THE PENNSYLVANIA PRISON SOCIETY

Policy Subcommittee on Sex Offense Issues

The Pennsylvania Prison Society supports a rational alternative to SORNA in the wake of the Supreme Court decision in Commonwealth v. Muniz.

This document expresses the position of the Pennsylvania Prison Society on Pennsylvania's Sex Offender Registration and Notification Act. Sharing of this document is encouraged. References to any content within this document should be properly attributed to the Pennsylvania Prison Society.

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THE PENNSYLVANIA PRISON SOCIETY SUPPORTS A RATIONAL ALTERNATIVE TO SORNA

Executive Summary:

On July 19, 2017 the Supreme Court of Pennsylvania held that the Sex Offender Registration and Notification Act (SORNA) is punitive and therefore cannot be applied retroactively to those whose underlying sexual offenses predate its enactment on December 20th, 2012.[1] As a result, thousands of currently registered former offenders may be stricken from the registry or have their registration periods reduced.

- Given that the recidivism rate for sexual offenders is proven to be extremely low, that very few minors are sexually assaulted by people unknown to them, and that the array of predicate offenses requiring registration is overbroad, the public access registry is not an effective means of preventing crimes;
- The impact of the registry is severe and is borne by the former offender and his or her family as well as those who offer housing, employment and education to former offenders;
- Amendments enacted to comply with *Muniz* should balance community safety with the rights of the former offender; they should also have a foundation in science;
- The former Megan's Law II is a reasonable starting point for any new law; and
- Any new law should include a provision for subsequent review of the former offender with an eye towards removing him or her from the registry.

Introduction:

Ideally, the Prison Society opposes any form of public-access registry. The common conception of high recidivism rates in this context is false. Considerable evidence exists to support the position that these registries have not enhanced community safety. The sexual recidivism rate for most forms of sexual offending has been shown to be extremely low.[2] Every scholarly article on the subject agrees. A recent study of nearly 8,000 sex offenders found an overall sexual recidivism rate of 11.7% over eight years.[3] Even the "frightening and high risk of recidivism"[4] found by the Supreme Court was debunked.[5] If registrants do not sexually reoffend within fifteen years, they almost never do (4%),[6] corresponding to the risk posed by someone with no history of sexual offending. The press and the public tend to focus on extreme outliers when considering recidivism. In such cases, however, compliance with registration has appeared to have no positive effect on community safety.[7]

Less than 10% of sexual assaults on minors are committed by strangers.[8] Furthermore, over 95% of sexual offenses against minors are at the hands of people with no prior record of arrest, meaning they were not on any registry at the time.[9] The fact is that the vast majority of new sex offenses are committed by individuals who were never on any registry.[10] The registry is costly in terms of tax dollars[11] and affords questionable benefits to community safety.[12, 13]

The array of predicate offenses has increased by 160 percent since 1995. The original Megan's Law listed only the ten most serious offenses as requiring registration. SORNA now includes twenty-six

including some misdemeanors. Many of these offenses ensnare those who have not sexually abused children, leading to a threshold misunderstanding of the registry in the mind of the public.

The federal Adam Walsh Act (AWA) created a new mandate for states to substantially conform to a model which actually represented a step backwards for Pennsylvania.[14] As always, Washington compelled this compliance through financial pressure in the form of monies withheld for other programs.[15] The AWA not only placed the scarlet letter on former offenders, it required the Commonwealth to shine a spotlight on that letter. Fortunately, the Adam Walsh Act's penalties are avoided when compliance would violate the state's constitution and Pennsylvania is not at risk of losing these funds in the wake of *Muniz*.

Pennsylvania enacted its first sex offender registration law in 1995. That law was subject to considerable judicial review and several mandated reforms. The result over the years has been a mishmash of precedents and amendments that can confuse even the best legal minds. Perhaps the sharpest illustration of this point is the presence of a procedural manual at some State Police barracks entitled "Megan's Law for Dummies."

The political reality is that the Commonwealth will not let thousands of people get off the registry. A bill to "patch" SORNA is considered an emergency in the legislature, and yet a hastily-crafted bill could do more harm than good. The Prison Society strongly encourages the legislature to commit ample time to study the research and provide for hearings so that experts can offer testimony.

The true aim should be to enact a law which is realistic in balancing three goals: The law should address community safety concerns; it should follow scientific research on risk; and it should allow those registrants who have demonstrated a period of law-abiding life in the community to be removed from the registry.

