IN THE COMMONWEALTH COURT OF PENNSYLVANIA

R.F.M.,	:	
Petitioner	:	
	:	No. 495 M.D. 2019
v.	:	
	:	Submitted: January 22, 2021
Pennsylvania State Police,	:	
Respondent	:	

BEFORE: HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE J. ANDREW CROMPTON, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McCULLOUGH FILED: October 4, 2021

R.F.M. (Petitioner) filed a petition for review (PFR) in this Court's original jurisdiction seeking relief on seven counts that concern his sexual offender registration requirements, administered by the Pennsylvania State Police (PSP), due to his status as a sexually violent predator (SVP). Procedurally, the instant matter comes before us for disposition based upon Petitioner's filing of an application for summary relief. Upon review, we deny Petitioner's application.

A. Background

Petitioner filed his PFR on September 9, 2019, which challenges the constitutionality of Subchapter I of the current version of the Sexual Offender Registration and Notification Act (SORNA), which requires lifetime registration of certain sexual offenders who have committed an offense on or after April 22, 1996,

but before December 20, 2012. 42 Pa.C.S. §§9799.51-9799.75 (Subchapter I of SORNA II).[1] The underlying facts of Petitioner's convictions are as follows.

Petitioner is an adult who is currently confined at the State Correctional Institution (SCI) at Forest. (PFR ¶4). He is subject to the registration, notification, and counseling provisions of SORNA II due to his status as a sex offender convicted of qualifying offenses under the former law known as Megan's Law III, *formerly* 42 Pa.C.S. §§9791-9799.9. (PFR ¶5). On October 8, 2009, Petitioner was charged via a criminal complaint with eight offenses, involving two minors, for events that occurred between August 29, 2009, and September 28, 2009. (PFR ¶7). Petitioner waived his preliminary hearing, and the offenses[2] were bound over to court. (PFR ¶8). On August 18, 2011, Petitioner pled guilty to two counts of aggravated indecent assault of a minor, and one count of sexual abuse of children by possessing child

[1] The previous version of SORNA was originally enacted on December 20, 2011, effective December 20, 2012. *See* Act of December 20, 2011, P.L. 446, No. 111, §12, effective in one year or December 20, 2012 (SORNA I). SORNA I was amended on July 5, 2012, also effective December 20, 2012, *see* Act of July 5, 2012, P.L. 880, No. 91, effective December 20, 2012 (Act 91 of 2012), and amended on February 21, 2018, effective immediately, known as Act 10 of 2018, *see* Act of February 21, 2018, P.L. 27, No. 10, §§1-20, effective February 21, 2018 (Act 10 of 2018), and, lastly, reenacted and amended on June 12, 2018, P.L. 140, No. 29, §§1-23, effective June 12, 2018 (Act 29 of 2018). Acts 10 and 29 of 2018 are generally referred to collectively as SORNA II. Through Act 10, as amended in Act 29, the General Assembly split SORNA I's former Subchapter H into a revised Subchapter H and Subchapter I. Subchapter I of SORNA II applies to sexual offenders, such as Petitioner, who committed an offense on or after April 22, 1996, but before December 20, 2012. *See* 42 Pa.C.S. §§9799.51-9799.75. Revised Subchapter H of SORNA II applies to offenders who committed an offense on or after December 20, 2012. *See* 42 Pa.C.S. §§9799.10-9799.42.

[2] The offenses as identified by Petitioner are: 18 Pa.C.S. §3125(b), relating to aggravated indecent assault of a child; 18 Pa.C.S. §3125(a)(7), relating to aggravated indecent assault of a child; 18 Pa.C.S. §6312(b), relating to the sexual abuse of children by possessing child pornography; 18 Pa.C.S. §6312(c), relating to the sexual abuse of children by disseminating child pornography; and 18 Pa.C.S. §3126(a)(7), relating to indecent assault of a minor.

pornography. (PFR ¶10). On November 23, 2011, Petitioner, advised by counsel, agreed to a stipulation whereby the trial court entered an order classifying Petitioner as an SVP under Megan's Law III, *formerly* 42 Pa.C.S. §9795.4(e)(4). (PFR ¶11). On December 22, 2011, Petitioner was sentenced to an aggregate sentence of 8 to 27 years' confinement. (PFR ¶12). Petitioner was advised that he would be a lifetime registrant under Megan's Law III. *Id*. Petitioner avers that at the time his offenses were committed and he was sentenced, Megan's Law III was the governing sex offender registration law. (PFR ¶13). He argues that under Subchapter I of SORNA II, his convictions for aggravated indecent assault and his designation as an SVP make him retroactively, and impermissibly, subject to SORNA II's provisions. (PFR ¶14).[3]

The PFR seeks relief on seven counts.[4] In Count I, Petitioner argues that his challenge to Subchapter I of SORNA II will be successful, and, therefore, he seeks an order enjoining the PSP from enforcing any provision of Subchapter I of SORNA II against him. (PFR ¶40). He argues he will suffer harm in a number of ways, and that the PSP will not suffer any injury if the Court grants his request. (PFR ¶¶41-43). In his wherefore clause, Petitioner requests that the Court grant him a preliminary and permanent injunction enjoining the enforcement of Subchapter I of SORNA II against him. (PFR at 13).

In Count II, Petitioner argues that despite legislative changes, Subchapter I of SORNA II remains punitive. He argues that, in *Commonwealth v.*

[3] In his PFR, Petitioner appears to preemptively address affirmative defenses that could be raised by the PSP. *See* PFR ¶¶21-28. These paragraphs address standing, indispensable parties, and mootness. *Id*.

[4] Petitioner asks that this Court take notice of the fact that counts five, six, and seven are misnumbered because he mistakenly labelled two counts as count four. We will refer to each count as if it was numbered correctly.

