

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,  
PENNSYLVANIA

COMMONWEALTH OF  
PENNSYLVANIA,

:  
: No. CR 1379-2017

vs.

ANDREW JOSEPH ULTSH,  
Defendant.

**ORDER**

AND NOW, this 25<sup>th</sup> day of October, 2024, upon consideration of the Commonwealth's request for an SVP hearing<sup>1</sup> relating to the Defendant, and the briefs<sup>2</sup> and arguments<sup>3</sup> of the parties, it is hereby ORDERED and DIRECTED that the Commonwealth's request is GRANTED, for reasons explained below.

***I. BACKGROUND.***

On April 6, 2018, the Defendant pleaded guilty<sup>4</sup> to five counts of possessing child pornography.<sup>5</sup> Defendant was directed to undergo an assessment by the

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<sup>1</sup> "SVP" is a commonly used abbreviation for "sexually violent predator." Under Pennsylvania's Sex Offender Registration and Notification Act ("SORNA"), which is commonly referred to as *Megan's Law*, this is a designation that can be applied to certain sexual offenders who are guilty of designated offenses and who have been determined to meet applicable criteria set by SORNA. See 42 Pa. C.S. §§ 9799.12 (defining, *inter alia*, "sexually violent predator"); 9799.24 (setting forth the procedure for determining whether an individual is a sexually violent predator).

<sup>2</sup> Under the somewhat unique circumstances of this and one other case, the Court was concerned that it may lack jurisdiction to conduct an SVP hearing. Therefore, the Court established a briefing schedule and held argument on this question. Scheduling Order, dated and entered June 7, 2024. The parties filed the following briefs: (i) the Commonwealth's "Memorandum of Law," filed July 7, 2024 (the "Commonwealth's Brief"); and (ii) the Defendant's "Memorandum of Law," filed August 9, 2024 (the "Defendant's Brief").

<sup>3</sup> The Court heard argument on the jurisdictional question on August 27, 2024. Scheduling Order, dated and entered June 7, 2024. Deputy Attorney General Jacob M. Jividan, Esq. argued for the Commonwealth, and Lycoming County Public Defender Nicole J. Spring, Esq. argued for the Defendant.

<sup>4</sup> Guilty Plea, entered April 6, 2018.

<sup>5</sup> 18 Pa. C.S. § 6312(d) ("Any person who intentionally views or knowingly possesses or controls any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material depicting a child under the age of 18 years engaging in a prohibited sexual act or in the simulation of such act commits an offense"). Due to the nature of the images depicted, two counts were graded as felonies of the second degree, and the remaining counts were graded as felonies of the third degree. See 18 Pa. C.S. § 6312(d.1) (providing that offenses under subsection (d) are graded as felonies of

Sexual Offender Assessment Board (SOAB) to determine whether he should be designated an SVP, and sentencing was scheduled for July 24, 2018.<sup>6</sup> On April 30, 2018, Defendant moved to vacate the Order for an SVP assessment<sup>7</sup> and on June 25, 2018 the Commonwealth filed a praecipe to schedule an SVP hearing.<sup>8</sup> In the interim, SOAB completed the assessment. Nonetheless, the Court scheduled argument for July 13, 2018,<sup>9</sup> at which time it directed the parties to file briefs concerning whether the Court had authority to conduct an SVP hearing. Ultimately, on December 13, 2018, the Court entered an Order in which it concluded that it was bound by the Superior Court's decision in *Commonwealth v. Butler*<sup>10</sup> and, therefore, that it could not hold an SVP hearing.<sup>11</sup> Defendant failed to appear for sentencing, and a bench warrant was issued for his arrest. Thereafter, he was sentenced eventually on March 22, 2019.<sup>12</sup>

On April 19, 2019, the Commonwealth appealed the Court's sentencing Order to the Supreme Court.<sup>13</sup> While the case was on appeal, the Supreme Court reversed the Superior Court's decision in *Butler*.<sup>14</sup> In its decision, the Supreme Court found that SORNA's lifetime registration, notification and counseling requirements (the "RNC requirements") were not applied to conduct, but, instead, were applied to an individual's status as suffering from a serious psychological

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the third degree, except that subsequent offenses and images involving indecent contact with a child or images involving a child under the age of 10 years may be graded higher).

