IN THE
COURT OF APPEALS OF MARYLAND

September Term, 2011

No. 125

JOHN DOE,
Petitioner

v.

DEPT. OF PUBLIC SAFETY AND CORRECTIONAL SERVICES,
Respondent

On Writ of Certiorari to the Court of Special Appeals

BRIEF AND APPENDIX OF PETITIONER

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DEPT. OF PUBLIC SAFETY	*	OF MARYLAND
& CORRECTIONAL SERVICES,	*	
Respondent	*	No. 125
	*	September Term, 2011
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STATEMENT OF THE CASE

On June 19, 2006, Petitioner, John Doe, pled guilty before the Honorable John H. McDowell in the Circuit Court of Washington County to a single count of child sexual abuse based on conduct that occurred in 1984 when Mr. Doe taught at a junior high school. On September 6, 2006, Mr. Doe was sentenced to ten years' incarceration with all but four and one-half years suspended and three years of probation upon release. The court ordered Mr. Doe to register as a "child sexual offender" and pay a fine of $500. On October 6, 2006, Mr. Doe filed a Motion to Correct an Illegal Sentence alleging that the court lacked authority to order Mr. Doe to register as a child sexual offender. On November 1, 2006, Judge McDowell entered an Order striking the condition that Mr. Doe register as a child sexual offender.

Mr. Doe was released from prison in 2008. After a change in the sex offender registry laws that went into effect on October 1, 2009, Mr. Doe was ordered to register as a child sexual offender for a period of ten years. On October 23, 2009, Mr. Doe filed a Complaint for Declaratory Judgment which was heard on July 23, 2010 in the

Circuit Court for Washington County, the Honorable John McDowell presiding. A Memorandum and Order denying the complaint for declaratory judgment relief was filed by Judge McDowell on the same date. Mr. Doe filed a timely appeal to the Court of Special Appeals who, in an unreported opinion filed on November 15, 2011, *Doe v. Department of Public Safety and Correctional Services*, No. 1326, Court of Special Appeals, September Term, 2010, affirmed the judgment of the lower court. The mandate of the Court of Special Appeals issued on December 15, 2011. The case is before this Court pursuant its grant of Mr. Doe's Petition for Writ of Certiorari on March 16, 2012.

QUESTIONS PRESENTED

1. Given the highly punitive and restrictive nature of Maryland's newly enacted sex offender registration laws, does their retroactive application violate the federal constitutional ban on *ex post facto* laws and ***both*** clauses of Article 17 of the Maryland Declaration of Rights prohibiting *ex post facto* laws and *ex post facto* restrictions?

2. Do Maryland's sex offender registration laws violate Mr. Doe's federal and state constitutional rights to due process?

3. Given that the plea agreement entered into by Mr. Doe did not, and indeed could not have, contemplate registering as a sex offender, is he entitled to specific performance of the plea agreement?

STATEMENT OF THE FACTS

On June 19, 2006, Mr. Doe pled guilty in the Circuit Court for Washington County to one count of sexual abuse of a minor pursuant to Maryland Code Art. 27, §35A (1984). (E.-13). That provision prohibited "any act that involves sexual molestation or exploitation of a child by a parent or other person who has permanent or temporary care or custody or responsibility or supervision of a child." *Id.* at §35A(a)(4)(i). The offense occurred during the 1983-84 school year when Mr. Doe was a public school teacher in

Boonsboro, Maryland. Allegations had been made to school officials that Mr. Doe inappropriately touched one or more students. (E-25). The Washington County Board of Education conducted an administrative investigation, after which Mr. Doe was removed from the school. (E-26). Shortly thereafter, Mr. Doe resigned his position and joined the United States Air Force where he remained until 1991 when he was honorably discharged. (E-47-48). During that time he served as the Commander of the Presidential Honor Guard at the Pentagon. (E-126). After his Air Force career, Mr. Doe embarked on a fifteen year successful career as a financial adviser. (E-126-127). In September of 2005, one of Mr. Doe's former students contacted law enforcement authorities and reported that she had been touched inappropriately by Mr. Doe when he was a public school teacher. (E-24). He was formally charged on February 10, 2006. (E-15-20).

