Testimony of
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On HB 1952
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My name is Fran Chardo, and I am the District Attorney in Dauphin County. I am pleased to be here today on behalf of my colleagues with the Pennsylvania District Attorneys Association to discuss HB 1952, a vital piece of public safety legislation.

HB 1952 needs to reach the Governor's desk soon. Otherwise:

- the State Police may be obligated as a matter of law to remove more than 15,000 sex offenders from the sex offender registry;

- District Attorneys will continue to be unable to prosecute sex offenders who fail to comply with their registration and verification requirements; and

- The process by which convicted sex offenders are assessed as to whether they are sexually violent predators will no longer exist.

These are the stakes. These are the issues.

Background: Terms, Acronyms, and the Muniz Decision

Former Cumberland County District Attorney Dave Freed testified on this issue before the House Judiciary Committee this fall. During his testimony, Dave went into great detail explaining the important background of how we got to where we are today. This is necessary background, and with your indulgence I would like to explain the legal and statutory underpinnings of the issues before you today.

One of the most important things I can do during the hearing is to explain the various phrases you have heard and will hear this morning: sex offender registry, Megan's Law, the Adam Walsh Act, and SORNA (an acronym for the Sex Offender Registration and Notification Act, which is our present version of Megan's Law). While these terms mean slightly different things legally, they all generally refer to our sex offender registration system and process.

The system and process include the following: 1) requirements that sex offenders register and verify their information such as their address and place of employment, 2) provisions that make it a crime to fail to comply with these obligations, 3) the process by which sexually violent predators are designated, and 4) the rules and guidance regarding what information is publicly accessible on our state's sex offender registration website.

Mr. Chairman and other members of the Committee, here is the short summary of why HB 1952 is necessary. On July 19, 2017, the Pennsylvania Supreme Court in *Commonwealth v. Muniz* ruled that provisions of SORNA that applied retroactively were unconstitutional because they were punitive. As a result, such retroactive application violated the Ex Post Facto Clause of the federal Constitution. An ex post facto law, among other things, increases the penalties for a crime after it has been committed. Ex post facto laws are unconstitutional. The United States Supreme Court denied a certiorari petition by the Cumberland County District Attorney's Office on January 22.

The import of this summary of *Muniz,* the decision which is effectively the reason we need HB 1952, is not completely clear without yet another brief summary, this time of the history of Megan's Law.

But as I provide this background, please remember that unless there is a legislative change, there is a probability that those who committed the crime for which they have had to register as sex offenders before December 20, 2012 (the effective date of SORNA) may not be able to be prosecuted for failing to meet their registration or verification obligations and will be removed entirely from the Megan's Law website. **That affects nearly every single sex offender and sexually violent predator who committed a sex crime before December 20, 2012.**

Legislative History of Megan's Law

- In 1995, Pennsylvania enacted Megan's Law to require the registration of sexual offenders and to provide for community notification about them. Many of you will recall the enactment of this law in 1995 followed the sexual assault and murder of Megan Kanka in Hamilton, New Jersey, by a repeat child rapist. In 1999, our state Supreme Court ruled that the 1995 law was unconstitutional. It was unconstitutional because the law

created a presumption that an offender who meets certain criteria was a sexually violent predator and thus was subject to enhanced penalties including a maximum of life imprisonment and a requirement of lifetime registration.

- The following year, the Legislature enacted Megan's Law II. Megan's Law II removed the sexually violent predator presumption and instead placed the burden on the Commonwealth to prove by clear and convincing evidence that a sex offender was a sexually violent predator, which is defined as an individual suffering from a mental abnormality that makes it likely that the person will engage in predatory sexually violent offenses. Sexually violent predators were also no longer subject to automatic increased maximum terms of imprisonment under Megan's Law II. The Pennsylvania Supreme Court did strike a provision providing for a mandatory criminal penalty of lifetime probation for failing to verify registration and an additional penalty of up to life imprisonment for failing to verify registration information.

- In 2004, the General Assembly improved Megan's Law dramatically by enacting Megan's Law III, which was your bill, Chairman Greenleaf. Most significant, the new law required that information about sex offenders and sexually violent predators be publicly accessible on a website. The Act also increased certain penalties for failing to register or verify and added new crimes to the list of crimes that triggered registration.

