[J-66-2021]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

BAER, C.J., SAYLOR, TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 23 MAP 2021
	:	
Appellant	:	Appeal from the Order of the Superior Court at No. 3488 EDA 2017 dated October 20, 2020
v.	:	Vacating the Judgment of Sentence and Reversing the conviction in the Monroe County Court of Common
DAVID SANTANA,	:	Pleas, Criminal Division, at No. CP-45-CR-0000031-2017 dated July 18,
Appellee	:	2017.
	:	
	:	ARGUED: October 26, 2021

OPINION

JUSTICE WECHT **DECIDED: December 22, 2021**

In this case, we must decide whether our decision in *Commonwealth v. Muniz*[1]—wherein we held that the Sexual Offender Registration and Notification Act ("SORNA")[2] constituted a punitive regulatory scheme that, when imposed retroactively to sex offenders who committed their offenses prior to SORNA's enactment, amounted to an unconstitutional *ex post-facto* law[3]—applies with equal force to offenders whose

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[1] 164 A.3d 1189, 1193 (Pa. 2017) (plurality).

[2] 42 Pa.C.S. §§ 9799.10—9799.41.

[3] The prohibition on *ex post facto* laws appears twice in the United States Constitution. The first proscription is found in Article I, Section 9, and serves as a limitation on Congress' authority to pass laws: "No Bill of Attainder or *ex post facto* Law shall be passed." U.S. CONST. art. I, § 9, cl. 3. The limitation appears for the second time in Article I, Section 10, and, in this usage, constitutes a restriction on the power of the states: "No State shall . . . pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." U.S. CONST. art. I, § 10, cl. 1.

triggering offenses occurred in another state. We conclude that it does. Therefore, we affirm the order of the Superior Court.

In 1983, David Santana was convicted of rape in New York.[4] At the time, neither New York nor Pennsylvania had enacted a sex offender registration scheme. However, as time passed—and prompted by federal law[5]—states began enacting statutory schemes aimed at monitoring sexual offenders by requiring them to comply with strict registration and notification requirements. In 1995, New York passed the "Sex Offender Registration Act" ("SORA"),[6] which became effective in January 1996. Pennsylvania followed suit, enacting the first version of Megan's Law in 1995.[7]

Pennsylvania's *ex post facto* provision is found in Article I, Section 17 of our Constitution, and states that: "No *ex post facto* law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed." PA. CONST. art I, § 17.

[4] N.Y. PENAL LAW § 130.35.

[5] *See* Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, Title XVII, §§ 170101-303. Known as the "Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act," the federal act required states, *inter alia*, to transmit sexual offender registration information to a national database. In 2006, the Jacob Wetterling Act was repealed and replaced by the Adam Walsh Child Protection and Safety Act of 2006, Pub.L. No. 109-248.

[6] N.Y. CORRECT. LAW §§ 168-A to 168-W.

[7] Megan's Law I, 42 Pa.C.S. § 9791, *et seq.*, Act of Oct. 24, 1995, P.L. 1079 (Spec. Sess. No. 1), effective April 22, 1996. Four years after its enactment, a significant aspect of the initial iteration of Megan's Law was struck down as unconstitutional by this Court in *Commonwealth v. Williams*, 733 A.2d 593, 603 (Pa. 1999) ("*Williams I*"). In response to *Williams I*, the General Assembly passed Megan's Law II, which was the version in effect when Santana moved to Pennsylvania in 2003. Megan's Law II, 42 Pa.C.S. § 9791, *et seq.*, Act of May 10, 2000, P.L. 74, No. 18, effective July 9, 2000.

There would be two more versions of Megan's Law before it was supplanted by SORNA in 2012. As noted throughout this opinion, this Court found SORNA to be an unconstitutionally punitive *ex post facto* law in *Muniz*. The General Assembly returned to the drawing board and redrafted SORNA into two subchapters: Subchapter H and Subchapter I. Subchapter H governs those whose offenses occurred after December 20,

Like Megan's Law and SORNA, New York's SORA applied retroactively,[8] enveloping, among others, those offenders who had been convicted of certain triggering offenses (including rape) and who were on probation or parole at the time of its enactment. Santana met these criteria. Because Santana was designated a level three offender,[9] he was required to comply with SORA's terms and conditions for the remainder of his life.

