

# ***DEFENDER ASSOCIATION OF PHILADELPHIA***

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February 5, 2018  
Pennsylvania Senate Judiciary Committee  
Harrisburg, Pennsylvania

## **Testimony of**

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Good morning Chairmen Greenleaf and Leach and members of the Senate Judiciary Committee. My name is Aaron Marcus. I am an assistant defender with the Defender Association of Philadelphia. I have been studying, lecturing on, and litigating matters related to Pennsylvania's sexual offender registration schemes for more than 6 years. This issue is of great importance to this Commonwealth and I appreciate the opportunity to speak with you about registration and notification in Pennsylvania, and the proposed bill, H.B. 1952.

You have asked two things: the effect of the Pennsylvania Supreme Court's July 2017 decision in *Commonwealth v Muniz*; and whether sexual offender registration and notification (or "SORN") programs effectively prevent sexual violence. I will answer both questions, but I think we should address the second question first.

In order to understand what *Muniz* does, we must explore the system we have, before we can understand what we might lose. It's imperative that this Committee hear that the program *Muniz* struck down, and that would mostly be reinstated by H.B. 1952, was doing nothing to reduce sexual violence or improve public safety. The evidence is conclusive. Large scale offense based registries like the ones Pennsylvania has employed over the past two decades not only fail to reduce sexual violence, but in fact, do just the opposite. Our current system is huge, it is expensive, and it does not improve public safety.

But before I get into the details of why this is, I want to be clear on where I come from. We share the same goal—reducing sexual violence in Pennsylvania. We all want that. I want that for me, my partner, my friends, and for my loved ones. Prior to my work in this area, I too believed in the registry. It seemed to make sense. But what I have learned over the years, and what I will now share with you, dispelled that myth. I also want to be clear, that I know there are certain people that need to be punished and incapacitated for the safety of the community. I have met some of those people in my work. Nothing I say today is intended to upend those defendants' destinies. I hope and expect our prosecutors will continue to bring charges and convict those who've committed horrible acts. But SORN laws do not help us reach our shared goal: they harm victims, make prosecutions more difficult and less accurate, and make those subject to registration more dangerous.

**So now, let's take a look at the system that our High Court declared to be punishment.**

SORN laws were all passed with laudatory goals. However, we now have dozens of studies evaluating the effectiveness of SORN schemes like Pennsylvania's.<sup>1</sup> I have attached a bibliography to my written testimony for you to review as well. This research is consistent and clear. There is no evidence that registration and notification reduce sexual violence. Although there is some evidence that registration requirements without notification may produce a 1% reduction in offending by people not currently on the registry, this is offset by a larger increase in the sexual re-offense rates caused by the registry itself.<sup>2</sup> This increase can best be summed up by recognizing that a hopeless man is a dangerous person. The largest study of its kind found that large, categorical registries with public notification, like Pennsylvania's, makes offenders more likely to commit crime because "the associated psychological, social, or financial costs [of living on the registry] make crime-free life relatively less attractive."<sup>3</sup>

SORN laws fail because they address the wrong problems and wrong offenders by focusing on those who have already committed a crime. They ignore that more than 90% of sexual violence is committed by people not included on a registry. SORN laws divert our attention from the bulk of the problem and divert resources away from proven violence reduction programs. And, they are so oppressive that

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<sup>1</sup> A bibliography is attached to this testimony. **Error! Main Document Only.**

<sup>2</sup> See, e.g., Prescott, J. J., Rockoff, J. E., *Do sex offender registration and notification laws affect criminal behavior?*, 54 J. of Law & Econ., 161 (2011).

<sup>3</sup> Prescott, J.J., *supra*.

they undermine the liberty, stability, and reentry of those subject to them.

These errors persist because SORN laws, like those enacted in Pennsylvania and the schemes proposed in House Bill 1952 all share a common structure. They base registration and the length of that registration on the offense alone, publicly label people as “sexual offenders”, and impose enormous obligations upon those individuals, often for the rest of their lives.

First, our offense based system is troubling. When a person is convicted of an enumerated offense, regardless of the sentence he receives, or whether that person is actually dangerous, registration is automatic. In some instances, the conviction does not even need to include a sexual component. Still, if that person is convicted, Pennsylvania imposes the label “sex offender”.

