

980 N.E.2d 312  
(Cite as: 980 N.E.2d 312)

## H

Supreme Court of Indiana.  
Andre GONZALEZ, Appellant (Defendant),  
v.  
STATE of Indiana, Appellee (Plaintiff).

No. 45S03-1206-CR-307.  
Jan. 10, 2013.

**Background:** Defendant petitioned for removal of his sex offender designation. The Superior Court, Lake County, [Clarence D. Murray, J.](#), [Natalie Bokota](#), Magistrate, denied petition. Defendant appealed, and the Court of Appeals reversed and remanded. Transfer was granted.

**Holding:** The Supreme Court, [Dickson](#), C.J., held that retroactive imposition of a lifetime registration period under the amended Sex Offender Registration Act as applied to defendant violated the Ex Post Facto Clause of Indiana Constitution.

Superior Court decision reversed and remanded.

Opinion, [966 N.E.2d 648](#), vacated.

### West Headnotes

**[1]** Constitutional Law 92  2790

[92](#) Constitutional Law  
[92XXIII](#) Ex Post Facto Prohibitions  
[92XXIII\(A\)](#) Constitutional Prohibitions in General  
[92k2790](#) k. Punishment in general. [Most Cited Cases](#)

Indiana Constitution's provision on ex post facto laws prohibits the passage of any law which imposes a punishment for an act which was not punishable at

the time it was committed or imposes additional punishment to that then prescribed. [West's A.I.C. Const. Art. 1, § 24.](#)

**[2]** Constitutional Law 92  2782

[92](#) Constitutional Law  
[92XXIII](#) Ex Post Facto Prohibitions  
[92XXIII\(A\)](#) Constitutional Prohibitions in General  
[92k2782](#) k. Relationship between federal and state provisions. [Most Cited Cases](#)

While Indiana courts in evaluating an ex post facto claim under the Indiana Constitution have adopted an approach consistent with the federal standard through use of the intent-effects test, Indiana does not use the heightened standard of clearest proof as used by the United States Supreme Court, and thus, court's analysis under the intent-effects test is independent from that of the federal standard. [West's A.I.C. Const. Art. 1, § 24.](#)

**[3]** Constitutional Law 92  2789

[92](#) Constitutional Law  
[92XXIII](#) Ex Post Facto Prohibitions  
[92XXIII\(A\)](#) Constitutional Prohibitions in General  
[92k2789](#) k. Penal laws in general. [Most Cited Cases](#)

**Constitutional Law 92**  2790

[92](#) Constitutional Law  
[92XXIII](#) Ex Post Facto Prohibitions  
[92XXIII\(A\)](#) Constitutional Prohibitions in General  
[92k2790](#) k. Punishment in general. [Most](#)

980 N.E.2d 312  
(Cite as: 980 N.E.2d 312)

### Cited Cases

In evaluating an ex post facto claim under the “intent-effects test,” court first determines what type of scheme the legislature intended the statute to establish; if the legislature's intention was to impose punishment, the inquiry ends and an ex post facto violation is found, but if the legislature's intention was regulatory or civil in nature, then the court must move to the second prong of the inquiry to determine whether the effects of the statute are so punitive as to transform the regulatory scheme into a criminal penalty. [West's A.I.C. Const. Art. 1, § 24.](#)

**[4] Constitutional Law 92**  990

#### 92 Constitutional Law

[92VI](#) Enforcement of Constitutional Provisions

[92VI\(C\)](#) Determination of Constitutional Questions

[92VI\(C\)3](#) Presumptions and Construction as to Constitutionality

[92k990](#) k. In general. [Most Cited Cases](#)

**Constitutional Law 92**  996

#### 92 Constitutional Law

[92VI](#) Enforcement of Constitutional Provisions

[92VI\(C\)](#) Determination of Constitutional Questions

[92VI\(C\)3](#) Presumptions and Construction as to Constitutionality

[92k996](#) k. Clearly, positively, or unmistakably unconstitutional. [Most Cited Cases](#)

Every statute stands before the court clothed with the presumption of constitutionality until that presumption is clearly overcome by a contrary showing.

