An encouraging win in Pennsylvania

By Larry . . . *T.S. v. Pennsylvania State Police* was just decided by the Commonwealth Court of Pennsylvania. The Commonwealth Court is the intermediate court of appeals which leaves open the door for the state to seek review in the Pennsylvania Supreme Court.

This case has the potential to remove a significant number of people from the state's sex offender registry. Petitioner T.S. sought mandamus and declaratory relief against the Pennsylvania State Police (PSP), challenging as unconstitutional subchapter I of the most recent version of the sexual offender registration scheme. T.S. was convicted and sentenced for his offenses before any sexual offender registration scheme existed in the state. He argued that the provisions of subchapter I of Act 29 governing his lifetime registration are punitive as applied to him in violation of the ex post facto clauses of the United States and Pennsylvania Constitutions.

SORNA, the fourth iteration of sex offender registration, which became operational in 2012, laid the foundation for this challenge. Pennsylvania enacted SORNA to comply with the federal Adam Walsh Act (AWA). SORNA classified offenders and offenses into three tiers, with each corresponding to an offender's duration of registration and frequency of required verification, anywhere from quarterly to annually. The Pennsylvania Supreme Court struck down SORNA as unconstitutional in 2017. See *Commonwealth v. Muniz, 164 A.3d 1189* (Pa. 2017), cert. denied, __ U.S. __, 136 S. Ct. 925 (2019). In *Muniz*, the petitioner was convicted and sentenced for his offense in 2007, when Megan's Law III was in place. He absconded and at the time of his capture in 2014, SORNA dictated his registration requirements. His triggering offense carried a 10-year registration requirement under Megan's Law III but a lifetime registration under SORNA. He challenged the retroactive application of SORNA's provisions to him as ex post facto. The Pennsylvania Supreme Court agreed, concluding that the increased registration period and the other registration requirements of SORNA, including quarterly in-person registration, in-person verification of registration information, and the dissemination of personal information online were punitive provisions.

In response to *Muniz*, the General Assembly enacted Act 29. The new law divided SORNA into two subchapters. Subchapter H is based on the original SORNA statute and is applicable to offenders who committed offenses after the December 20, 2012, effective date of SORNA; Subchapter I is applicable to offenders who committed offenses prior to the effective date of SORNA and to whom the *Muniz* decision directly applied. However, the Supreme Court did not strike down the mere registration of such offenders retroactively, analyzing instead the provisions governing registration, which included an online database with information about offenders' criminal convictions and requirements for periodic updates by offenders, and determined these provisions were nonpunitive.

PSP argued that subchapter I of Act 29 is not a criminal punishment but "a civil registration system," and neither PSP nor the courts can alter the registration obligations. None of the prior case law in Pennsylvania has addressed the application of subchapter I of Act 29 in the wake of *Muniz* to offenders who committed offenses prior to the enactment of any sexual offender registration scheme. Pursuant to subchapter I of Act 29, T.S. argued that he must: (1) register for life; (2) notify PSP within three business days of a change in residency or employment; (3) appear annually to verify residence and be photographed; (4) be subject to criminal sanction if he fails to verify his residence or notify PSP of changes; and (5) be subject to display on the internet for life through the internet dissemination provision.

The Supreme Court in *Muniz* emphasized the multiple times per year and over a lifetime that an offender was required to appear in person under SORNA; it also more generally stated that it found ". . . the in-person reporting requirements, for both verification and changes to an offender's registration, to be a direct restraint upon liberty" and that this factor ". . . weighs in favor of finding SORNA's effect to be punitive." *See Commonwealth v. Muniz*, 164 A.3d at 1211. In *Muniz*, the Supreme Court stated, "The information SORNA allows to be released over the internet goes beyond publicly accessible conviction data," to include addresses of residence and employment, physical description, and vehicle information. *Id*. at 1215-16.

Despite the General Assembly's intent to address the concerns of the Supreme Court in *Muniz* through subchapter I of Act 29, T.S. asserted that this factor and the Mendoza-Martinez factors on the whole weigh in favor of finding subchapter I of Act 29 punitive. He emphasized that at the time of commission of his offenses and convictions, he could not have anticipated that his conduct would subject him to the sanctions imposed by Act 29. The Court agreed and held that Act 29 cannot be applied to T.S. because it violates the ex post facto clause. It remains to be seen if the state will seek further review to the Pennsylvania Supreme Court.