<sup>6</sup> Orders, entered April 24, 2018.

<sup>7</sup> Motion to Vacate Order for SVP Assessment, filed April 30, 2018.

<sup>8</sup> Praecipe to Schedule a Haring to Determine Defendant's Sexually Violent Predator Status, filed June 25, 2018.

<sup>9</sup> Scheduling Order, entered June 27, 2018.

<sup>10</sup> *Com. v. Butler*, 173 A.3d 1212 (Pa. Super. 2017).

<sup>11</sup> Opinion and Order, entered December 13, 2018.

<sup>12</sup> See the Court's Opinion in Support of Order in Compliance with Rule 1925(a) of the Rules of Appellate Procedure, entered July 9, 2019, at 2.

<sup>13</sup> Notice of Appeal, filed April 19, 2019.

<sup>14</sup> *Com. v. Butler*, 226 A.3d 972 (Pa. 2020).

defect, *i.e.*, from the individual's SVP status, such that the he was likely to engage in predatory sexually violent offenses. Thus, our Supreme Court held that the RNC requirements were nonpunitive and did not constitute criminal punishment for purposes of *Apprendi v. New Jersey*<sup>15</sup> and *Alleyne v. United States*,<sup>16</sup> under which anything that increases the mandatory minimum sentence for a crime is an element and must be submitted to a jury and found beyond a reasonable doubt.<sup>17</sup>

On September 2, 2020, the trial judge held a conference with counsel, and counsel filed a joint application for remand of the case to this Court.<sup>18</sup> Accordingly, on September 25, 2020, the Supreme Court remanded the case for further proceedings.<sup>19</sup> On September 28, 2020, the Record Remittal in this case was filed here.<sup>20</sup> At that point, the case went into limbo.<sup>21</sup> Neither party requested that the matter be scheduled for an SVP hearing, and the Court did not schedule an SVP hearing *sua sponte*. The case came back to the Court's attention when the Pennsylvania State Police contacted the Court regarding another case wherein the same situation obtained, and the Court scheduled a conference for August 11, 2023.<sup>22</sup> As a result of the conference, the Court entered an Order scheduling an SVP hearing.<sup>23</sup>

Prior to the hearing, however, the parties recognized issues that needed to be addressed first. More than five years had elapsed since sentencing, and the case

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<sup>15</sup> *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000).

<sup>16</sup> *Alleyne v. United States*, 133 S. Ct. 2151 (2013).

<sup>17</sup> *Butler*, *supra*, 226 A.3d at 972.

<sup>18</sup> Order, dated June 20, 2023 and entered June 21, 2023, at 1.

<sup>19</sup> Order, *Com. v. Ultsch*, 42 MAP 2019, entered September 25, 2019.

<sup>20</sup> Record Remittal, filed September 28, 2020.

<sup>21</sup> Order, dated June 20, 2023 and entered June 21, 2023, at 1-2. The case was remanded during the Covid-19 pandemic, at a time when Pa. R. Crim. P. 600 (requiring a prompt trial in criminal matters) was suspended. Further, the trial judge retired in early November, 2021. *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> Order, dated and entered August 21, 2023.



had been remanded from the Supreme Court four years earlier with no further action taken. Due to the substantial delay in scheduling the SVP hearing, questions arise concerning whether the Defendant's constitutional protections were implicated by conducting an SVP hearing at this late date and whether the Court retained jurisdiction to conduct the hearing.

## **II. LAW AND ANALYSIS.**

### **A. The Sex Offender Registration and Notification Act.**

The General Assembly adopted the current version of SORNA<sup>24</sup> to comply with the Adam Walsh Child Protection and Safety Act of 2006,<sup>25</sup> which requires that states provide for the registration of sexual offenders, and to address the Pennsylvania Supreme Court's decisions in *Commonwealth v. Muniz*<sup>26</sup> and *Commonwealth v. Neiman*<sup>27</sup> and the Superior Court's decision in *Commonwealth v. Butler*.<sup>28</sup> The General Assembly specified that

[i]t is the policy of the Commonwealth to require the exchange of relevant information about sexual offenders among public agencies and officials and to authorize the release of necessary and relevant information about sexual offenders to members of the general public as a means of assuring public protection and shall not be construed as punitive.<sup>29</sup>

When enacting SORNA, the General Assembly found, *inter alia*, that the laws of the Commonwealth regarding registration of sexual offenders need to be strengthened "in a manner which is nonpunitive but offers an increased measure of

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<sup>24</sup> See 42 Pa. C.S. §§ 9799.11(b)(1), (3), (4).