**[5] Mental Health 257A**  469(1)

#### 257A Mental Health

[257AIV](#) Disabilities and Privileges of Mentally Disordered Persons

[257AIV\(E\)](#) Crimes

[257Ak469](#) Registration and Community

#### Notification

[257Ak469\(1\)](#) k. In general. [Most Cited Cases](#)

In the absence of evidence of punitive intent on the part of the legislature in amending sex offender registration law, the Supreme Court would assume that in passing the law, the legislature's intent was to create a civil, non-punitive, regulatory scheme. [West's A.I.C. 11-8-8-19.](#)

**[6] Constitutional Law 92**  2789

#### 92 Constitutional Law

[92XXIII](#) Ex Post Facto Prohibitions

[92XXIII\(A\)](#) Constitutional Prohibitions in General

[92k2789](#) k. Penal laws in general. [Most Cited Cases](#)

**Constitutional Law 92**  2790

#### 92 Constitutional Law

[92XXIII](#) Ex Post Facto Prohibitions

[92XXIII\(A\)](#) Constitutional Prohibitions in General

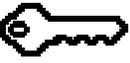
[92k2790](#) k. Punishment in general. [Most Cited Cases](#)

In determining whether the effects of a law are so punitive in nature as to constitute a criminal penalty for purposes of an ex post facto claim, the court is guided by seven factors: (1) whether 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. [West's A.I.C. Const. Art. 1, § 24.](#)

**[7] Constitutional Law 92**  2821

980 N.E.2d 312  
(Cite as: 980 N.E.2d 312)

[92](#) Constitutional Law  
[92XXIII](#) Ex Post Facto Prohibitions  
[92XXIII\(B\)](#) Particular Issues and Applications  
[92k2819](#) Sex Offenders  
[92k2821](#) k. Registration. [Most Cited Cases](#)

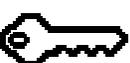
**Mental Health 257A**  **433(2)**

[257A](#) Mental Health  
[257AIV](#) Disabilities and Privileges of Mentally Disordered Persons  
[257AIV\(E\)](#) Crimes  
[257Ak433](#) Constitutional and Statutory Provisions  
[257Ak433\(2\)](#) k. Sex offenders. [Most Cited Cases](#)

Extension of sex offender registration obligations to a lifetime requirement was an affirmative restraint that weighed in favor of treating the effects of the Sex Offender Registration Act as punitive for purposes of defendant's ex post facto claim. [West's A.I.C. Const. Art. 1, § 24](#); [West's A.I.C. 11-8-8-8, 11-8-8-11, 11-8-8-15, 11-8-8-19\(c\)](#).

**[8] Constitutional Law 92**  **2821**

[92](#) Constitutional Law  
[92XXIII](#) Ex Post Facto Prohibitions  
[92XXIII\(B\)](#) Particular Issues and Applications  
[92k2819](#) Sex Offenders  
[92k2821](#) k. Registration. [Most Cited Cases](#)

**Mental Health 257A**  **433(2)**

[257A](#) Mental Health  
[257AIV](#) Disabilities and Privileges of Mentally Disordered Persons  
[257AIV\(E\)](#) Crimes  
[257Ak433](#) Constitutional and Statutory Provisions

[257Ak433\(2\)](#) k. Sex offenders. [Most Cited Cases](#)

By extending the duration of the sex offender registration requirement from ten years to life, the Sex Offender Registration Act had the effect of increasing shame on the defendant, which weighed in favor of punitive treatment for purposes of defendant's ex post facto claim. [West's A.I.C. Const. Art. 1, § 24](#); [West's A.I.C. 11-8-8-19\(c\)](#).

**[9] Constitutional Law 92**  **2821**

[92](#) Constitutional Law  
[92XXIII](#) Ex Post Facto Prohibitions  
[92XXIII\(B\)](#) Particular Issues and Applications  
[92k2819](#) Sex Offenders  
[92k2821](#) k. Registration. [Most Cited Cases](#)

**Mental Health 257A**  **433(2)**

[257A](#) Mental Health  
[257AIV](#) Disabilities and Privileges of Mentally Disordered Persons  
[257AIV\(E\)](#) Crimes  
[257Ak433](#) Constitutional and Statutory Provisions  
[257Ak433\(2\)](#) k. Sex offenders. [Most Cited Cases](#)

Fact that defendant's criminal conviction for child solicitation was a prerequisite for sex offender registration, and the offense required a showing of mens rea, weighed in favor of treating the effects of the amended Sex Offender Registration Act as punitive for purposes of defendant's ex post facto claim. [West's A.I.C. Const. Art. 1, § 24](#); [West's A.I.C. 11-8-8-19\(c\)](#).

**[10] Constitutional Law 92**  **2821**

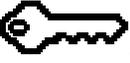
[92](#) Constitutional Law  
[92XXIII](#) Ex Post Facto Prohibitions  
[92XXIII\(B\)](#) Particular Issues and Applications

980 N.E.2d 312  
(Cite as: 980 N.E.2d 312)

tions

[92k2819](#) Sex Offenders  
[92k2821](#) k. Registration. [Most Cited](#)

[Cases](#)

**Mental Health 257A**  **433(2)**

[257A](#) Mental Health

[257AIV](#) Disabilities and Privileges of Mentally Disordered Persons

[257AIV\(E\)](#) Crimes

[257Ak433](#) Constitutional and Statutory Provisions

[257Ak433\(2\)](#) k. Sex offenders. [Most Cited Cases](#)

Although lifetime registration required by the amended Sex Offender Registration Act had a likely deterrent effect and promoted community condemnation of offenders, it also served a valid regulatory function by providing the public with information related to community safety, which weighed in favor of treating the Act as non-punitive for purposes of defendant's ex post facto claim. [West's A.I.C. Const. Art. 1, § 24](#); [West's A.I.C. 11-8-8-19\(c\)](#).

