JOSEPH P. GREEN, JR. *Attorney for Defendant*
Atty I. D. No. 32604
138 West Gay Street
West Chester, PA 19380
Telephone: (610) 692-0500

COMMONWEALTH OF PENNSYLVANIA	: IN THE MONTGOMERY COUNTY
	: COURT OF COMMON PLEAS
vs.	
	: CRIMINAL DIVISION
WILLIAM H. COSBY, JR.	: No. CP-46-CR-0003932-2016

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR DECLARATION OF UNCONSTITUTIONALITY

Defendant offers this Memorandum to support his Motion to bar the application of SORNA II, Subchapter I of Chapter 97 of the Judicial Code (Sentencing). Subchapter I, titled *Continued Registration of Sexual Offenders*, was enacted to apply exclusively retroactively, by Act 10 of 2018, as amended by Act 29 of 2018 (enacted June 12, 2018). The Commonwealth contends that, as applied to this defendant, Subchapter I retroactively requires lifetime registration, reporting and counseling, and purports retroactively to authorize the Court to deem Mr. Cosby a sexually violent predator.

We contend that the retroactive application of Subchapter I's lifetime registration scheme constitutes prohibited *ex post facto* punishment. We also contend that the retroactive application of Subchapter I's sexually violent predator scheme constitutes *enhanced, mandatory minimum* punishment that may not constitutionally be applied without prior notice, proof beyond a reasonable doubt to the satisfaction of a jury, and

confrontation. Finally, we contend that the application of Subchapter I unconstitutionally impairs the defendant's state constitutional fundamental right to reputation.

Subchapter I, also known as SORNA II, was enacted in 2018 in a legislative effort to revive the sexual offender scheme that was declared unconstitutional, on *ex post facto* grounds as to offenses committed prior to 2012, in *Commonwealth v. Muniz,* 164 A.3d 1189 (Pa. 2017) and later in *Commonwealth v. Butler*, 2017 PA Super 344, 173 A.3d 1212 (Pa. Super. 2017). The legislature claimed to have fixed the constitutional defects articulated in these decisions by enacting Subchapter I. As will be seen here, the constitutional deficiencies have not been eliminated.

The Commonwealth here argues from dated, discredited sources about the risk of recidivism. See, e.g., *Response*, at 2-3, claiming that "Sex offenders" are also "much more likely than any other type of offender to be rearrested for a new rape or sexual assault." citing, inter alia, *McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality opinion). In *Commonwealth v. Muniz*, the Court noted that, although the General Assembly asserted a legislative finding that "[s]exual offenders pose a high risk of committing additional sexual offenses," there are "contrary scientific studies," and "we note there is by no means a consensus." This Court should decide the constitutionality of Subchapter I, as applied to this defendant, on the facts and the law, and not on appeals to partisan emotion.

I. FACTUAL BACKGROUND AND LEGISLATIVE SCHEME

Mr. Cosby was found guilty of 3 counts of Aggravated Indecent Assault in violation

of 18 Pa.C.S. § 3125(a). The offenses were charged to have occurred in 2004, and were initiated by Criminal Complaint filed on or about December 30, 2015.

After the verdict was returned, on Motion of the District Attorney, the Court ordered an SOAB assessment on April 27, 2018. That assessment recommends that the defendant be deemed to be a sexually violent predator. When the District Attorney filed a Praecipe requesting the scheduling of an SVP hearing, the defendant filed his Motion seeking a declaration that Subchapter I is unconstitutional as applied to Mr. Cosby, and requesting that no SVP hearing be held. The Commonwealth has filed a response, and the defense here supports its Motion and responds to the Commonwealth's Opposition.

In *Commonwealth v. Muniz,* 164 A.3d 1189 (Pa. 2017), the Supreme Court held that SORNA, Subchapter H of the Sentencing Code, 42 Pa.C.S. Chapter 97, cannot be applied retroactively to offenses committed on or before December 20, 2012. The linchpin of that decision is the conclusion that SORNA's registration provisions are punitive.

