

0

**IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
JUVENILE DIVISION**

In the Interest of	:	Petition No. J1085-2008
W.E.	:	
In the Interest of	:	Petition No. J0162-2008
J.K.	:	
In the Interest of	:	Petition No. J0664-2011
W.G., II	:	

APPEARANCES:

Counsel for the Commonwealth:

Amber Czerniakowski, Esquire
Assistant District Attorney

Counsel for the Petitioners:

Marsha L. Levick, Esquire
Riya Saha Shah, Esquire
Juvenile Law Center

CLERK OF COURTS
2014 FEB 11 AM 9:58
LANCASTER COUNTY, PA

OPINION

I. INTRODUCTION

The instant action arises from the *nunc pro tunc* motions of three juvenile petitioners who seek relief from their inclusion in Pennsylvania's sex offender registry pursuant to Pennsylvania's Sex Offender Registration and Notification Act, 42 Pa.C.S. § 9799.10 *et seq.* (2013) ("SORNA" or the "Act"). Each Petitioner was adjudicated for a registrable offense prior to SORNA's effective date of December 20, 2012. Although adjudicated prior to the Act's effective date, SORNA required each Petitioner to register retroactively as a sex offender. Petitioners now challenge the constitutionality of SORNA's retroactive application as well as its prospective application to other juveniles. This Court finds, for reasons more fully set out below, that Petitioners are entitled to relief from SORNA's sex offender registry requirements.

II. BACKGROUND

A. Juvenile Procedural History

W.E., J.K., and W.G., II ("Petitioners" or "Juveniles") were all adjudicated delinquent of qualifying offenses prior to December 20, 2012, the date when Pennsylvania implemented SORNA.

On December 15, 2008, W.E. admitted, with the knowledge and consent of his parents, to committing the offense of rape of a child. (W.E. Adjudication Order, Dec. 15, 2008). On January 5, 2009, W.E. was adjudicated delinquent and later committed to receive residential treatment. (Dispositional Orders, Jan. 5, 2009; Mar. 9, 2009). W.E. remained committed under the Court's supervision through SORNA's effective date. (W.E. SORNA Colloquy). On November 14, 2012, W.E. signed the SORNA Colloquy.¹ (*Id.*). W.E. was later released from his residential treatment program and now is placed in SafeGuards Specialized Foster Care. (Pet'rs' Mem. in Supp. 5).

On February 13, 2008, J.K. admitted, with the knowledge and consent of his parents, to committing the offense of rape of a child. (J.K. Adjudication Order, Feb. 13, 2008). On March 17, 2008, J.K. was adjudicated delinquent and later committed to receive residential treatment. (Dispositional Orders, Mar. 17, 2008; Mar. 31, 2010). J.K. remained committed under the Court's supervision through SORNA's effective date. (J.K. SORNA Colloquy). On November 21, 2012, J.K. signed the SORNA Colloquy. (*Id.*). J.K. has been discharged from his residential treatment program and now resides among the community. (Pet'rs' Mem. in Supp. 5).

On September 15, 2010, W.G., II admitted, with the knowledge and consent of his parents, to committing the offense of involuntary deviate sexual intercourse. (W.G., II Adjudication Order, Oct. 10, 2011). On November 30, 2011, W.G., II was adjudicated delinquent of the offense and committed to receive treatment. (Dispositional Order, Nov. 30, 2011). W.G., II remained committed under the Court's supervision through SORNA's effective date. (W.G., II SORNA

¹ See 42 Pa.C.S. § 9799.20(2) (2013) (referred to as the "SORNA Colloquy").

Colloquy). On November 14, 2012, W.G., II signed the SORNA Colloquy. (*Id.*). W.G., II has been discharged from his residential treatment program and now resides among the community.

On May 22, 2013, the Juvenile Law Center of Philadelphia filed motions for *nunc pro tunc* relief on behalf of the three Juveniles. (Pet'rs' Mem. in Supp. 100). Petitioners raise five (5) arguments for why they are entitled to relief. (*See id.* at 47-92). Petitioners assert the following claims:

- (1) SORNA Imposes Additional Punishments in Violation of the *Ex Post Facto* Clauses of the Pennsylvania and United States Constitutions. ("Claim 1").
- (2) Juvenile Registration Violates the Pennsylvania and United States Constitutional Bans on the Infliction of Cruel and Unusual Punishment. ("Claim 2").
- (3) In Providing for Mandatory Lifetime Registration, SORNA Creates An Irrebuttable Presumption in Violation of the Pennsylvania Constitution. ("Claim 3").
- (4) Registration Imposes Stigma And Restrictions That Impede Petitioner's [sic] Reputation Rights Expressly Protected By the Pennsylvania Constitution. ("Claim 4").
- (5) Lifetime Juvenile Sex Offender Registration Contravenes the Pennsylvania Juvenile Act. ("Claim 5").

(*Id.* at 47, 75, 83, 88, 91).

On August 9, 2013, the Commonwealth filed a Response and accompanying Memorandum of Law in Opposition to Petitioners' *nunc pro tunc* motions. (Resp't's Mem. in Opp'n 1). The Commonwealth contends, in essence, that Petitioners' arguments fail because SORNA's statutory scheme is identical to Megan's Law II which the Pennsylvania Supreme Court has already ruled is constitutional. (*See id.* at 4-11). Petitioners filed a Reply on August 22, 2013. (Reply 12). Petitioners counter that juveniles are so fundamentally different than adults that past legal analyses about sex offender registration laws as applied to adults are inapplicable. (*See id.* at 1-11). The Court first addresses the Act's legislative framework and the differences between juveniles and adults before discussing the issues presented.

