enforcement of the Unlawful Entry Statute but leave in place Kirby's underlying conviction for Class D felony child solicitation.

Facts and Procedural History

[¶4] On January 11, 2010, Kirby was charged with Class C felony child solicitation.

In charging Kirby, the State alleged that Kirby, being at least twenty-one years old, "did knowingly or intentionally solicit a Child presumed to be the age of 15, a child at least fourteen years of age but less than sixteen years of age, to engage in sexual intercourse, said solicitation having been accomplished by the use of a computer network[.]" Appellant's App. Vol. II, p. 15. On November 5, 2010, Kirby pled guilty to the lesser-included offense of Class D felony child solicitation.

[¶5] The trial court accepted Kirby's plea, entered judgment of conviction for Class D felony child solicitation, and sentenced him to a term of eighteen months, all of which was suspended to probation. The trial court imposed both the standard rules of probation and the special recommended probation conditions for adult sex offenders on Kirby, with the exception being that the trial court explicitly granted Kirby permission to enter onto school property for the purpose of attending and observing his son's school activities.[3] Kirby was also ordered to register as a sex offender for a term of ten years.

[¶6] Kirby successfully completed all of the terms of his probation and, on November 21, 2014, petitioned to have his conviction reduced to a misdemeanor. On February 10, 2015, the trial court granted Kirby's petition, reducing Kirby's conviction to a Class A misdemeanor.

[¶7] On July 1, 2015, the Statute went into effect. The Statute defines a serious sex offender as a person required to register as a sex offender and who has convicted of certain offenses, including child solicitation. Ind. Code § 35-42-4-14(a)(1)(F). The Statute provides that a serious sex offender "who knowingly or intentionally enters school property commits unlawful entry by a serious sex offender, a Level 6 felony." Ind. Code § 35-42-4-14(b). As is stated above, it is undisputed that the Statute applies to Kirby.

[¶8] After being notified of the Statute's application, Kirby filed a PCR petition on April 16, 2016, and an amended PCR petition on June 20, 2016. Following an

evidentiary hearing, the post-conviction court denied Kirby's amended PCR petition. This appeal follows.

Discussion and Decision

[¶9] Kirby contends that the post-conviction court erred in denying his amended PCR petition because the unlawful entry statute is unconstitutional as applied to him because it amounts to retroactive punishment in violation of the Ex Post Facto Clause.[4] Alternatively, Kirby contends that the unlawful entry statute (1) violates his due process interest in the care, custody, and control of his son and (2) is unconstitutionally vague.

I. Standard of Review

[¶10] Post-conviction procedures do not afford the petitioner with a super-appeal. *Williams v. State*, 706 N.E.2d 149, 153 (Ind. 1999). Instead, they create a narrow remedy for subsequent collateral challenges to convictions, challenges which must be based on grounds enumerated in the post-conviction rules. *Id.* A petitioner who has been denied post-conviction relief appeals from a negative judgment and as a result, faces a rigorous standard of review on appeal. *Dewitt v. State*, 755 N.E.2d 167, 169 (Ind. 2001); *Colliar v. State*, 715 N.E.2d 940, 942 (Ind.Ct.App. 1999), *trans. denied*.

[¶11] Post-conviction proceedings are civil in nature. *Stevens v. State*, 770 N.E.2d 739, 745 (Ind. 2002). Therefore, in order to prevail, a petitioner must establish his claims by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); *Stevens*, 770 N.E.2d at 745. When appealing from the denial of a PCR petition, a petitioner must convince this court that the evidence, taken as a whole, "leads unmistakably to a conclusion opposite that reached by the post-conviction court." *Stevens*, 770 N.E.2d at 745. "It is only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion, that its decision will be disturbed as contrary to law." *Godby v. State*, 809 N.E.2d 480, 482 (Ind.Ct.App. 2004), *trans. denied*. The post-conviction court is the sole judge of the weight of the evidence and the credibility of the witnesses. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). We therefore accept the post-conviction court's findings of fact unless they are clearly erroneous but give no deference to its conclusions of law. *Id.*

II. Constitutionality of the Statute as Applied to Kirby[5]

[¶12] Article I, section 24 of the Indiana Constitution provides that

> "[n]o ex post facto law ... shall ever be passed." Among other things, "[t]he ex post facto prohibition forbids ... the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" *Weaver v. Graham*, 450 U.S. 24, 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26, 18 L.Ed. 356 (1866)). The underlying purpose of the Ex Post Facto Clause is to give effect to the fundamental principle that persons have a right to fair warning of that conduct which will give rise to criminal penalties. *Armstrong v. State*, 848 N.E.2d 1088, 1093 (Ind. 2006).