Pennsylvania courts have had occasion to construe and invalidate sex offender registration laws on a number of occasions over the years. In *Commonwealth v. Williams*, 557 Pa. 285, 733 A.2d 593 (1999) (*Williams I*), the Court held that the SVP provisions of Megans Law I were unconstitutional because they presumed from conviction that an offender was a sexually violent predator, and provided for an increase in the available maximum sentence to life imprisonment for any such SVP. Four years later, in *Commonwealth v. Williams*, 832 A.2d 962, 984, 574 Pa. 487, 524-525 (Pa. 2003) (*Williams II*), the Court held that the Megan's Law II registration, notification, and

counseling requirements are not unconstitutionally punitive.[1]

After a series of enactments and amendments of Pennsylvania law, SORNA was enacted in 2011 in response to the federal Adam Walsh Child Protection and Safety Act of 2006, Public Law 109–248, 42 U.S.C. §§ 16901–16991. The registration provisions of SORNA were then deemed punitive in *Commonwealth v. Muniz,* 164 A.3d 1189 (Pa. 2017).

In *Commonwealth v. Butler*, 2017 PA Super 344, 173 A.3d 1212 (Pa. Super. 2017), *Pet.All.App. Granted*, No. 47 WAL 2018, (July 31, 2018), the Superior Court held that the SVP procedures contained in SORNA extended the period of registration, and were likewise punitive, and concluded that 42 Pa.C.S. § 9799.24(e)(3), a portion of SORNA's framework for designating a convicted defendant as a Sexually Violent Predator ("SVP"), violates the federal and state constitutions. [2] In her opinion in *Commonwealth v. Butler*, supra, Judge Olson accurately described the *Muniz* analysis as a "sea change." *Commonwealth v. Butler*, supra, 173 A.3d 1215

In *Commonwealth v. Butler*, supra, the Superior Court held that the SVP

---

[1] The Court specifically held as follows:

> In the absence of competent and credible evidence undermining the relevant legislative findings, Megan's Law's registration, notification, and counseling provisions constitute non-punitive, regulatory measures supporting a legitimate governmental purpose. Therefore, these measures are presently upheld against Appellees' claim that they result in additional criminal punishment.

Commonwealth v. Williams, 832 A.2d 962, 986, 574 Pa. 487, 528 (Pa. 2003).

[2] Section 9799.24(e)(3) authorizes the trial court to find that a defendant qualifies as an SVP based on "clear and convincing evidence."

designation process was unconstitutional because that process permitted a Judge, and not a jury, to find the facts which increased punishment by clear and convincing evidence. The *Butler* Court observed that the SVP designation increased that defendant's maximum term of registration. The *Butler* Court recognized that the Supreme Court in *Commonwealth v. Muniz* had concluded that the registration itself was punitive. The *Butler* Court therefore concluded that the extension of registration occasioned by an SVP finding violated the rules announced in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L. Ed. 2d 314 (2013), which require that any fact which increases the statutory maximum punishment or the mandatory minimum punishment must be treated as an element that must be submitted to the jury and proved beyond a reasonable doubt. See also, *Commonwealth v. Hopkins*, 632 Pa. 36 , 117 A.3d 247 (2015) (invalidating judicially determined mandatory minimum sentences).

The *Butler* Court concluded that there is no "legitimate path forward for undertaking [SVP] adjudications pursuant to Section 9799.24. As such, trial courts may no longer designate convicted defendants as SVPs, nor may they hold SVP hearings, until our General Assembly enacts a constitutional designation mechanism." 173 A.3d 1218, n. 12 and accompanying text. The legislature has now responded with Subchapter I of Chapter 97 (Sentencing) of the Judicial Code, applicable to offenses which occurred prior to December 20, 2012.

II. QUESTIONS PRESENTED

1. *Is Subchapter I an Unconstitutional Ex Post Facto Law That Retroactively Punishes Offenders, Including Those Deemed Sexually Violent Predators?*

2. *Does Subchapter I and its Related Components Violate State and Federal Rights to Substantive Due Process and to Trial by Imposing Lifetime Punishment upon a Person Deemed a Sexually Violent Predator Without Proof Beyond a Reasonable Doubt Established to the Satisfaction of a Jury?*

3. *Does Subchapter I Impose an Unconstitutional Burden on the Right to Reputation Protected by the Commonwealth Constitution?*

III. ARGUMENT

1. ***Subchapter I Is an Unconstitutional Ex Post Facto Law That Retroactively Punishes Offenders, Including Those Deemed Sexually Violent Predators.***

Subchapter I operates retroactively in an effort to punish, shame and control offenders in violation of their state and federal constitutional rights. Subchapter I and its related provisions still constitute retroactive punishment that violate the state and federal ex post facto clauses.