<sup>25</sup> 34 U.S.C. §§ 20901, *et seq.*

<sup>26</sup> *Com. v. Muniz*, 164 A.3d 1189 (Pa. 2017) (holding that, because SORNA's RNC requirements were punitive in effect, retroactive application of the RNC requirements to the defendant violated the *ex post facto* clauses of the United States and Pennsylvania Constitutions).

<sup>27</sup> *Com. v. Neiman*, 84 A.3d 603 (Pa. 2013) (holding that certain amendments to SORNA violated the single subject rule of the Pennsylvania Constitution and, therefore, were invalid).

<sup>28</sup> See, *supra*, n. 10. The General Assembly passed the current version of SORNA before the Supreme Court overruled the Superior Court's decision in *Butler*.

<sup>29</sup> 42 Pa. C.S. § 9799.11(b)(2).

protection to the citizens of this Commonwealth;<sup>30</sup> that sexual offenders pose a high risk of committing additional sexual offenses and that protecting the public from this type of offender is “a paramount governmental interest;”<sup>31</sup> that sexual offenders have a reduced expectation of privacy because of the public’s interest in public safety and in effective operation of government;<sup>32</sup> that release of relevant information about sexual offenders to public agencies and the general public furthers the governmental interests of public safety and public scrutiny of the criminal and mental health systems;<sup>33</sup> that release of relevant information about sexual offenders will assist individuals in protecting themselves, their family members, and members of group or community organizations from recidivist acts by sexual offenders;<sup>34</sup> and that communities, if provided adequate notice of and information about sexual offenders, “can develop constructive plans to prepare for the presence of sexual offenders in the community,” such as “provid[ing] education and counseling to residents, particularly children.”<sup>35</sup>

### **1. Purpose and interpretation of SORNA.**

The General Assembly’s purpose in enacting SORNA was not to punish sexual offenders but to promote public safety through a civil regulatory scheme.<sup>36</sup>

It is clear ... that the legislature's intent in requiring offenders to register with the State Police regarding their whereabouts was not retribution; rather, the legislature's stated intent was to provide a system of registration and notification so that relevant information would be available to state and local law enforcement officials in order to protect the safety and general welfare of the public. Thus, the legislature's actual purpose in enacting the registration provisions was

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<sup>30</sup> 42 Pa. C.S. § 9799.11(a)(2).

<sup>31</sup> 42 Pa. C.S. § 9799.11(a)(4).

<sup>32</sup> 42 Pa. C.S. § 9799.11(a)(5).

<sup>33</sup> 42 Pa. C.S. § 9799.11(a)(6).

<sup>34</sup> 42 Pa. C.S. § 9799.11(a)(7).

<sup>35</sup> 42 Pa. C.S. § 9799.11(a)(3).

<sup>36</sup> *Muniz*, *supra*, 164 A.3d at 1209-10 (citing *Com. v. Williams*, 832 A.2d 962, 972 (Pa. 2005)), abrogated on other grounds by *Com. v. Santana*, 266 A.3d 528 (Pa. 2021).

not punishment; rather its purpose was to effectuate, through remedial legislation, the non-punitive goal of public safety.<sup>37</sup>

Thus, the RNC requirements of SORNA do not constitute criminal punishment of an SVP.<sup>38</sup> As such, SORNA's RNC requirements are to be liberally construed "to effect their objects and to promote justice."<sup>39</sup> As our Supreme Court has explained,

In construing any statute, our goal is to "ascertain and effectuate the intention of the General Assembly." In doing so, we must give effect to all the provisions. While we must not disregard the clear words of an unambiguous statute under the pretext of pursuing its spirit, we nevertheless must look beyond the language when the words of a statute are not explicit and consider, *inter alia*, the occasion and necessity for the statute, the circumstances under which it was enacted, the mischief to be remedied, and the object to be attained. Moreover, we must construe statutes liberally to give effect to their purposes and promote justice.<sup>40</sup>

Therefore, in determining whether to grant the Commonwealth's request for an SVP hearing in this case, the Court must construe SORNA liberally to effectuate its purposes of making relevant information available to state and local law enforcement officials and the general public in order to protect the safety and general welfare of the public, if the Defendant is determined to be an SVP, and to promote justice.

