

Nos. 47 MAP 2016, 48 MAP 2016, and 10 WAP 2016

IN THE SUPREME COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

10 WAP 2016; 47 MAP 2016; & 48 MAP 2016

COMMONWEALTH OF PENNSYLVANIA

V.

THOMAS M. REED,

Appellant

Appeal by Allowance from the Order of the Superior Court Entered November 24, 2014 at No. 402 WDA 2014, Affirming the Judgment of the Court of Common Pleas of Clearfield County Entered February 12, 2014 at No. CP-17-CR-0000894-2000.

COMMONWEALTH OF PENNSYLVANIA

V.

JOSE M. MUNIZ,

Appellant

Appeal by Allowance from the Order of the Superior Court Entered August 7, 2015 at No. 2169 MDA 2014, Affirming the Judgment of the Court of Common Pleas of Cumberland County Entered October 14, 2014 at No. CP-21-CR-0000903-2006.

COMMONWEALTH OF PENNSYLVANIA

V.

TAURUS KENYATA GILBERT,
Appellant

Appeal by Allowance from the Order of the Superior Court Entered
February 10, 2015 at No. 287 MDA 2014, Affirming the Judgment of
the Court of Common Pleas of Lancaster County Entered January 15,
2014 at No. CP-36-CR-0002038-2003.

**BRIEF FOR THE ASSOCIATION FOR THE TREATMENT OF SEXUAL
ABUSERS, ASSESSMENT AND TREATMENT ALTERNATIVES, AND
JOSEPH J. PETERS INSTITUTE AS AMICI CURIAE IN SUPPORT OF
TAURUS GILBERT, JOSE MUNIZ, AND THOMAS REED AS
APPELLANTS**

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INTEREST OF THE AMICI CURIAE

The Association for the Treatment of Sexual Abusers (“ATSA”) is an international, multi-disciplinary organization dedicated to preventing sexual abuse. Through research, education, and shared learning, ATSA promotes evidence-based practice, public policy, and community strategies that lead to the effective assessment, treatment, and management of individuals who have sexually abused or are at risk to abuse. ATSA is an association of individuals from around the world committed to achieving a high level of professional excellence. ATSA promotes the philosophy that empirically based assessment, practice, management, and policy strategies will: enhance community safety, reduce sexual recidivism, protect victims and vulnerable populations, transform the lives of those caught in the web of sexual violence, and illuminate paths to prevent sexual abuse.

The Joseph J. Peters Institute (“JJPI”) is a non-profit organization of medical professionals that has offered outpatient treatment for victims of sexual abuse and released offenders since 1955. Recently, JJPI has expanded its outreach through targeted education initiatives on sexual abuse in Philadelphia and surrounding Pennsylvania communities.

The Assessment of Treatment Alternatives (“ATA”) is a non-profit, forensic mental health clinic that specializes in the treatment of children, adolescents, and adults with emotional and behavioral problems in the greater Philadelphia area.

Their staff draws experience from psychiatrists, psychologists, social workers, and case managers. The ATA uses trauma-focused treatment to treat child abuse victims and their caregivers together to encourage effective family healing. The professionals at the ATA also offer therapeutic, supervised visitation where they send a specially trained clinician to parental visits to ensure a safe healing environment.

The *amici curiae* are directly affected by the new lifetime notification and registration requirements. JJPI, ATA, and ATSA members all currently treat patients who have been retroactively subjected to lifelong government monitoring and community notification requirements. These new rules make it more difficult for the *amici curiae* to reintegrate their current patients and limit the *amici curiae*'s ability to protect the community from patient recidivism. Both the mission of the *amici curiae* and the safety of the community are jeopardized by the retroactive change in notification and registration requirements.

The *amici curiae*'s combined experience treating victims, counseling released offenders, and educating the community is unique in Pennsylvania. They offer an experienced, on-the-ground perspective of the challenges facing victims and ex-offenders. Furthermore, their guiding goals promote the three primary purposes of sexual-offender notification and registration laws: (1) protect the

community from recidivism, (2) treat and protect former victims, and (3) monitor, rehabilitate, and reintegrate released offenders.