State v. Pollard, 908 N.E.2d 1145, 1148-49 (Ind. 2009).

[¶13] In 2009, the Indiana Supreme Court determined that in evaluating ex post facto claims under the Indiana Constitution, Indiana Courts apply what is commonly referred to as the "intent-effects" test. *Id.* at 1149 (citing *Wallace v. State*, 905 N.E.2d 371');">905 N.E.2d 371, 378 (Ind. 2009)).

> Under this test the court must first determine whether the [Indiana General Assembly ("the General Assemblly")] meant the [S]tatute to establish civil proceedings. [*Wallace*, 905 N.E.2d at 378]. If the intention of the legislature was to impose punishment, then that ends the inquiry, because punishment results. If, however the court concludes the legislature intended a non-punitive, regulatory scheme, then the court must further examine whether the statutory scheme is so punitive in effect as to negate that intention thereby transforming what was intended as a civil, regulatory scheme into a criminal penalty. *Id.*

Id.

A. Whether the General Assembly Intended to Impose Punishment

[¶14] Whether the General Assembly intended for the Statute to be civil or criminal is primarily a matter of statutory construction. *Id.*

> And as we observed in *Wallace* for the overall Sex Offender Registration Act [("the Act")], "it is difficult to determine legislative intent since there is no available legislative history and the Act does not contain a purpose statement." [905 N.E.2d at 383] (quoting *Spencer v. O'Connor*, 707 N.E.2d 1039, 1043 (Ind.Ct.App. 1999)).

Id.

[¶15] In *McVey*, we considered whether the General Assembly intended for the Statute to be civil or criminal in nature. 56 N.E.3d at 679-80. We noted that "[b]ecause there is no available legislative history and the Act does not contain a purpose statement, our Supreme Court has consistently assumed without deciding that the legislature's intent in passing the Act was to create a civil, regulatory, non-punitive scheme, and then moved to the second part of the test." *Id.* at 680. We then made the same assumption, again without deciding the question, and moved on to the second prong of the analysis. *Id.* We will do the same here.

B. Whether the Effect of the Statute is Punitive

[¶16] In assessing a statute's effects we are guided by seven factors that are weighed against each other: “[1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment-retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may

rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned."

> *Wallace*, 905 N.E.2d at 379 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)) (alterations in original). No one factor is determinative. "[O]ur task is not simply to count the factors on each side, but to weigh them." *Id.* (quoting *State v. Noble*, 171 Ariz. 171, 829 P.2d 1217, 1224 (1992)).

Pollard, 908 N.E.2d at 1150 (brackets in original). We address each factor in turn.

1. Affirmative Disability or Restraint

[¶17]

> When determining whether a law subjects those within its purview to an "affirmative disability or restraint, " *Mendoza-Martinez*, 372 U.S. at 168, 83 S.Ct. 554, the Court inquires "how the effects of the Act are felt by those subject to it. If the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Smith v. Doe*, 538 U.S. 84, 99-100, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003).

Id.

[¶18] In this case, the disability or restraint imposed by the Statute is neither minor nor indirect. Review of the record reveals that in sentencing Kirby in 2010, the trial court explicitly gave Kirby permission to enter school property for the purpose of attending and observing "activities involving his son." Appellant's App. Vol. II, p. 22. Kirby was permitted to do so for a period of five years before the Statute went into effect. Importantly, the record is devoid of any suggestion that Kirby behaved inappropriately at any time while on school property. Given these facts, we are persuaded that this factor clearly favors treating the effects of the Statute as punitive as applied to Kirby.

2. Sanctions that Have Historically been Considered Punishment

[¶19] "We next determine 'whether [the sanction] has historically been regarded as a punishment.'" *Pollard*, 908 N.E.2d at 1150 (quoting *Mendoza-Martinez*, 372 U.S. at 168) (brackets in original). Generally speaking, schools-especially school sporting events-have been open to members of the public. It seems reasonable to assume, therefore, that the act of restricting an individual from entering school property has historically been considered a form of punishment, whether for an act committed on school grounds or in the community. This is especially true considering that until the Statute went into effect, Kirby had been permitted to enter school property for the purpose of observing his son's activities, even after he pled guilty to and was convicted of child solicitation. As such, we are persuaded that this factor also favors treating the effects of the Statute as punitive as applied to Kirby.