Santana appears to have complied with SORA during his residency in New York. In 2015—the year Santana moved from New York to Pennsylvania—SORNA, which replaced Megan's Law, had been in effect for approximately three years. Upon establishing a residence here, Santana no longer was required to register and report in New York. However, the relocation triggered automatically a duty to register and report in Pennsylvania under SORNA's mandates, which are stricter than those imposed by SORA.[10] Among a litany of new substantive provisions, SORNA created a three-tiered

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2012. Subchapter I applies to those whose offenses were completed prior to that date. In *Commonwealth v. Lacombe*, 234 A.3d 602 (Pa. 2020), this Court upheld the constitutionality of Subchapter I. *See id.* at 626-27 (holding that "Subchapter I does not constitute criminal punishment, and [any] *ex post facto* claims [] necessarily fail").

[8] *See* N.Y. EXEC. LAW § 259-c(14). Unlike our ruling in *Muniz* pertaining to SORNA, New York courts have held that SORA's obligations do not constitute criminal punishment, and, thus, can be applied retroactively without running afoul of the constitutional prohibition on *ex post facto* laws. *See People v. Buyund,* ___ N.E.3d ___, 2021 WL 5451381, at *4 (N.Y. Nov. 23, 2021) ("[W]e have repeatedly stated that SORA [is a] remedial civil statute[] and not punitive in nature.").

[9] *See* N.Y. CORRECT. LAW § 168-A(3) (categorizing rape as a "sexually violent offense"); *id.* § 168-H(2) (subjecting sex offenders who are classified as a "level three risk" to lifetime "registration and verification"); *id.* § 168-L(6)(c) (authorizing a "board of examiners of sex offenders" to categorize an offender as a level three offender when the "risk of repeat offense is high and there exists a threat to the public safety").

[10] *See* 42 Pa.C.S. § 9799.13(7)(i) (including within those individuals who "shall register with the Pennsylvania State Police . . . [a] sexual offender required to register in a sexual offender registry in another jurisdiction or in a foreign country based upon a conviction for a sexually violent offense or under a sexual offender statute in the

system to categorize offenders. SORNA designated rape as a Tier III offense.[11] Tier III offenses subjected the offender to lifetime registration and reporting.[12] While some of the particulars of Santana's obligations may have changed when his obligations transferred from SORA to SORNA (such as how promptly he was required to report changes in his identifying information) the duration did not. Both statutory schemes required lifetime compliance.

Upon establishing a residence here, Santana immediately registered himself with the Pennsylvania State Police ("PSP") and began complying with SORNA. During his first eleven months of living in Pennsylvania, Santana checked in with the PSP six times. However, he was not entirely forthcoming with the information that he provided to the PSP at the check-ins. After an investigation, the PSP learned that Santana failed to inform them that he had: (1) created a telephone number; (2) terminated a telephone number; (3) started a new job; and (4) registered a telephone number and an email address on a Facebook account. For these infractions, Santana was arrested and charged with failure to provide accurate information under 18 Pa.C.S. § 4915.1(a)(3), a second-degree felony.[13]

Santana pleaded guilty to the offense. On July 18, 2017, the trial court sentenced Santana to two years and nine months to five years and six months in a state penitentiary. Then, on the very next day, this Court issued our decision in *Muniz*, invalidating the

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jurisdiction where the individual is convicted and . . . has a residence in this Commonwealth or is a transient").

[11] *Id.* § 9799.14(d)(2) (classifying an offense under 18 Pa.C.S. § 3121 as a Tier III sexual offense).

[12] *Id.* § 9799.15(a)(3) "(An individual convicted of a Tier III sexual offense shall register for the life of the individual.").

[13] 18 Pa.C.S. § 4915.1(b)(3) ("An individual who violates subsection (a)(3) commits a felony of the second degree.").

statutory scheme that Santana had just pleaded guilty to violating. Santana immediately filed a motion to withdraw his guilty plea and to have the charges filed against him dismissed. Following *Muniz*' lead, Santana argued that applying SORNA retroactively to his 1983 New York offense constituted an *ex post facto* violation no different from the one found in *Muniz*. The trial court denied the motion.