B. SORNA Legislative Framework

The Pennsylvania General Assembly enacted SORNA to bring Pennsylvania's sex offender registry laws into substantial compliance with the Adam Walsh Child Protection and Safety (Adam Walsh) Act of 2006, 42 U.S.C. § 16901 *et seq.* *See* 42 Pa.C.S. § 9799.10(1).² To achieve substantial compliance the General Assembly enacted far-reaching sex offender registration provisions, modeled after Title I of the Adam Walsh Act. Title I of the Adam Walsh Act, the federal version known also as SORNA, establishes a comprehensive framework for registering

² Substantial compliance with the Adam Walsh Act enabled Pennsylvania to retain ten percent (10%) of its Byrne Grant from the federal government. *See* 42 U.S.C. § 16925(a) (2012).

and monitoring sex offenders. The framework increases the frequency and duration of scheduled reporting for sex offenders as well as the breadth of information to be reported and persons required to register. Most strikingly, the framework, which Pennsylvania implemented, requires certain juvenile offenders aged fourteen (14) years or older to register as sex offenders for life.³

The Act applies both prospectively and retroactively to juveniles who qualify as *juvenile offenders*.⁴ See 42 Pa.C.S. § 9799.13(8). In relevant part, *prospective* juvenile offenders include juveniles who are adjudicated delinquent after SORNA's effective date of an offense that if the juvenile were an adult, would constitute rape, involuntary deviate sexual intercourse, aggravated indecent assault, or the inchoate offenses thereof. See *id.* § 9799.12 (Juvenile offender defined). The Act applies retroactively to juveniles who at the time of SORNA's effective date were "subject to the jurisdiction of the court on the basis of . . ." being adjudicated delinquent for the same registrable offenses. *Id.* This includes juveniles who, like Petitioners, were committed to a facility or institution because of their offense. See *id.*

Juvenile offenders, like other SORNA registrants, are required to "read and sign" a SORNA Colloquy. 42 Pa.C.S. § 9799.20(2). The colloquy that each Juvenile signed, years after their admissions, consists of a single page and seven cursory paragraphs. (See W.E. SORNA Colloquy). It briefly addresses why the juvenile is required to register, how the juvenile will register, and that consequences exist for a juvenile's noncompliance. (*Id.*).

The current admission colloquy, however, consists of three (3) pages and over fifteen (15) paragraphs. It includes four (4) sections entitled: "[g]eneral [i]nformation," "[u]nderstanding of [r]egistration [r]equirements," "[f]ailure to [r]egister is a new crime" and "[c]onsequences of [f]ailure to [r]egister." See Sexual Offender Registration and/or Act 21 Colloquy at 1-3 ("SORNA Colloquy").⁵ The colloquy information discusses that upon registration a juvenile must disclose specific, personally identifiable information to the Pennsylvania State Police and have his or her photograph taken. *Id.* at 2. The colloquy notes that a juvenile must appear both periodically to check in and when the juvenile changes any personally identifiable information previously submitted to the Pennsylvania State Police. *Id.* Moreover, the colloquy explains that a juvenile's failure to meet these requirements results in mandatory imprisonment. *Id.* at 3. Finally, the form itself recommends that the "colloquy be placed on the record in open court." *Id.* at 1. The Court and attorneys routinely use the colloquy and its information to inform

³ The legislative history behind the Pennsylvania General Assembly's adoption of SORNA is barren in regards to concern for the demanding sex offender regulations imposed upon juveniles. See S.B. 1183, 2011-2012 Reg. Sess. (Pa. 2011); *but see* S. Journal, 195-74, 1st Sess., at 1374 (Pa. 2011). In the federal arena, however, SORNA's application of sex offender regulations to juveniles was widely recognized as a central obstacle to compliance with the Adam Walsh Act for a majority of states. See Sex Offender Notification and Registration Act (SORNA): Barriers to Timely Compliance by States Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the Comm. on the Judiciary H.R., 111th Cong. 2-12 (2009).

⁴ Because Petitioners challenge SORNA as applied only to juveniles, the Court focuses its discussion on SORNA's statutory framework as it applies to juveniles. (See Pet'rs' Mem. in Supp. 1-98). Petitioners also limit their discussion to juveniles other than those classified as sexually violent delinquent children. (*Id.* at 19 n.26). Act 21, 42 Pa.C.S. § 6401 *et seq.* (2013), exists to manage juveniles who are found to be sexually violent and require civil commitment. See *id.*

⁵ Sexual Offender Registration and/or Act 21 Colloquy, <http://www.pacourts.us/assets/files/setting-1746/file-2034.pdf?cb=387ec1> (last visited February 7, 2014).

juveniles of the potential consequences for being classified a juvenile offender. *See* Pa.R.J.C.P. 407 cmt. (describing how an attorney should review the written admission colloquies “with the juvenile prior to entering the courtroom”).

SORNA compels juvenile offenders to submit to numerous registration requirements. *See* 42 Pa.C.S. § 9799.15–9799.21. The Act requires juvenile offenders to provide their name, nickname or alias, telephone number, any moniker the juvenile uses to communicate over the internet, social security number, and address. *Id.* § 9799.16(b). Juveniles must also provide their employer’s name and address, travel routes to their place of employment, any professional licensing information, school name and address, and vehicle information including license plate identification, registration, and parking locations. *Id.* Finally, juvenile offenders must submit to current photographing, fingerprinting, and DNA sampling. *Id.* § 9799.16(c). A juvenile offender must report the entirety of this information upon initial registration. *Id.* § 9799.19(h).

Every three (3) months thereafter a juvenile offender must report in person to a designated reporting location where the juvenile is subject to updated photographing and verification of previously reported information. *Id.* §§ 9799.15(e), 9799.25(a). Moreover, a juvenile offender is required to report in person within three (3) business days of **any changes** to his or her name, residence, employment, schooling, contact information, internet monikers, or vehicle information.⁶ *Id.* § 9799.15(g)(1)-(9). Once collected, the Pennsylvania State Police are tasked with making available the juvenile’s reported information. *Id.* § 9799.18.