The impact of the current registry:

Although SORNA is commonly referred to as the sex offender registration law, it does much more than establish a registration scheme for offenders who commit particular sexual crimes. The registry has a severe impact on the more than 20,000 Pennsylvania citizens who are listed on it. That impact cannot be minimized. [16] Of those, more than 83% must report in-person more than once each year for routine verifications and more than two thirds must report quarterly. These do not include additional in-person visits to registration points to make changes in information as basic as an email address. These visits were historically equated with renewing one's driver's license – a process now available online – when, in fact, the verification visits are generally far more time-consuming and must be completed within a defined ten-day window.

Some of the examples listed by the court in *Muniz* in support of their punitive finding were the posting of vehicle information, the requirement for frequent in-person visits to update or verify information and public access via the Internet. The last example was described by the Court as the modern-day form of shaming because it goes beyond simply providing court records.

The State Police and other law enforcement entities frequently conduct compliance checks, sending one or two uniformed officers to the door of the offender's home. In one case, when no one answered, the officers simply started knocking on neighbors' doors asking questions.

Life on the registry can be burdensome to the point of homelessness.[17] Landlords see registered

sex offenders as liabilities and will not rent to them, mark-up the rent substantially or simply refuse to renew leases. There have been constant legislative efforts to create exclusion zones that would place most incorporated areas out-of-reach. In cities such as Philadelphia, registered sex offenders would be banished to all but the most outlying areas or to industrial neighborhoods. In one suburban township, the only location that would be available was the middle of a golf course.[18]

Employment is equally problematic. Potential employers simply do not want their addresses on a public-access website. Jobs which take the registrant to different sites on an irregular basis can be pitfalls. Self-employment is a complex status that can be easily questioned and could conceivably require the registrant to list his clients' addresses.

Even daily life is impacted. There is a constant risk of being "outed" in churches, stores and fast-food establishments. We hear reports from registrants who were harassed while buying a cup of coffee at their local McDonalds; one was harassed before he even left his car. Online harassment is common. One need only spend a few hours on Facebook or other social media to find screen captures taken from the Megan's Law website. And while harassment of a registrant can form the basis for criminal prosecution, the Commonwealth has never released any statistical data that would point to actual enforcement of that provision.

Families of former offenders suffer as well. For example, with registry information now searchable through Google, a search for a teenage athlete's latest game victory could bring up a link to his adult namesake on the registry. Children of registrants have been harassed and bullied in their schools.

The alternative:

Megan's Law II was enacted on May 10, 2000.[19] It was far less onerous and its registration provisions were largely upheld as non-punitive. Among the significant differences are:

a. The criteria for listing an employment location were less onerous: locations where one worked less than 30 days per year were exempt, versus 14 days per year under SORNA. It did not include contract workers whose job locations were constantly changing;
b. The criteria for listing a residence were less onerous: locations where one lived less than 30 days per year were exempt and it did not include temporary lodging (like hotels, hospitals or campgrounds);
c. There were far fewer predicate offenses: the former law was not triggered by crimes such as unlawful restraint (§2902b), false imprisonment (§2903b), luring a child (§2910), corruption of minors (§6301), indecent assault (§3126) less than a first degree misdemeanor, invasion of privacy (§7501.1), statutory sexual assault (§3122.1b), obscenity (§5903) less than a felony or interference with custody of a child (§2904)[20];
d. Ten-year registration was imposed for more offenses: kidnapping, indecent assault (M), incest, promoting prostitution and child pornography, most of which now impose 25 years or lifetime on the registry;
e. Only sexually violent predators (SVPs) were required to verify quarterly, versus more than 12,000 Tier III registrants also required to endure quarterly verification under SORNA;
f. There was no public-access website or subscription system for email alerts;

g. The State Police did not collect web identifiers, an employer's name and address, email addresses, phone numbers, SSNs, professional licenses, passport information, immigration status or vehicle information;
h. Registrants were not required to provide advance notice of international travel;
i. There was no category of Sexually Violent Delinquent Child.

Megan's Law III, which was enacted on November 24, 2004,[21] modified its predecessor and created a relief process (§9795.5) that entitled sexually violent predators to petition for relief after twenty years.[22] A process for periodic review goes a long way to reduce the burden of registration. The New Hampshire Supreme Court granted a lifetime registrant a review in a case which largely parallels *Muniz*.[23] Other states' highest courts have reached similar conclusions.[24]

Thirty-four states offer some pathway to relief for its registrants and twenty states offer this relief to lifetime registrants. The most lenient state is Iowa, which allows those convicted of less serious crimes to petition for relief after two years and those convicted of more serious offenses to petition after five years.[25] Somewhat less lenient is Tennessee, where all but the most serious offenders can seek relief after ten years.[26]

A review of the individual's registration obligation makes sense. As our Commonwealth Court noted in *A. S. v. State Police*[27], the recidivism model is implicated in SORNA, and the stated objective of SORNA has been to protect the public from repeat sexual offenses. We also know that the risk of recidivism is very low upon release from prison and steadily decreases over time.[28] The desistance model informs us that people "age-out" of criminal thinking and behavior. Meanwhile, the current registry continues to expand because the outflow (mostly due to death or moving out of Pennsylvania) is much less than the inflow. The larger the registry becomes, the more destructive it becomes.