Muniz, 164 A.3d 1189 (Pa. 2017), our Supreme Court held that registration, notification, and counseling requirements were punitive, and that offenders who committed their offenses prior to December 20, 2012—SORNA I's effective date—violated the *Ex Post Facto* Clauses of the United States and Pennsylvania Constitutions.[5] *See* U.S. Const. art. 1, §10, cl. 1; Pa. Const. art. I, §17. (PFR ¶48). He also points out that in *Commonwealth v. Butler*, 173 A.3d 1212 (Pa. Super. 2017) (*Butler I*), *rev'd*, 226 A.3d 972 (Pa. 2020) (*Butler II*), our sister court "declared the SVP process to be unconstitutional" and an illegal sentence. (PFR ¶ 52). He argues that, under *Muniz*, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Alleyne v. United States*, 570 U.S. 99 (2013), the Commonwealth must prove beyond a reasonable doubt that he is an SVP, rather than offering proof by clear and convincing evidence. (PFR ¶58). He argues that Subchapter I of SORNA II is qualitatively harsher, and therefore punitive, as to offenders who are classified as SVPs. (PFR ¶60). He argues that no statute imposed registration requirements as part of his sentence, and therefore, his registration requirements constitute an illegal sentence. (PFR ¶62). In sum, he argues that his designation as an SVP retroactively under Subchapter I is unconstitutional under *Muniz* and *Butler I*, and is punitive and therefore is also an *ex post facto* violation. (PFR ¶64).

Next, Petitioner argues that, even though the General Assembly stated that Subchapter I of SORNA II was passed to "protect the safety and general welfare of the people of this Commonwealth . . . ," its intent is not controlling or unassailable. (PFR ¶¶67-68). He argues that Subchapter I of SORNA II is so punitive in effect that it negates the General Assembly's stated intent. (PFR ¶68). In support, he

[5] In *Muniz*, our Supreme Court held that the registration provisions of SORNA I were punitive, such that application of those provisions to offenders who committed their crimes prior to SORNA I's effective date violated *ex post facto* principles.

argues that this Court is required to look to the factors articulated in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). (PFR ¶¶69-71). He maintains that the "minimal changes" enacted by the legislature are insufficient to render Subchapter I of SORNA II nonpunitive under *Muniz*. (PFR ¶74). He maintains that the sanction of registration is still to be regarded as punishment. (PFR ¶¶ 75-76).

Petitioner argues that the operation of Subchapter I of SORNA II promotes the traditional aims of punishment. In sum, he argues that Subchapter I of SORNA II is punitive, has shaming effects, and contains probationary-like requirements of registration, supervision, reporting, and monitoring. (PFR ¶¶78-80, 85). Consistent with *Muniz*, he asks this Court to find that Subchapter I of SORNA II is punitive in effect. (PFR ¶86). In his wherefore clause, he asks this Court to declare Subchapter I of SORNA II unconstitutionally punitive, and unconstitutional as applied to him. (PFR at 28).

In Count III, Petitioner argues that the registration requirements imposed on him under Megan's Law III were rendered null and void, and, therefore, unenforceable, by our Supreme Court in *Commonwealth v. Neiman*, 84 A.3d 603 (Pa. 2013). Specifically, he argues that Subchapter I of SORNA II clearly, plainly, and palpably violates the United States and Pennsylvania Constitutions when applied retroactively to "pre-SORNA offenders" convicted and sentenced under Megan's Law III because Megan's Law III was struck down as unconstitutional in *Neiman*. (PFR ¶88). Petitioner argues that *Neiman*'s invalidation of Megan's Law III voided any statutory authority for any sex offender requirements under that statute, and therefore, all registration requirements and SVP designations imposed by the courts are illegal and cannot be revived retroactively by the legislature. (PFR ¶89). In his wherefore clause, Petitioner requests that this Court enter an order declaring the

lifetime registration requirements and SVP designation imposed under Megan's Law III to be null and void and inoperative and unenforceable as a matter of law under Subchapter I of SORNA II, and any other future law requiring registration. (PFR at 31). He also asks this Court to declare Subchapter I of SORNA II unconstitutional as applied to him and to bar further application of Subchapter I of SORNA II against him. *Id*.

In Count IV, he argues that Subchapter I of SORNA II violates the separation of powers doctrine under the Pennsylvania Constitution. He argues that Subchapter I of SORNA II does this in two respects: first, by legislatively reviving the registration requirements and SVP designation imposed on him by Megan's Law III, and, second, by imposing more onerous registration requirements retroactively under Subchapter I of SORNA II, through the PSP, by effectively transferring the sentencing function of the judiciary to the executive branch (*i.e.*, the PSP). (PFR ¶97). He argues that Subchapter I of SORNA II violates the separation of powers doctrine by statutorily reopening final judgments through retroactive legislation, creating new obligations, and imposing new duties on registrants. (PFR ¶98). In his wherefore clause on this Count, he seeks a declaration that Subchapter I of SORNA II is unconstitutional because it violates the separation of powers doctrine, and is unconstitutional as applied to him. (PFR at 34). He also asks for an injunction permanently enjoining its retroactive application to him. *Id*.

In Count V, he argues that Subchapter I of SORNA II violates fundamental fairness, denies him substantive and procedural due process, creates an irrebuttable presumption, and impugns upon his right to reputation without due process. Petitioner's arguments under this Count are difficult to understand; however, as best as this Court can discern, they can be broken into three distinct

arguments. First, he argues Subchapter I of SORNA II runs afoul of his Fourteenth Amendment[6] due process rights because it affords him no pre-deprivation remedy or procedure to contest the applicability and/or enforcement of Subchapter I of SORNA II to/against him. (PFR ¶107). He avers that the procedure to seek removal from the registry after 25 years under 42 Pa.C.S. §9799.59(a)(1) fails to adequately safeguard his rights. *Id*. Second, he argues that the registration requirements are violative of his procedural and substantive due process rights under the Pennsylvania Constitution. (PFR ¶113). He argues that under the Pennsylvania Constitution, he is entitled to notice, an opportunity to be heard, and judicial process, and that the deprivation of a protected right cannot be accomplished solely by legislative action, regardless of the process afforded under the statute. (PFR ¶114). He asserts that his constitutionally protected rights are his rights to reputation[7] and privacy[8] under Article I, Sections 1 and 11 of the Pennsylvania Constitution, Pa. Const. art. I, §§1, 11. (PFR ¶118). He maintains that both of these interests are adversely affected by Subchapter I of SORNA II's notification procedures and public registry requirement, which will "expose him to public humiliation and shaming, embarrassment, and stigmatize him in his community." *Id*. Petitioner argues that there is no procedure

[6] U.S. Const. amend. XIV.