Pursuant to SORNA, the information a juvenile offender has reported is made available to a limited public. *Id.* Persons entitled to access the reported information include “the jurisdiction” in which the juvenile resides, is employed, or attends school. *Id.* § 9799.18(a)(1). Other entities granted access include the local law enforcement, county district attorney, and office of probation or parole where the juvenile resides, is employed, or attends school. *Id.* § 9799.18(4)-(6). Notably, however, none of these entitled persons are subject to penalty or limited in further disclosing the information. *See id.* Finally, several federal entities are entitled to a juvenile registrant’s information “for inclusion in the National Sex Offender Registry” and other similar federal databases. *Id.* § 9799.18(a)(3). Federal agencies with access to a juvenile’s information are permitted to share the information with other states. *Id.* § 9799.16(a). Other states are not limited in their dissemination of a juvenile’s information, including the publication of a juvenile’s information to the general public. *See id.* In addition to those requirements imposed by Pennsylvania, a juvenile offender who wishes to travel to another state is also subject to that state’s requirements and penalties for noncompliance. *See id.*

A juvenile offender who fails to comply with any of the Act’s requirements is subject to mandatory imprisonment. *Id.* § 9799.21(a). A juvenile who fails to provide accurate registration information or later verify the registration information, faces mandatory minimum imprisonment terms ranging from three (3) to five (5) years.⁷ *See* 18 Pa.C.S. § 4915.1(c)(1)–(3); 42 Pa.C.S. §

⁶ Juvenile offenders who are without a permanent residence face even more onerous requirements. Classified as transients, the offender must appear for monthly in-person registration. 42 Pa.C.S. §§ 9799.12, 9799.15. The transient offender must also provide, in addition to other registration information, wherever the offender temporarily resides and where he or she “eats, frequents and engages in leisure activities” *Id.* § 9799.16(B)(6).

9718.4(a)(1)(iii), (v). The Act provides no defense for a juvenile's noncompliance. For at least twenty-five (25) years a juvenile offender must fulfill a plethora of registration requirements before he or she is allowed to petition for removal from the registry. 42 Pa.C.S. § 9799.17. Any misstep, however small, subjects the juvenile to lifetime registration. *See id.*

C. Children and Adults are Fundamentally Different

Petitioners contend that children are fundamentally different than adults. (*See* Pet'rs' Mem. in Supp. 1-11). The Commonwealth agrees. (Resp. 3). The differences between adults and juveniles are well recognized within courts of the United States.

The law acknowledges that children are different than adults and treats them accordingly.⁸ *See Miller v. Alabama*, ___ U.S. ___, 132 S. Ct. 2455, 2462 (2012); *accord J.D.B. v. North Carolina*, ___ U.S. ___, 131 S. Ct. 2394, 2403-04 (2011); *Graham v. Florida*, 560 U.S. 48, 68 (2010). In criminal proceedings, juveniles are considered less culpable given their distinct attributes. *Miller*, 132 S. Ct. at 2464. These include a juvenile's lack of maturity, susceptibility to peer pressure, and the fact that a juvenile's character is not as well formed. *Id.* A juvenile's ill-fated decisions, as courts have recognized, are a derivative of a juvenile's undeveloped anatomy. *See id.*; *Roper v. Simmons*, 543 U.S. 551, 570 (2005). Petitioners proffer evidence that a juvenile's distinct attributes and undeveloped anatomy are at the heart of SORNA's over-inclusive reach.

Statistics demonstrate that juvenile sex offenders have lower recidivism rates than adult sex offenders. (Pet'rs' Mem. in Supp., Ex. H at 1). This is due, in part, to the fact that juveniles sexually offend for different reasons than adults. (Pet'rs' Mem. in Supp., Ex. I ¶ 13). For instance, juveniles lack maturity and impulse control, behaviors which lead to the original offense, but which will not exist once the juvenile reaches adulthood. (*Id.* at ¶¶ 14-15). Accordingly, a juvenile's maturation process will render their immature behaviors nonexistent and the juvenile will not repeat the associated deviant offense. (*See id.*).

A juvenile's ability to reform is also intertwined with a juvenile's cognitive development. (*See* Pet'rs' Mem. in Supp., Ex. L at 25-31). During adolescence a juvenile's brain is amenable to substantial change and develops considerably in areas associated with reasoning and emotion. *See id.* at 26. This initial cognitive inability to reason and control emotions results in juveniles committing deviant behaviors for a wider range of reasons than adults. (*Id.*). However, a juvenile's ability to develop anatomically will also leave the juvenile more disposed to rehabilitation than an adult. (*Id.*). Accordingly, juveniles do not exhibit the same commonality in committing sexual offenses that adults do. (*Id.* at 27-29). As a result, recidivism rates for juveniles are low and strikingly less than that for adults. (*Id.* at 30-31).

⁷ Although national guidelines offer examples of circumstances where a juvenile who fails to timely report is excused, Pennsylvania's SORNA is without provision to address any such scenario. *See* The Nat'l Guidelines for Sex Offender Notification & Registration, 73 Fed. Reg. 38030, 38049 (July 2, 2008) ("e.g., in the case of a sex offender hospitalized and unconscious . . ."). Thus, under Pennsylvania's SORNA, a juvenile's noncompliance for any reason automatically results in mandatory penalties. *See* 42 Pa.C.S. §§ 9799.21-9799.23.

⁸ In Pennsylvania, the legislature enacted the Juvenile Act, 42 Pa.C.S. § 6301 *et seq.* (2013), with the intent to rehabilitate and reform juveniles. *In re J.M.*, 42 A.3d 348, 350-51 (Pa. Super. Ct. 2012).

Against this background, Petitioners challenge the Act's application to juveniles aged fourteen (14) and older. Petitioners filed motions for *nunc pro tunc* relief on May 22, 2013. (Pet'rs' Mem. in Supp. 100). The Commonwealth filed a Response on August 9, 2013, and Petitioners filed a Reply thereto on August 22, 2013. (Resp. 1; Reply 12). The matter is now ripe for review.