In an opinion issued contemporaneously with its order denying Santana's motion to withdraw his guilty plea, the trial court explained that its decision was predicated upon its determination that *Muniz* could be differentiated from the instant circumstances, and, thus, did not apply. While it was indisputable that SORNA was punitive and could not apply retroactively without violating our Constitutions, the trial court found that SORNA's application to Santana was not, in fact, a retroactive application. *Muniz*, the court opined, was limited to its narrow facts. That is, in the trial court's view, *Muniz* mandated relief only when the offender: (1) was a Pennsylvania resident and committed one of SORNA's triggering offenses within the borders of Pennsylvania; (2) was sentenced to serve a sentence in a Pennsylvania prison; (3) was obliged to comply with a version of Megan's Law upon release from that Pennsylvania prison for a period of ten years; (4) was released from prison and then absconded from Pennsylvania; and (5) was apprehended after SORNA took effect, which, when retroactively imposed, increased the offender's period of registration to the remainder of the offender's lifetime.[14]

The trial court then outlined what it perceived to be the key differences between *Muniz* and the circumstances of this case. Santana committed his crime and was convicted in New York, not Pennsylvania. He became obligated to comply with New York's SORA requirements only after he completed his New York sentence. Unlike Muniz, he was never incarcerated in Pennsylvania. The court emphasized that, under

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14 Trial Court Opinion ("T.C.O."), 10/17/2017, at 8-10.

both SORA and SORNA, Santana was required to register and report for the remainder of his lifetime. Thus, by transferring here, Santana incurred no increase in the duration of his obligations. Because of these deviations from the core factual components of *Muniz*, the trial court believed *Muniz* to be wholly distinguishable. The court concluded that "[*Muniz* and its progeny] did not address the situation where a registered sex offender, already established under the laws of another state, relocates to Pennsylvania after SORNA's enactment therefore invoking a clause in SORNA pertaining to registered sex offenders from other jurisdictions."[15] Thus, the trial court held that, even though this Court already had deemed the statutory scheme unconstitutional when applied retroactively to sexual offenders whose crimes were committed in Pennsylvania, its application to Santana was not an *ex post facto* violation because Santana committed an offense in New York, moved here, had notice that SORNA already had taken effect, and already was required to register as a sexual offender.

Santana appealed. On October 20, 2020, an *en banc* panel of the Superior Court addressed the question of whether "the Commonwealth could constitutionally charge and convict [Santana] with failing to register in Pennsylvania, under SORNA, for a pre-SORNA crime that occurred in New York."[16] Finding that the trial court focused upon "locality and not chronology,"[17] the *en banc* panel reversed.

After setting forth the applicable legal and appellate standards associated with reviewing the denial of a post-sentence motion to withdraw a guilty plea, the court

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[15] *Id.* at 10.

[16] *Commonwealth v. Santana*, 241 A.3d 660, 662 (Pa. Super. 2020) (*en banc*). Judge Kunselman authored the majority opinion, and was joined by Judges Bowes, Murray, Shogan, and Lazarus. Judges Olson and Nichols concurred in the result, but did not write separately. Judge Stabile dissented, and was joined by Judge Dubow, who also noted her dissent individually.

[17] *Id.*

identified the overarching issue in the case: whether, as a matter of law, Santana could be convicted of failing to register as a sexual offender. To convict Santana of that offense, the Commonwealth had to prove that Santana was subject to registration under SORNA. If *Muniz* governs Santana's unique circumstances, then he never was required to register, and he could not be convicted of the crime. Thus, the task before the *en banc* panel was ascertaining the reach of our *Muniz* ruling.

In *Muniz*, this Court held that: "1) SORNA's registration provisions constitute punishment notwithstanding the General Assembly's identification of the provisions as nonpunitive; 2) retroactive application of SORNA's registration provisions violate the federal *Ex Post Facto* Clause; and 3) retroactive application of SORNA's registration provision also violates the *Ex Post Facto* Clause of the Pennsylvania Constitution."[18] Despite the facial breadth of these conclusions, the trial court found that *Muniz* applies only in the limited situation in which a person commits a Pennsylvania crime during Megan's Law III's tenure, absconds, and then returns after SORNA has taken effect and increased the offender's registration period. The Superior Court rejected this narrow interpretation of *Muniz*. The panel noted that, in *Commonwealth v. Butler*,[19] this Court described the issue in *Muniz* as whether "the registration requirements of SORNA constituted criminal punishment" for purposes of an *ex post facto* analysis.[20] In no way did we condition the statement of that inquiry upon the unique facts in the case. Nor did we do so in our analysis in *Muniz* itself. The Superior Court determined, "[f]ar from

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18 *Muniz*, 164 A.3d at 1193. The third of these three rulings (the *ex post facto* holding arising from the Pennsylvania Constitution) did not garner a majority vote of the participating Justices, and, thus, represented the opinion of only a plurality of the Court.