In *Commonwealth v. Muniz*, supra, the Court held that retroactive application of SORNA's registration provisions constituted unconstitutional *ex post facto* punishment. The 2018 amendments codified as Subchapter I also constitute punishment, and are only applied retroactively.[3] The requirements of Subchapter I, including the SVP procedures

---

[3] Subchapter I only applies to offenses committed before December 20, 2012. Act 29-2018, provides in Section 21(2) that the reenactment or amendment of 18 Pa.C.S. § 4915.2 and 42 Pa.C.S. Ch. 97 Subch. I [42 Pa.C.S.A. § 9799.51 et seq.] shall apply to:

> "(i) An individual who committed an offense set forth in 42 Pa.C.S. § 9799.55 on or after April 22, 1996, but before December 20, 2012, and whose period of

invoked by the District Attorney here, remain so punitive in effect that they must be deemed prohibited retroactive punishment.

A. Legislative Intent

The analysis of sexual offender registration schemes begins with an analysis of legislative intent. The General Assembly states that it does not intend Subchapter I to be punitive, but then states punitive purposes and imposes punitive effects. Section § 9799.51(b) declares the General Assembly's intention in enacting Subchapter I to be (1) the protection of the public by notification regarding offenders who are about to be released from custody, (2) the protection of the public by ensuring the release of information about sexually violent predators and offenders , (3) address *Commonwealth v. Wilgus*, 975 A.2d 1183 (2009), by requiring sexually violent predators and offenders without a fixed place of habitation or abode to register, and (4) address the Pennsylvania Supreme Court's decision in *Commonwealth v. Muniz*, and the Pennsylvania Superior Court's decision in *Commonwealth v. Butler*.

The General Assembly in Subchapter I has stated its non-punitive intent. However, it has enacted a punitive scheme. While Section 9799.51(b)(1) claims a protective purpose regarding "offenders who are about to be released from custody,"

---

registration as set forth in 42 Pa.C.S. § 9799.55 has not expired.

Act 10-2018 of 2018, provides in Section 20(2) that the addition of 18 Pa.C.S. § 4915.2 and 42 Pa.C.S. Ch. 97 Subch. I [42 Pa.C.S.A. § 9799.51 et seq.] shall apply to:

> (i) An individual who committed an offense set forth in 42 Pa.C.S. § 9799.55 on or after April 22, 1996, but before December 20, 2012, and whose period of registration as set forth in 42 Pa.C.S. § 9799.55 has not expired.

Subchapter I requires updated address changes, updated employment changes, updated vehicle changes, etc., for extended periods of time and with no relation to the release from custody. Section 9799.51(b)(2) authorizes Internet publication, and active, direct notification in the case of offenders deemed sexually violent predators, but without any limitation on the time of notification. This scheme presents the same life-time registration and notification scheme as did SORNA I. It is fair to say that the legislature has claimed an intention to enact a civil registration scheme.

2. Punitive Purpose and effect

However, the Court must now conduct an analysis of the factors identified in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963), to determine whether Subchapter I is sufficiently punitive in effect to overcome the General Assembly's claimed non-punitive purpose. *Commonwealth v. Muniz*, supra, 164 A.3d 1210. An analysis of the *Mendoza- Martinez* factors demonstrates that Subchapter I remains so punitive in effect that the retroactive application of its provisions violates the defendant's state and federal constitutional rights to be free from *ex post facto* punishment. We address these factors *seriatim*:

i. Whether the Statute Involves an Affirmative Disability or Restraint

Like SORNA, Subchapter I requires quarterly in-person appearances for persons deemed sexually violent predators, and annual in-person registration for others. The Supreme Court held in *Commonwealth v. Muniz* that "in-person reporting requirements, for both verification and changes to an offender's registration, to be a

direct restraint . . . and hold this factor weighs in favor of finding SORNA's effect to be punitive." 164 A.3d 1211.