The flaw here is twofold. People who commit sexual crimes are not all alike and these types of laws both miss people who engage in risky behavior and include thousands of people who will never commit another sexual crime. Empirical risk assessments do a much better job of identifying those who might reoffend. Still, while a small percentage of offenders demonstrate highly recidivistic conduct with multiple documented victims, most people who commit sexual crimes do so for a variety of reasons, present different degrees of future risk, and most do not reoffend, even accounting for the likelihood of underreporting.<sup>4</sup> As far back as 2006, our own Sexual Offender Assessment Board tried to refute the myth that every person convicted of a sex crime poses a danger to the public.<sup>5</sup> And even assuming it was true that all sexual offenders were likely to commit another sexual crime, we now know that SORN laws do nothing to reduce offending. So regardless of what the real re-offense rate may be, if registration and notification don't reduce reported crimes, one has to start wondering – what's the point.

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<sup>4</sup> See, e.g., **Error! Main Document Only.**Jill S. Levenson, et al., *Grand Challenges: Social Justice and the Need for Evidence-based Sex Offender Registry Reform*, 18 J. Sociology & Social Welfare (Vol. 2) 3 (June 2016) (summarizing research); Elizabeth J. Letourneau et al., *Evaluating the Effectiveness of Sex Offender Registration and Notification Policies for Reducing Sexual Violence against Women*, Final Report for National Institute of Justice, at 52 (2011) (summarizing research);

<sup>5</sup> **Error! Main Document Only.**Pennsylvania's Sexual Offender Assessment Board, *Sex Offender Containment Model*, 207 (2006), available at [www.goo.gl/6Ykg6n](http://www.goo.gl/6Ykg6n). See also, **Error! Main Document Only.**Ira Ellman, “Frightening and High”: *The Supreme Court's Crucial Mistake About Sex Crime Statistics*, 30 Const. Comment. 495 (2015) (discussing the misnomer of “high risk” recidivism and noting that the 1997 Prescott study cited by David Attorney Freed showing offenders have as many as 100 victims examined only people who were confined in the Massachusetts Treatment Center for Sexually Dangerous Persons, which was created “for the purpose of evaluating and treating individuals convicted of repetitive and/or aggressive sexual offenses”).

Moreover, when registration is based on the conviction alone, it perverts the plea bargaining process such that the final charges do not reflect the facts of the crime committed.<sup>6</sup> This is because many prosecutors and judges have long believed what our Supreme Court just said – that registration is punishment. These criminal justice players often view registration as disproportionately severe, or unnecessary in specific cases. Therefore, deals are structured to bargain around registration, or reduce registration exposure, resulting in convictions that in no way reflect the reality of the underlying crime. In its most damaging form, some judges simply acquit defendants of registerable charges because they deem the consequences too severe.<sup>7</sup>

Second, our SORN laws, and H.B. 1952, also require extremely long periods of registration, again based on the offense alone, without regard to the sentence imposed, the person's age, or a scientific assessment of risk. Our SORN laws have, and HB 1952 still would, subject more than three quarters of registrants to decades of supervision, and more than half, to supervision for the rest of their lives.<sup>8</sup>

No evidence supports such long restrictions on freedoms and individual reputations. The research shows that after 10 or 15 crime free years, 97 to 99 out of every 100 offenders will not offend again.<sup>9</sup> This is true even for those originally assessed as high risk. The reason seems to be that most people age out of crime, and second, that those likely to reoffend sexually, usually do so within three years of release and our criminal justice system then properly removes them from society, often for long periods of time.

Third, and likely the most damaging feature of SORN programs, is the universal inclusion on a publicly accessible website, which provides easily usable tracking and mapping functions to identify people on the registry. Although SORN laws are supposed to allow the public to protect themselves by knowing the identity and location of convicted offenders, again, neither goal is accomplished. First, even

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<sup>6</sup> See Rose Corrigan, *UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS* (NYU Press, 2013); Elizabeth Letourneau et al., *The Effects of Sex Offender Registration and Notification on Judicial Decisions*, 35 *Criminal Justice Rev.* 295 (2010).

<sup>7</sup> See Corrigan, *supra*, & Levenson, *supra* note 5.

<sup>8</sup> SORNA has historically classified more than 75% of registrants in Tier II and Tier III. Under Megan's Law, more than half of registrants would be classified as Lifetime. See Historical Monthly Pennsylvania State Police Data on file with the Defender Association of Philadelphia.