III. DISCUSSION

Petitioners raise five (5) claims for why they are entitled to relief. (Pet'rs' Mem. in Supp. 100). Upon review, this Court finds that SORNA's application to W.E., J.K., and W.G., II, is unlawful. The Court will address Petitioners' due process challenges, Claims 3 and 4, first and then Petitioners' remaining arguments in turn.

Standard of Review

Under Pennsylvania common law "all lawfully enacted Pennsylvania legislation enjoys . . . a general presumption of constitutionality" within courts of the Commonwealth of Pennsylvania. *Com. v. Lee*, 935 A.3d 865, 876 (Pa. 2007). A statute will not be invalidated "unless the legislation clearly, palpably and plainly violates the Pennsylvania and United States Constitutions." *Com. v. Omar*, 981 A.2d 179, 192 (Pa. 2009) (citing *Pennsylvania Tpk. Comm'n v. Com.*, 899 A.2d 1085, 1094 (2006)). Accordingly, a Pennsylvania Court will "construe a statute to uphold its validity" whenever possible and resolve any doubt regarding the constitutionality in favor of finding the statute constitutional. *See id.* at 192 (citations omitted). Petitioners bear a heavy burden, therefore, to "overcome the presumption that the statute is valid." *Johnson v. Alleghany Intermediate Unit*, 59 A.3d 10, 16 (Pa. Commw. Ct. 2012).

Petitioners contend that SORNA violates certain due process protections owed them. (Pet'rs' Mem. in Supp. 83-87). In Claim 3, Petitioners assert that SORNA creates an irrebuttable presumption that is unconstitutional: the presumption that Petitioners are a high risk for sexual recidivism based upon their adjudication. (*Id.*). The Commonwealth contends, in effect, that even if an irrebuttable presumption exists, "labeling one a sexual offender" does not restrict a fundamental freedom and thus does not constitute a due process violation. (Resp't's Mem. in Opp'n at 9). This Court agrees with Petitioners that an irrebuttable presumption exists which denies Petitioners due process under the Pennsylvania Constitution. Contrary to Petitioners' wishes, however, as discussed below, the Court restricts its finding to the juveniles at bar.

A. Irrebuttable Presumption

An irrebuttable presumption arises where the legislature presumes the truth of a fact about a distinct group of individuals without providing that group a chance for rebuttal. *See Vlandis v. Kline*, 412 U.S. 441, 446-48 (1973).⁹ The presumption invites a due process challenge when it

⁹ The Court notes that reasonable doubt exists whether the doctrine is still viable under federal jurisprudence, where it was first conceived. *See Com., Dept. of Transp., Bureau of Traffic Safety v. Slater*, 462 A.2d 870, 880 (Pa. Commw. Ct. 1983). However, little doubt exists the doctrine is viable as a matter of Pennsylvania common law

deprives the individual of a fundamental interest or burdens an individual as a result of the presumption. *See, e.g., Clayton*, 684 A.2d at 1062-66 (Pa. 1996) (due process invoked where statute suspended driving licenses for one year for all persons having had a seizure); *D.C. v. School Dist. of Phila.*, 879 A.2d 408, 418 (Pa. Commw. Ct. 2005) (due process invoked where statute required a disciplinary transfer to alternative education for any student returning to school after an adjudication of delinquency for certain offenses). An individual is deprived of process due where the irrebuttable presumption is “deemed not universally true and a reasonable alternative means of ascertaining that presumed fact are available.” *Clayton*, 684 A.2d at 1063 (citing *Vlandis*, 412 U.S. at 452). SORNA creates an irrebuttable presumption that all juveniles who admit to qualifying offenses represent a high risk for recidivism. From this presumption Petitioners were classified as sex offenders and therein deprived of their fundamental right to reputation without due process.

1. Identifying the Presumption

An irrebuttable presumption exists where the legislature presumes a conclusion from a characteristic distinct to a class of individuals. *See Clayton*, 684 A.2d at 1062; *D.C.*, 879 A.2d at 418. For instance, in *Clayton*, the Pennsylvania Supreme Court reviewed a public safety regulation which declared and presumed that all persons having had a single epileptic seizure, as a class, were incompetent to drive and thus subject to a one (1) year driving licenses suspension. *Clayton*, 684 A.2d at 1061, 1062. Outside of two exceptions which the Court found irrelevant, the regulation afforded qualifying individuals no avenue to contest the finding of incompetence. *Id.* at 1062. On review, the Court found that the statute created an irrebuttable presumption because it concluded without regard to critical rebuttable evidence, such as medical clearance to drive by the individual’s physician, that a person who had an epileptic seizure was automatically incompetent to drive for at least a year. *See id.*

Similarly, in *D.C.*, the Commonwealth Court reviewed a statute which provided that, in relevant part, juveniles who were adjudicated delinquent of specified offenses required placement in an alternative education setting upon returning to school. *D.C.*, 879 A.2d at 410. The statute presumed that any juvenile adjudicated delinquent for one of four (4) specified offenses was in effect a disruptive student. *Id.* Accordingly, these disruptive students were transferred to an alternative education program without the opportunity to contest the finding of disruptiveness. *Id.* On review, the Commonwealth Court found the statute created an irrebuttable presumption because it classified students who committed specified offenses as disruptive without an opportunity to rebut this classification. *Id.* at 418.

SORNA establishes an irrebuttable presumption that because a juvenile committed a specified sexual offense he is a high risk for recidivism and thus requires registration as a sex offender. The statute presumes that any juvenile adjudicated delinquent of three specified offenses presents a high risk to reoffend.¹⁰ *See* 42 Pa.C.S. § 9799.12(8). The Act affords

given its continued use by Pennsylvania Courts. *See, e.g., Com. Dep’t of Transp., Bureau of Driver Licensing v. Clayton*, 684 A.2d 1060, 1064 (Pa. 1996) (applying the doctrine after *Slater*); *Dewey v. Com., Dept. of Transp., Bureau of Driver Licensing*, 997 A.2d 416, 417-18 (Pa. Commw. Ct. 2010) (same).

juveniles no opportunity to present rebuttable evidence and contest such a finding. *See id.* Rather, the Act requires categorical registration as a sex offender for each juvenile adjudicated delinquent of a specified sexual offense. SORNA's categorical approach of labeling juveniles as sex offenders without regard to rebuttal evidence is decisively an irrebuttable presumption.¹¹ *See D.C.*, 879 A.2d at 418. The irrebuttable presumption that the Juveniles are a high risk for recidivism is actionable only if it affects a fundamental interest.