[7] As to his right to reputation, he argues that because the Pennsylvania Constitution provides for a right to reputation, we should follow *Muniz* and conclude that such a right is a significant factor in determining that Subchapter I of SORNA II is punitive. (PFR ¶120). Further, he argues that his right to reputation prevents the dissemination of his photograph, personal identifiers, and public information about his case because it would damage his right to reputation. (PFR ¶124).

[8] As to his right to privacy, he argues that this right protects him from the automatic inclusion in a government maintained, publicly accessible registry, and protects the disclosure of his photograph, personal information, and identifiers. (PFR ¶128).

available to challenge these requirements under Subchapter I of SORNA II. *Id*. He argues that pre-deprivation notice and a hearing would be appropriate. (PFR ¶119).

Third, he argues that Subchapter I of SORNA II violates his due process rights by creating two irrebuttable presumptions that are not universally true and are excessive and overly broad. (PFR ¶130). The first presumption identified by Petitioner is that all sex offenders present a high risk of recidivism. *Id*. The second is that all offenders are sexually violent, as defined by 42 Pa.C.S. §§9799.53, 9799.55, and as such pose a substantial risk of reoffending if convicted of one or more enumerated offenses. *Id.*

As to the risk of recidivism, he avers that sex offenders are treated as a class for legislative purposes. (PFR ¶135). He argues that this case is similar to *In re J.B.*, 107 A.3d 1 (Pa. 2014), where our Supreme Court held that SORNA's registration requirements violated a juvenile offender's due process rights by utilizing an irrebuttable presumption that all juvenile offenders posed a high risk of recidivism, because the presumption was not true and impinged the juvenile's right to reputation. (PFR ¶131). He notes that, in *J.B.*, the Court rejected the notion that a hearing allowing a sex offender to have his or her name removed from the registry after 25 years failed to satisfy due process. (PFR ¶133). Petitioner maintains that in *J.B.*, the Court was critical of the fact that the process provided did not consider the paramount factor of the likelihood that an individual would commit another offense in the future. *Id*. Petitioner recognizes that Subchapter I has a procedure in place that allows a sex offender to petition for removal from the registry after 25 years of compliance under 42 Pa.C.S. §9799.59, but argues that this still results in a minimum of 25 years of reputational damage. (PFR ¶134). Moreover, he argues that Subchapter I of SORNA II unfairly shifts the burden to the sex offender to prove

that he is no longer a threat to society, and, therefore, the process is illusory. *Id*. Thus, he asks this Court to conclude that Subchapter I of SORNA II, specifically, 42 Pa.C.S. §9799.59, fails to satisfy due process on the same grounds announced in *J.B.* (PFR ¶134).

As to the irrebuttable presumption of sexual violence, he argues that offenses are deemed to be sexually violent, without consideration of the underlying facts and circumstances of the offenses, the individual characteristics of the offender, and the "concerns which typically guide all sentencing considerations." (PFR ¶136). He argues that such presumptions are stigmatizing, degrading, and violative of his due process rights because they are not universally true and negatively affect his right to reputation without process. (PFR ¶137). Again, he asks that this Court rely on *J.B.* to conclude that Subchapter I of SORNA II violates due process by way of an irrebuttable presumption. *Id*.

In Count VI, he argues that Subchapter I of SORNA II violates the prohibition against *ex post facto* laws found in the United States and Pennsylvania Constitutions. (PFR ¶140). He avers that *Muniz* already found the registration requirements under SORNA I violated *ex post facto* protections when applied retroactively and that Subchapter I of SORNA II is indistinguishable from SORNA I, and because Megan's Law III was invalidated under *Neiman,* there are no valid registration requirements to enforce against him. (PFR ¶¶142-44). Moreover, he argues that the requirements of Subchapter I of SORNA II constitute a second sentence because Megan's Law III was invalidated under *Neiman*. (PFR ¶146). Petitioner spends a substantial portion of his PFR rehashing the dictates of *Muniz*, why SORNA I and Subchapter I and SORNA II are indistinguishable, and he revisits his previous argument under *Mendoza-Martinez*, which appears to mirror the first

part of his PFR. (PFR ¶¶148-66). Relying on *Muniz*, he emphasizes the fundamental right to reputation under the Pennsylvania Constitution, and argues that it draws greater protections under our *ex post facto* clause. (PFR ¶169).

Lastly, he maintains in Count VII that Subchapter I of SORNA II is punitive and inflicts a second punishment violative of the double jeopardy protections under the United States and Pennsylvania Constitutions, *see* U.S. Const. amend. V; Pa. Const. art. I, §10. (PFR ¶178). Petitioner's argument is that his offenses were committed in 2009 when Megan's Law III was in effect. (PFR ¶183). However, he argues that Megan's Law III was never legally in effect, and therefore, never existed and, thus, any registration requirement imposed against him under Subchapter I of SORNA II constitutes a second punishment. (PFR ¶183). He asks for a declaration that Subchapter I of SORNA II is unconstitutional because it violates federal and state double jeopardy principles and is unconstitutional as applied to him. (PFR at 64). He also seeks an injunction enjoining the retroactive application of Subchapter I to him on double jeopardy grounds. *Id.*

On November 7, 2019, the PSP filed an answer and new matter in response to the PFR. On January 14, 2020, Petitioner responded by filing an answer to the new matter raised by the PSP, and by filing preliminary objections. On January 27, 2020, the PSP filed an answer to the preliminary objections; however, on January 29, 2020, we overruled Petitioner's preliminary objections. On February 11, 2020, Petitioner filed supplemental preliminary objections, which this Court struck as unauthorized on February 19, 2020. On July 24, 2020, Petitioner filed the instant application for summary relief, averring that there are no material issues of fact in dispute and that he has a clear right to relief.