**[11] Constitutional Law 92**  **2821**

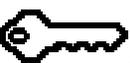
[92](#) Constitutional Law

[92XXIII](#) Ex Post Facto Prohibitions

[92XXIII\(B\)](#) Particular Issues and Applications

[92k2819](#) Sex Offenders

[92k2821](#) k. Registration. [Most Cited Cases](#)

**Mental Health 257A**  **433(2)**

[257A](#) Mental Health

[257AIV](#) Disabilities and Privileges of Mentally Disordered Persons

[257AIV\(E\)](#) Crimes

[257Ak433](#) Constitutional and Statutory Provisions

[257Ak433\(2\)](#) k. Sex offenders. [Most Cited Cases](#)

Fact that defendant's offense of child solicitation was already a registration-triggering offense at the time of commission under the Sex Offender Registration Act weighed in favor of treating enhanced registration period as non-punitive as applied to defendant for purposes of his ex post facto claim. [West's A.I.C. Const. Art. 1, § 24](#); [West's A.I.C. 11-8-8-19\(c\)](#).

**[12] Constitutional Law 92**  **2821**

[92](#) Constitutional Law

[92XXIII](#) Ex Post Facto Prohibitions

[92XXIII\(B\)](#) Particular Issues and Applications

[92k2819](#) Sex Offenders

[92k2821](#) k. Registration. [Most Cited Cases](#)

**Mental Health 257A**  **433(2)**

[257A](#) Mental Health

[257AIV](#) Disabilities and Privileges of Mentally Disordered Persons

[257AIV\(E\)](#) Crimes

[257Ak433](#) Constitutional and Statutory Provisions

[257Ak433\(2\)](#) k. Sex offenders. [Most Cited Cases](#)

Sex Offender Registration Act advanced the legitimate regulatory purpose of protecting the public from repeat sexual crime offenders, which weighed in favor of treating the enhanced registration requirements as non-punitive for purposes of defendant's ex post facto claim. [est's A.I.C. Const. Art. 1, § 24](#); [West's A.I.C. 11-8-8-19\(c\)](#).

**[13] Constitutional Law 92**  **2821**

[92](#) Constitutional Law

[92XXIII](#) Ex Post Facto Prohibitions

[92XXIII\(B\)](#) Particular Issues and Applications

[92k2819](#) Sex Offenders

[92k2821](#) k. Registration. [Most Cited](#)

980 N.E.2d 312  
(Cite as: 980 N.E.2d 312)

[Cases](#)

**Mental Health 257A**  **433(2)**

[257A](#) Mental Health

[257AIV](#) Disabilities and Privileges of Mentally Disordered Persons

[257AIV\(E\)](#) Crimes

[257Ak433](#) Constitutional and Statutory Provisions

[257Ak433\(2\)](#) k. Sex offenders. [Most](#)

[Cited Cases](#)

The retroactive imposition of a lifetime registration requirement under amended Sex Offender Registration Act was excessive in relation to the purpose of protecting the public from repeat sexual crime offenders as applied to defendant, who was not a sexually violent predator and could not predicate his request for relief from registration requirements on the grounds that he had been rehabilitated and presented no risk to the public, which weighed in favor of treating the enhanced registration as punitive for purposes of ex post facto claim. [West's A.I.C. Const. Art. 1, § 24](#); [West's A.I.C. 11-8-8-19\(c\)](#), [11-8-8-22](#).

**[14] Constitutional Law 92**  **2821**

[92](#) Constitutional Law

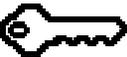
[92XXIII](#) Ex Post Facto Prohibitions

[92XXIII\(B\)](#) Particular Issues and Applications

[92k2819](#) Sex Offenders

[92k2821](#) k. Registration. [Most Cited](#)

[Cases](#)

**Mental Health 257A**  **433(2)**

[257A](#) Mental Health

[257AIV](#) Disabilities and Privileges of Mentally Disordered Persons

[257AIV\(E\)](#) Crimes

[257Ak433](#) Constitutional and Statutory Provisions

[257Ak433\(2\)](#) k. Sex offenders. [Most](#)

[Cited Cases](#)

Retroactive imposition of a lifetime registration period under the amended Sex Offender Registration Act as applied to defendant, who had been convicted of soliciting a minor and completed his ten year registration requirement under prior version of Act, violated the Ex Post Facto Clause of the Indiana Constitution. [West's A.I.C. Const. Art. 1, § 24](#); [West's A.I.C. 11-8-8-19\(c\)](#).