<sup>9</sup> Karl Hanson, Andrew Harris, Elizabeth Letourneau, L. Maaik Helmus, & David Thronton, *Reductions in Risk Based on Time Offense Free in the Community: Once a Sexual Offender, Not Always a Sexual Offender*, *Psychology, Pub. Pol. And La*, advance online publication (Oct. 2017), available at <http://dx.doi.org/10.1037/law0000135> (also collecting prior research).



assuming the public regularly uses the registry for this purpose, which is suspect in the literature, the public overestimates the risk that a convicted individual will commit more crime and nearly 80% of the public wrongly believes that registration is effective in controlling sexual violence.<sup>10</sup> The result is an artificially heightened public fear of people on the registry.<sup>11</sup> We all know this to be true, regardless of what is stated on the website or in the legislation. The label sex offender is the equivalent of the modern-day scarlet letter. Its effect amounts to no less than a public death.

The consequences of leading a life on the registry are devastating for not only registrants, but their families, and even their victims. Those subject to SORN struggle to find and keep housing, employment, and often suffer severe psychological trauma.<sup>12</sup> The largest sexual offending treatment provider association in the world has declared that SORN's destabilizing effects increase offending because they exacerbate factors correlated with criminal recidivism.<sup>13</sup> These effects spill over to registrants families as well.<sup>14</sup> I have worked with hundreds of registrants and their families. I have seen the hardships they face when their friends or neighbors discover their loved one is on the registry.

For example, a client of mine, I'll call him Mark, is listed as a lifetime registrant. In 1999, when he was 19 years old, he assaulted a woman in his house in New York. He was convicted of what is essentially a first degree misdemeanor indecent assault and was sentenced to 2 – 4 years jail. After his release in 2000, he got engaged to wonderful woman, I'll call her Lisa, and they were married in 2005. They decided to start a family, and in 2009 they moved to Pennsylvania to be near Lisa's parents. But Mark had to register here. The couple and their new daughter were turned away from apartment after apartment when landlords saw that Mark was on the public website. At one point, Mark even chose to become homeless for

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<sup>10</sup> Center for Sex Offender Management, *Exploring Public Awareness and Attitudes about Sex Offender Management: Findings from a National Public Opinion Poll*, United States Department of Justice (2010) available at <http://www.csom.org/pubs/CSOM-Exploring%20Public%20Awareness.pdf>.

<sup>11</sup> Marcus Galeste et al., *Sex Offender Myths in Print Media*, 12 West. Criminology Rev. 4 (2012).

<sup>12</sup> See Jill Levenson et al, *Grand Challenges*, *supra* note 5, 11-14 (summarizing and citing the research); **Error! Main Document Only.** Michael P. Lasher & Robert J. McGrath, *The Impact of Community Notification of Sex Offender Reintegration: A Quantitative Review of the Research Literature*, 56 Int. J. of Offender Therapy & Comp. Crim. 6 (2012).

<sup>13</sup> Association for Treatment of Sexual Abusers, *Statement on The Registration and Notification of Sexual Offenders*, adopted April 5, 2010, available at <http://www.atsa.com/registration-and-community-notification-adult-sexual-offenders>.

<sup>14</sup> See, e.g., **Error! Main Document Only.** May Ann Farkas & Gale Miller, *Reentry and Reintegration: Challenges Faced by the Families of Convicted Sex Offenders*, 20 Fed. Sent. Reporter 88, 90 (2007); Stillman, S., *The List*, New Yorker Magazine (March 12, 2016) (discussing the effects and literature).

three months so the family could secure housing. Lisa explained to me that they now homeschool their two daughters, 7 and 9, because she fears they will be harassed or assaulted at school. And this is not just speculation. When a mother of her daughter's friend found out that Mark was on the registry, she told Lisa that their daughters could no longer be friends. The child was devastated and still is too young to truly understand why. As their daughters age, Lisa knows she will have to send them to public school. She dreads that day and has anxiety attacks about what teenagers will do or say to them when they discover their father online, or if their landlord finds out and refuses to renew their lease. Mark has even contemplated suicide because he feels his family would be better off without him. Mark's struggle and Lisa's fear remain today even though Mark is now almost 40 years old, has held a steady job for almost a decade as a restaurant manager, and his only arrests since 1999 were because he missed his verification dates with the State Police due to scheduling mistakes.