Providing a realistic opportunity for exit from the registry serves public policy interests. It simultaneously creates an incentive for the registrant to maintain a law-abiding lifestyle and better ensures that the registry contains only those who continue to pose the greatest risk to their communities. Going forward, the policy question needs to be whether subjecting individuals to lifetime or decades-long registration and community notification without the possibility of relief is sensible, not simply that doing so is politically popular.

Conclusion:

We encourage the legislature to enact a law which better balances community safety with concerns for the former offender. To do so, the new law must be less burdensome than SORNA; it must ultimately withstand what may someday be called the *Muniz* test. Rather than look for ways to slip under the bar, we hope the legislature will take the bold step of a major rollback.

The Pennsylvania Prison Society respectfully submits the following recommendations:

- We recommend that Pennsylvania returns to a bi-level registry for only the ten predicate offenses listed in Megan's Law I and with lifetime registration reserved for only the most serious felonies.
- We encourage the legislature to include a review provision for all offenders on the registry, especially for those required to register beyond ten years, including the SVP determination.

- We propose starting with the model that was part of Megan's Law I: review prior to release from imprisonment and then every five years thereafter.
- In addition, the burden should be on the Commonwealth to prove by clear and convincing evidence[29] that the individual still presents sufficient risk of re-offense that continued presence on any registry is warranted, since there should not be a presumption of recidivism.[30]
- Finally, we encourage the legislature to engage in a fact-gathering effort that includes hearings at which various experts on offender characteristics, treatment and recidivism can be heard.

Since 1787, the Pennsylvania Prison Society has worked to ensure humane prison conditions and advocate for sensible criminal justice policies. In the age of mass incarceration, this mission is more relevant than ever. The Society is the oldest organization in the country dedicated to sensible and humane criminal justice. Today the Society advocates for systemic policy change, responds to the concerns of inmates and their families, provides subsidized bus service for Philadelphia families visiting loved ones incarcerated in different parts of the state, and provides assistance to individuals returning home from incarceration.

The Policy Subcommittee for Sex Offense Issues was created nearly fifteen years ago through the efforts of both The Prison Society and the Joseph J. Peters Institute. Key members include treatment providers, advocates, attorneys, criminologists, educators, survivors, former offenders and members of the Prison Society Board of Directors, Official Visitors and staff. Our mission is to bring representatives of all sides of this difficult issue together to study legislation, litigation, policy and public safety, to provide learned input in the policy-making process, to educate the community, and to support former sex offenders as they pass though incarceration and back into the community.

[1] Commonwealth v. Jose Muniz, 47 MAP 2016, 164 A.3d 1189 (Pa. 2017).
[2] Richard Tewksbury et al., *Final Report on Sex Offenders*, Nat'l. Crim. Just. Reference Serv., Dep't. of Justice, at 10 (March 2012).
[3] R. Karl Hanson, Andrew J. Harris, Leslie Helmus, and David Thornton, *High Risk Offenders May Not Be High Risk Forever*, 29 J. of Interpersonal Violence, 2792, 2796 (2014).
[4] Smith v. Doe, 583 U.S. 84, 103 (2003) (quoting McKune v. Lile, 536 U.S. 24, 34 (2004), which cited 1986 article in *Psychology Today* written for a lay audience by a prison treatment provider.)
[5] Ira Ellman, *"Frightening and High": The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Const. Comment 495, 497-498.
[6] Hanson et al., *supra* at 2802—06.
[7] One need only turn to the tragedy of Jaycee Dugard, who was imprisoned and sexually tortured for years by a registered offender who was in full compliance with the requirements of California's registration law.
[8] Howard J. Snyder, *Sexual assault of young children as reported to law enforcement: Victim, incident and offender characteristics*, National Center for Juvenile Justice (2000) at 10. https://www.bjs.gov/content/pub/pdf/saycrle.pdf
[9] Sandler, J. C., Freeman, N. J., & Socia, K. M. (2008). Does a watched pot boil? A time-series analysis of New York State's sex offender registration and notification law. *Psychology, Public Policy, and Law, 14*(4), 284-302. High-profile cases such as Jerry Sandusky's illustrate that the registry is not a viable tool for preventing sexual assault.
[10] A study conducted by three professors at the University of Albany, School of Criminal justice using data supplied by the New York Division of Criminal Justice reached the following conclusion: "Analysis also shows that over 95% of all sexual offenses leading to arrest are committed by first-time sex offenders, casting doubt on the ability of

laws that target repeat offenders to meaningfully reduce sexual offending." J. Sandler, N. Freeman & K. Socia, *Does A Watched Pot Boil? A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, Psychology, Public Policy and Law, Vol. 14, No. 4, at 284-302 (2008)