West Codenotes

Unconstitutional as Applied [West's A.I.C. 11-8-8-19\(c\)](#). \*315 [Benjamin W. Murphy](#), Merrillville, IN, Attorney for Appellant.

[Gregory F. Zoeller](#), Attorney General of Indiana, [J.T. Whitehead](#), Deputy Attorney General, Indianapolis, IN, Attorneys for Appellee.

On Transfer from the Indiana Court of Appeals, No. 45A03-1108-CR-369

[DICKSON](#), Chief Justice.

After the defendant had fully served his sentence of imprisonment and probation for Child Solicitation, and during the ten-year period of his required registration as a sex offender, the statutory registration requirement was amended to require lifetime registration in certain circumstances. The defendant's offense fell within these circumstances. Upon completion of his ten-year registration requirement, the defendant unsuccessfully sought his removal from the Sex Offender Registry, claiming refuge under the Indiana Constitution's prohibition against ex post facto laws. We hold that, under the facts of this case and as applied to this defendant, the Ex Post Facto Clause of the Indiana Constitution prohibits retroactive application of the lifetime registration requirement.

In 1997, the defendant, Andre Gonzalez, pled guilty to Child Solicitation, a class D felony. [FNI Ind.Code § 35-42-4-6](#). The trial court imposed a three-year sentence, with eighteen months incarcerated and eighteen months on probation. Upon discharge from probation in 1999, the defendant was required to register as a sex offender for ten years pursuant to the Sex Offender Registration Act ("Act"). See [Ind.Code § 5-2-12-5 \(1996\)](#). In 2006, the legislature amended the Act to require certain sex offenders, based on the details of their crimes, to register with local law enforcement for life. See, e.g., [Ind.Code § 11-8-8-19\(c\)](#) (requiring lifetime registra-

980 N.E.2d 312  
(Cite as: 980 N.E.2d 312)

tion if offender over age eighteen and victim under age twelve at time of crime). In 2010, after the defendant had completed ten years of registration, he wrote the trial court, requesting the removal of his registration requirement. On January 27, 2011, the defendant, by counsel, filed a “Verified Petition to Remove Sex Offender Designation Pursuant to [Ind.Code 11-8-8-22](#).” Appellant’s App’x at 34. The trial court denied the petition, and the defendant appealed. The Court of Appeals reversed. [Gonzalez v. State](#), 966 N.E.2d 648 (Ind.Ct.App.2012). The State sought transfer, urging that the decision of the Court of Appeals is inconsistent with precedent. We granted transfer and thus consider the appeal and issues as originally presented to the Court of Appeals. [Ind. Appellate Rule 58\(A\)](#).

**FN1.** At the time of the offense, the victim was the nine-year-old child of the defendant’s live-in girlfriend. Appellant’s App’x at 23.

In his appeal the defendant contends that, as applied to him, the 2006 amendments to the Act, which belatedly extend his registration requirement from ten years to life, violate the prohibition against \*316 ex post facto laws contained in the Indiana Constitution. [Ind. Const. art. 1, § 24](#). Important in the defendant’s claim is that there is no opportunity for review of the defendant’s future dangerousness or complete rehabilitation. The State asserts that the availability of a review process is irrelevant to the ex post facto determination.

[1] The Indiana Constitution states “No *ex post facto* law ... shall ever be passed.” *Id.* This provision prohibits, in relevant part, the passage of any law “which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.” [Weaver v. Graham](#), 450 U.S. 24, 28, 101 S.Ct. 960, 964, 67 L.Ed.2d 17, 22 (1981) (quoting [Cummings v. Missouri](#), 71 (4 Wall.) U.S. 277, 325–26, 18 L.Ed. 356, 364 (1867)) (internal quotation marks omitted). The policy underlying the Ex Post Facto Clause is to give effect to the fundamental principle that “persons have a right to fair warning of that conduct which will give rise to criminal penalties.” [Armstrong v. State](#), 848 N.E.2d 1088, 1093 (Ind.2006) (quoting [Marks v. United States](#), 430 U.S. 188, 191, 97 S.Ct. 990, 992–93, 51 L.Ed.2d 260, 265 (1977)).<sup>FN2</sup>

**FN2.** The defendant makes his ex post facto challenge solely on the basis of the Indiana Constitution and not the U.S. Constitution. See Appellant’s App’x 35 (referencing only the Indiana Constitution in his Petition); Appellant’s Br. at 7 (“Andre only raises a state claim which seems to offer more protection.”).