- In 2006, the Legislature further improved the website by enacting new laws which expanded the information about convicted sex offenders included on the public sex offender website. Such information included street addresses and whether the victim was a minor. The 2006 legislation also reduced the time period for an offender to first register and verify his or her information from 10 days to 48 hours. Previously, this information was only included for sexually violent predators.

- In 2011, the Legislature closed two loopholes that permitted both out-of-state sex offenders who moved to Pennsylvania and transient sex offenders to avoid registration.

- In 2011, the General Assembly also enacted legislation that implemented the federal Adam Walsh Child Protection and Safety Act. This law went

into effect in December, 2012. It is sometimes referred to as the Adam Walsh Act or SORNA. SORNA is an acronym for the name of Title I of the federal Act: the Sex Offender Registration and Notification Act. As required by federal law, SORNA increased the number of crimes which subjected an individual to registration requirements, increased the length of time many sex offenders had to register as sex offenders, increased the amount of information that had to be included in the registration information, and increased the amount of information on the public website. SORNA also required juveniles adjudicated delinquent for a limited number of sex crimes (rape, involuntary deviate sexual intercourse, and aggravated indecent assault) to register on a non-public registry. Our Supreme Court ultimately struck down those provisions relating to juveniles as unconstitutional.

- Nearly 20 states are in compliance with SORNA. States that are not in substantial compliance with SORNA receive a 10 percent reduction in federal Justice Assistance Grants (JAG), which are typically used for public safety purposes.

- Significantly, and also required by federal law, Pennsylvania's SORNA statute was retroactive, meaning that anyone who, on the effective date of SORNA, was incarcerated, under county or state supervision, or on the registry, was subject to the new SORNA requirements. It is this provision that was the subject of *Muniz*.

States that are not substantially compliant with SORNA are fined. The fine comes from their Justice Assistance Grants (JAG) funding, which is funding used to support law enforcement and public safety programs and functions.

- In 2014, our Supreme Court in *Commonwealth v. Neiman* struck Megan's Law III, the version of Megan's Law enacted in 2004, because its enactment violated the single subject rule. Megan's Law III (the 2004 version of Megan's Law) had included provisions related to the jurisdiction of certain park police and provided for a two-year limit on asbestos actions.

- As a result of the *Neiman* decision, the General Assembly enacted new legislation to ensure that sex offenders were not allowed to evade their registration requirements. Specifically, the new law included provisions preventing an individual who was designated as a sexually violent predator prior to the Adam Walsh legislation taking effect from challenging his or her status. This was necessary because the 2004 law made changes to the process by which an individual would be determined to be a sexually violent predator. The law also ensured that those convicted of luring a child into a motor vehicle and institutional sexual assault must continue to register. This was necessary because the 2004 version of Megan's Law that was declared unconstitutional added these crimes to the list of crimes that triggered registration.

Sexually Violent Predators

I also wanted to discuss briefly the process by which a sex offender is determined to be a sexually violent predator (SVP). The process is well-summarized on the website of the Sexual Offenders Assessment Board (SOAB). An SVP is a convicted sex offender who has "a mental abnormality or personality disorder the makes the person likely to engage in predatory sexually violent offenses." Every person convicted of a registration offense must be assessed by the SOAB to determine whether that individual is an SVP. Within 90 days of the date of conviction, the SOAB must submit a written assessment recommending whether or not the individual should be classified as an SVP, based on statutory criteria. For a sex offender to be deemed an SVP, the Commonwealth must prove in court by clear and convincing evidence that this individual meets the statutory criteria.

SVPs must register for life, verify their information quarterly and in-person, receive monthly sex offender counselling for life, and be the subject of active community notification.