STATEMENT OF THE QUESTIONS INVOLVED

The *amici curiae* defer to the statement of the questions involved provided by the Appellants.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The *amici curiae* defer to the statement of the scope and standard of review provided by the Appellants.

STATEMENT OF THE CASE

The *amici curiae* defer to the statement of the case provided by the Appellants.

SUMMARY OF ARGUMENT

The central purpose of Pennsylvania’s Sex Offender Registration and Notification Act (“SORNA”), 42 Pa. C.S. §§ 9799.10, *et seq.* (2014), is to make the public safer. 42 Pa. C.S. § 9799.11(a)(2)-(3). Reclassifying ex-offenders retroactively to increase their terms of registration does not serve this goal. First, it increases the risk of patient recidivism. Prolonged community notification aggravates risk factors that make sexual-offense recidivism more, rather than less,

likely. Second, it decreases the chances that patients will rehabilitate and reintegrate successfully into their communities. Requiring lifetime notification is equivalent to the state proclaiming that sexual offenders cannot rehabilitate, marginalizing the work of treatment organizations that provide therapy at the order of the courts or as a condition of parole. Third, SORNA's offense-based risk classification system is ineffective at accurately classifying offenders' recidivism risk. As a result, neither the police nor the community is properly warned about released offender recidivism risk. Finally, retroactive application instantly swells the number of names on the registry, further reducing the power of community notification tools. Together, the consequences of the new SORNA requirements will increase the risks to the community.

ARGUMENT

I. The Retroactive Application of SORNA Does Not Further SORNA's Purpose of Preventing Ex-Offender Recidivism.

Retroactive application of SORNA will not protect communities. Pennsylvania ex-sexual offenders are the least likely ex-offenders to recidivate in any way, let alone commit a new sexual offense.

SORNA's registration requirements are based on the legislative finding that "[s]exual offenders pose a high risk of committing additional sexual offenses." 42 Pa. C.S. § 9799.11(4). But the evidence does not support that ex-offenders subject

to SORNA's retroactive reclassification and increased registration requirements pose this risk. The Pennsylvania Department of Corrections has found that ex-offenders who had previously committed a sexual crime pose a lower than average risk of any sort of recidivism when compared to those who had committed non-sexual offenses.¹ In fact, only 3.1% of all Pennsylvania recidivist offenses in 2008 were sexual offenses.² Both national and state studies show that the risk of an ex-offender recidivating by the commission of another sexual offense within three years is extremely low.³

¹ The average rate of recidivism for all released offenders in Pennsylvania is 59.9%. Pa. Dep't of Corr., *Recidivism Report 2013*, 21, tbl. 12 (2013). The average for ex-sexual offenders is 53.2%. *Id.* For those that do recidivate, over 60% of reincarcerations are for technical parole violations, not stand-alone crimes. *Id.* at 24, tbl. 18. *See also* Jill S. Levenson, et al., *Grand Challenges: Social Justice and the Need for Evidence-based Sex Offender Registry Reform*, J. OF SOC. & SOC. WELFARE, June 2016, at 3, 14 (stating that sex offenders "are less likely to be re-arrested for a new crime compared to other violent, property, and drug offenders").

² Broken down, the 3.1% is comprised of 0.6% forcible rapes, 0% statutory rape, and 2.5% other sexual offenses. *Recidivism Report 2013*, at 22, tbl. 14. Most significant in the Pennsylvania data is the fact that "inmates who recidivated were not necessarily rearrested or reincarcerated for the same crime as the original commitment crime." *Id.* at 20. In other words, not all of the recidivist sexual offenses were re-offenses.