This trauma can be even worse for victims, especially for children. Considering that many children are assaulted by family members, when a victim is publicly stigmatized due to their relationship with the abuser, the registry serves not to protect, but re-victimize. A consequence no one wants. Additionally, research has shown that when combined with their own feelings of guilt and pressure from family members and peers, many victims will not report an assault if it means that a relative, classmate, or other close acquaintance will appear on a public database for years, decades, or even a lifetime.<sup>15</sup> Because of these concerns, the largest victim advocate organization in the country, the National Alliance to End Sexual Violence, has called to limit the registry to "those offenders whose public disclosure will not immediately or implicitly identify the victim" in addition to other significant reforms.<sup>16</sup>

Finally, our SORN programs all require the inclusion of an extraordinary amount of information, much more than most probation departments ask of supervisees. The State Police currently asks for 188 different categories of information.<sup>17</sup> Under all SORN programs, scheduling errors, missed verification appointments, and the omission of even the smallest change, are all crimes, and all punished severely.

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<sup>15</sup> See Rose Corrigan, *UP AGAINST A WALL; RAPE REFORM AND THE FAILURE OF SUCCESS*, 218-21 (NYU Press, 2013).

<sup>16</sup> National Alliance to End Sexual Violence, *Community Management of Sex Offenders*, available at <http://endsexualviolence.org/where-we-stand/community-management-of-sex-offenders>.

<sup>17</sup> See SP4-218, available at [http://www.pccd.pa.gov/criminaljustice/advisory\\_boards/Documents/Sex%20Offender%20Registration%20SP%20218.pdf](http://www.pccd.pa.gov/criminaljustice/advisory_boards/Documents/Sex%20Offender%20Registration%20SP%20218.pdf).

These prosecutions are costly.<sup>18</sup> The bulk of the cost stems from the massive increase in the Department of Corrections budget to house the hundreds of people jailed for failure to comply with registration. In Philadelphia alone, there are at least 150 people in state custody for failure to comply and hundreds more on county supervision.<sup>19</sup> The state spends close to 6.5 million dollars annually just to house individuals from Philadelphia, most of whom committed scheduling and paperwork errors.<sup>20</sup> Rarely are these offenses accompanied by new crimes. Statewide, the DOC likely spends between 25 and 50 million a year to incarcerate these individuals without contributing to public safety. The numbers bear this out. We have put hundreds if not thousands of registrants behind bars, but the number of reported rapes has not declined in Pennsylvania. Instead, the rate actually went up during the first three years of SORNA.<sup>21</sup>

**This is the system we have. *Muniz* gives this Committee, and Pennsylvania more broadly, a perfect opportunity to be smart on crime and do something that works.**

*Muniz* likely invalidates registration obligations for thousands of people, but it will not put the public at risk. That's because *Muniz* keeps our current system in place moving forward, and while it will require removing thousands of people from the registry, it has no effect on the large number of people who are still under supervision by probation or parole. It also has almost no impact on supervising sexually violent predators. Instead, the primary effect is to remove people, like Mark, who have long ago finished serving their sentences, not been rearrested, pose no risk to the public, and are trying to live out their lives in peace.

Let me explain why. *Muniz* declared that SORNA is punishment. That means that individuals who committed a crime prior to December 20, 2012, SORNA's effective date, cannot be registered under the law as it stands. But let me be clear, *Muniz* does not invalidate SORNA. For people whose crimes occurred on or after December 20, 2012, SORNA remains law. *Muniz* merely prevents SORNA's

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<sup>18</sup> Belzer, R. (2015). *The costs and benefits of subjecting juveniles to sex-offender registration and notification* (R Street Policy Study 41). Retrieved from <http://www.rstreet.org/wp-content/uploads/2015/09/RSTREET41.pdf>

<sup>19</sup> Cases identified by a search of the Administrative Offices of the Pennsylvania Courts records on file with the Defender Association.

<sup>20</sup> Vera Institute of Justice, *The Price of Prisons* (2012), available at, <http://archive.vera.org/files/price-of-prisons-pennsylvania-fact-sheet.pdf>. (identifying the yearly cost of incarceration at more than \$42,300).

<sup>21</sup> See Pennsylvania Uniform Crime Reporting System, 2015 Pennsylvania Online Annual Crime Report (2015), available at <https://ucr.psp.state.pa.us/UCR/Reporting/Annual/AnnualFrames.asp?year=2015>.

application to a class of people whose crimes were committed years ago.