Significant Sex Offender Recidivism and Underreporting of Sex Offenses

Some have questioned whether sex offender registries work or otherwise represent good policy. I wanted to share some thoughts on this issue. The underpinning of sex offender registries is that sex offenders are dangerous; they often prey on our most vulnerable and commit crimes that can result in a lifetime of struggle and challenges for the victims and their families; sex

offenders are high risk and they re-offend. There has been a significant amount of literature and studies attempting to measure risk posed by released sex offenders. And while there is some social science discussing how dangerous released sexual offenders are, there is no social science asserting that sexual offenders are not dangerous or do not recidivate. Nor is there any social science asserting that new sexual crimes by released sexual offenders are not of great concern. [1]

One such study followed 9,691 male sex offenders released from prisons in 15 states in 1994 and found that nearly 4 out of every 10 returned to prison within 3 years. Another study that spanned a twenty-five year period after release found that rapists and child molesters remained at risk to reoffend at least 15-20 years after discharge, and that the sexual recidivism arrest rate for rapists was 39% and the sexual recidivism arrest rate for child molesters was an even higher 52%.[2]

Equally significant is that any statistical attempts to measure the risk of new offenses greatly understate the true nature of the problem because the vast majority of sex crimes are never reported. Victims and parents of victims frequently do not report offenses because they fear further victimization by the offender, retribution by the offender's friends and family, loss of privacy, risk of not being believed, embarrassment, trauma from the criminal justice system, and fear of poverty (where the victims are dependent on their assailant). Studies by the Bureau of Justice Statistics estimate that two out of three sexual assaults against individuals age 12 or older are not reported. Another study found that 84% of rape victims do not report the crime.[3] Data obtained by polygraph examinations of imprisoned sex offenders averaging fewer than two known victims found that such offenders had an actual average of 110 victims.[4]

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[1] Langan, Patrick A, et al. "Recidivism of Sex Offenders Released from Prison in 1994." *Bureau of Justice Statistics*, 2003.

[2] Prentky, R.A, et al. "Recidivism rates among child molesters and rapists: A methodological analysis." *Law of Human Behavior*, vol. 21, no. 6, 1997, pp. 635-659

[3] Kilpatrick, DG, et al. "Rape in America: a report to the nation." Prepared by the National Victim Center & the Crime Victims Research and Treatment Center. 1992. http://www.evawintl.org/Library/DocumentLibraryHandler.ashx?id=538

[4] Ahlmeyer, S, et al. "The impact of polygraphy on admissions of victims and offenses in adult sexual offenders." *Sexual Abuse: A Journal of Research and Treatment,* vol. 12, no. 2, 2000, pp. 123-138.

A similar study of sex offenders found they had been "committing sex crimes for an average of 16 years before being caught."[5]

All of this means one thing: assessments of the threat posed by released sexual offenders are certain to underestimate the risk.

Do sex offender registries help to mitigate the unquestionable risk that released sexual offenders pose? My colleagues and I believe they do. To be sure, looking at sex offender registries can never be the exclusive way in which an individual tries to keep him or herself or his or her children safe from sexual predators. We have to remember that a child predator is more likely to be someone that a victim or his or her parents know; that we should be suspicious of adults who make special efforts to be alone with a child; that we need to listen to what our kids tell us; that women can be sexual abusers; that we should talk to our kids about specific suspicious situations to be cautious of, such as an adult asking a child for directions. If used as a tool, and not the exclusive tool, sex offender registries do provide important information for protecting both children and adults from sexual predators.

Effects of Muniz

Returning to the beginning point of our discussion: On July 19, 2017, the Pennsylvania Supreme Court, in *Commonwealth v. Muniz,* ruled that provisions of SORNA that applied retroactively were unconstitutional because they constituted punishment. As a result, such retroactive application violated the Ex Post Facto Clause of the federal Constitution.

Those affected by the decision are those who committed their registration crimes before December 20, 2012. In other words, if a person committed a rape before December 20, 2012, he or she may not be required to register nor may he or she be prosecuted for failing to register. This is because SORNA, which was effective on that day, is no longer retroactive. Because it is not retroactive and because the prior version of Megan's Law (Megan's Law III) was replaced by SORNA, there may not be a sufficient statute in place to place any registration requirements on these sexual offenders. PSP advises that there are over 15,000 such individuals. If those individuals failed to register or verify

[5] Ahlmeyer, S, et al. "The impact of polygraphy on admissions of crossover offending behavior in adult sexual offenders." Association for the Treatment of Sexual Abusers 18th Annual Research and Treatment Conference, 1999, Lake Buena Vista, FL. Presentation.

their registry, we may not be able to prosecute them. And whether they would remain on the registry appears to be less than promising. Many of us are unable to proceed on cases where sex offenders have failed to verify their registration information.