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<sup>37</sup> *Com. v. Gaffney*, 733 A.2d 616, 619 (Pa. 1998).

<sup>38</sup> See, e.g., 42 Pa. C.S. § 9799.11(b)(2) (The exchange of relevant information about sexual offenders among public agencies and officials and the release of necessary and relevant information about sexual offenders to the general public for public protection "shall not be construed as punitive"); *Butler, supra*, 226 A.3d at 993 ("[T]he RNC requirements applicable to SVPs do not constitute criminal punishment").

<sup>39</sup> 1 Pa. C.S. § 1928(c) (providing that all provisions of a statute not specifically intended to be construed otherwise and not falling into certain categories inapplicable here are to be liberally construed to give effect to their purposes and to promote justice).

<sup>40</sup> *Craley v. State Farm Fire and Cas. Co.*, 895 A.2d 530, 539 (Pa. 2006) (footnotes and citations omitted) (quoting 1 Pa. C.S. § 1921(a) and citing 1 Pa. C.S. §§ 1921(b), (c), 1928(c)).



## **2. SORNA's classification and registration requirements.**

Under SORNA, sexual offenses are classified in a three-tiered system based upon the offense committed.<sup>41</sup> SORNA's RNC requirements require an individual to whom SORNA applies to register with the Pennsylvania State Police<sup>42</sup> according to the tier of the offense and the status of the defendant.<sup>43</sup> Individuals convicted of less serious sexual offenses must register for a definite period of time according to the nature of the offense,<sup>44</sup> but an SVP must register for life.<sup>45</sup> Defendant was convicted of a Tier I sexual offense,<sup>46</sup> so he is required to register for a period of fifteen (15) years,<sup>47</sup> unless he is determined to be an SVP.

An SVP designation subjects an individual to enhanced requirements in certain circumstances. For example, (i) an SVP is required to appear at least quarterly at an approved registration site to provide or verify information contained in the registry and to be photographed,<sup>48</sup> whereas certain other offenders are permitted to appear less often;<sup>49</sup> (ii) an SVP is subject to enhanced victim notification requirements;<sup>50</sup> and (iii) an SVP is subject to monthly counselling requirements, for which he is financially responsible and subject to monitoring.<sup>51</sup> Thus, if Defendant ultimately is determined to be an SVP, the RNC requirements applicable to him will be enhanced in character, as well as in duration.

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<sup>41</sup> See 42 Pa. C.S. § 9799.14 (establishing a three-tiered system for categorizing sexual offenses according to the nature of the offense and frequency of offending).

<sup>42</sup> See 42 Pa. C.S. § 9799.16 (establishing a statewide registry of sexual offenders in order to carry out the provisions of SORNA).

<sup>43</sup> 42 Pa. C.S. § 9799.15 (establishing the period of registration under SORNA).

<sup>44</sup> 42 Pa. C.S. §§ 9799.15(a)(1), (2).

<sup>45</sup> 42 Pa. C.S. § 9799.15(a)(6).

<sup>46</sup> 42 Pa. C.S. § 9799.14(b)(9).

<sup>47</sup> 42 Pa. C.S. § 9799.15(a)(1).

<sup>48</sup> 42 Pa. C.S. §§ 9799.15(e), (f), 9799.25(a).

<sup>49</sup> While Tier III sexual offenders are also required to appear quarterly, Tier II sexual offenders are only required to appear semiannually, and Tier I sexual offenders, such as Defendant, need only appear annually. 42 Pa. C.S. §§ 9799.15(e), 9799.25(a).

<sup>50</sup> See 42 Pa. C.S. § 9799.26 (pertaining to victim notification).

<sup>51</sup> See 42 Pa. C.S. § 9799.36 (pertaining to counseling of SVP's).