Pursuant to Subchapter I, persons deemed to be sexually violent predators are required to appear in-person quarterly, and more frequently when their residence, counseling, employment, vehicle, etc. changes. 42 Pa.C.S. § 9799.60(a)(Quarterly appearance for verification of residence and counseling by sexually violent predators). See also, 42 Pa.C.S. § 9799.56 (Registration procedures and applicability) (Three day registration window for changes in residence, employment, enrollment and/or travel). These registration procedures for persons deemed sexually violent predators are more punitive than the registration procedures found punitive in *Commonwealth v. Muniz.*

The Commonwealth argues here that other reporting requirements have changed in Subchapter I[4], but these changes are not material or relevant to the analysis here. First, for persons deemed sexually violent predators, Subchapter I still requires quarterly verification. 42 Pa.C.S. § 9799.60(a) (a sexually violent predator shall appear quarterly). Second, the "changed information" requirement in Subchapter I requires that a registrant "inform" the state police, 42 Pa.C.S. § 9799.56(a)(2), rather than requiring the in-person appearance specifically prescribed in Subchapter H, 42 Pa.C.S. § 9799.25 (Verification by sexual offenders). However, this ability to "inform" rather than "appear"

---

[4] The Commonwealth argues in its *Response*, at 15, that Act 29 has substantially reduced the requirements of in-person reporting for most offenders. The Commonwealth neglects to point out that it seeks a designation that Mr. Cosby is a sexually violent predator, requiring 4 PSP visits per year, the same as the Tier III offense reporting requirements addressed in *Commonwealth v. Muniz*, as well as 12 counseling visits per year that were not required in *Muniz.*

applies only in Subchapter H, applicable to offenses committed on or after December 20, 2018.

The Commonwealth also argues that the reporting requirements of Subchapter I are somehow rendered non-punitive because, after 25 years of reporting, an offender may petition for exemption from the registration requirements pursuant to 42 Pa.C.S. § 9799.59. *Response*, at 15. This relief is available "at the discretion of the court" and "only upon a finding of clear and convincing evidence that exempting the petitioner from a particular requirement or all of the requirements of this subchapter is not likely to pose a threat to the safety of any other person." 42 Pa.C.S. § 9799.59(a)(5). This provision provides no meaningful assurance of relief, and provides very little comfort to this 81 year-old defendant.

There are substantial additional punitive effects applicable to Subchapter I offenders deemed to be sexually violent predators. First, there is the monthly counseling requirement imposed on persons deemed to be sexually violent predators. 42 Pa.C.S. § 9799.70 (Counseling of sexually violent predators).This requirement for at-least monthly attendance at counseling ***for life*** is monitored in person quarterly by the State Police, and also by the Board.[5] The failure to attend this counseling constitutes a crime. The counseling requirement imposed on persons deemed to be sexually violent predators manifestly constitutes an "affirmative disability or restraint" in precisely the terms

---

[5] The Court in *Williams II*, stated that the svp counseling requirement in Megans Law II did not impose an "affirmative disability or restraint." *Commonwealth v. Williams,* 574 Pa. 487, 508-509, 832 A.2d 962, 974-975 (2003). It is apparent that this statement in *Williams II* can not survive the analysis in *Commonwealth v. Muniz*.

utilized in *Commonwealth v. Muniz*.

Second, the designation as a sexually violent predator under Subchapter I has substantial adverse effects, and imposes an "affirmative disability or restraint," on a person's ability to maintain a relationship with children, even in cases where there was never the hint of misconduct or dangerousness regarding children. Act 10-2018 enacted, and Act 29-2018 (in Section 3) re-enacted, a definition of child abuse that includes leaving a child with a person who has been designated a sexually violent predator or a life-time registrant. See, 23 Pa.C.S. § 6303(b.1)(8)(vii). This has the effect of discouraging a parent who is designated an svp/life-registrant, from caring for their child and/or from leaving a child with a grandparent who is an svp/life-registrant. This provision has the effect of preventing parents from having contact with their children, and prevents grandparents from having contact with grandchildren or acting as caretakers of/for their grand-children, regardless of whether the underlying sexual offense had anything to do with children.