³ A Department of Justice study found that only 5.3% of sexual offenders recidivated with a new sexual offense within three years. Bureau of Justice Statistics, *Recidivism of Sex Offenders Released from Prison in 1994*, 24 (2003). More recent, state-specific studies have found three-year sexual offense recidivism rates of 1.05% and 0.80%, respectively. Ind. Dep't of Corr., *Recidivism Rates Decrease for 3rd Consecutive Year*, 1 (2009)

The latest research shows that ex-offender recidivism is highest during the first few years.⁴ After those first few years, the risk of sex-offense recidivism substantially decreases for the ex-offenders that remain in the community.⁵ “Further [a]fter 10 years, moderate risk sex offenders reach recidivism rates comparable to general criminal offenders.”⁶ In fact, after 16.5 years without re-offense, even “high risk sex offenders are no more likely to be arrested for a new sexual crime than an offender with no prior sex crime history.”⁷

Those subject to retroactive, lifelong registration are the ex-offenders who have not re-offended since they have been in the community. Therefore, retroactive application places a lifelong burden on the ex-offenders that are the least likely to commit a new sexual offense.

http://www.in.gov/idoc/files/IDOC_Recidivism.pdf; Calif. Dep’t of Corr. & Rehab., *2014 Outcome Evaluation Report*, 30, tbl. 13 (2015), http://www.cdcr.ca.gov/adult_research_branch/Research_Documents/2014_Outcome_Evaluation_Report_7-6-2015.pdf.

⁴ Kristen M. Zgoba, et al., *The Adam Walsh Act: An Examination of Sex Offender Risk Classification Systems*, SEXUAL ABUSE: A J. OF RES. & TREATMENT Feb. 2015, at 1, 15. In Pennsylvania, as explained above, that high rate of sexual offense recidivism is somewhere near 3.1% in the first three years. *See supra* Note 2.

⁵ *Id.*

⁶ Levenson, *Grand Challenges*, *supra* note 1, at 18-19.

⁷ *Id.* at 19.

II. Lifetime Notification Inhibits Successful Reintegration and Rehabilitation.

Retroactively increasing SORNA's registration requirements *increases* the risk of sexual offense recidivism and puts communities more at risk.

This Court has recognized that lifetime notification for juveniles “leads to ... in some cases, an increased risk of other criminal acts.” *In the Interest of J.B.*, 107 A.3d 1, 10 (Pa. 2014). Scientific studies show that registration and notification can increase the risk of recidivism in adults as well. Being placed on the registry entails, in many cases, unemployment, homelessness, physical and verbal harassment, and property damage.⁸ Oftentimes, treatment centers see patients that are denied housing by landlords on the basis of their status.⁹ Even government programs meant to aid ex-offenders in securing employment routinely exclude sexual offenders from their reach.¹⁰ Psychologically, the tolls are just as serious and include “shame, stigma, isolation, anxiety, depression, and hopelessness.”¹¹ These are all dynamic risk factors that increase the risk of sexual offense

⁸ *Id.* at 11.

⁹ *See id.* at 13 (“[H]ousing instability is consistently associated with criminal recidivism and absconding.”).

¹⁰ *See, e.g.*, THE MAYOR'S OFFICE OF REINTEGRATION SERVS. FOR THE EX-OFFENDER (R.I.S.E.), *Guide to the Philadelphia Reentry Employment Program (PREP)*, 7 (2011).

¹¹ Levenson, *Grand Challenges*, *supra* note 1, at 13.

recidivism among released offenders.¹² On the other hand, a steady job, livable home, and social support all decrease the risk of sexual offense recidivism among ex-offenders.¹³ By decreasing access to tools that help decrease the risk of recidivism, lifetime notification may lead to the opposite, unintended outcome: increased recidivism rates.

Increased recidivism rates are only one part of the problem. Permanent public shaming through lifetime notification may drive patients underground, away from treatment, employment, and a chance at rehabilitation and reintegration.¹⁴ Furthermore, when ex-offenders have difficulty meeting their basic needs, treatment is less effective. In the face of homelessness, harassment, depression, and joblessness, it is challenging for *amici* and their patients to overcome stressors and focus on treatment. These stressors, as previously noted, can lead to increased recidivism rates. When a patient recidivates, whether it is a failure to register or a

¹² See, e.g., R. Karl Hanson & Kelly Morton-Bourgon, *Predictors of Sexual Recidivism: An Updated Meta-Analysis* (2004); Joan Tabachnick & Alisa Klein, *A Reasoned Approach: Reshaping Sex Offender Policy to Prevent Child Sexual Abuse*, ASS'N FOR THE TREATMENT OF SEXUAL ABUSERS, 7 (2011). Cf. Candace Kruttschnitt, et al., *Predictions of Desistance Among Sex Offenders: The Interactions of Formal and Informal Social Controls*, 17 JUST. Q., No. 1, 78-80 (2000) (finding that stable employment and treatment significantly reduces the risk of recidivism).