**B. The Commonwealth's position.**

In support of its request for an SVP hearing, the Commonwealth argues that a hearing would have been conducted here but for the Superior Court's decision in *Butler* finding SORNA unconstitutional.<sup>52</sup> The Commonwealth contends that the decision not to conduct a hearing was made despite the Commonwealth's objection and that its appeal resulted in the Supreme Court reversing the Superior Court's decision.<sup>53</sup> As such, the Commonwealth argues that a hearing should be conducted.

SVP assessments typically must be done prior to sentencing. SORNA provides that

After conviction but before sentencing, a court shall order an individual convicted of a sexually violent offense to be assessed by [SOAB]. The order for an assessment shall be sent to the executive director of [SOAB] within ten days of the date of conviction for the sexually violent offense.<sup>54</sup>

Here, the Court ordered an assessment of the Defendant within the time frame specified by SORNA.<sup>55</sup> SOAB conducted the assessment and provided its results in advance of sentencing, within ninety (90) days from the date of Defendant's conviction, as required by SORNA.<sup>56</sup> Thereafter, SORNA requires that the court, upon praecipe of the Commonwealth, hold a hearing prior to sentencing, at which time the court must determine "whether the Commonwealth has proved by clear and convincing evidence that the individual is a sexually violent predator."<sup>57</sup> SORNA

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<sup>52</sup> Commonwealth's Brief, at 1.

<sup>53</sup> *Id.*, at 1-2.

<sup>54</sup> 42 Pa. C.S. § 9799.24(a). SORNA provides that SOAB must "establish standards for evaluations and for evaluators conducting the assessments" and sets forth a non-exclusive list of factors to be examined during the evaluation. 42 Pa. C.S. § 9799.24(b). SORNA further provides that agencies and officials must cooperate by providing copies of records and information requested by SOAB in order to conduct the evaluation. 42 Pa. C.S. § 9799.24(c).

<sup>55</sup> Order of SOAB Assessment, entered April 24, 2018.

<sup>56</sup> 42 Pa. C.S. § 9799.24(d) ("[SOAB] shall have 90 days from the date of conviction of the individual to submit a written report containing its assessment to the district attorney").

<sup>57</sup> 42 Pa. C.S. § 9799.24(e).



provides that SOAB's assessment shall be provided to the agency preparing the presentence investigation,<sup>58</sup> thereby contemplating that the SVP assessment will be taken into consideration by the sentencing court<sup>59</sup> and that the sentencing court would inform the defendant of his reporting obligations at the time of sentencing.<sup>60</sup>

Even though the SVP hearing was not conducted prior to sentencing here, the Commonwealth maintains that it may happen now because a defendant's SVP status is not a punishment but, rather, a collateral consequence of conviction of a sexual offense.<sup>61</sup> The Commonwealth cites *Commonwealth v. Whanger*<sup>62</sup> for the proposition that an SVP hearing may be held after sentencing, despite SORNA stating otherwise. The defendant in *Whanger* pleaded guilty to sexual offenses and proceeded to sentencing in May, 2009. He was later assessed by SOAB and, in February, 2010, the trial court imposed an SVP designation on the defendant.<sup>63</sup>

The *Whanger* defendant initially claimed that, because SORNA requires an SVP assessment to be conducted after conviction but prior to sentencing, his designation is invalid. The Superior Court disagreed, finding that SORNA's requirement relating to timing of the assessment and hearing could be waived and that the defendant had done so there, depriving him of the right to seek relief on that basis thereafter.<sup>64</sup>

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<sup>58</sup> 42 Pa. C.S. § 9799.24(f).

<sup>59</sup> See, e.g., *Com. v. Manzano*, 237 A.3d 1175 (Pa. Super. 2020).

<sup>60</sup> 42 Pa. C.S. § 9799.20; *Com v. Baird*, 856 A.2d 114 (Pa. Super. 2004). Notably, however, failure of a court to inform a defendant accurately, or at all, of his obligations under SORNA does not relieve the defendant from complying with SORNA's RNC requirements, and a court does not have authority to relieve a defendant of the RNC requirements, except as expressly set forth in SORNA. 42 Pa. C.S. § 9799.23(b).