19 226 A.3d 972 (Pa. 2020).

20 *Santana*, 241 A.3d at 666 (quoting *Butler*, 226 A.3d at 980).

suggesting that *Muniz* applies only to defendants who commit their crimes under Megan's Law III and flee the Commonwealth, the *Butler* Court clarified that the result in *Muniz* stemmed from the text of SORNA and the punishment that it inflicts upon registrants."[21]

Having concluded that *Muniz* was based upon the statutory elements and not the facts of that case, the *en banc* panel then shifted its attention to the question of whether *Muniz* nonetheless could be distinguished because Santana's 1983 New York rape conviction already required him to register for life. In other words, the court confronted the trial court's conclusion—and the Commonwealth's argument—that, for purposes of an *ex post facto* analysis, Santana did not face an increase in punishment when he moved here. The trial court and the Commonwealth emphasized that, because Santana was subject to a lifetime compliance requirement before and after he moved here, there could be no *ex post facto* violation.

The Superior Court rejected this attempt at distinguishing *Muniz* as "misplaced."[22] Drawing from the Supreme Court of the United States' opinion in *Calder v. Bull*,[23] the *en banc* panel explained that the relevant date for purposes of an *ex post facto* analysis is the date that the crime was committed, which, in this case, was in 1983.[24] When Santana committed his offense, he faced no registration requirements in New York; nor would he have faced them in Pennsylvania for that matter. He had no notice, nor could he, that, twenty-eight years later, Pennsylvania would subject him to a punitive statutory regimen. He went from no punishment in 1983 to a lifetime of punishment. That statutorily-mandated escalation amounts to an unconstitutional *ex post facto* law.

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21 *Id.* at 667.

22 *Id.*

23 3 U.S. (3 Dall.) 386 (1798).

24 *Santana*, 241 A.3d at 668.

The Superior Court found no salience in the fact that Santana committed the rape in New York. "Under *Muniz*, Pennsylvania could not apply SORNA to Mr. Santana if he had committed his 1983 crime in this Commonwealth. Likewise, it may not apply SORNA to the 1983 crime he committed ***outside*** this Commonwealth."[25] The *Ex Post Facto* Clauses of both of our Constitutions "do not focus on ***where*** crimes occurred; they focus on ***when*** crimes occurred."[26] The panel noted that a person "has as much of a constitutional right to be free from *ex post facto* laws that penalize him for pre-existing crimes that occurred outside this Commonwealth as he does from *ex post facto* laws that penalize him for pre-existing crimes that occurred inside this Commonwealth."[27]

Because *Muniz* could not be distinguished, and, because application of SORNA to him was thus unconstitutional, the *en banc* panel concluded that Santana was not required to register as a sexual offender. He could not be convicted for failing to do that which he was not required by law to do. Binding him to a contrary plea bargain would be a manifest injustice. Accordingly, the Superior Court vacated Santana's judgment of sentence.

Judge Stabile dissented. In his view, the majority veered off course by contemplating whether "the entirety of SORNA's registration provisions . . . may be retroactively applicable" to Santana.[28] Judge Stabile believed that the court should have focused upon the more narrow question of whether Santana's "registration failures supporting his conviction disadvantage him more than the registration obligations he

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[25] *Id.* at 669 (emphasis in original).

[26] *Id.* (emphasis in original).

[27] *Id.*

[28] *Id.* at 670 (Stabile, J., dissenting).

already is subject to under New York law."[29] Assessing that question only, Judge Stabile would have found that SORNA does not represent an increase in punishment over that which Santana already faced when he moved here; ergo, no *ex post facto* violation.