[2][3] In evaluating an ex post facto claim under the Indiana Constitution we apply what is commonly known as the “intent-effects” test.<sup>FN3</sup> [Wallace v. State](#), 905 N.E.2d 371, 378 (Ind.2009). Under the first prong of this test, we determine what type of scheme the legislature intended the statute to establish. *Id.* (citing [Smith v. Doe](#), 538 U.S. 84, 92, 123 S.Ct. 1140, 1146–47, 155 L.Ed.2d 164, 176 (2003)). If the legislature’s intention was to impose punishment, the inquiry ends and an ex post facto violation is found. If, however, the legislature’s intention was regulatory or civil in nature, then the court must move to the second prong of the inquiry to determine whether the effects of the statute are so punitive as to transform the regulatory scheme into a criminal penalty. See *id.*

**FN3.** While Indiana courts have adopted an approach consistent with the federal standard through use of the intent-effects test, see [Hevner v. State](#), 919 N.E.2d 109, 111 (Ind.2010); [Wallace v. State](#), 905 N.E.2d 371, 378 (Ind.2009), the defendant is correct in his assertion that “Indiana does not use the heightened standard of clearest proof ... as used by the United States Supreme Court...” Appellant’s Br. at 7; [Wallace](#), 905 N.E.2d at 378 n. 7 (“The heightened standard of clearest proof is not consistent with this State’s decisional law.”). Thus, our analysis under the intent-effects test is independent from that of the federal standard. See [Wallace](#), 905 N.E.2d at 378.

[4][5] First, “it is difficult to determine legislative intent since there is no available legislative history and the Act does not contain a purpose statement.” [Wallace](#), 905 N.E.2d at 383 (quoting [Spencer v. O’Connor](#), 707 N.E.2d 1039, 1043 (Ind.Ct.App.1999)). However, we are aided by the principle that every statute stands before us clothed

980 N.E.2d 312  
(Cite as: 980 N.E.2d 312)

with the presumption of constitutionality until that presumption is clearly overcome by a contrary showing. *State v. Rendleman*, 603 N.E.2d 1333, 1334 (Ind.1992). The defendant has put forth no evidence of punitive intent on the part of the legislature with respect to the 2006 amendments to the Act. Therefore, as this Court has consistently done, we assume without deciding that, in passing the Act, \*317 “the legislature’s intent was to create a civil, non-punitive, regulatory scheme.” *State v. Pollard*, 908 N.E.2d 1145, 1150 (Ind.2009); see also *Wallace*, 905 N.E.2d at 379.

[6] Second, we consider whether the effects of the Act, as applied to the defendant, are so punitive in nature as to constitute a criminal penalty. *Wallace*, 905 N.E.2d at 378. In evaluating a statute’s effects we are guided by the seven factors listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644, (1963).

[1] Whether 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.

*Wallace*, 905 N.E.2d at 379 (alterations in original) (quoting *Mendoza-Martinez*, 372 U.S. at 168–69, 83 S.Ct. at 567–68, 9 L.Ed.2d at 661). No one factor is determinative. We address each factor in turn, noting that “our task is not simply to count the factors on each side, but to weigh them.” *Id.* (quoting *State v. Noble*, 171 Ariz. 171, 829 P.2d 1217, 1224 (1992)) (internal quotation marks omitted).

#### 1. Affirmative Disability or Restraint

[7] The first factor is “[w]hether the sanction involves an affirmative disability or restraint.” *Mendoza-Martinez*, 372 U.S. at 168, 83 S.Ct. at 567, 9 L.Ed.2d at 661. We have found that the Act imposes significant affirmative obligations and a severe stigma on those to whom it applies. *Lemmon v. Harris*, 949 N.E.2d 803, 811 (Ind.2011) [hereinafter *Harris* ]; *Jensen v. State*, 905 N.E.2d 384, 391

(Ind.2009); *Wallace*, 905 N.E.2d at 379. The duties on the defendant are significant: he must provide a wide array of personal information which is made public, *Ind.Code* § 11–8–8–8, must register in person with local law enforcement and have his photograph taken annually, *Ind.Code* § 11–8–8–14(a), must re-register upon changes in residential or employment status, *Ind.Code* § 11–8–8–11, and must carry valid identification at all times, *Ind.Code* § 11–8–8–15, among other requirements.