<sup>61</sup> Commonwealth's Brief, at 2-3.

<sup>62</sup> *Com. v. Whanger*, 30 A.3d 1212 (Pa. Super. 2011). The Superior Court has noted that *Whanger* was impliedly overruled in light of its decision in *Butler*, *supra*. *Com. v. Campinelli*, 2018 WL 461515, \*8 n.6 (Pa. Super. 2018). The Commonwealth argues, however, that the Supreme Court later overruled the Superior Court's decision in *Butler* and, in so doing, "arguably reaffirmed" the holding in *Whanger*. Commonwealth's Brief, at 3.

<sup>63</sup> *Whanger*, *supra*, 30 A.3d 1214.

<sup>64</sup> *Id.*

He also argued that the trial court lost jurisdiction to modify its sentencing order because Section 5505 of the Judicial Code<sup>65</sup> only permits a court to modify or rescind an order within thirty (30) days of its entry and more time than that had elapsed between his sentencing and the order designating him an SVP.<sup>66</sup> The Superior Court again disagreed, since an SVP determination is a collateral consequence of conviction of a designated offense and is not a sentence.<sup>67</sup> In so holding, the Superior Court clarified that “[t]he sentencing order was one thing; the SVP order was another. Because the SVP order did not modify the sentence, Section 5505—which limits a court’s ability to modify its orders—is not applicable.”<sup>68</sup>

Accordingly, the Commonwealth contends here that

[a]n SVP assessment was ordered following the guilty plea and Defendant waived his right to immediate sentencing [upon demand of the Defendant]. Over the Commonwealth’s objection, an SVP hearing was never held and the case was appealed to the Supreme Court. Because an SVP determination is a collateral consequence rather than a sentence, this Court has jurisdiction to hold an SVP hearing regardless of the length of time since sentencing and to order [that] Defendant be classified an SVP if the Court so determines.<sup>69</sup>

***C. The Defendant’s position in opposition.***

The Defendant contends that the Court does not have jurisdiction to hold an SVP hearing five (5) years after sentencing “because such proceeding undermines the norms of the sentencing process, violates SORNA procedural rules, and thereby, the Defendant’s procedural due process rights.”<sup>70</sup>

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<sup>65</sup> 42 Pa. C.S. § 5505 (“Except as otherwise provided or prescribed by law, a court upon notice to the parties may modify or rescind any order within 30 days after its entry, notwithstanding the prior termination of any term of court, if no appeal from such order has been taken or allowed”).

<sup>66</sup> *Whanger, supra*, 30 A.3d at 1214-15.

<sup>67</sup> *Id.*, at 1215 (citing *Com. v. Leidig*, 956 A.2d 399, 404-05 (Pa. 2008)).

<sup>68</sup> *Id.*

<sup>69</sup> Commonwealth’s Brief, at 3.

<sup>70</sup> Defendant’s Brief, at 2.

Defendant first complains that *Whanger* is distinguishable because the defendant there waived his right to have an SVP assessment done prior to sentencing, whereas he has made no such waiver here.<sup>71</sup> Instead, the Defendant objected to an SVP hearing on the basis that *Butler* found SORNA unconstitutional.<sup>72</sup> When the case returned to Lycoming County, it was remanded without vacating sentence. He points out that it is not his burden to insist that the Commonwealth praecipe for an SVP hearing in a timely manner and that the Commonwealth could have preserved its ability to seek an SVP hearing by asking for a continuance of Defendant's sentencing pending disposition of the issue by the appellate courts.<sup>73</sup> Fundamentally, he contends that it is his right to have all information presented at the time of sentencing and that he did not waive that right.<sup>74</sup>

Ultimately, the Court is not persuaded by the Defendant's arguments. Defendant was aware of SORNA's RNC requirements at the time of sentencing. Indeed, the Court had issued an Order for an SVP assessment from SOAB prior to sentencing, and Defendant's sentencing had been delayed accordingly. Moreover, Defendant was aware of SORNA's applicability to him at the time of sentencing by virtue of his classification as a Tier I sexual offender under SORNA and the current fifteen (15) year registration requirement applicable to him. It is true that the Defendant did not explicitly waive SORNA's timing requirements here; however, Defendant effectively did so when he asked the Court not to conduct the SVP hearing prior to sentencing on the basis of the decision in *Butler*. Finally, when the Supreme Court, in overruling *Butler*, determined that SORNA's RNC requirements