2. Fundamental Interest

In their related argument Petitioners indirectly identify a fundamental right or entitlement which the irrebuttable presumption affects. (*See* Pet'rs' Mem. in Supp. 83-87; Reply 8). The Commonwealth contends that in fact no fundamental right or entitlement is implicated. (Resp't's Mem. in Opp'n 9). However, the implication of Petitioners' fundamental right to reputation is implicit in their irrebuttable presumption argument. (*See* Pet'rs' Mem. in Supp. at 86-88). For, once adjudicated delinquent, a juvenile is presumed a high risk for recidivism and labeled a sex offender as a result. *See* 42 Pa.C.S. §§ 9799.11(a), 9799.13(8). The presumption and finding are intertwined and automatic; moreover, the effect on a juvenile's reputation by being labeled a sex offender is unquestionably severe.¹² Therefore, Petitioners do identify a fundamental interest implicated by the irrebuttable presumption –reputation.

The Pennsylvania Constitution provides for an individual's right to possess and protect his reputation. Pa. Const. art. I, §§ 1, 11. The Pennsylvania Supreme Court has recognized this right as fundamental. *R. v. Com. Dep't of Pub. Welfare*, 636 A.2d 142, 148-49 (Pa. 1994).¹³ For this right to be abridged, Petitioners must be afforded due process of law. *Id.* at 149. Whether the deprivation implicates procedural or substantive due process is a murky distinction. *See Clayton*, 684 A.2d at 1062-64. In fact, the Supreme Court of Pennsylvania has cautioned against limiting the discussion to the precise due process principle. *Id.* at 1064. Petitioners here, however, expressly argue a denial of their *procedural* due process rights. (*See* Pet'rs' Mem. in Supp. 83; Pet'rs' Reply 8). The Court finds that such precision is fitting. Petitioners neither challenge the facts that generated the presumption, their adjudications; nor the General

¹⁰ The Act states that "a paramount governmental interest" for its execution is to protect the public from sexual offenders who "pose a high risk of committing additional sexual offenses." 42 Pa.C.S § 9799.11(a)(4). As indicated above, the Act includes juvenile offenders as sexual offenders and thus the Act bases its paramount interest upon a finding that juvenile offenders pose a high risk of sexual recidivism. *See id.* § 9799.11.

¹¹ The Court acknowledges that a juvenile may petition for removal from the registry, and thus not qualify as a sexual offender, after twenty-five (25) years of compliance. As discussed later, however, this Court refuses to accept that the ability to petition for removal, after twenty-five (25) years, is anything but illusory. Furthermore, if an irrebuttable presumption is found to exist where a statute imposes only a *one (1) year* license suspension because of a distinct characteristic, it follows without question that an irrebuttable presumption exists where a statute imposes a *lifetime* sex offender classification because of a distinct characteristic. *See Clayton*, 684 A.2d at 1062.

¹² As discussed below, a juvenile's inclusion in the registry places his reputation at issue.

¹³ The Court notes that reputational harm alone does not invoke due process for federal purposes. *Com. v. Maldonado*, 838 A.2d 710, 714 (Pa. 2003) (citing *Paul v. Davis*, 424 U.S. 693 (1976)); *Com. v. Mountain*, 711 A.2d 473, 475-75 (Pa. Super. Ct. 1998). However, procedural protections are available under the Pennsylvania Constitution for reputational harm alone. *See Pennsylvania Bar Ass'n v. Com.*, 607 A.2d 850, 855-56 (Pa. Commw. Ct. 1992).

Assembly's authority to classify the juveniles as high-risk sex offenders. Rather, Petitioners assert they were not given the requisite process due to them: *the opportunity* to contest the legislature's presumption that Petitioners are a high risk for sexual recidivism because of their adjudications. (Pet'rs' Mem. in Supp. 86). Indeed, not until later in Petitioners memorandum do they argue a substantive due process violation. (*See id.* at 88-91). The analysis surrounds, therefore, whether the Juveniles were given sufficient procedural due process before they were found to be a high risk for recidivism.

3. Process Due

The requisite process due depends upon the nature of the deprivation at issue. *Clayton*, 684 A.2d at 1064-65. At a minimum, however, due process requires notice and a meaningful opportunity to be heard. *See id.* at 1064 (citing *Bell v. Burson*, 402 U.S. 535, 542 (1971)). Notice is given when it "informs the interested parties of the pending action and [provides them] an opportunity to present objections." *Pennsylvania Bar Ass'n*, 607 A.2d at 856 (citing *Pennsylvania Coal Mining Ass'n v. Ins. Dep't*, 370 A.2d 685, 692-93 (Pa. 1997)). The opportunity to be heard is meaningful where the individual is heard "at a meaningful time and in a meaningful manner." *Id.* at 857. Ultimately, what process is due to the Juveniles is flexible and depends upon what is "appropriate for the situation presented." *See D.C.*, 879 A.2d at 418 (citing *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975)). The Petitioners at bar were given neither notice nor a meaningful opportunity to be heard for whether they are a high risk for recidivism.