[11] Richard Belzer, *The Costs of Subjecting Juveniles to Sex-Offender Registration and Notification*, R. Street Policy Study 15 (Sept. 2015) (A 2015 cost benefit analysis looked at both adult and juvenile research and concluded that "registration alone is unlikely to produce net social benefits" and "public notification is almost certainly a highly cost-ineffective way to reduce future sex offenses.") Pennsylvania's cost to implement SORNA was estimated at over twenty million dollars.

[12] *Megan's Law: Assessing the practical and monetary efficacy,* The Research & Evaluation Unit, Office of Policy and Planning, New Jersey Department of Corrections, Kristen Zgoba, Ph.D. and Philip Witt, Ph.D., stating *inter alia*: 1) Megan's Law has no effect on time to first re-arrest; 2) Megan's Law showed no demonstrable effect in reducing sexual re-offenses; 3) Megan's Law has no effect on the type of sexual re-offense or first time sexual offense; 4) Megan's Law has no effect on reducing the number of victims involved in sexual offenses; 5) Given the lack of demonstrated effect of Megan's Law on sexual offenses, the growing costs may not be justifiable.

[13] Jillian B. Carr, The Effect of Sex Offender Registries on Recidivism: Evidence from a Natural Experiment (2015).

[14] Thirty-two states have opted not to come into compliance with the Adam Walsh Act, including New Jersey, New York, Delaware, Maryland and West Virginia.

[15] Adam Byrne Memorial Justice Assistance Grant, 42 U.S.C. §§ 3750 et seq. See 42 U.S.C. § 16925(b) (1).

[16] Heath v. State, 983 A.2d 77, 81 (Del. 2009) "The Registry requirement affects individual liberty more profoundly than simply serving as a recording mechanism for determining prior offenders."; Doe v. Att'y Gen., 686 N.E.2d 1007, 1016 (Mass. 1997) (Fried, J., concurring), stating that registration represents "a continuing, intrusive, and humiliating regulation of the person himself".

[17] The State Police list 263 registrants as "transient/homeless" as of October 19, 2017.

[18] Jurisdictions are barred from establishing residency restrictions (Fross v. County of Allegheny, 20 A.3d 1193 (PA 2011)), but the legislature has entertained bills that would create restrictions in every term back to Megan's Law I.

[19] SB 380, P.L. 74, No. 18.

[20] SB 854 would remove this offense.

[21] SB 92 of 2004.

[22] The original Megan's Law (SB 7, P. L. 1079, No. 24, enacted October 24, 1995, allowed SVPs to petition for review prior to release from prison and every five years thereafter. SORNA contains a provision for those adjudicated as juveniles to petition for relief after 25 years (42 Pa. C.S.A. §9979.17(a)).

[23] Doe v. State of New Hampshire, No. 2013-496, February 12, 2015.

[24] See, e.g., Gonzalez v. State, 980 N.E.2d 312, 320 (Ind. 2013) (deeming law punitive because it applied without regard for degree to which "a prior offender has been rehabilitated and does not present a risk to the public"); State v. Letalien, 2009 ME 130, ¶ 62, 985 A.2d 4 (retroactive application of lifetime registration requirement "without, at a minimum, affording those offenders any opportunity to ever be relieved of the duty as was permitted under [prior law] is punitive").

[25] Iowa Code Ann. § 692A.128(2)(a), (6) (West Supp. 2014).

[26] Tenn. Code Ann. §§ 40-39-202, -207 (2014).

[27] 473 MD 2012.

[28] Joshua Vaughn, "*2016 Crime Review: A look at the effectiveness of sex offender registries*," The Cumberland County Sentinel, February 13, 2017 (discussing the low recidivism rate in counties surrounding Harrisburg.)

[29] *G.V. v. Dep't. of Public Welfare*, 91 A3d 667, 673-673 (PA 2014) (stating that preservation of one's reputation is a recognized and protected interest under Pennsylvania's Constitution and that a lesser standard of proof would be appropriate only if the information was not readily available to the public).

[30] *In re J.B.,* 107 A.3d 1, 14 (PA 2015) (holding that SORNA utilizes an irrebuttable presumption of recidivism that is not universally true.)