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<sup>71</sup> *Id.*, at 3.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*, at 3-4.



did not apply to conduct, but, instead, applied to an individual's status as suffering from a serious psychological defect, Defendant lost the ability to complain that he was unaware of the potential consequence of his conviction of a sexual offense.<sup>75</sup>

Next, Defendant claims that *Whanger* is also distinguishable because the SVP designation there was imposed in February, 2010, which is relatively soon after his sentencing in May, 2009. Here, in contrast, Defendant was sentenced five (5) years ago.<sup>76</sup> Essentially, Defendant contends that, even if the RNC requirements are a collateral consequence, the Commonwealth has forfeited the opportunity to ask for an SVP hearing by virtue of unreasonable delay. Defendant asserts that an SVP hearing under these circumstances “undermines the primary principles of timeliness and procedural due process that are implicated in all aspects of the criminal justice system” and that “[t]he very essence of timeliness runs throughout all adjudicatory processes.”<sup>77</sup> He contends that, notwithstanding that SORNA's RNC requirements are a collateral consequence of his criminal conviction, the Court cannot impose a collateral consequence after an indefinite period of time following his conviction because he did not waive his right to an SVP hearing before sentencing and because he has a right to procedural due process.<sup>78</sup>

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<sup>75</sup> It is an ancient maxim that “ignorance of the law is no excuse,” *i.e.*, that one is presumed to know the law applicable to him. See, *e.g.*, *Com. v. Roberts*, 293 A.3d 1221, 1226 (Pa. Super. 2023) (“Essentially, the General Assembly, when enacting SORNA, codified the ancient maxim that ‘ignorance of the law is no excuse.’ Roberts may not excuse noncompliance with SORNA based on alleged ignorance of his lifetime-registration obligation. His second and last appellate issue warrants no relief”) (citing *Com. v. Kratsas*, 764 A.2d 20, 30 (Pa. 2001)). Indeed, our Supreme Court has explicitly held that there is no requirement that a defendant know of a civil collateral consequence of his conviction at the time of his guilty plea. *Com. v. Duffey*, 639 A.2d 1174 (Pa. 1994) (holding that license suspension is a civil collateral consequence of conviction for underage drinking and, accordingly, that there is no requirement that a licensee know or be informed of that consequence at the time of his guilty plea).

<sup>76</sup> Defendant's Brief, at 4.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*, at 4-5.

While the Court finds the Commonwealth's delay in seeking an SVP hearing to be problematic, the Court is not persuaded that the delay is prejudicial to the Defendant. Unreasonable delay in seeking to impose a collateral consequence has been found to bar imposition of that consequence where the delay results in prejudice to the defendant and, thereby, deprives him of due process.<sup>79</sup> Moreover, courts are more reluctant to impose adverse consequences against the government for delay than when a private right is involved.<sup>80</sup> Here, the Court does not find prejudice. A showing of prejudice resulting from a potential SVP designation is not sufficient. Defendant must demonstrate that he suffered prejudice as a result of the delay.<sup>81</sup> In discussing prejudice concerning a due process claim arising out of pre-arrest delay, our Supreme Court has stated that:

The threshold question we must address whenever a defendant raises a due process claim due to pre-arrest delay is whether the defendant suffered actual prejudice from the delay. We have not elucidated the meaning of "actual prejudice"; however, numerous federal appellate courts have refined the concept. In order for a defendant to show actual prejudice, he or she must show that he or she was meaningfully impaired in his or her ability to defend against the state's charges to such an extent that the disposition of the criminal proceedings was likely affected. This kind of prejudice is commonly demonstrated by the loss of documentary evidence or the unavailability of an essential witness. It is not sufficient for a defendant to make speculative or

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<sup>79</sup> See, e.g., *Com., Dep't of Transp., Bureau of Driver Licensing v. Middaugh*, 244 A.3d 426 (Pa. 2021) (holding that a driver's license suspension imposed as a collateral consequence of a conviction was precluded when the suspension was imposed after an unreasonable delay that results in prejudice to the driver and, thus, deprives him of due process).