For new cases, *Muniz* changes little. The only change is that our process for determining whether someone meets the criteria for a sexually violent predator, or SVP, is unconstitutional because certain procedural protections must apply. That was the holding of the Superior Court's decision in *Commonwealth v. Butler*. But eliminating an SVP protocol will not endanger anyone. Our criminal courts have been doing an excellent job of properly sentencing and supervising people who get labeled SVP. They will continue to hand out appropriate lengthy sentences for serious crimes. Most people who would have been labeled SVP today, will be incarcerated for the foreseeable future and supervised for years to come, if not decades. Further, they will still be registered offenders under SORNA. Basically, *Butler* is largely meaningless as far as public safety is concerned.

With respect to people who committed their crimes before December 20, 2012, the effect will be significant for them and their families, but will also have little impact on public safety. I agree with the State Police when they declared in September that *Muniz* requires the removal of thousands of current registrants whose crimes occurred prior to SORNA. This is because there is no existing legal mechanism that requires these individuals to register. All prior versions of Megan's Law were repealed in 2012.

But we should not be swayed by a knee jerk reaction to the possibility of releasing thousands of offenders. Removing a burden from people, which should not have been imposed to begin with, is very different than if *Muniz* required ending a structured and individualized sentence before a defendant completed it. *Muniz* does not affect any person's sentence. If they are still in jail or under supervision, they remain so. And as I just discussed, even if some registrants are dangerous, SORN laws don't stop them from re-offending. In fact, removing these restrictions will likely reduce their risk.

Most importantly, the thousands of people who have completed their sentences, not been rearrested, and have tried to move on with their lives are not a danger to the community. Those that do remain under probation or parole have more than adequate restrictions imposed upon them. The State Board of Probation and Parole for example, imposes at least 14 conditions on parolees and probationers, including restrictions on pornography, social media, and contact with victims. When a child was victimized, even more restrictions are imposed. When combined with individualize treatment, these conditions are much more effective in reducing



violence.<sup>22</sup>

Further, *Muniz* gives the General assembly the once in a lifetime opportunity to be smart on crime by re-examining our current laws, and proposing new ones that attack the problem head on armed with resources freed up by fewer people on the registry. That financial boon will be immediate. *Muniz* likely requires vacating convictions and releasing from jail many individuals serving sentences for failure to comply and who have not committed any other new crimes. It will free up court resources, prosecutor's dockets, and probation officer's caseloads by reducing the large number of failure to comply cases pending around the state.

Finally, I have heard some officials express concern about what *Muniz* means for SVPs whose crimes occurred before 2012. It seems that the effect is marginal. Out of 2175 people who are labeled SVP, according the Megan's Law website, roughly 60% are currently in jail, most for their original offenses and many more for probation or parole violations. An additional large percentage remain on some form of probation or parole.<sup>23</sup> Thus, most SVPs will not be lost to the system as the State Police claim. Most of them will remain supervised or incarcerated, often for years. Moreover, nearly three quarters of all SVPs have been placed on the registry after SORNA took effect.<sup>24</sup> Those who would be removed have likely been crime and arrest free for a decade or more, exactly the length of time that brings re-offense rates close to zero, even for people who were originally in high risk categories, like SVPs.

Ultimately, *Muniz* offers the General Assembly the chance to benefit Pennsylvanians. Because *Muniz* declared portions of SORNA unconstitutional, Pennsylvania will not be deprived of federal funds, and the General Assembly does not at this time have to vote to repeal anything. Rather, it can examine laws and policies that will achieve our shared goal. I would ask this Committee to create a commission to propose a comprehensive empirically based sexual violence management policy for the state. It is the right time to approach this issue and the tide across the country is shifting toward this end. More and more courts and legislatures are re-examining SORN laws and their response to sexual violence

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<sup>22</sup> See, e.g., J. Stinson, J. Becker & L. McVay, *Treatment Progress and Behavior Following 2 Years of Inpatient Sex Offender Treatment: A Pilot Investigation of Safe Offender Strategies*, 29 *Sexual Abuse: A Journal of Research and Treatment* 3 (2017); Jill Levenson & D. Prescott, *Déjà vu: From Furby to Langstrom and Evaluation of Sex Offender Treatment Effectiveness*, 20 *J. of Sexual Aggression* no. 3, 257 (2013).

<sup>23</sup> Internal examination of court history and dockets for over 100 SVPs across Pennsylvania.

<sup>24</sup> On December 20, 2012, there were 586 SVPs registered in Pennsylvania. See Pennsylvania State Police, Megan's Law Count Active Offender Public Report (Dec. 20, 2012) (on file with the Defender Association).