If a parent is deemed an SVP or life-registrant, or a parent permits an svp/life-registrant grandparent to care for a child, the parent is subject to a finding that s/he has engaged in "child abuse" under the Protective Services Act, without a hint or suggestion of improper conduct toward a child. For the defendant here, an SVP determination would substantially interfere with his relationship with his grandchildren, without any suggestion that he had ever endangered a child. This is also manifestly punitive in this case where no misconduct regarding children has ever been alleged, and creates an

unsupported but irrebuttable presumption of dangerousness.

In summary, the application of Subchapter I to this defendant, and a determination that he is a sexually violent predator, would manifestly impose punitive affirmative restraints and disabilities, following the authority of *Commonwealth v. Muniz*.[6]

ii. Whether the Sanction Has Been Historically Regarded as Punishment

The active[7] and passive internet notification provisions accompanying a determination that this defendant qualifies as a sexually violent predator are precisely the sort of shaming punishments found to be punitive in *Commonwealth v. Muniz*.

In addition, the quarterly in-person reporting and monthly counseling requirements imposed on persons deemed to be sexually violent predators are similar to a mandatory meeting with a probation officer.[8] As in *Commonwealth v. Muniz*, the effects of the registration, reporting and counseling provisions here weigh in favor of

---

[6] In the real world, an SVP designation is likely to impose secondary disabilities in finding and keeping housing, employment, and schooling, in traveling out of state, and increases the likelihood the offender may be subject to violence and adverse social and psychological impacts. In addition, the SVP regulates residence in a "group based home." 42 Pa.C.S. § 9799.55(d).

[7] The active notification of neighbors and others is codified in Subchapter I at 42 Pa.C.S. § 9799.62. The procedures applicable to a person deemed a sexually violent predator imposes more public shaming through active notification, including active notification of neighbors within 5 days pursuant to Section 9799.62(b)(1).

[8] Like probation, the quarterly monitoring and counseling provisions applicable to persons deemed to be sexually violent rest on the assumption that the individual requires supervision, require regular in–person appearances, and are enforced by punitive sanctions upon failure to comply.

finding SORNA's effect to be punitive.

The Commonwealth in its *Response* suggests that the availability of the illusory exemption process after 25 years of shaming and reporting somehow makes Subchapter I less punitive. *Response*, at 18. The availability of this illusory remedy after 100 quarterly visits to PSP and at least 300 monthly counseling sessions does not change the conclusion required by *Muniz* that the retroactive application of the sexually violent predator determination is punishment that is prohibited by the *ex post facto* clauses.

The Commonwealth here continues to rely on the now-discredited decisions in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), and *Williams II*, *Commonwealth v. Williams*, 832 A.2d 962, 984, 574 Pa. 487, 524-525 (Pa. 2003). The Commonwealth seems unwilling to accept the "sea-change" wrought by *Commonwealth v. Muniz* and its progeny.

In *Commonwealth v. Muniz*, the Court noted that the United States Supreme Court's earlier decision in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003), was "decided in an earlier technological environment." The *Muniz* Court then quoted the concurring opinion of now-Justice Donohue in *Commonwealth v. Perez*, 2014 PA Super 142, 97 A.3d 747, 765-766 (Pa.Super. 2014), to explain why the Pennsylvania Supreme Court chose not to follow the United States Supreme Court's earlier decision in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003):

> The environment has changed significantly with the advancements in technology since the Supreme Court's 2003 decision in *[Smith v. Doe]*. 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.

Commonwealth v. Muniz, supra, 48-49, quoting *Commonwealth v. Perez*, 97 A.3d at 765-66 (Donohue, J., concurring).

The active notification required for offenders designated as sexually violent predators compels the conclusion that the reporting, the counseling and the shaming sanctions applied by Subchapter I have historically been regarded as punishment.

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

The Supreme Court held in *Commonwealth v. Muniz*, that this factor is "of little significance" in this inquiry. We note, however, that Subchapter I is applicable here only because the jury found that defendant had committed Aggravated Indecent Assault, which requires proof that the defendant acted with scienter, i.e. " for any purpose other than good faith medical, hygienic or law enforcement procedures," pursuant to 18 Pa.C.S. § 3125(a).

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

The Supreme Court found in *Commonwealth v. Muniz* that SORNA had a deterrent purpose and effect, and a retributive purpose and effect, furthering the traditional aims of punishment:

> 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.