The State contends that, because the defendant’s offense, Child Solicitation, has always been a qualifying sex offense, and because he was already required to register as a sex offender at the time of his discharge from probation, see *Ind.Code* § 5–2–12–5 (1996), there is no further burden or restraint placed on the defendant aside from a change in the duration of the registration requirement. Appellee’s Br. at 7–8. However, this Court has found that an increase to a lifetime registration requirement was a particularly important additional restraint which leans in favor of treating the effects of the Act as punitive. *Harris*, 949 N.E.2d at 811. Here, we again find that the extension of such intrusive registration obligations to a lifetime requirement is an additional affirmative restraint which weighs in favor of treating the effects of the Act as punitive.

#### 2. Sanctions That Have Historically Been Considered Punishment

[8] The next factor, “whether [the sanction] has historically been regarded as a punishment,” *Mendoza-Martinez*, 372 U.S. at 168, 83 S.Ct. at 567, 9 L.Ed.2d at 661, which involves the dissemination and widespread availability of offenders’ personal\*318 information, has been found to resemble the historical punishment of “shaming.” See *Harris*, 949 N.E.2d at 811; *Jensen*, 905 N.E.2d at 392. By extending the duration of the registration requirement from ten years to life, the Act has the effect of increasing shame on the defendant, which weighs in favor of punitive treatment.

#### 3. Finding of Scienter

[9] In applying the third factor, “whether [the statute] comes into play only on a finding of scienter,” *Mendoza-Martinez*, 372 U.S. at 168, 83 S.Ct. at 567, 9 L.Ed.2d at 661, our focus is whether the sanction is linked to a showing of *mens rea*. If so, it is more likely to be considered punishment. Here, the

980 N.E.2d 312  
(Cite as: 980 N.E.2d 312)

defendant's criminal conviction for Child Solicitation is a prerequisite for registration, and this offense requires a showing of *mens rea*, <sup>FN4</sup> as do the vast majority of offenses to which the Act applies. [Wallace, 905 N.E.2d at 381](#). Therefore, this factor also weighs in favor of treating the effects as punitive.

**FN4.** See [Indiana Code Section 35-42-4-6\(3\)](#) (1994), the law in place at the time the defendant committed his crime:

A person eighteen (18) years of age or older who *knowingly or intentionally* solicits a child under twelve (12) years of age to engage in any fondling or touching intended to arouse or satisfy the sexual desires of either the child or the older person commits child solicitation.

*Id.* (emphasis added).

#### 4. Traditional Aims of Punishment

**[10]** The fourth factor considers “whether [the statute's] operation will promote the traditional aims of punishment—retribution and deterrence.” <sup>FNS</sup> [Mendoza-Martinez, 372 U.S. at 168, 83 S.Ct. at 567, 9 L.Ed.2d at 661](#). The more the Act promotes these traditional aims of punishment, the more likely it is to be punitive. [Harris, 949 N.E.2d at 812](#) (citing [Jensen, 905 N.E.2d at 393](#)). Although lifetime registration required by the Act has a likely deterrent effect and promotes community condemnation of offenders, it also serves a valid regulatory function by providing the public with information related to community safety. As to the relative punitive or regulatory values served by this factor, we are guided by prior decisions of this Court that have not found deterrent and retributive effects as to a defendant claiming that the increased registration period violates the Ex Post Facto Clause, and that have interpreted this factor as non-punitive as to such a defendant. Compare [Harris, 949 N.E.2d at 812](#) (offense required registration both before and after 2007 amendments to Act; factor favored non-punitive treatment), with [Wallace, 905 N.E.2d at 381–82](#) (offense did not require registration at time committed; factor favored punitive treatment). This factor weighs in favor of treating the effects of the Act as non-punitive.

**FN5.** It is important to note that under our state constitution the primary aim of pun-

ishment is rehabilitation, not retribution or deterrence. [Ind. Const. art. 1, § 18](#).

#### 5. Applicability Only to Criminal Behavior

**[11]** The fifth factor for consideration is “whether the behavior to which [the statute] applies is already a crime.” [Mendoza-Martinez, 372 U.S. at 168, 83 S.Ct. at 567, 9 L.Ed.2d at 661](#). Although the registration requirement is triggered exclusively by criminal behavior, the defendant's offense, Child Solicitation, was already a registration-triggering offense at the time of commission. Our prior cases, in analogous circumstances, have weighed this factor in favor of treating the enhanced registration period as non-punitive as applied. \***319** [Harris, 949 N.E.2d at 812; Jensen, 905 N.E.2d at 393](#). We decline to depart from our precedent.

#### 6. Advancing Non-Punitive Interest

**[12]** Under the sixth factor, we determine “whether an alternative purpose to which [the statute] may rationally be connected is assignable for it.” [Mendoza-Martinez, 372 U.S. at 168–69, 83 S.Ct. at 567–68, 9 L.Ed.2d at 661](#). Because the Act advances the legitimate regulatory purpose of protecting the public from repeat sexual crime offenders, our cases have consistently treated this factor as non-punitive. [Harris, 949 N.E.2d at 812; Pollard, 908 N.E.2d at 1152–53; Jensen, 905 N.E.2d at 393; Wallace, 905 N.E.2d at 383](#). Likewise, here, this factor weighs in favor of treating the effects of the Act as non-punitive.