B. <u>Petitioner's Application for Summary Relief</u>

In support of his application for summary relief, Petitioner generally repeats the arguments raised in his PFR arguing that there are no genuine issues of material fact in dispute that would prevent summary relief. Beyond the arguments raised in his PFR, we note that he appears to preemptively argue that the affirmative defenses asserted by the PSP do not prevent relief. Specifically, he argues that sovereign immunity does not apply because he is seeking equitable relief, that laches is inapplicable because he was diligent in pursuing his claim, that res judicata and collateral estoppel do not bar relief, and that there are no indispensable parties that have not been joined.

The PSP responds that, due to the Pennsylvania Supreme Court's decision in *Commonwealth v. Lacombe*, 234 A.3d 602 (Pa. 2020), all of Petitioner's claims based on *Muniz* are no longer viable. It argues that any claim not covered by the decision in *Lacombe* otherwise fails as a matter of law. As to *Lacombe*, the PSP argues that any *ex post facto* argument by Petitioner fails because *Lacombe* held that Subchapter I of SORNA II is nonpunitive and does not violate the prohibition against *ex post facto* laws. Moreover, the PSP points out that although the Court in *Lacombe* noted that a substantive due process challenge to Subchapter I of SORNA II was not before it, such a challenge would be dependent on a finding that Subchapter I of SORNA II is punitive, which the Court found, it was not.

The PSP explains that while imprisoned, Petitioner was *subject* to all prior versions of the sex offender registration statutes, but that the statutes did not require him to *register* until he was released from prison. It avers that Petitioner was advised of his lifetime registration requirement when he was convicted. As for the statute that applies to Petitioner, the PSP explains that Megan's Law III was enacted on November 24, 2004, to remedy the limited penalty provisions that were contained

in Megan's Law II, *formerly* 42 Pa.C.S. §§9791-9799.7. It asserts that Megan's Law III was found to be unconstitutional by *Neiman* solely because it violated the single subject rule by including an asbestos provision in the law. The PSP maintains that Petitioner's reliance on *Neiman* is futile because Subchapter I of SORNA II still requires him to register as a sex offender.

Further, it asserts that Subchapter I of SORNA II was enacted prior to the Court's decision in *Neiman* and required Petitioner to register as a sex offender for life. Moreover, it argues that Subchapter I of SORNA II applies to Petitioner because he was required to register under former registration laws enacted before December 20, 2012, and his period of registration has not expired. In other words, it argues that Subchapter I of SORNA II requires him to register because he was required to register under Megan's Law III.

The PSP maintains that even if we were to grant Petitioner relief on his state law claims, he would still be subject to registration under the Adam Walsh Child Protection and Safety Act of 2006 (Walsh Act), 34 U.S.C. §§20901-20991. It argues that the Walsh Act requires the retroactive registration of sex offenders convicted prior to the enactment of the Walsh Act. The PSP argues that the Commonwealth is required to comply with the requirements in the Walsh Act or risk forfeiting federal funding that it receives for its compliance with the Act.

Furthermore, it argues that Subchapter I of SORNA II does not place a unique or unwarranted burden on Petitioner's reputation and that any "harm" to his reputation is due to his convictions and the consequences thereof. It maintains that the public is entitled to this information.

The PSP also argues that *Lacombe* defeats Petitioner's substantive due process argument, which is premised on a violation of the separation of powers and

Alleyne. As to procedural due process and irrebuttable presumptions, the PSP relies on *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 8 (2003), and argues that individuals who assert the right to a hearing under the Due Process Clause must show that the facts they seek to establish at a hearing are relevant to the statutory scheme. It argues that Subchapter I of SORNA II does not signal the dangerousness of Petitioner as an offender, but that sex offenders, *as a group*, have a high risk of recidivism, and that the statute speaks to sex offenders as a group. In the PSP's view, there is no need for Petitioner to have a hearing on his individual dangerousness or likelihood to reoffend because Subchapter I of SORNA II is not dependent on either of those facts and is instead based on the policy determination that sex offenders as a group are at a high risk of reoffending, and therefore registration is required to protect the public. Moreover, it argues that Petitioner's registration requirements are solely the result of his conviction.

Lastly, it argues that Petitioner's arguments as to the affirmative defenses that it raised in its new matter are irrelevant because it has not filed an application seeking relief on any of the defenses.

C. <u>Discussion</u>

Rule 1532(b) of the Pennsylvania Rules of Appellate Procedure provides that "[a]t any time after the filing of a petition for review in an appellate or original jurisdiction matter the court may on application enter judgment if the right of the applicant thereto is clear." Pa.R.A.P. 1532(b). Relief sought in an application for summary relief is "similar to the type of relief envisioned by the Pennsylvania Rules of Civil Procedure regarding judgment on the pleadings and peremptory and summary judgment." Pa. R.A.P. 1532, Note; *see also Pennsylvania Independent Oil and Gas Association v. Department of Environmental Protection*, 146 A.3d 820, 821

n.3 (Pa. Cmwlth. 2016), *aff'd*, 161 A.3d 949 (Pa. 2017) ("Both an application for summary relief under Rule 1532 of the Pennsylvania Rules of Appellate Procedure and a motion for judgment on the pleadings under [Pa.R.Civ.P.] 1034 of the Pennsylvania Rules of Civil Procedure seek similar relief.").

As to the history of the statutes requiring those deemed "sex offenders" to register under Pennsylvania Law, this Court has stated:

> By way of brief statutory background, beginning in 1995, Pennsylvania's General Assembly has enacted a series of statutes and amendments requiring sex offenders living within the Commonwealth to register for varying periods of time with the [PSP] based on their convictions for certain sexual offenses. The General Assembly enacted the first of these statutes, commonly known as Megan's Law I, *former*[*ly*] 42 Pa.C.S. §§9791-9799.6, in 1995, followed five years later, in 2000, by what is commonly known as Megan's Law II, *former*[*ly*] 42 Pa.C.S. §§9791-9799.7. In 2004, the General Assembly enacted what is commonly known as Megan's Law III, *former*[*ly*] 42 Pa.C.S. §§9791-9799.9, which remained in effect until the enactment of [SORNA I] in 2012. On July 19, 2017, the Pennsylvania Supreme Court handed down the decision in [*Muniz*], which held that SORNA I violated the *[E]x [P]ost [F]acto* [C]lauses of the United States and Pennsylvania Constitutions by increasing registration obligations on certain sex offender registrants. Thereafter, in 2018, to clarify that sex offender registration provisions were not *ex post facto* punishment, the General Assembly enacted SORNA II.