Muniz Effects Have Expanded: New Case Stops Sexually Violent Predator Assessments

The decision in *Muniz* has caused another significant problem: the process for determining which sex offenders are sexually violent predators has all but stopped; we no longer are able to determine which sexual offenders are the worst of the worst and the most dangerous predators.

This is the case because following *Muniz*, our Superior Court issued a sua sponte ruling in *Commonwealth v. Butler*, which said that as a result of *Muniz* the process by which sex offenders are evaluated to determine whether they are sexually violent predators is unconstitutional.

The reasoning is complex and involves the interplay with caselaw that holds that all elements of a crime must be proven to the factfinder at trial and proven beyond a reasonable doubt. But according to the *Butler* court, because *Muniz* held that the SORNA provisions are punitive, the steps in the process by which a sexual offender is assessed to determine whether he is a sexually violent predator must be treated as elements of the underlying crime. Practically speaking, *Butler* would require the SOAB to complete a sexual offender evaluation before trial in every single sex offender case, even if the defendant is ultimately acquitted. Not only would this be costly and require a significant extra appropriation to the SOAB, but it would necessarily slow down virtually every sexual assault trial and require matters to come before the court during trial that are not entirely appropriate and perhaps prejudicial.

Delays, higher costs and less justice. That's where we are now.

HB 1952 Will Remedy These Problems

HB 1952 would help to avoid this significant problem.

There are two legal goals in HB 1952. First, the legislation seeks to ensure that those who committed registration offenses before December 20, 2012 remain on the registry and can be prosecuted, if appropriate, for failing to verify their registration information. HB 1952 accomplishes this goal by reinstating virtually all of Megan's Law as it was in effect before SORNA was enacted into law. In other words, the sexual offenders who committed their crimes before December 20, 2012 would be subject to the Megan's Law provisions to which they were subject before SORNA took effect. This provision is necessary because SORNA itself eliminated the prior versions of Megan's Law and subjected all of our sexual offenders to SORNA.

One may ask whether this provision is constitutional since it applies a prior version of Megan's Law retroactively. It is indeed constitutional. Prior versions of Megan's Law included in this language were never held to be punitive and, therefore, were never held to represent punishment. Instead, they were recognized as collateral consequences and therefore civil in nature. Civil provisions may be applied retroactively as a matter of law. Criminal statutes may not. Because versions of Megan's Law prior to SORNA, such as that which is contained in HB 1952 (which would, again, apply to those who committed their registration crimes before December 20, 2012), were civil in nature, retroactive application is entirely legal and appropriate.

The second purpose of the legislation is to address the problems created by the *Butler* decision. The most immediate problem is the inability to conduct assessments to determine if convicted sex offenders are sexually violent predators. To remedy this problem, HB 1952 seeks to make SORNA non-punitive; to do so it removes burdens on sexual offenders in two ways. First, it allows sexual offenders to petition to be relieved of registration requirements after 25 years. Second, it allows most sexual offenders to only have to verify in person their information with law enforcement once per year. Any remaining verifications during that annual period may occur telephonically. Sex offenders would have to wait three years after they first are placed on the registry and have a clean record during this time period in order to take advantage of this provision. These provisions would apply to the provisions of the bill which

reinstate the prior version of Megan's Law for those who committed their crimes before December 20, 2012.

These two sets of provisions were included because of specific language in the majority opinion in *Muniz.* We believe this language will render SORNA non-punitive in the eyes of the Court. As all of you know, we cannot predict what the Courts will do, but what we can do is attempt to respond in a thoughtful and deliberate manner, relying upon the holding and reasoning in the majority opinion.

Thank you Mr. Chairman for the opportunity to testify before you this morning. I am happy to answer any questions.