The Commonwealth Court's decision in *D.C.* is similar to the case at bar and particularly instructive. There, the Court reviewed a statutory presumption which directed that, without exception, students previously adjudicated delinquent of specified offenses were currently disruptive and thus unfit for the normal classroom. *D.C.*, 879 A.2d at 410, 417-18. The Court found this irrebuttable presumption violated the students' due process rights for several reasons. *Id.* First, the students were never given a meaningful opportunity to contest the finding they were disruptive or unfit for the classroom. *Id.* at 418. For example, at the students' adjudicatory hearing no evidence was taken to determine their classroom fitness since it was never at issue. *Id.* Moreover, the juvenile court lacked the jurisdiction to decide the students' placement upon return. *Id.* And finally, upon returning to school no rebuttal evidence was taken before the student's transfer. *Id.* Thus, the Court held that the failure to consider a student's actual fitness deprived the student of a meaningful opportunity to challenge the disciplinary transfer. *Id.* The Court also rejected that a student's adjudicatory hearing alone provided sufficient due process protections. *See id.* The Court noted that since a students' classroom fitness was never at issue during adjudication, the student was never given notice to defend this finding at the proceeding. *See id.* Therefore, absent a lack of notice, the adjudicatory hearing could not have provided the student a meaningful opportunity to be heard. *Id.* Overall, the Commonwealth Court found the irrebuttable presumption of unfitness deprived the students of due process. *Id.*

The Juveniles at bar received no indication that their admissions would result in a presumption they are dangerous or a high risk for recidivism; thus, they received no meaningful notice. *See D.C.*, 879 A.2d at 418. The Juveniles' lack of notice is evident in SORNA's retroactive application. For example, each Juvenile was found a high risk for recidivism years

after having submitted an admission to a qualifying offense and being adjudicated delinquent. (*Compare* W.E. Adjudication Order, Dec. 15, 2008 *with* W.E. SORNA Colloquy). Accordingly, the Juveniles could not possibly have received notice of their impending risk determination where it was made years after their admissions. Moreover, the fact that the Juveniles were not given notice is implicit in the Act itself. *See* 42 Pa.C.S. § 9799.23(a)-(d). The Act itself makes no provision for notice to a juvenile of such a finding prior to the adjudicatory hearing or thereafter. *See id.* Similarly, although the Act provides some notice for related requirements, the Act states that, without exception, there is no remedy if a court fails to inform the juvenile of such. *Id.* § 9799.23(b)(1). This lack of exception is consistent with the Act's failure to provide notice.

The earliest notice Juveniles could have received is from the SORNA Colloquy. This colloquy, signed by each Petitioner, informs juveniles that they are considered "Juvenile Offenders," subject to onerous registration requirements and penalties for noncompliance. *See* SORNA Colloquy. However, the Juveniles never received the colloquy until years after their admissions. (*See* W.E. Adjudication Order, Dec. 15, 2008; W.E. SORNA Colloquy). Accordingly, the Juveniles had no notice of the potential registration requirements let alone of a finding they are currently dangerous. Moreover, the colloquies given to the Juveniles are significantly less informative than those given to current juveniles. (*Compare* W.E. SORNA Colloquy *with* SORNA Colloquy). Without access to the colloquy, the Juveniles had no foresight as to the implications of their admission.¹⁴ The absence of foresight demonstrates the lack of meaningful notice given to the Juveniles.

The Court is cognizant that the adjudication process itself provides due process protections to juveniles; however, the juveniles at bar were afforded no such process. Each juvenile admitted and was adjudicated delinquent years before SORNA was enacted and before they were found to be a high risk for recidivism. Accordingly, as the Juveniles' risk for recidivism was never at issue in their adjudicatory hearings, the proceedings could not have afforded meaningful due process protections. *See D.C.*, 879 A.2d at 418. After adjudication, the Juveniles still were given no meaningful opportunity to contest the high risk finding. Indeed, at no point were the Juveniles allowed to submit rebuttal evidence contesting the fact that they are a high risk for recidivism. Such rebuttal evidence, as discussed by Petitioners, includes a youth's lack of maturity and rehabilitative potential, or studies that demonstrate the lack of recidivism for juveniles who commit sexual offenses. (Pet'rs' Mem. in Supp., Ex. L 25-31). The Juveniles were given no *meaningful* opportunity, therefore, to contest SORNA's presumption and thus were deprived of the process due to them.¹⁵

¹⁴ *See* Pa.R.J.C.P. 407 cmt. ("Pursuant to paragraph (C), an attorney is to review the written admission colloquy with the juvenile prior to entering the courtroom."). Juveniles who admit to a qualifying SORNA offense submit a SORNA colloquy with the written admission colloquy form which is "recommended . . . to be placed on the record in open court." SORNA Colloquy. In fact, the Juvenile Court Procedural Rules Committee has proposed that Pa.R.J.C.P. 407(C) be amended to include that it be mandatory for a juvenile to review the colloquy before the adjudicatory hearing. (*See* Pet'rs' Mem. in Supp., Ex. N "Proposed SORNA Rules" (Rule 407)). This proposal reflects the severe consequences associated with the Act for which a juvenile should be apprised. (*See id.* at Rule 407 (Because consequences include lifetime registration, a prior reading of the "colloquy is being mandated.")). The Juveniles were not apprised of the consequences of their admissions and thus were completely without foresight as to the same before entering a plea bargain.

Finally, the Commonwealth asserts that Petitioners' due process argument is foreclosed under *Com. v. Mountain*, 711 A.2d at 475-75. A review of *Mountain* reveals, however, that the Commonwealth is mistaken. In *Mountain*, a defendant raised several "inartfully posed challenges" on appeal of his conviction for crimes requiring he register as a sex offender. 711 A.2d at 474-75. Appellant's inartful challenges included an "illogical, vague and confusing" due process argument. *Id.* at 475-76. The Superior Court characterized part of this argument as a procedural due process challenge where appellant contested the imposition of the registration requirements absent a formal hearing. *Id.* at 477-78. The Court found this argument meritless for two central reasons. *Id.* First, because appellant challenged the imposition of registration requirements on adults which had already been held civil, non-punitive, and justified under a public safety rationale. *Id.* And second because appellant failed to identify a fundamental interest for which he was not afforded procedural due process. *Id.* Neither reason precludes the Juveniles' current argument.