Rosenberger v. Wolf (Pa. Cmwlth., No. 283 M.D. 2018, filed November 7, 2019) (unreported), slip op. at 2-3. *See* section 414(a) of this Court's Internal Operating Procedures, 210 Pa. Code §69.414(a).

1. Count I

We conclude that Petitioner is not entitled to summary relief under Count I. Under Count I, Petitioner asks for a preliminary and permanent injunction enjoining the enforcement of Subchapter I of SORNA II against him. Petitioner seeks injunctive relief on the grounds stated in Counts II – VII of his PFR, which we discuss at length *infra*. Because we deny summary relief on the grounds set forth in Counts II-VII, we necessarily deny summary relief on Count I for the same reasons set forth in detail *infra*.

2. Counts II, IV, VII

Under Count II, Petitioner seeks relief on the grounds that Subchapter I of SORNA II is punitive. The PSP counters that Petitioner's position is foreclosed by our Supreme Court's holding in *Lacombe*. We agree. Our Supreme Court explained in *Lacombe* that

> [i]n response to *Muniz* . . . the General Assembly enacted Subchapter I, the retroactive application of which became the operative version of SORNA for those sexual offenders whose crimes occurred between April 22, 1996[,] and December 20, 2012. In this new statutory scheme, the General Assembly, *inter alia*, eliminated a number of crimes that previously triggered application of SORNA and reduced the frequency with which an offender must report in person to the [PSP]. With regard to Subchapter I [of SORNA II], the General Assembly declared its intent that the statute "shall not be considered as punitive." 42 Pa.C.S. §9799.51(b)(2).

Lacombe, 234 A.3d at 615.

The Supreme Court then explained that, in crafting the provisions of Subchapter I of SORNA II, "the General Assembly made a number of material changes to the operation of SORNA" in order "[t]o achieve its dual goals of ensuring public safety without creating another unconstitutionally punitive scheme." *Id.* at

616. Among other things, pursuant to Subchapter I of SORNA II, and unlike SORNA I, "an SVP or lifetime reporter can [now] petition a court to be removed from the statewide registry" by demonstrating with "clear and convincing evidence that he or she no longer poses a risk, or a threat of risk, to the public or any individual person." *Id.* at 616-17.[9]

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[9] In this regard, the relevant parts of Subchapter I of SORNA II provide as follows:

> (a) General rule.--An individual required to register under section 9799.55(a.1) and (b) (relating to registration) may be exempt from the requirement to register, the requirement to verify residence, employment and enrollment in an educational institution, the requirement to appear on the publicly accessible Internet website maintained by the Pennsylvania State Police and all other requirements of this subchapter if:
> (1) At least 25 years have elapsed prior to filing a petition with the sentencing court to be exempt from the requirements of this subchapter, during which time the petitioner has not been convicted in this Commonwealth or any other jurisdiction or foreign country of an offense punishable by imprisonment of more than one year, or the petitioner's release from custody following the petitioner's most recent conviction for an offense, whichever is later.
> (2) Upon receipt of a petition filed under paragraph (1), the sentencing court shall enter an order directing that the petitioner be assessed by the [State Sexual Offenders Assessment Board (SOAB)]. Upon receipt from the court of an order for an assessment under this section, a member of the [SOAB] designated by the administrative officer of the [SOAB] shall conduct an assessment of the petitioner to determine if the relief sought, if granted, is likely to pose a threat to the safety of any other persons. The [SOAB] shall establish standards for evaluations and for evaluators conducting assessments.
> (3) The order for an assessment under this section shall be sent to the administrative officer of the [SOAB] within 10 days of the entry. No later than 90 days following receipt of the order, the [SOAB] shall submit a written report containing the [SOAB's] assessment to the sentencing court, the district attorney and the attorney for the sexual offender.

(Footnote continued on next page…)

The Supreme Court then proceeded to thoroughly discuss each of the factors enumerated in *Mendoza-Martinez*[10] to determine whether Subchapter I of SORNA II is punitive in effect. *See Lacombe*, 234 A.3d at 620-25. In balancing these factors, our Supreme Court reasoned:

> As the above *Mendoza-Martinez* analysis clearly reflects, Subchapter I [of SORNA II] effected significant changes

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> (4) Within 120 days of filing the petition under paragraph (1), the sentencing court shall hold a hearing to determine whether to exempt the petitioner from the application of any or all of the requirements of this subchapter. The petitioner and the district attorney shall be given notice of the hearing and an opportunity to be heard, the right to call witnesses and the right to cross-examine witnesses. The petitioner shall have the right to counsel and to have a lawyer appointed to represent the petitioner if the petitioner cannot afford one.
> (5) The sentencing court shall exempt the petitioner from application of any or all of the requirements of this subchapter, at the discretion of the court, 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)(1)-(5).

[10] The *Mendoza-Martinez* factors are as follows:

> (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote the traditional aims of punishment, that is, retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned.

372 U.S. at 146.

> from the original version of SORNA, retroactive application of which we found unconstitutional in *Muniz*. To summarize, we find three of the five factors weigh in favor of finding Subchapter I [of SORNA II] nonpunitive. Additionally, we give little weight to the fact Subchapter I [of SORNA II] promotes the traditional aims of punishment and give significant weight to the fact Subchapter I [of SORNA II] is narrowly tailored to its nonpunitive purpose of protecting the public. As we have not found the requisite "clearest proof" Subchapter I [of SORNA II] is punitive, we may not override legislative intent and transform what has been denominated a civil remedy into a criminal penalty[.]

Lacombe, 234 A.3d at 626 (internal citations and quotation marks omitted).