¹³ See, e.g., Jill Levenson & Leo Cotter, *The Effects of Megan's Law on Sex Offender Reintegration*, 21 J. OF CONTEMPORARY CRIM. JUST., No. 3, 298-300 (2005).

new crime, treatment stops. The constant cycling between jail and the community puts more stress on treatment centers, which are required to re-evaluate prisoners as they are re-released. The retroactive application of lifetime registration and notification, therefore, places the community at greater risk and limits patient treatment.

III. Requiring Lifetime Notification Based on Offense Type Is Ineffective at Assessing Recidivism Risk and Dilutes the Power of the Registry.

SORNA requires ex-offenders to register for a fifteen-year term, a twenty-five year term, or their entire lifetime, based on the type of offense the ex-offender committed. 42 Pa. C.S. § 9799.13. When SORNA was amended in 2011, it not only required lengthier registration periods for all people subject to its reach, it also reclassified thousands of people who were previously required to register for a finite period of time, retroactively converting them to lifetime registrants. *See* 42 Pa. C.S. § 9799.13(2). The effects of this – prolonging ex-offenders’ registration term based on offense-type – will strain police resources needlessly, misinform the public, and dilute the effectiveness of the registry. Classification based on type of offense rather than individual characteristics is ineffective in assessing an individual’s recidivism risk and misclassifies offenders for notification purposes.

¹⁴ Kruttschnitt, *supra* note 12, at 67-87.

Pennsylvania law assigns recidivism risk based on offense type instead of individual offender and offense characteristics. 42 Pa. C.S. §§ 9799.14, 9799.15. This type of classification is not nearly as effective as individualized, judicially determined risk profiles.¹⁵ Close empirical study has found that SORNA’s “tiers overestimate risk in most cases and erroneously imply that the majority of [ex-offenders] pose a high threat to community safety.”¹⁶ For the police, offense-based classification systems force them to monitor potentially low-risk offenders who have been misclassified as high-risk while not monitoring potentially high-risk offenders who have been misclassified as low-risk.¹⁷

Currently, there are 14,463 people on Pennsylvania’s sex offender registry who must be monitored for life, including thousands retroactively reclassified under SORNA.¹⁸ Given this staggering amount, retroactive application of SORNA

¹⁵ Naomi J. Freeman & Jeffrey C. Sadler, *The Adam Walsh Act: A False Sense of Security or an Effective Public Policy?*, CRIM. JUST. POL’Y REV. (2009). See also Levenson, *Grand Challenges*, *supra* note 1, at 18-20 (discussing the Static-99-R, a “validated actuarial risk assessment tool[] . . . that demonstrate[s] predictive ability to screen offenders into relative risk categories”).

¹⁶ See Zgoba, *supra* note 4, at 14-15 (“Tier 3 offenders did not have significantly higher rates of recidivism than Tier 2 offenders.”).

¹⁷ See Zgoba, *supra* note 4, at 2 (“[I]mposing higher levels of treatment and supervision than is necessary based on offender risk is not cost-effective and can create collateral consequences to offenders and communities that potentially compromises public safety.”)

¹⁸ There are 12,758 Tier 3 offenders and 1,705 sexually violent predators currently on the registry. Pa. State Police, *Megan’s Law Count Active Offenders Public*

creates less monitoring and less effective monitoring. State and local police forces must monitor more ex-offenders, spreading out already thin resources, and must do so for the rest of the ex-offenders' lives.¹⁹

Retroactive lifetime notification may also confuse the public for the same reasons it can confuse the police: misclassification. Moreover, lifetime notification communicates a skewed picture of from where the sexual offense risk stems. Most sexual offenses are committed by new offenders who are known to their victims rather than ex-offenders who are strangers living nearby. The U.S. Department of Justice has found that 87% of sexual crimes committed in a year are committed by those who have not previously offended.²⁰ Another Department of Justice study found that almost all sexually abused children are victimized by someone familiar, not a stranger.²¹ Finally, a more recent study based in Baltimore, Maryland found

Report, <https://www.pameganslaw.state.pa.us./Reports/ReportViewer.aspx?ReportType=CountActiveOffenders> (last accessed July 28, 2016). Both of these groups, based on the change in law, must be monitored by the police for the rest of their lives.