Judge Stabile charged the majority (and Santana) with overlooking a critical fact. In *Muniz*, the defendant failed to appear for his sentencing. Had he done so, he would have been notified that he was required to comply with the then-applicable version of Megan's Law for a period of ten years. Because Muniz absconded, he was never subjected formally to that particular scheme. By the time he was apprehended and formally sentenced, SORNA had taken effect and Muniz was required to register for life.[30] Unlike the circumstances of the case *sub judice*, the application of SORNA was the first statute with which Muniz had to comply. There was nothing to compare for purposes of ascertaining whether Muniz was disadvantaged by SORNA.[31] To the contrary, in this case, a comparison could be made, because Santana already was mandated to register under SORA. In other words, Judge Stabile maintained, SORA, as a "prior and lawful registration scheme," functions "as a benchmark against which to measure the retroactive application of SORNA for *ex post facto* purposes."[32]

Judge Stabile then examined the applicable statutory provisions, emphasizing that both SORA and SORNA require lifetime compliance, quarterly in-person appearances to verify certain personal information, and prompt in-person appearances to update the PSP of changes in certain identifying information. Judge Stabile acknowledged that there were some differences between the two statutes. For instance, SORNA requires the in-person

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[29] *Id.*

[30] See *Muniz*, 164 A.3d at 1193.

[31] *Santana*, 241 A.3d at 673 (Stabile, J., dissenting).

[32] *Id.*

updates of changes in information to occur within three days, while SORA affords the offender ten days. Judge Stabile opined that these deviations were minor and did not materially affect the relevant inquiry. In his view, SORA and SORNA were sufficiently similar such that, when Santana transitioned from the former to the latter by moving here, Santana was not disadvantaged for *ex post facto* purposes. Santana's lifetime of registration did not increase when he moved to Pennsylvania, where he faced the same lifetime burden of registration.

The Commonwealth filed a petition for allowance of appeal. On April 12, 2021, we granted *allocatur* to address the following two questions:

> (1). Did the Superior Court err in determining that Santana was not required to register under SORNA even though he was already required to register for life in New York and relocated to Pennsylvania after the effective date of SORNA?
>
> (2). Did the Superior Court err in finding a *ex post facto* violation even though Santana was not disadvantaged any more than his lifetime registration he was already subject to under New York Law?[33]

In its brief, the Commonwealth consolidates in a single discussion the two questions upon which we granted review. We will do the same, as the holding that we reach fully resolves both issues.

The Commonwealth's argument substantially mirrors the centerpiece of Judge Stabile's dissent: the theory that *Muniz* does not apply here because Santana did not face an increase in punishment when he moved from New York to Pennsylvania. The Commonwealth insists that *Muniz* was not an all-encompassing constitutional ruling. Rather, the Commonwealth contends, this Court held that SORNA only was unconstitutional when its after-the-fact application increased an offender's reporting and registration obligations from ten years to a lifetime. Only then would SORNA function as

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[33] *Commonwealth v. Santana*, 252 A.3d 590 (Pa. 2021) (*per curiam*).

an increase in punishment. The Commonwealth maintains that no such increase occurred here, as Santana was not disadvantaged further by virtue of his move. He was subject to a lifetime of registration and reporting in New York. He was subject to the same in Pennsylvania. This came as no surprise to Santana, the Commonwealth notes, as SORNA was on the books long before his relocation.

The Commonwealth's arguments stumble right out of the gate—and fail—because the Commonwealth misapprehends the core aspect of an *ex post facto* analysis. The question is not whether SORA and SORNA impose the same or different registration periods. The analysis does not examine whether a new resident's crossing of Pennsylvania's borders actually increased the length of Santana's punishment. It does not even matter where Santana committed the triggering offense. For present purposes, what matters most is ***when*** that crime occurred. Because the Commonwealth ignores this initial, but most consequential, question, its arguments largely are beside the point.

In *Calder v. Bull*, the Supreme Court of the United States identified four types of laws that traditionally constitute *ex post facto* violations.

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.[34]

Most recently, drawing upon *Calder* and its progeny, this Court in *Muniz* summarized the *ex post facto* framework as follows:

> Two critical elements must be met for a criminal or penal law to be deemed *ex post facto*: [(1)] it must be retrospective, that is, it must apply to events

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34 3 U.S. at 390.