3. Finding of Scienter

[¶20] Third, we consider "whether [the statute] comes into play only on a finding of *scienter*." *Mendoza-Martinez*, 372 U.S. at 168, 83 S.Ct. 554. "The existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes." *Wallace*, 905 N.E.2d at 381 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 362, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997)). If a sanction is not linked to a showing of *mens rea*, it is less likely to be intended as punishment.

Id. at 1151 (emphases in original).

[¶21] The Statute includes a showing of *mens rea*, *i.e.*, that the serious sex offender "knowingly or intentionally" enters school property. Ind. Code § 35-42-4-14(b). Also, child solicitation, the underlying qualifying offense that invoked the Statute in this case, requires a finding of scienter. *See* Ind. Code § 35-42-4-6. As such, it would appear that this factor favors treating the effects of the Statute as punitive as applied to Kirby.

4. The Traditional Aims of Punishment

[¶22] We next consider whether the Statute's operation will promote the traditional aims of punishment. *Wallace*, 905 N.E.2d at 381. Under the Indiana Constitution, the primary objective of punishment is rehabilitation. *Id.* (citing Ind. Const. art. 1, § 18). "And there are other objectives including the need to protect the community by sequestration of the offender, community condemnation of the offender, as well as deterrence." *Id.* (citing *Abercrombie v. State*, 441 N.E.2d 442, 444 (Ind. 1982)).

[¶23] "'Deterrent measures serve as a threat of negative repercussions to discourage people from engaging in certain behavior.'" *Id.* n.12 (quoting *Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235, 1255 (3d Cir. 1996)). In *Pollard*, the Indiana Supreme Court found that the residency restriction statute, which limits where sex offenders can reside, was an "even more direct deterrent to sex offenders than the [Indiana Sex Offender Registration Act]'s registration and notification regime." 908 N.E.2d at 1152. One may reasonably assume that like the residency restriction statute, the Statute is designed to reduce the likelihood of future crimes by depriving the offender the opportunity to commit those crimes. In this sense, the Statute is a direct deterrent to sex offenders. We therefore find the Indiana Supreme Court's finding with regard to this factor in *Pollard* to be instructive and are similarly persuaded that this factor favors treating the effects of the Statute as punitive as applied to Kirby.

5. Application Only to Criminal Behavior

[¶24] "Under the fifth factor we consider 'whether the behavior to which [the Statute] applies is already a crime.'" *Id.* (quoting *Mendoza-Martinez*, 372 U.S. at 168). "The fact that a statute applies only to behavior that is already and exclusively criminal supports a conclusion that its effects are punitive." *Id.* (citing *Wallace*, 905 N.E.2d at 381). In *Pollard*, the Indiana Supreme Court noted that "[t]here is no question that it is the determination of guilt for a qualifying offense that exposed Pollard to further criminal liability under the residency restriction statute. We conclude this factor favors treating the effects of the residency statute as punitive when applied to Pollard." *Id.* We follow the logic

employed by the Indiana Supreme Court and conclude that because there is no question that it was the determination of guilty for a qualifying offense that exposed Kirby to further criminal liability under the Statute, this factor favors treating the effects of the Statute as punitive as applied to Kirby.

6. Advancing a Non-Punitive Interest

[¶25] We next ask whether, in the words of the Supreme Court, "an alternative purpose to which [the statute] may rationally be connected is assignable for it." *Mendoza-Martinez*, 372 U.S. at 168-69, 83 S.Ct. 554. This statement is best translated as an inquiry into whether the Act advances a legitimate, regulatory purpose. *Wallace*, 905 N.E.2d at 382-83.

Id. There is no doubt that the Statute has a purpose other than to simply punish sex offenders, that being to promote public safety and to protect children. It is certainly reasonable to conclude that restricting sex offenders, especially those convicted of acts against children, from entering school property advances public safety and helps to protect children. As such, this factor clearly favors treating the Statute as non-punitive as applied to Kirby.

7. Excessiveness in Relation to State's Articulated Purpose

[¶26] Finally, we determine whether the unlawful entry statute "'appears excessive in relation to the alternative purpose assigned.'" *Wallace*, 905 N.E.2d at 383 (quoting *Mendoza-Martinez*, 372 U.S. at 169). "We give this factor the greatest weight." *Pollard*, 908 N.E.2d 1145, 1153 (Ind. 2009).