Pursuant to a binding plea agreement, Mr. Doe agreed to plead guilty to a single count of sexual child abuse and receive a sentence of no more than five years, in exchange for the state dismissing all other charges. (E-15-16). At no point during the hearing on the plea was the issue of sex offender registration discussed or mentioned. (E-14-31). In fact, at a subsequent hearing, Mr. Doe testified that during consultations with his attorneys regarding the plea agreement, he was told "that there was absolutely no registration required under the statute." (E-129). On September 6, 2006, the court sentenced Mr. Doe to ten years with all but four and one-half years suspended, and three years of probation upon release. (E-59-60). As a basis for his sentencing, the judge stated:

> [Mr. Doe] some of what your attorney has said, Mr. Salvatore has said, during the course of his closing remarks and also what is contained in this sentencing Memorandum are very true, that I am impressed with the life that you have lived since being relieved of your responsibilities as a teacher with the Washington County Board of Education. I'm also impressed by some of the difficulties that you've experienced in your life and the responsibility that you showed to your family and the responsibility that you've shown to others even since that time. So the court is certainly taking into consideration all of the things that you have done of a positive nature since the time of this incident back in the 1980s. And what has been also said is true that rehabilitation is one of the factors that the Court must look at, and you appear to have rehabilitated yourself significantly since the time of this incident.

(E-24-25). The court specifically noted that although deterrence is important in any sentence "to prevent you from committing an act such as this again, which I don't think will occur." (E-25). The court further ordered that Mr. Doe register as a child sex offender as a condition of probation. (E-59-60). Shortly after sentencing, Mr. Doe filed a Motion to Correct an Illegal Sentence arguing that registration as a sex offender was not part of the plea agreement, and, in any event, could not be imposed because the registry laws did not exist at the time of the offense in 1983 and the law in existence at the date of sentencing was retroactive only if the crime was committed before 1995 and Mr. Doe was either in custody or under the supervision of a supervising authority on October 1, 2001. (E-63-64). Mr. Doe was not under the supervision of a supervising authority on October 1, 2001. (E-64). The court agreed and ordered that the requirement that Mr. Doe register as a sex offender be "stricken from the sentence imposed in this matter." (E-67).

Shortly after Mr. Doe's release from prison on December 31, 2008,[1] the General Assembly passed a new law that went into effect on October 1, 2009. The new law required retroactive application of sex offender registration requirements to those who committed offenses prior to 1995 but were not convicted until after 1995. The new law thus required Mr. Doe to register as a child sex offender which he did in early October, 2009. (E-133).

On October 23, 2009, a Complaint for Declaratory Judgment was filed in Anne Arundel Circuit Court challenging the applicability and constitutionality of the newly enacted law. (E-69-75). After a hearing on July 23, 2010, the court issued its Memorandum Opinion rejecting Mr. Doe's arguments and ordering him to remain on the sex offender registry. (E-157-166). A timely appeal was filed and, on November 15, 2011, the Court of Special Appeals issued its unreported opinion affirming the decision of the trial court. (E-167).

ARGUMENT

GIVEN THEIR HIGHLY PUNITIVE AND RESTRICTIVE NATURE, RETROACTIVE APPLICATION OF MARYLAND'S SEX OFFENDER REGISTRATION LAWS VIOLATES THE FEDERAL CONSTITUTIONAL BAN ON *EX POST FACTO* LAWS AND BOTH CLAUSES OF ARTICLE 17 OF THE MARYLAND DECLARATION OF RIGHTS PROHIBITING *EX POST FACTO* LAWS AND *EX POST FACTO* RESTRICTIONS.

"History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure."

[1] Mr. Doe served a total of two years and four months before being released for good behavior.

Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

A. Maryland's Sex Offender Registry Laws: 1995-2012.

Maryland first enacted its sex offender registry law in 1995. Md. Ann. Code, Art. 27, §692B (1995 Repl. Vol.). It contained a single category of offender known as a "child sexual offender" which was defined to include those convicted of violating any one of seven listed crimes. Five of those crimes applied only if the victim was under the age of 15. Conviction for one of the crimes, fourth degree sexual offense, required registration only if ordered by the court. §692B(a)(2). Registration statements included the child sexual offender's name, address, place of employment, photograph, fingerprints, date of conviction, jurisdiction of conviction, a list of any aliases, the offender's social security number. §692B(g). The child sexual offender was required to register with his local law enforcement agency annually for ten years and was required to report a change of address within seven days. §692B(i) and (h). The local law enforcement agency was required to send "written notice of the registration statement to the county superintendent,…in the county where the child sexual offender will reside" who, in turn, was required to send written notice of the registration statement "to the principals of the schools within the supervision of the superintendent." §692B(d). They also had to provide the Department of Public Safety and Correctional Services (hereinafter DPSCS), a copy of the statement. The local law enforcement agency had discretion to provide notice of the registration statement to a community organization, a religious organization, and "[a]ny other organization that relates to children or youth" "if the agency determines that such notice

is necessary to protect the public interest." §692B(d). Failure to register as required could result in a misdemeanor conviction subject to not more than three years imprisonment. §692B(k). This new law applied prospectively to those who committed offenses after October 1, 1995. The legislature re-enacted the registry law in 1996 but redesignated it as §792. All provisions from the 1995 enactment remained the same.

In 1997, the legislature expanded the category of offenders to include child sexual offenders, offenders, sexually violent predators, and sexually violent offenders. §792(a)(2), (a)(6), (a)(10), and (a)(11). A sexually violent predator was one convicted of a second or subsequent sexually violent offense and who had been determined to be "at risk of committing a subsequent sexually violent offense." §792(a)(11). The number of crimes for which one could be required to register was increased to 30. The contents of the registration statements remained unchanged. §792(d). The frequency and duration of registration depended on the category one was placed into: child sexual offenders had to register annually for ten years; offenders and sexually violent offenders had to register annually for an unlimited time; sexually violent predators had to register every 90 days until a court deemed them no longer to be within the sexually violent predator category. §792(h). Additionally, child sexual offenders had to register in person as opposed to through the mail. §792(c), (h). Dissemination of registration statements was also widened. In addition to the dissemination as existed in the 1996 law, DPSCS was required to maintain a central registry and transmit the registration information to the Federal Bureau of Investigation. The new law required DPSCS to release the statements to the public "in accordance with regulations established by the Department." §792(d).

Further, local law enforcement agencies were required to provide the registration statements to anyone who provided a written request for the information. §792(d)(6). And finally, local law enforcement was permitted to provide notice of a registration statement "to any person or organization that the Department or local law enforcement agency determines may serve to protect the public concerning a specific registrant if the Department or the agency determines that such notice is necessary to protect the public." §792(f)(3). The requirements under the 1997 law were prospective only from its effective date of July 1, 1997. The 1998 law changed very little from the 1997 version except to correct the lack of a fixed period of duration for registering for offenders and sexually violent offenders. It set the duration of registration for an offender and a sexually violent offender at annually for ten years. §792(h)(3).

The 1999 law drastically changed the restrictions and burdens placed on registrants. The category of offenders remained unchanged. Child sexual offenders and sexually violent offenders were required to register in person annually for ten years or for life if convicted of specified crimes. §792(d)(2). Offenders had to register annually for ten years. §792(d)(3). Sexually violent predators had to register every 90 days for life. §792(d)(5). In addition to all previous information required to be provided, sexually violent predators also had to provide "[i]dentifying factors, including physical description, anticipated future residence, offense history and documentation of treatment received for a mental abnormality or personality disorder." §792(e)(2). Lastly, the new law provided that DPSCS "shall release registration statements or information concerning registration statements to the public and may post on the Internet a current listing of each

registrant's name, offense and other identifying information…" §792(j)(6). Further, local law enforcement was required to provide notice of a registration statement "to any person that the Department or local law enforcement agency determines may serve to protect the public concerning a specific registrant if the department or the agency determines that such notice is necessary to protect the public." §792(j)(7).