> occurring before its enactment, and [(2)] it must disadvantage the offender affected by it. As such, only those laws which disadvantage a defendant and fall within a *Calder* category are *ex post facto* laws and constitutionally infirm.[35]

Unsurprisingly, after *Muniz*, the Superior Court in this case—both the majority and the dissent—focused at least in part upon whether, and when, Santana was disadvantaged. However, a closer inspection of the Supreme Court of the United States' *ex post facto* decisions reveals that our statement of the law in *Muniz* was incomplete. The United States Constitution does not require a defendant to prove that he, in fact, was disadvantaged by the retroactively applied law.

In formulating this standard in *Muniz*, we cited *Calder* and two earlier opinions,[36] a 1981 case from the Supreme Court, *Weaver v. Graham*,[37] and a 1993 decision from this Court, *Commonwealth v. Young*,[38] both of which included a statement of the law that required proof of a concrete disadvantage to the defendant. However, both of those cases preceded the Supreme Court's 1995 decision in *California Department of Corrections v. Morales*,[39] in which the Court explained that the proof of disadvantage had been eliminated as a constitutional requirement. In a footnote, the Court explained:

> Our opinions in [*Lindsey v. Washington*, 301 U.S. 397, 401 (1937), *Miller v. Florida*, 482 U.S. 423 (1987), and *Weaver*] suggested that enhancements to the measure of criminal punishment fall within the *ex post facto* prohibition because they operate to the "disadvantage" of covered offenders. But that language was unnecessary to the results in those cases and is inconsistent with the framework developed in *Collins v. Youngblood*,

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[35] *Muniz*, 164 A.3d at 1195-96 (internal citations and quotation marks omitted; capitalization modified).

[36] *Id.* at 1196.

[37] 450 U.S. 24 (1981).

[38] 637 A.2d 1313 (Pa. 1993).

[39] 514 U.S. 499 (1995).

497 U.S. 37, 41 (1990). After *Collins*, the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage," nor [] on whether an amendment affects a prisoner's opportunity to take advantage of provisions for early release, but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable.[40]

Thus, in *Muniz*, this Court did not expressly recognize alterations to the substantive law that occurred after the cases we relied upon to articulate the standard.

When applied retroactively, sexual offender registration laws implicate the third *Calder* category of retroactive provisions.[41] An *ex post facto* analysis concerning the third *Calder* category of laws distills to the following questions. First, a court must ask when the initial offense was committed. Second, the court must ask whether the challenged law was enacted after the occurrence of the triggering offense and was then applied retroactively. If so, the final question is whether that retroactive law is punitive or increases the penalty for the existing crime. We proceed accordingly.

The Commonwealth's argument that no *ex post facto* argument occurred here focuses upon when Santana moved to Pennsylvania. But neither *Calder* nor *Muniz* supports that position. The third *Calder* category of *ex post facto* laws—"a law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime"[42]— establishes the relevant point in time as "***when committed***."[43] We said the same in *Muniz* when we categorized sex offender registration requirements as potentially implicating that third type of problematic *ex post facto* laws. We noted that "application of the statute would inflict greater punishment on [a sexual offender] than the law in effect

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40 *Id.* at 506, n.3 (cleaned up).

41 *Id.* at 1196.

42 *Calder*, 3 U.S. at 390.

43 *Id.* (emphasis added).

at the time he committed his crimes."[44] Both cases unambiguously set the relevant comparative date as the date upon which the offender committed the offense.[45] The Commonwealth's attempt to shift that date to somewhere further down the timeline finds no support in the governing caselaw. It does not matter that Santana's offense was committed in New York, as SORNA applies just the same to an extra-jurisdictional offense such as rape. Nor does it matter what requirements Santana was bound to follow when he moved here in 2015, or how these may (or may not) have changed.

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[44] *Muniz*, 164 A.3d at 1196 (emphasis added).

[45] Chief Justice Baer (joined by Justice Mundy) finds *Muniz* distinguishable and discerns no *ex post facto* problem in this case. But the Chief Justice does so by selecting the incorrect offense as his focus. As the pertinent *ex post facto* decisions from both the United States Supreme Court and this Court make abundantly clear, the date that first must be ascertained is the date of the offense that subjected the offender to the challenged law. For purposes of assessing retroactive application of sexual offender laws, the inquiry begins by determining when the offense occurred that triggered the challenged statutory scheme. Here, that statutory scheme is SORNA. Santana is not asserting that Section 4915 is unconstitutional. He is asking this Court to determine whether the statutory scheme that required him to register at all—SORNA—could not constitutionally require him to do so. After *Muniz*, the answer appears indisputable.