#### 7. Excessiveness in Relation to Articulated Purpose

**[13]** The seventh and final factor to be considered is “whether [the statute] appears excessive in relation to the alternative purpose assigned.” [Mendoza-Martinez, 372 U.S. at 169, 83 S.Ct. at 568, 9 L.Ed.2d at 661](#). Our previous cases have reached differing results based on the outcome of this final factor.

In [Wallace](#), we determined the seventh factor to be punitive for a defendant convicted and released prior to the Act's 1994 passage. In so doing, we found it significant that “the Act provides no mechanism by which a registered sex offender can petition the court for relief from the obligation of continued registration and disclosure. Offenders cannot shorten their registration or notification period, even on the clearest proof of rehabilitation.” [Wallace, 905 N.E.2d at 384](#).

980 N.E.2d 312  
(Cite as: 980 N.E.2d 312)

In *Jensen*, this Court found that the effects of the Act applied differently to Jensen than they had to Wallace. We first noted that the 2006 amendments had changed nothing with regard to Jensen's actual disclosure requirements; they had changed only the duration of the requirement.<sup>FN6</sup> *Jensen*, 905 N.E.2d at 394. Second, Jensen, unlike Wallace, was able to petition the court after ten years for reconsideration of his status as a sexually violent predator ("SVP"). *Id.* (citing *Ind.Code § 35-38-1-7.5(g)* (2006)). We thus concluded that the seventh factor weighed in favor of non-punitive treatment. *Id.*; see also *Harris*, 949 N.E.2d at 812-13 (finding seventh factor non-punitive due to availability of individualized review of SVP status under *Indiana Code Section 35-38-1-7.5(g)*).

**FN6.** Here, as in *Jensen*, the effect of the 2006 amendments was to lengthen the duration of the registration requirement without adding any additional restraints or burdens. However, the defendant's situation here differs from that of Jensen in that, at the time the defendant committed his crime in 1996, the Act was less restrictive than it was at the time of Jensen's crime in 1998. In 1996, limited information was available on offenders, the verification process was minimal, and the availability of information to the public was limited. Amendments to the Act in 1998 imposed heavy restraints on offenders related to notification requirements and verification of the disclosed information. *Wallace*, 905 N.E.2d at 375-76 (noting that the 1998 amendments require disclosure of an offender's fingerprints, photograph, address, complete criminal history, and information concerning treatment of mental disorders, and that the 1998 amendments require local law enforcement to verify the offender's current residence by mailing a form to the offender once per year, which the offender must return in person).

Here, unlike defendants Jensen and Harris, the defendant is not an SVP. Under Indiana law, there are two avenues by which a sex offender may qualify as an SVP. First, a person can qualify as an SVP by reason of a "mental abnormality or personality disorder that makes the individual\*320 likely to repeatedly commit a sex offense." *Ind.Code § 35-38-1-7.5(a)*.

This determination may be made by the court upon request by the prosecuting attorney. *Ind.Code § 35-38-1-7.5(e)* (providing that, if it grants the motion of the prosecuting attorney, the court shall conduct a hearing at which two court-appointed psychologists or psychiatrists with expertise in criminal behavior disorders evaluate the person and testify). Second, a person may become an SVP by virtue of the offense committed. *Ind.Code § 35-38-1-7.5(b)*. Here, the defendant neither had a hearing to determine SVP status under subsection (a), nor committed a qualifying offense under subsection (b). Rather, his lifetime registration requirement arose under *Indiana Code Section 11-8-8-19(c)* due to the nature of his offense and the fact that, when committed, the defendant was at least eighteen years of age and the victim less than twelve years of age. Thus, unlike Jensen and Harris, the defendant has no available channel through which he may petition the trial court for review of his future dangerousness or complete rehabilitation. Compare *Ind.Code § 11-8-8-19(b)* (providing that an SVP "is required to register for life"), and *Ind.Code § 35-38-1-7.5(g)* (allowing an SVP to "petition the court to consider whether the person should no longer be considered a sexually violent predator"), with *Ind.Code § 11-8-8-19(c)* (providing that a sex offender falling under the section [i.e. a non-SVP] "is required to register for life"), and *Ind.Code § 11-8-8-22(j)* (allowing a non-SVP asserting a claim of ex post facto punishment to petition the trial court to remove the designation of sex offender or to permit registration under less restrictive conditions). Future dangerousness or complete rehabilitation are not grounds upon which a non-SVP could base such a petition.