[¶27] It is undisputed that the unlawful entry statute applies to Kirby. It is also undisputed that there are unquestionably legitimate, non-punitive purposes of the Statute-public safety and protection of children. The Statute, however, does not consider the seriousness of the crime, the relationship between the victim and the offender, or an initial determination of the risk of re-offending. *See id.* (noting that the residentiary restrictions statute which applies to certain sex offenders failed to consider the seriousness of the offender's crime, the relationship between the victim and the offender, or an initial determination of the risk of re-offending). In considering whether the residentiary restrictions statute was unconstitutional as applied to a particular offender, the Indiana Supreme Court found that by restricting offenders "without considering whether a particular offender is a danger to the general public, the statute exceeds its non-punitive purposes." *Id.* We believe that this logic applies equally to the Statute.

[¶28] At the time of Kirby's sentencing, the trial court explicitly granted Kirby permission to enter school property for the purpose of observing activities involving his son. It is unreasonable to think that the trial court would have made this exception had it believed Kirby to be a danger to society. Kirby entered school property for the purpose of observing his son's activities for nearly five years before the Statute went into effect. Importantly, the record is devoid of any suggestion that Kirby behaved inappropriately at any time while on school property. Also, by the time the Statute went into effect, Kirby had completed all forms of punishment imposed by the trial court, except for his continued registration on the sex offender registry.

[¶29] To suddenly deny Kirby of the opportunity to attend his son's activities for no reason other than his prior conviction is excessive. As such, we are persuaded that this factor favors treating the effects of the Statute as punitive as applied to Kirby.

Conclusion

[¶30] After considering each of the above-discussed factors, we conclude that the Statute is unconstitutional as applied to Kirby because it amounts to retroactive punishment in violation of the Ex Post Facto Clause. Having reached this conclusion, we need not consider whether the Statute violates Kirby's due process interest in the care, custody, and control of his son, or is unconstitutionally vague.

[¶31] The judgment of the post-conviction court is reversed only as to the enforcement of the Unlawful Entry Statute.

Baker, J., and Mathias, J., concur.

Notes:

[1] Ind. Code § 35-42-4-14.

[2] Kirby's original PCR petition was filed on April 15, 2016.

[3] At all times relevant to this case, Kirby had custody of his now-teenage son. His son was, and continues to be, involved in numerous school activities.

[4] We have previously found similar ex post facto challenges to be timely even before the appellant has been charged with violating the Statute. *See McVey v. State*, 56 N.E.3d 674, 679 n.9 (Ind.Ct.App. 2016) (quoting *Smith v. Wis. Dep't of Agric.*, 23 F.3d 1134, 1141) (7th Cir. 1994) for the proposition that a person "should not be required to face the Hobson's choice between forgoing behavior that he believes to be lawful and violating the challenged law at the risk of prosecution"); *see also Greer v. Buss*, 918 N.E.2d 607, 614 (Ind.Ct.App. 2009) (acknowledging that a person need not first expose himself to actual arrest or prosecution to be entitled to challenge whether a particular statute is unconstitutional as applied to him).

[5] Seemingly given the post-conviction court's statement that Kirby did not ask the court to consider the constitutionality of the Statue, the State chose not to address the merits of Kirby's claim that the Statute was unconstitutional as applied to him because it amounted to a retroactive punishment in violation of the Ex Post Facto Clause. Instead, the State framed its argument as whether the Statute impacted the knowing and voluntary nature of Kirby's guilty plea. Despite the post-conviction court's statement to the contrary, review of Kirby's post-conviction pleadings demonstrate that Kirby did challenge the constitutionality of the Statute before the post-conviction court. As such, because we

believe Kirby sufficiently challenged the constitutionality of the Statute below, we will decide Kirby's claims on appeal as they were presented by Kirby.

SUPREME COURT

STATE OF WASHINGTON

JOHN DOE, Appellant, v. STATE OF WASHINGTON, Respondent.	Case No.: 94770-8 CERTIFICATE OF SERVICE NOTICE TO THE COURT

I certify under penalty of perjury under the laws of the State of Washington, that I caused the documents referenced below to be served as follows:

DOCUMENTS:

1. Notice to the Court with copies of referenced cases:
   a) Commonwealth v. Muniz, PA Supreme Court;
   b) Millard v. Rankin, Federal District Court of Colorado;
   c) Kirby v. State, Court of Appeals, IN; and
2. This Certificate of Service.

COPY TO: Mailed to the office of:

Mr. Paul M. Crisalli
Attorney General of Washington
Labor & Industries Division
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Seattle, WA 98104-3188

DATED this 26 day of September, 2017.

Stephen Spear
Pacific, WA

MATHEW LAWSON - FILING PRO SE

September 27, 2017 - 9:33 AM

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Appellate Court Case Number:	94770-8
Appellate Court Case Title:	John Doe v. State of Washington
Superior Court Case Number:	15-2-12121-9

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