Chief Justice Baer would look instead to the date that Santana committed his failure-to-report offense, which occurred a number of years after SORNA was enacted. This misaligned focus legally is erroneous and contravenes the clear principles of *Calder* and *Muniz*. It also misapprehends the basis for Santana's motion to withdraw his plea. Santana was required to comply with SORNA because, in 1983, he committed a rape, not because he failed to comply with SORNA's terms at a later point in time. In other words, Santana only was required to register because of the 1983 rape, which occurred before SORNA was enacted. And if SORNA is unconstitutional when applied retroactively, as we held in *Muniz*, then Santana never was required to register in the first place. Thus, this case is not distinguishable from *Muniz,* as both appeals have asked the fundamental question of whether our Constitutions permit SORNA's requirements to apply to crimes that occurred before its enactment. That Santana was convicted of failing to comply with those requirements is entirely beside the point, and has no bearing on the legal question presented to this Court. Any comparison that involves the date of the failure-to-report offense is entirely irrelevant to the *ex post facto* analysis.

Santana committed a rape in 1983. SORNA was enacted in 2012, and was applied retroactively to the triggering rape in 2015, when Santana moved here, over thirty years after the commission of that offense. Obviously, SORNA is being applied retroactively. All that remains is the question of whether SORNA is punitive. In 1983, there were no sexual offender registration laws in New York or in Pennsylvania, and, thus, Santana faced no punishment beyond his imposed sentence. The same cannot be said for 2015. Because rape is classified under SORNA as a Tier III offense, Santana was subjected to the same SORNA requirements as was Muniz. We already have ruled in *Muniz* that those requirements are punitive in nature.

Aside from the slight amplification of the applicable legal standard, we discern no defensible basis to distinguish *Muniz* from this case. In *Muniz*, we undertook a *Mendoza-Martinez*[46] analysis, examining each of the relevant statutory criteria in order to ascertain whether those criteria, working together, demonstrated that the statute was punitive in its effect. The facts of the case established that SORNA was being enforced after Muniz' triggering offense, and that Muniz was a Tier III offender. Besides directing this Court's

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[46] *See Kennedy v. Mendoza–Martinez*, 372 U.S. 144 (1963). In *Mendoza-Martinez*, the High Court articulated a two-part test for deciding whether a legislative enactment is punitive. The first inquiry asks whether the legislature intended a statutory scheme to be punitive. If so, the inquiry ends. If not, the reviewing court must assess whether the statute nonetheless is punitive in its effect. *Id.* This second inquiry requires consideration of the following seven factors:

> [1] [w]hether 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—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[.]

Id. at 168-69 (footnotes omitted).

review to those criteria imposed upon Tier III offenders, the facts played little to no role in our analysis. Rather, our *ex post facto* analysis was based upon an objective review of SORNA's statutory elements. We analyzed those elements for the impact that they had on all Tier III offenders. Nothing about our decision implies that the statute was unconstitutional only as to Muniz himself, or based upon his unique circumstances.[47]

Nonetheless, on the most material facts, Santana stands in the same posture as Muniz. Santana, like Muniz, is a Tier III offender whose triggering offense occurred prior to the enactment of SORNA. Both offenders had the same statutory scheme imposed upon them retroactively. The fact that Santana committed his offense in New York is not a distinguishing factor. SORNA treats extra-judicial offenders in the same way that it treats Pennsylvania offenders.[48] SORNA, as it existed in *Muniz*, is just as unconstitutional for Tier III New Yorkers as it is for Tier III Pennsylvanians. *Muniz* applies with full force in this case. Accordingly, SORNA's application to Santana is an *ex post facto* law. Indeed, a comparison of the correct dates in this case—1983 and 2015— reveals a dramatic increase in the punishment imposed upon Santana. He went from no punishment arising under a sexual offender registration scheme to being subjected to a patently punitive statutory scheme. Because that punishment was inflicted retroactively to his 1983 offense, it was unconstitutional.