Therefore, the Supreme Court distinguished *Muniz* and its constitutional assessment of SORNA I and held that "Subchapter I [of SORNA II] is nonpunitive and does not violate the constitutional prohibition against *ex post facto* laws." *Id.* at 626-27. *See also id.* at 605 ("Subchapter I [of SORNA II] does not constitute criminal punishment, and the *ex post facto* claims . . . necessarily fail."); *Butler II* (concluding that for purposes of a right to a jury trial and *Apprendi*, the lifetime registration, notification, and counseling requirements applicable to an SVP under SORNA II "do not constitute criminal punishment"). As to what appears to be a corollary point, Petitioner argues that under *Butler I*, 173 A.3d at 1212, the registration procedure for conducting SVP determinations results in increased criminal punishment. However, this argument was flatly rejected in *Butler II*, 226 A.3d at 993.

Thus, to the extent that Petitioner argues that Subchapter I of SORNA II remains punitive, we must disagree in light of *Lacombe*, which is binding precedent. *See In re Ross*, 109 A.3d 781, 785 (Pa. Cmwlth.), *aff'd sub nom. In re Substitute Nomination Certificate of Ross*, 101 A.3d 1150 (Pa. 2014) ("[T]his Court,

as an intermediate appellate court is bound to follow the majority opinions of our Supreme Court . . . ."). Of course, this conclusion necessarily defeats Petitioner's argument that Subchapter I of SORNA II violates the *Ex Post Facto* Clauses of the United States and Pennsylvania Constitutions. Generally, the *Ex Post Facto* Clause proscribes, among other laws, "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Muniz*, 164 A.3d at 1196 (internal citation omitted). For a criminal or penal law to be deemed *ex post facto*, it must be retrospective, that is, it must apply to events occurring before its enactment, and it must also disadvantage the offender affected by it, or, in other words, be punitive in nature. *See R.H. v. Pennsylvania State Police* (Pa. Cmwlth., No. 699 M.D. 2018, filed Jan. 12, 2021) (unreported) (holding that under *Lacombe*, Subchapter I of SORNA II did not violate the *ex post facto* clause of the Pennsylvania Constitution, because Subchapter I is not punitive in nature).

In Count IV, Petitioner argues that Subchapter I of SORNA II violates the separation of powers doctrine under the Pennsylvania Constitution. In *Lacombe*, our Supreme Court discussed whether "the separation of powers doctrine . . . unconstitutionally usurp[ed] judicial sentencing authority," and concluded that although it did not address those claims, "[e]ach of these claims, however, is predicated upon [the] argument that Subchapter I [of SORNA II] is punitive and, given our ultimate holding that Subchapter I [of SORNA II] is nonpunitive, these claims would fail in any event." 234 A.3d at 608 n.5. Thus, any claim under the separation of powers doctrine necessarily fails. *See M.A.S.B. v. Evanchick* (Pa. Cmwlth., No. 706 M.D. 2019, filed Mar. 11, 2021) (unreported) (concluding that

because Subchapter I of SORNA II is not punitive, the petitioner's claim that it constituted a penal law and violated the separation of powers doctrine failed).

The same is true for Count VII. Under Count VII, Petitioner argues that Subchapter I of SORNA II is punitive and inflicts a second punishment under the Double Jeopardy Clauses of the United States and Pennsylvania Constitutions. In *Lacombe,* the Court held that in order for Subchapter I of SORNA II to violate the Double Jeopardy Clauses, Subchapter I of SORNA II would have to be punitive in nature. Because the Court in *Lacombe* held that Subchapter I of SORNA II was not punitive, it stated that a double jeopardy challenge would necessarily fail. Thus, because Subchapter I of SORNA II is not punitive, Petitioner's double jeopardy challenge is meritless. *See R.O. v. Blocker* (Pa. Cmwlth., No. 256 M.D. 2020, filed May 24, 2021) (unreported) (holding that the Supreme Court's conclusion that Subchapter I of SORNA II is nonpunitive defeated a claim that the petitioner was entitled to summary relief under a double jeopardy claim).

3. Count III

In Count III, Petitioner argues that Megan's Law III, the statute in effect when he was sentenced, has been declared unconstitutional pursuant to *Neiman*, and therefore, his registration requirements are unenforceable. Because of this, he argues that there was no valid registration statute existing under which he could have been required to register. Therefore, he asks this Court to follow our decision in *T.S. v. Pennsylvania State Police*, 231 A.3d 103 (Pa. Cmwlth.), *rev'd*, 241 A.3d 1091 (Pa. 2020), and rule that Subchapter I of SORNA II constitutes an *ex post facto* law. Summary relief is inappropriate under both arguments.

First, as to Petitioner's "*Neiman*-based" challenge, he essentially argues that because Megan's Law III was found to be unconstitutional, no registration law

applied to him when he was sentenced, and, therefore, there could be no subsequent law requiring him to register. Subchapter I belies his argument. Historically, Megan's Law III was found unconstitutional in *Neiman* in 2013. Prior to the Court's decision in *Neiman*, the General Assembly enacted SORNA I on December 20, 2011, which became effective on December 20, 2012. Petitioner does not dispute that he was required to register as a sex offender under Megan's Law III. *See* PFR ¶¶11-13. SORNA II, which replaced SORNA I, expressly requires sex offenders who are offenders in a state or county correctional institution within the Commonwealth to register with the PSP. 42 Pa.C.S. §9799.13(2). The term sex offender, as used within section 9799.13(2), is defined as "[a]n individual who has committed a sexually violent offense. The term includes a [SVP]." 42 Pa.C.S. §9799.12. Furthermore, Subchapter I of SORNA II very clearly applies to those "required to register with the [PSP] under a former sexual offender registration law of this Commonwealth on or after April 22, 1996, but before December 20, 2012, whose period of registration has not expired." 42 Pa.C.S. §9799.52. Moreover, section 9799.75 clearly addresses the *Neiman* decision, stating:

> **(a) Registration.--**Nothing in this subchapter shall be construed to relieve an individual from the obligation to register with the [PSP] under this subchapter if the individual:
>
> (1) committed a sexually violent offense within this Commonwealth
>
> * * *
>
> (2) was required to register with the [PSP] under a former sexual offender registration law of this Commonwealth that was enacted before December 20, 2012, or would have been required to register with the [PSP] under the act of November 24, 2004 (P.L. 1243, No. 152) . . . but for the

> decision by the Pennsylvania Supreme Court in . . . *Neiman* . . . .