The State contends that a distinction must be made between an SVP whose registration requirement is based on his or her mental state and someone in the defendant's position whose increased registration requirement is "based on facts admitted by him ... that do not change with the passage of time, or with rehabilitation." Appellee's Trans. Br. 6-7. As noted above, this seventh *Mendoza-Martinez* factor requires that we consider whether the retroactive application appears excessive *in relation to the alternative purpose assigned*. The alternative purpose is protection of the public from repeat sexual crime offenders. The degree to which a prior offender has been rehabilitated and does not present a risk to the public is thus integral to our evaluation of whether an extension of the ten-year registration requirement is reasonable in relation to such public protection. The

980 N.E.2d 312  
 (Cite as: 980 N.E.2d 312)

availability of meaningful review of an offender's future dangerousness is therefore germane to the determination of whether a statute's effects are excessive. Under the procedures contained in [Indiana Code Section 11-8-8-22](#), the sole avenue of relief available to a non-SVP defendant, a trial court may, if it chooses, summarily dismiss an offender's petition without ever setting a hearing.<sup>FN7</sup> \*321 [Ind.Code § 11-8-8-22\(e\)\(l\)](#). Further, [Indiana Code Section 11-8-8-22](#) may be utilized only when there is an ameliorative change in federal or state law applicable to an offender's prior conduct, [Ind.Code § 11-8-8-22\(b\)](#), [\(g\)](#), or when an offender files an ex post facto claim, [Ind.Code § 11-8-8-22\(j\)](#). Neither of these avenues of relief relates to an offender's future dangerousness in relation to the alternative purpose assigned, protection of the public.

[FN7](#). While it is true that an SVP's petition under [Indiana Code Section 35-38-1-7.5\(g\)](#) may also be dismissed by the trial court without a hearing, *id.* (“A court may dismiss a petition filed under this subsection or conduct a hearing to determine if the person should no longer be considered a sexually violent predator.”), that section also expressly allows an SVP to repeatedly file such petition “not more than one (1) time per year.” *Id.* Thus, if an SVP's petition is dismissed by the trial court, the SVP has the opportunity to re-petition annually. *Id.* But if a non-SVP's petition is summarily dismissed by the trial court, [Indiana Code Section 11-8-8-22](#) offers no similar express opportunity to re-petition the trial court unless or until there is a further ameliorative or punitive change in the law. The statute does not expressly permit (nor does it deny) a non-SVP the opportunity to file repeated requests for review of a lifetime registration requirement based on a claim of ex post facto punishment. We find this distinction to magnify the disparity as to the availability of *meaningful* review.

In the present case, the defendant, Gonzalez, as a non-SVP, may not predicate his request for relief on the grounds that he has been rehabilitated and presents no risk to the public. And the trial court has refused to grant a hearing despite his repeated attempts to seek the trial court's review of his claim of

ex post facto punishment. Thus, as to this defendant, we find that the retroactive imposition of a lifetime registration requirement appears excessive in relation to the purpose of protecting the public from repeat sexual crime offenders. For these reasons, we find this seventh factor weighs slightly in favor of treating the enhanced registration period as punitive rather than non-punitive.

### Conclusion

[14] We apply the seven [Mendoza-Martinez](#) factors to guide our evaluation of the defendant's claim that, as applied to him, the retroactive imposition of a lifetime registration period violates the Ex Post Facto Clause. Our task is not merely to determine whether there are more punitive or non-punitive factors, but to consider them collectively to determine whether the application of the challenged statute's effects upon the defendant are so punitive in nature as to constitute a criminal penalty. *See Wallace, 905 N.E.2d at 378-79*. The underlying conviction of the defendant for Child Solicitation was for a D felony, the lowest class of felony under Indiana's criminal code. Although the defendant was sentenced to the maximum term of three years, eighteen months were suspended to probation. Because of the nature of the offense, the then-prevailing statutes required him to register as a sex offender for ten years, which registration he completed. As we collectively weigh the punitive and non-punitive nature of the seven factors as they apply to this defendant and his circumstances, we find that to apply the 2006 amendments so as to subject this defendant to a lifetime registration requirement violates the Ex Post Facto Clause of the Indiana Constitution.

We reverse the denial of the defendant's petition to remove the lifetime registration requirement and remand for further proceedings consistent with this opinion.

[DAVID, MASSA](#), RUSH, JJ., concur.  
[RUCKER](#), J. concurs in result.

Ind.,2013.  
 Gonzalez v. State  
 980 N.E.2d 312

END OF DOCUMENT

980 N.E.2d 312  
(Cite as: **980 N.E.2d 312**)