A contrary result would engender a disparity in our law that cannot be justified. Were we to decline to extend *Muniz* to the present case, the terms and conditions of SORNA would be unconstitutional as to those who committed their crimes here, but the exact same criteria would be constitutional for one who has committed a crime in a sister state. SORNA does not discriminate based upon geographic borders. Our cases should

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47 *Muniz*, 164 A.3d at 1218.

48 *See*, *supra*, n.10.

not do so either. Fortunately, the possibility of such a pernicious result readily is obviated by *Muniz*' clear applicability to all Tier III offenders, including those who committed offenses elsewhere and then relocated here.[49]

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[49] Justice Mundy, the Commonwealth, and the trial court all have expressed concern that, if offenders from other states were permitted to migrate here and avoid application of SORNA, such a circumstance would create a "safe haven" for sexual offenders seeking to avoid the burdens of registration statutes. *See* Diss. Op. at 1-2 (Mundy, J., dissenting); Commonwealth Br. at 32-33; and T.C.O. at 11. Also, Justice Mundy—who, like Chief Justice Baer, believes that the focus of the *ex post facto* analysis should be the criminal statute instead of SORNA—suggests that, to allow an out-of-stater to relocate to Pennsylvania and not be subjected to SORNA would destroy the General Assembly's stated purpose of gathering and compiling information about known sexual offenders. Neither of these policy-based concerns can transform an unconstitutional statutory scheme into a constitutional one.

Justice Mundy's attempt to direct the *ex post facto* inquiry to the criminal statute to which Santana pleaded guilty fails for the same reasons that Chief Justice Baer's fails. An *ex post facto* challenge concerns a statute that is being applied retroactively. That is, the statute did not exist when the act that gave rise to the retroactive application was committed. Section 4915.1 unquestionably existed when Santana failed to comply with SORNA. But, for purposes of the present *ex post facto* analysis, that statute entirely is irrelevant. It is not being applied retroactively and Santana is not (and cannot) allege that it is.

Instead, Santana maintains that the statute that actually is being applied retroactively, SORNA, is unconstitutional as an *ex post facto* law. The crime, Section 4915.1, relates to the failure to register pursuant to SORNA. It logically follows, and is Santana's precise argument, that, if he did not have to register, *i.e.*, SORNA was unconstitutionally applied to him, then he could not have committed the crime. Hence, Santana sought to withdraw his plea on this ground. The elements or enactment of the criminal case have no relevance to the *ex post facto* analysis at the heart of this case.

What is at the heart of this case is the question of whether *Muniz* applies equally to Santana. As outlined above, on all material aspects, the cases are the same. Both Santana and Muniz committed their offenses before SORNA was enacted. Both had SORNA applied retroactively years after the commission of those offenses. Both were subjected to the same exact requirements under SORNA. The only difference between the two is that Santana committed his triggering offense in New York, while Muniz committed his here. But that difference is no reason to draw constitutional distinctions. Neither Chief Justice Baer nor Justice Mundy cite any cases that would permit a statutory scheme to be applied in such a way. There is no constitutionally justifiable basis to hold

The order of the Superior Court is affirmed.

Justices Saylor, Todd, Donohue and Dougherty join the opinion.

Chief Justice Baer files a dissenting opinion.

Justice Mundy files a dissenting opinion.

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that a scheme is unconstitutional for Pennsylvanians, but that exact scheme, applied the exact same way, is constitutional as to New Yorkers.

The policy concerns expressed by Justice Mundy cannot yield a different result. A statutory scheme that amounts to an *ex post facto* violation cannot escape its fate simply because it would frustrate the General Assembly's intent. Rather than ignore the unconstitutionality of the statute in order to meet the General Assembly's goals, our job is to rule accordingly and let the General Assembly fix the statute. This is exactly what happened after *Muniz*. We ruled as we did, and the General Assembly responded by passing a constitutional scheme, Subchapter I, that effectuated its intent.

The passage of Subchapter I, which also applies retroactively, is why Justice Mundy's fears that we are creating a "safe haven" for extra-jurisdictional sexual offenders are unfounded. Any offender that moves into Pennsylvania now would be subject to one of the General Assembly's most recent enactments, either Subchapter H, 42 Pa.C.S. §§ 9799.10-9799.42, or Subchapter I, *id.* §§ 9799.51-9799.75, depending upon the date that the offender committed the triggering offense. These statutes ameliorate, if not outright extinguish, any such concerns.