Commonwealth v. Muniz, 164 A.3d 1189, 1216. The Commonwealth conceded the deterrent purpose of SORNA in *Muniz*, and must do so here where it seeks a determination that the defendant is a sexually violent predator.

The Commonwealth argues however in its *Response,* at 21, that Subchapter I is not punitive because Act 29 . . . "has substantially reduced the in-person reporting requirements for all offenders." This contention ignores the fact that the Commonwealth has invoked the procedures to label the defendant a sexually violent predator, and the frequent quarterly PSP reporting and monthly counseling sessions that attend that determination. The Commonwealth then asks the Court to apply *Williams II* and *Smith v. Doe,* to ignore *Muniz* and to ignore the sea change.

This Court does not have the luxury, indulged by the Commonwealth, to ignore the Pennsylvania Supreme Court's most recent holdings.

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

The Court applied "little weight" to this factor in *Commonwealth v. Muniz,* 164 A.3d 1216.

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

This factor weighs in favor of finding that Subchapter I is non-punitive, given the

stated purpose of protecting the public. The *Muniz* court noted, as should this Court, that there are conflicting studies on recidivism, and that "there is by no means a consensus.". "[T]here 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." 164 A.3d 1217.

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

SORNA was deemed to be excessive in *Muniz*, and Subchapter I and its provisions for determination that a person shall be treated as a sexually violent predator, should be deemed to be excessive here.

The Commonwealth contends that the "possibility" of removal from the registry after 25 years renders Subchapter I no longer excessive. As we have argued infra, this option for the possibility of removal is illusory at best. After a term of 25 years, a lifetime registrant, including a person deemed to be a sexually violent predator, may petition for removal. 42 Pa.C.S. § 9799.59 The person must prove to a court by "clear and convincing evidence" "that he is not likely to pose a threat to the safety of any other person." 42 Pa.C.S. § 9799.59(a)(2)-(5).

Under this statute, the petitioner bears the burden of proving a negative. Not only must he show he is not at risk of committing a new sexual crime, but that he is not a danger in ***any*** respect. What degree of risk is tolerable is not specified and, therefore, because no person is ever at an absolute zero risk, such a showing is impossible. Finally, even if a registrant is somehow eligible and makes a sufficient showing, the statute gives

the trial court unlimited "discretion" to exempt, or not to exempt, the registrant from the requirements. 42 Pa.C.S. § 9799.59(a)(5).

Here it should be noted that, if the defendant were deemed to be a sexually violent predator, he would have substantial interference with his relationships with children and grandchildren. Because he has not been charged, let alone convicted, of any misconduct regarding children, these "child abuse" provisions are manifestly excessive.

Finally, the Commonwealth returns to rely on its two best authorities, *Williams II* and *Smith v. Doe*. See, *Response*, at 24. The trouble is that this Court cannot rely on earlier, discredited decisions in applying the *Mendoza-Martinez* factors, and the *ex post facto* analysis. The statute that the Commonwealth seeks to have applied to the defendant here, including his designation as a sexually violent predator, is by any measure excessive when applied to an 81 year old blind man.[9]

viii. Balancing of Factors

As in *Commonwealth v. Muniz*, the balancing of the *Mendoza-Martinez* factors here compel the conclusion that the Subchapter I registration scheme and the sexually violent predator provisions contained therein were intended to be applied retroactively here and are so punitive in effect that they violate the defendant's state and federal constitutional rights to be free from the effects of *ex post facto* laws.

---

[9] It should be noted here that the Commonwealth argued in *Muniz* that the lifetime registration requirements were not excessive because they did not require monthly counseling sessions monitored by the Sexual Offenders Assessment Board. 164 A.3d 1217-1218. The Commonwealth seeks to impose those requirements here, without any opportunity for waiver or exemption. That provision is also excessive.

2. Subchapter I and its Related Components Violate State and Federal Rights to Substantive Due Process and to Trial by Imposing Lifetime Punishment upon a Person Deemed a Sexually Violent Predator Without Proof Beyond a Reasonable Doubt Established to the Satisfaction of a Jury.