<sup>80</sup> See, e.g., *Weinberg v. Com., State Bd. of Examiners of Public Accountants*, 501 A.2d 239, 243 (Pa. 1985) ("We have also recognized the availability of the defense [of laches] against the Commonwealth and other governmental units in numerous cases and in a variety of situations, although the courts will be generally reluctant to apply the doctrine against the government and will require a stronger showing by a defendant who attempts to apply the doctrine against the Commonwealth than by one who would apply it against an individual"); *Com., Dep't of Transp. v. Rockland Constr. Co.*, 448 A.2d 1047 (1982) (discussing the common law doctrine of *nullum tempus occurrit regi* ("time does not run against the king") and "reaffirm[ing] the well[-]established rule that statutes of limitations are not applicable to actions brought by the Commonwealth unless the statute expressly so provides").

<sup>81</sup> See, e.g., *Middaugh, supra*, 244 A.3d at 437-38 (noting that a driver facing license suspension imposed as a collateral consequence of a conviction who alleges prejudice as a result of unreasonable delay in imposing the collateral consequence must demonstrate actual prejudice from the delay to avoid suspension).



conclusory claims of possible prejudice as a result of the passage of time. Where a defendant claims prejudice through the absence of witnesses, he or she must show in what specific manner missing witnesses would have aided the defense. Furthermore, it is the defendant's burden to show that the lost testimony or information is not available through other means.<sup>82</sup>

Here, Defendant has not articulated any prejudice of this nature that arises out of the delay in holding an SVP hearing.<sup>83</sup>

Finally, the Defendant complains that an SVP hearing is unnecessary here because the Defendant “has completed the prescribed sexual offender treatment while in the State Correctional System, as required to be granted parole.”<sup>84</sup> He asserts that he continues in treatment and complies with current SORNA conditions and that his SVP assessment was completed more than six years ago and cannot be updated, absent waiver.<sup>85</sup>

Again, this argument does not convince the Court that it lacks jurisdiction to conduct an SVP hearing. These issues go to the weight of whether the Commonwealth can demonstrate by clear and convincing evidence that Defendant is an SVP rather than to the question of whether the Court has jurisdiction to hold an SVP hearing in the first instance.

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<sup>82</sup> *Com. v. Scher*, 803 A.2d 1204, 1222 (Pa. 2002) (citations omitted).

<sup>83</sup> In particular, the Court finds that the Defendant is not prejudiced as a result of the delay (i) because he is already under the disability of SORNA's registration requirement for 15 years, *see, supra*, Part II.A.2., and his complaint of prejudice based on possible extension of that period is merely speculative; (ii) because, should the Court find that Defendant is an SVP, he retains the right, after 25 years, to petition for an updated assessment and possible future exemption from registration, *see* 42 Pa. C.S. § 9799.15(a.2); and (iii) because the Court is under remit to construe SORNA's RNC requirements broadly to advance their object of protecting public safety and to promote justice, *see, supra*, Part II.A.1. Additionally, there is no prejudice to the Defendant as SORNA's registration requirement is a collateral consequence of his conviction and not a sentence and is based on the Defendant's status and not on his conduct.

<sup>84</sup> Defendant's Brief, at 5.

<sup>85</sup> *Id.*

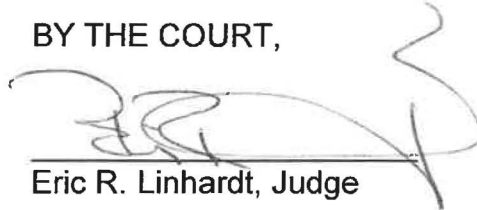


**III. CONCLUSION AND ORDER.**

For the reasons explained above, the Court finds that Defendant's constitutional rights to due process are not implicated, and the Court retains jurisdiction to conduct an SVP hearing here. An SVP hearing will be scheduled by separate Order.

IT IS SO ORDERED.

BY THE COURT,

A handwritten signature in black ink, appearing to read 'ERL', is written over a horizontal line. The signature is stylized and extends to the right of the line.

Eric R. Linhardt, Judge

ERL/bel

cc: Jacob M. Jividen, Esq., *Office of Attorney General*  
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