42 Pa.C.S. §9799.75.

Indeed, Petitioner's own averments establish that he was subject to registration under Megan's Law III. Petitioner explains that on the advice of counsel, he agreed to a stipulation classifying him as an SVP under Megan's Law III, *formerly* 42 Pa.C.S. §9795.4(e)(4). (PFR ¶11). Petitioner was sentenced to a combined aggregate sentence of 8 to 27 years' confinement and was advised that he would be a lifetime registrant under Megan's Law III. (PFR ¶12). Petitioner states that at the time his offenses were committed, and he was sentenced, Megan's Law III was the governing sex offender registration law. (PFR ¶13). Thus, *Neiman's* invalidation of Megan's Law III does not invalidate the requirement that Petitioner register under Subchapter I.

Next, he asks us to follow *T.S.* and conclude that because there was no registration law in effect at the time he was convicted, Subchapter I of SORNA II constitutes an *ex post facto* law. Petitioner's position is illuminated by this Court's recent case in *M.G. v. Pennsylvania State Police* (Pa. Cmwlth., No. 201 M.D. 2019, filed Sept. 25, 2020) (unreported). In that case, the petitioner pled guilty to one count of robbery and *nolo contendere* to one count of involuntary deviate sexual intercourse on November 4, 1992. At the time of his conviction and sentencing, Pennsylvania did not have a law requiring sex offenders to register with the PSP. The petitioner was paroled, and as a condition of his parole, he was required to register with the PSP as a sex offender, which he did in March of 2012. At that time, Megan's Law III was in effect, and imposed a lifetime registration requirement on the petitioner. Under Subchapter I of SORNA II, the petitioner would have been required to register for life. The petitioner argued that the registration requirements

in Subchapter I of SORNA II did not apply to him. We concluded that the petitioner was entitled to summary relief under *T.S.* where "this Court held that subchapter I of SORNA II was punitive and could not be applied to the petitioner, because he committed his sexual offenses before Pennsylvania had enacted a sex offender registration scheme." *M.G.*, slip op. at 7.

First, *T.S.* is distinguishable because the petitioner in that case committed his offense prior to the enactment of any registration law. In *M.G.*, this Court's holding under *T.S.* was clearly based on the fact that no registration law had ever existed when the petitioner committed his offense. Second, this Court's decision in *T.S.*, which *M.G.* relied upon to reach its holding, was reversed by our Supreme Court on December 22, 2020, by a one paragraph order stating that, under the Court's decision in *Lacombe*, "Subchapter I of Sex Offender Registration and Notification Act, 42 Pa.C.S. §§ 9799.51-9799.76, does not constitute criminal punishment and is not an *ex post facto* law." *T.S.*, 241 A.3d 1091 (*per curiam*). Thus, Petitioner is not entitled to relief under Count III for any reason he has offered to this Court.

4. Count V

Under this Count, Petitioner argues (1) that his due process rights have been violated under the Pennsylvania and United States Constitutions and (2) that Subchapter I sets forth an irrebuttable presumption that he poses a high risk of recidivism and that he is sexually violent.

We first address his claim that his due process rights under the Fourteenth Amendment have been violated. The thrust of his argument under the Fourteenth Amendment is that his *federal* due process rights have been violated because Subchapter I affords him no pre-deprivation procedure to contest its

applicability. Specifically, he argues that he has a federal due process right to privacy and reputational rights under the Pennsylvania Constitution. To maintain a due process challenge, a party must initially establish a deprivation of a protected liberty or property interest; only if the party establishes the deprivation of a protected interest will this Court consider what procedural mechanism is required to satisfy due process. *Miller v. Workers' Compensation Appeal Board (Pavex, Inc.)*, 918 A.2d 809, 812 (Pa. Cmwlth. 2007). Here, Petitioner does not name a protected liberty interest under the Fourteenth Amendment. He explicitly only alleges liberty interests protected under the Pennsylvania Constitution. Petitioner does not state or allude to any protected interest under the United States Constitution, and he does not argue that his rights to reputation or privacy under the Pennsylvania Constitution are protected under the United States Constitution. Therefore, he is not entitled to relief under Count V on these grounds.

Moreover, Petitioner is not entitled to summary relief under the United States or Pennsylvania Constitution for a violation of his substantive due process rights. Recently, in *W.W. v. Pennsylvania State Police* (Pa. Cmwlth., No. 239 M.D. 2020, filed Jan. 15, 2021) (unreported), *aff'd*, (Pa., No. 4 WAP 2021, filed Aug. 17, 2021), this Court held:

> Although the right to reputation is a fundamental right, Act 29 is not making a determination as to [the offender's] likelihood to reoffend but to sex offenders as a cohort. Even if this Court was to address the merits of [the offender's] substantive due process claim, Act 29 satisfies constitutional muster under both intermediate and strict scrutiny. Unlike its predecessors, Act 29 allows offenders an opportunity to be removed from the registry after 25 years.

> The *Lacombe* Court noted that, while a substantive due process challenge to Subchapter I was not squarely before it, this claim would be dependent upon a finding that Subchapter I is punitive. The Court opined, "given our ultimate holding that Subchapter I is nonpunitive, the claim[ ] would fail in any event." *Lacombe*, 234 A.3d at 608 n.5. Because Subchapter I is nonpunitive, [the offender's] substantive due process claim likewise fails. *See id.*

We reached the same holding in *Wetzel v. Pennsylvania State Police* (Pa. Cmwlth., No. 362 M.D. 2018, filed July 14, 2021) (unreported). Relying on *W.W.*, this Court held that substantive due process challenges to Subchapter I of SORNA II necessarily fail because of *Lacombe*'s holding that it is not punitive.