Subchapter I improperly permits the designation of a person as a sexually violent predator in violation of the state and federal constitutional rights to due process and to trial by jury. Because the punitive effect of the SVP determination extends the maximum period of punishment from the statutory maximum term of ten years to a lifetime of punitive counseling and probation monitored by the state police and the Board, that determination must meet the due process requirements set out in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 186 L. Ed. 2d 314 (2013). These decisions require that any fact which increases the statutory maximum punishment or the mandatory minimum punishment must be treated as an element that must be submitted to the jury and proved beyond a reasonable doubt. See also, *Commonwealth v. Hopkins*, 632 Pa. 36 , 117 A.3d 247 (2015) (invalidating judicially determined mandatory minimum sentences).

The SVP determination increases both the maximum and the minimum punishment from the statutory maximum for the offense of Aggravated Indecent Assault in violation of 18 Pa.C.S. § 3125(a) (a felony of the Second Degree), which is Ten years pursuant to 18 Pa.C.S. § 1103(2). Subchapter I requires a mandatory term of lifetime probation, supervised by the state police and the Sexual Offenders Assessment Board, and subject to the requirements of quarterly in-person reporting and at-least monthly counseling. This enhanced term of lifetime probation increases the maximum sentence

and also creates a minimum mandatory sentence.

We have argued, supra, that all of Subchapter I is punitive, and therefore not properly made retroactive. What is abundantly clear, and beyond rational disagreement, is that the SVP procedures and requirements of Subchapter I are punitive, and may not be applied retroactively. We argue here that these punitive provisions cannot be applied even prospectively without proper due process protections, including charging notice prior to trial, confrontation at trial, proof beyond a reasonable doubt at trial and fact-finding by jury, not a Judge.

3. Subchapter I Imposes an Unconstitutional Burden on the Right to Reputation Protected by the Commonwealth Constitution

The Commonwealth Constitution protects a fundamental right to reputation. *In re J.B.*, 630 Pa. 408, 107 A.3d 1, 16 (2014) (collecting cases). Article 1, Section 1, includes in the "Inherent Rights of Mankind" the "inherent and indefeasible" right to protect one's reputation. Article 1, Section 11, guarantees a right to remedy an injury done to one's reputation.

The requirement for lifetime registration, and authorization for a designation as a sexually violent predator, and its accompanying active notification provisions, violate that right to reputation. The Pennsylvania Supreme Court held in *In the Interest of J.B.*, supra, 107 A.3d 1, 16-17, 630 Pa. 408, 433-434 (2014) that SORNA registration requirements, premised upon the stated legislative presumption that all sexual offenders pose a high risk of recidivating, and that many offenders pose that risk for the rest of their natural life, impinge upon juvenile offenders' fundamental right to reputation

as protected under the Pennsylvania Constitution. That decision applies with equal weight here where the only purported right to attack that "presumption" is the illusory 25 year waiver provision.

IV. CONCLUSION

Subchapter I is unconstitutional because it purports to authorize retroactive imposition of punishment, and because it impairs the state constitutional right to reputation with an irrebuttable presumption. The Court must declare the statute unconstitutional, and refuse to hold a hearing on the Commonwealth's request to deem Mr. Cosby a sexually violent predator.

Respectfully submitted,
law offices of
JOSEPH P. GREEN, JR.
a professional corporation

Dated: 8/9/2018

By: _____
Joseph P. Green, Jr.

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: August 9, 2018
Attorney ID No. 32604

By: _____
Joseph P. Green, Jr.

JOSEPH P. GREEN, JR. *Attorney for Defendant*
Atty I. D. No. 32604
138 West Gay Street
West Chester, PA 19380
Telephone: (610) 692-0500

COMMONWEALTH OF PENNSYLVANIA	: IN THE MONTGOMERY COUNTY
	: COURT OF COMMON PLEAS
vs.	
	: CRIMINAL DIVISION
WILLIAM H. COSBY, JR.	: No. CP-46-CR-0003932-2016

CERTIFICATE OF SERVICE

This is to certify that in this case, a true and correct copy of the within document has been served upon the following persons, by the following means and on the date stated:

Name:	**Means of Service:**	**Date of Service:**
Kevin R. Steele, Esquire District Attorney's Office PO Box 311 Norristown, PA 19404-0311	First Class mail & Electronic service	August 9, 2018

Respectfully submitted,
law offices of
JOSEPH P. GREEN, JR.
a professional corporation

Dated: 8/9/2018

By: _____
Joseph P. Green, Jr.