¹⁹ See Levenson, *Grand Challenges*, *supra* note 1, at 16 (“With individuals placed on registries for mandatory durations of 25 years to life, little attrition occurs, and fiscal burdens for states will continue to escalate.”).

²⁰ Bureau of Justice Statistics, *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault* (1997).

²¹ See Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported by Law Enforcement: Victim, Incident, and Offender Characteristics*, 10 (2000) (finding that only 7% of sexually abused children are victimized by strangers).

there was *less* risk of sexual offense victimization in neighborhoods that have higher concentrations of registered sexual offenders.²² Community notification, as a general matter, does not accurately warn community members of their risk.

Ohio serves as an important example of how lifetime notification dangerously dilutes the registry. In striking down a law that would have ballooned Ohio's sexual offender registry, Ohio's Supreme Court explained "if we were to adjudicate all sexual offenders as sexual predators, we run the risk of 'being flooded with a number of persons who may or may not deserve to be classified as high-risk individuals, with the consequence of diluting both the purpose behind and the credibility of the law.'" *State v. Eppinger*, 743 N.E.2d 881, 888 (Ohio 2001) (quoting *State v. Thompson*, 748 N.E.2d 1144, 1151 (Ohio Ct. App. 1999)).²³ Pennsylvania's SORNA has already added over 14,000 ex-offenders to

²² Amanda Y. Agan & J.J. Prescott, *Sex Offender Law and the Geography of Victimization*, 11 J. EMPIRICAL LEGAL STUDIES 786, 786 (2014).

²³ Even after the court's warning, the change in Ohio's classification system led to a flood of so-called high-risk ex-offenders. Of the total ex-sexual offender population, after 20 years, only between 24-27% may recidivate. In Ohio, double this number, 56%, were placed in Tier 3. This tier is supposed to delineate those ex-offenders with the highest risk for re-offense. Andrew J. Harris, et al., *Widening the Net: The Effects of Transitioning to the Adam Walsh Act's Federally-Mandated Sex Offender Classification System*, 37 CRIM. JUST. & BEHAV., May 2010, at 503, 514-16. Classification will not match risk in Pennsylvania either. Currently, 73% of ex-offenders have been classified into Tier 3 and are subject to lifetime registration. See Pa. State Police, *supra* note 18 (calculating that 14,463 out of 19,766 ex-offenders on the registry will be subject to lifetime registration).

the registry for life. With so many people on the registry, it is a monumental task for the police to determine true recidivism risk of ex-offenders, and an impossible one for the public.²⁴ Retroactive application, as a result, makes the registry less useful in the short- and long-term and fails to protect the community as promised.

²⁴ See Levenson, *Grand Challenges*, *supra* note 1, at 17 (declaring that “the ability of the public to differentiate high risk offenders is diluted” by SORNA’s lifetime registration and offense-based classification system).

CONCLUSION

The government and the *amici curiae*'s interests are aligned: safe communities, recovered victims, and rehabilitated and reintegrated ex-offenders. Experience and careful study strongly indicate that retroactively applying lifetime registration and notification to ex-offenders will lead to increased recidivism. It will strain already-limited public and private resources. It will misinform the public and dilute the power of a small, focused registry of high-risk offenders. It will jeopardize the efforts of treatment centers. And ultimately, it likely will endanger the community.²⁵

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²⁵ Special thanks to Lisa Swaminathan, Esquire, and Andrew D'Aversa, an extremely talented law student, for their work supporting the drafting of this brief.

CERTIFICATE OF SERVICE

I, Jason A. Leckerman, hereby certify that on this 5th day of August, 2016, I caused a true and correct copy of the foregoing Brief of Amici Curiae to be served by electronic filing.

/s/ Jason Leckerman
Jason A. Leckerman