Petitioner also has failed to satisfy this Court that he is entitled to relief on the grounds that Subchapter I of SORNA II results in an unconstitutional irrebuttable presumption. In *R.C. v. Evanchick* (Pa. Cmwlth., No. 223 M.D. 2019, filed March 17, 2021) (unreported), this Court considered an offender's challenge to Subchapter I, arguing, *inter alia*, that it created an irrebuttable presumption that sexual offenders posed a high risk of recidivism, which violated procedural and substantive due process and infringed on the offender's right to reputation. *R.C.*, slip op. at 1. That analysis substantially revolved around our Supreme Court's decision in *Commonwealth v. Torsilieri*, 232 A.3d 567 (Pa. 2020), in which the Court considered whether revised Subchapter H of SORNA II, 42 Pa.C.S. §§9799.10-9799.42, established an unconstitutional irrebuttable presumption that offenders subject to its requirements pose a high risk of recidivism.[11] The *Torsilieri* Court

[11] In *R.C.*, we recognized that the Supreme Court's decision in *Torsilieri* applied to Subchapter H of SORNA II, rather than Subchapter I. However, because "the irrebuttable presumption that sexual offenders pose a high risk of recidivism in Subchapter H is the same as
(Footnote continued on next page…)

ultimately remanded for further evidentiary development as to whether there is a scientific consensus sufficient to justify overturning the legislative determination concerning sexual offenders' likelihood of reoffending. *Torsilieri*, 232 A.3d at 587-88.

Following the rationale of *Torsilieri*, this Court in *R.C.* held that in the event a petitioner raises a colorable due process violation under the irrebuttable presumptions doctrine, "the petitioner must be given the opportunity to present evidence in an effort to rebut the legislative finding with respect to an adult sexual offender's recidivation rates and the effectiveness of a tier-based registration and notification system." *R.C.*, slip op. at 18. We noted, that the "**petitioner should be given the opportunity to prove his contentions *through scientific studies or comparable evidence***," which would prove that the presumption was not universally true. *Id*. at 21-22 (emphasis added). Furthermore, we noted that the petitioner should also be given the opportunity to present evidence that there is a reasonable alternative means for ascertaining the presumed fact. *Id*. at 22. Thus, to succeed under this principle, the offender must state an interest protected by this Commonwealth's Constitution, which is encroached by an irrebuttable presumption, such as an individual's right to reputation; must show that the presumption is not universally true; and must show that there are reasonable alternative means of ascertaining the fact. *Id*. at 19-22.[12]

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that employed in Subchapter I," we found that the Supreme Court's analysis was equally applicable to Subchapter I. *R.C.*, slip op. at 15 n.9.

[12] We also rejected the argument that, under *Connecticut Department of Public Safety*, an individual who asserts the right to a hearing under the Due Process Clause must show that the facts he or she seeks to establish at a hearing are relevant to the statutory scheme. *R.C.*, slip op. at 14.

Here, even assuming that Petitioner has stated a colorable claim in his PFR sufficient to establish that his rights to reputation and/or privacy under the Pennsylvania Constitution have been encroached under the irrebuttable presumption doctrine, we cannot conclude that he is entitled to summary relief. The thrust of the principle announced in *R.C.* is that at the preliminary objections stage, an offender need only state a colorable claim under the irrebuttable presumption doctrine. Then, the offender must be given an opportunity to present evidence that the presumption is not universally true, and that there is a reasonable alternative means of ascertaining the fact. Importantly, at this stage, Petitioner has filed a motion for summary relief and the PSP has not filed preliminary objections challenging the sufficiency of the averments in the PFR. The summary relief stage is much different than the preliminary objection stage discussed in *R.C.* Under Pennsylvania Rule of Appellate Procedure 1532(b), this Court "may on application enter judgment if the right of the application thereto is clear." Pa.R.A.P. 1532(b). Presently, Petitioner's right to relief is unclear. *R.C.*'s holding explicitly states that where a colorable claim under the irrebuttable presumption doctrine has been presented, a claim may move forward to allow the petitioner an opportunity to present *evidence*. As explained in *R.C.*, following the initial stage where a colorable claim may be pled, the focus becomes whether the application has proven that the presumption is not universally true, and the fact presumed is reasonably ascertainable through different means. Here, however, Petitioner has produced no evidence, let alone scientific studies or comparable evidence, to satisfy the mandates outlined in *R.C.* This analysis would also apply to Petitioner's argument that Subchapter I of SORNA II also establishes an irrebuttable presumption of his tendency toward sexual violence. Simply stated,

Petitioner has failed to adduce any evidence that would allow this Court to conclude that he is entitled to summary relief at this stage.[13]

D. Conclusion

In sum, Subchapter I of SORNA II is nonpunitive, Petitioner's "*Neiman*-based" challenge does not afford grounds for relief, his due process rights have not been violated, and he has failed to prove that Subchapter I of SORNA II establishes an irrebuttable presumption. Based on the foregoing, we deny Petitioner's application for summary relief in its entirety as he has failed to persuade this Court that he is entitled to relief on any grounds asserted in his application.

PATRICIA A. McCULLOUGH, Judge

[13] Petitioner has attempted to buttress his claims by way of an application for leave to file a post-case submission, filed with this Court on June 7, 2021. Having reviewed this application, we note the following. In his application, he argues that legislative journals he received through a Right-to-Know Law (RTKL), Act of February 14, 2008, P.L. 6, 65 P.S. §§67.101-67.3104, request do not "identify any specific research, studies, empirical data, statistics or case authority relied upon by the General Assembly to support and/or justify its legislative findings, determinations[,] and policy decisions in regards to the regulation and registration of sex offenders." (Application For Leave to File Post-Case Submission at 2). He also argues that the journals failed to identify any source to support the General Assembly's findings that all sex offenders pose a high risk of reoffending, creating a statutory presumption that violates due process. *Id*. at 2-3. Simply stated, these arguments do not support the analysis under *R.C.*, which requires proof that the presumption is not universally true, and that there are no reasonable alternatives to ascertain the fact. These concerns amount to disagreements with the Legislature's decision-making process.

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

R.F.M.,	:	
Petitioner	:	
	:	No. 495 M.D. 2019
v.	:	
	:	
Pennsylvania State Police,	:	
Respondent	:	

ORDER

AND NOW, this 4th day of October, 2021, Petitioner's Application for Leave to File a Post-Case Submission is GRANTED, and Petitioner's Application for Summary Relief is DENIED.

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PATRICIA A. McCULLOUGH, Judge