To begin, unlike the appellant in *Mountain*, the Juveniles have articulated a competent argument that presents a fundamental interest for which they were deprived due process –the right to possess and protect their reputations. *See Mountain*, 711 A.2d at 474-75. Secondly, the Juveniles challenge not the imposition of the registration requirements but the Act's foundational presumption that they are a high risk for recidivism. Finally, each Juvenile here was adjudicated delinquent years before SORNA's registration requirements were implemented. Conversely, however, appellant in *Mountain* challenged registration requirements which existed before his conviction. *Id.* at 474-75. Therefore, for the above-stated reasons, *Mountain* does not foreclose the Juveniles' irrebuttable presumption argument.¹⁶

Accordingly, based upon the aforementioned, the Court finds in Claim 3 that the irrebuttable presumption that the Juveniles are a high risk for recidivism, denies them due process. As discussed below, however, this holding is limited to only the Petitioners. Finally, because Petitioners raise a closely related due process argument in Claim 4, the Court addresses this argument next and then Petitioners' remaining claims in turn.

¹⁵ The Court also rejects the notion that a juvenile's ability to petition for removal from the registry, and presumably to not constitute a risk as a result, provides a procedural safeguard. The ability to petition for removal is only available after twenty-five (25) years, long after a juvenile's reputation has been irreparably destroyed. Moreover, the stringent registration requirements, which make no exception for noncompliance, therein make the likelihood of compliance nonexistent.

¹⁶ The Court acknowledges the decision by the Supreme Court of the United States in *Connecticut Dept. of Pub. Safety v. Doe*, 538 U.S. 1, 6-7 (2003). There, the Supreme Court rejected an adult sex offender's argument that due process entitled him to a hearing to determine whether he was currently dangerous before his inclusion in a sex offender registry. *Id.* at 6-7. Central to the Court's holding was that the statute operated according to conviction and without regard to an offender's recidivist risk. *Id.* Here, however, the General Assembly states 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) (emphasis supplied). Thus, as an offender's risk of recidivism is material to the statute, due process is required. *See Doe*, 538 U.S. at 6. Additionally, the Court notes that the *Doe* decision addressed only adult sex offenders, who, as discussed above, are fundamentally different than juveniles. *See id.* at 1-8.

B. Due Process: Reputation

Petitioners also contend that, distinct from the recidivist presumption, their classification as sex offenders and inclusion in the registry impedes their reputational rights without due process of law under the Pennsylvania Constitution. (Pet'rs' Mem. in Supp. 88). Petitioners' raise issues of both procedural and substantive due process in their argument. (*See id.* at 88-90). The Commonwealth asserts that the Petitioners' reputations are hindered by their adjudications alone and that, in any case, the General Assembly may, within its powers, limit an individual's reputational rights. (Resp. 9-10). This Court finds, for similar reasons discussed above, that Petitioners were not afforded procedural due process before their inclusion in the registry as sex offenders. *See Pennsylvania Bar Ass'n*, 607 A.2d 855-56. Accordingly, as the Court resolves Petitioners' argument on procedural due process grounds, the Court refrains from addressing Petitioners' substantive due process argument.

Under the Pennsylvania Constitution, the state may not abridge an individual's right to possess and protect his reputation without the protections of due process. *See Simon v. Com.*, 659 A.2d 631, 639 (Pa. Commw. Ct. 1995) (citing *Hatchard v. Westinghouse Broad. Co.*, 532 A.2d 346 (Pa. 1987)); *Pennsylvania Bar Ass'n*, 607 A.2d at 855-56. Where the state action harms an individual's reputation, due process is invoked. *See Pennsylvania Bar Ass'n*, 607 A.2d at 855-56. Here, the state classified the Juveniles as sex offenders, collected extensive personal information, and placed this information in the state's sex offender registry. 42 Pa.C.S. §§ 9799.12, 9799.16(b). Such state action constitutes reputational harm for which due process is required.

1. Reputational Harm

A state maintained registry of records "containing information that might subject a party to negative stigmatization is a 'threat' to that party's reputation." *Pennsylvania Bar Ass'n*, 607 A.2d at 853 (citing *Wolfe v. Beal*, 384 A.2d 1187, 1189 (1978)). This is true even where the records are kept confidential and only available to a limited public. *See id.* at 853-854. For instance, in *Pennsylvania Bar Ass'n*, the Pennsylvania Bar Association challenged a statute which required the reporting of suspected fraudulent insurance claims, including the names of the attorneys associated with the claims. *Id.* On review the Court found that a serious threat to the attorneys' reputations existed although no attorney had reported actual harm from being on the list and even though only specified entities could access the confidential information. *Id.* at 854, 856. The Court reasoned that the attorney's inclusion on the list would inevitably lead to the attorneys' reputational harm based on suspicion alone. *Id.* at 854.

The Juveniles' inclusion in the state-maintained registry of sexual offenders constitutes more than a serious threat to the Juveniles' reputations. *See Pennsylvania Bar Ass'n*, 607 A.2d at 854-56. Although the Juveniles offer no specific instances of harm, the existence of their names and personal information in Pennsylvania's sex offender registry alone threaten their reputations

through negative stigmatization. *See id.* Carrying the label of a sex offender itself is a heavy burden. (*See* Pet'rs' Mem. in Supp., Ex. L at 4-5). For a juvenile the burden is heavier because unlike an adult, a juvenile has the ability to rehabilitate his reputation. (*Id.* at 25-30). Under this label, however, lifetime registration forecloses any opportunity a juvenile would have had for rehabilitation. (*See id.* 25-30, 50-52). It also forecloses a juvenile's opportunities in areas of employment, education, and housing. (*Id.* at 64-74). Moreover, the Act is founded on its ability to collect and disseminate a juvenile's information, thus showing that a juvenile's reputation is always at issue. *See* 42 Pa.C.S. § 9799.11(a)(1)-(6). Finally, it is of little consequence that only a limited public may access a juvenile's information because the Act places no limit on republication of a juvenile's information. *See id.* § 9799.18(4)-(6). The state-induced threat to the Juveniles' reputations, invokes procedural due process protections. *See Pennsylvania Bar Ass'n*, 607 A.2d at 856.

2. Process Due

To determine what process is due, a court must balance an individual's interest in protecting his reputation with that of the government in proceeding without procedural safeguards. *Pennsylvania Bar Ass'n*, 607 A.2d at 856 (citing *Pennsylvania Coal Mining Ass'n*, 70 A.2d at 689). A court generally must consider three factors: (1) the private interest affected, (2) the risk of erroneous deprivation and value of additional process, and the (3) government's interest involved. *In re Merlo*, 17 A.3d 869, 872 (Pa. 2011) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)); *D.C.*, 879 A.2d at 417. The Juveniles have a distinct interest in protecting their reputations from their classification as sex offenders and their placement on the sex offender registry. (Pet'rs' Mem. in Supp. 88-91). Conversely, the Commonwealth has a paramount interest in protecting the public from recidivist sexual offenders. 42 Pa.C.S. § 9799.11(a)(4); (Resp. 10).¹⁷ With these factors in mind the Court finds, for similar reasons as stated above, that the Juveniles were not afforded sufficient procedural due process.

The risk of erroneous deprivation is severe, the value of additional process is significant, and any addition presents only a minimal burden for the Commonwealth. The Commonwealth's stated interest in burdening the Juveniles' reputations is to protect the public from recidivist sexual offenders. 42 Pa.C.S. § 9799.11(a)(4); (Resp. 10). However, Petitioners offer compelling evidence that shows few juveniles classified as sexual offenders present an actual risk to the public. (*See* Pet'rs' Mem. in Supp. Exs. H, L). Moreover, such classification permanently injures a juvenile's reputation and thus forecloses any rehabilitative potential a juvenile may have had. (*Id.*). Therefore, the Juveniles' classification as sexual offenders based solely upon their convictions, presents a serious risk of error that will deprive juveniles of their reputations.

¹⁷ The Court notes that the Commonwealth has a de facto interest in the rehabilitation of juveniles. *See J.M.*, 42 A.3d at 350-51.

Affording juveniles even minimal process such as notice would add significant value. *See Pennsylvania Bar Ass'n*, 607 A.2d at 856. For instance, allowing a juvenile to review a SORNA Colloquy **before** tendering an admission can have a significant impact. Access to the colloquy would enable a juvenile to preview the full weight of his admission, such as inclusion in the registry and classification as a sexual offender. (*See* SORNA Colloquy at 1-3). The importance of such foresight cannot be understated. (*See, e.g.*, Pet'rs' Mem. in Supp., Ex. N. "Proposed SORNA Rules" at Rule 407 (pending rule requiring juvenile to review SORNA Colloquy before adjudicatory hearing and for the Judge to confirm the same before finding the admission is "knowingly, intelligently, and voluntarily made")). The pending amendment to Pa.R.J.C.P. 407 demonstrates the importance of a juvenile's ability to review the colloquy before proceeding with his adjudication.¹⁸ (*See id.*). The Juveniles had no opportunity to review the SORNA Colloquy before tendering their admissions. (*Compare* W.E. Adjudication Order, Dec. 15, 2008 *with* W.E. SORNA Colloquy). Accordingly, the Juveniles were deprived of valuable process before their inclusion in the registry and classifications as sexual offenders.

This Court cannot envision how allowing juveniles to access the SORNA Colloquy would burden the Commonwealth. In fact, the pending amendment to Rule 407 of the Rules of Juvenile Court Procedure suggests any burden does not exist. The Court finds, therefore, that the Juveniles' classification as sexual offenders and their inclusion in the Pennsylvania sex offender registry, deprive them of their right to possess and protect their reputations without due process of law.

As discussed next, this holding is limited to the Juveniles before the Court.

C. Juveniles' Claims One, Two, and Five

For reasons stated above, the Court finds the Petitioners were denied due process as addressed in Petitioners' Claims 3 and 4. However, what process is owed is flexible and depends on the particulars of each individual's case. *See D.C.*, 879 A.2d at 418 (citing *Goss*, 419 U.S. at 583-84). As Petitioners present only the facts bearing on their own admissions, the Court declines to address the Act's retroactive application to other juveniles.

The Court also reserves judgment as to the Act's prospective application to juveniles who have advance notice that their admissions will result in a finding they are a high risk for recidivism or that their reputations will be affected. At this point, it is sufficient to hold that the Petitioners alone were not given adequate process. *See Harris v. Rendell*, 982 A.2d 1030, 1035-

¹⁸ The Court stops short of recommending that juveniles be classified as sexual offenders only after a Juvenile Court Judge makes an individualized, risked-based determination. However, the Court has serious reservations of such findings absent a Juvenile Court Judge's input. The Court notes the unique role Juvenile Court Judges are called to hold in the arena of Juvenile proceedings. Moreover, this Court notes that an individualized or risked-based approach does not foreclose the Commonwealth from achieving substantial compliance with the Adam Walsh Act. *See* The Nat'l Guidelines for Sex Offender Notification & Registration, 73 Fed. Reg. 38030, 38037-038 (July 2, 2008).

I certify this document to be filed
in the Lancaster County Office of
the Clerk of the Courts.



A handwritten signature in black ink, appearing to read "Joshua G. Parsons".

Joshua G. Parsons
Clerk of the Courts

ATTEST: _____

BY THE COURT,

A handwritten signature in black ink, appearing to read "David R. Workman".

DAVID R. WORKMAN, JUDGE

Copies to:

Clerk of Courts

Marsha L. Levick, Esq., Juvenile Law Center, 1315 Walnut Street, Suite 400, Philadelphia PA
19107

Riya Saha Shah, Esq., Juvenile Law Center, 1315 Walnut Street, Suite 400, Philadelphia PA
19107

Amber Czerniakowski, Assistant District Attorney, 50 North Duke Street, Lancaster PA 17602
The Pennsylvania State Police, 1800 Elmerton Avenue, Harrisburg PA 17110