The registry laws were recodified in 2001 and placed into the Criminal Procedure Article, §11-701 *et seq.* The significant change to the law in 2001 concerned its retroactive application to those who committed offenses prior to October 1, 1995. Specifically, child sexual offenders who committed offenses on or before October 1, 1995, had to register if they were under custody or supervision on October 1, 2001. Md. Ann. Code, Crim. Proc. Art. §11-702.1(b).

The next major change to the registry laws occurred in 2009 when juvenile sex offenders were added to those who had to register. §11-707(a). Further, registration statements had to include, in addition to all previous information, a "list of any aliases, former names, electronic mail addresses, computer log-in or screen names or identities, instant-messaging identities, and electronic chat room identities that the registrant has used;…any other name by which the registrant has been legally known; a copy of the registrant's valid driver's license or identification card; the license plate number and description of any vehicle owned or regularly operated by the registrant; and the registrant's signature." §11-706(a)(1) through (12). The frequency of registration also increased with child sexual offenders having to register in person every six months for ten years; offenders and sexually violent offenders having to register in person every six

months for ten years or life in some cases; and sexually violent predators having to register every three months for life. §11-707(a)(3) and (4). All registrants had to provide updated photographs every six months. Significantly, the 2009 law allowed the public to "electronically transmit information the public may have about a registrant" to DPSCS, to a parole agent of the registrant, or to local law enforcement. §11-717(c). The physical movements of registrants was also burdened by the new law that allowed registrants to enter real property where the registrant was a student or where the registrant's child was a student or received child care only if the registrant was given "specific written permission of the Superintendent of Schools, the local school board, the principal of the school, or the owner or operator of the registered family day care home…as applicable" and the registrant "promptly notifies an agent or employee of the school, home, or institution of the registrant's presence and purpose of visit." §11-722(a). Further, a registrant was prohibited from entering onto real property used for public or nonpublic elementary or secondary education, or on property where is located a family day care home, a child care home or institution. §11-722(b). Moreover, a person who "enters into a contract with a county board of education or a nonpublic school" was prohibited from "knowingly employ[ing] an individual to work at a school if the individual is a registrant." §11-722(c). One who entered into such a contract could be convicted and receive a five year sentence.

In 2010, the law changed to provide tiers of offenders as opposed to specific classifications. Tier I offenders had to register every six months for 15 years. Tier II offenders must register in person every six months for 25 years; and Tier III offenders

had to register in person every three months for life. §11-707(a). Only Tier I offenders were permitted to petition the court for a reduction in the registration term and only after serving on the registry for 10 years. The 2010 law increased the burdens placed on registrants by requiring that they provide three days notice after changing addresses, applying for a driver's license, changing vehicle or license plate information, changing electronic mail or internet identifiers, changing a home or cell phone number or changing employment. §11-705(c), (e). A registrant must notify local law enforcement if he "obtains a temporary residence or alters the location where the registrant resides or habitually lives for more than 5 days or when the registrant will be absent from the registrant's residence or location where [he] habitually lives for more than 7 days." §11-705(i). This notice must be in writing and must be provided prior to the change in residence or location. The 2010 law added to the registration statement information such as a copy of the registrant's passport or immigration papers, any professional licenses held, the license plate number, registration number and description of any vehicle, including all motor vehicles, boats, and aircraft owned or regularly operated by the registrant, the permanent or frequent addresses or locations where all vehicles are kept, all landline and cellular telephone numbers, a copy of the registrant's driver's license, the criminal history of the registrant including the dates of all arrests and convictions, as well as parole, probation status, and any outstanding warrants. §11706(a).

B. Maryland and Federal Constitutional Prohibitions Against *Ex Post Facto* Laws

Article I, Section 10 of the United States Constitution prohibits states from passing "any…*ex post facto* Law." Thus, "[e]ach time a statute has been challenged as being in

conflict with the constitutional prohibitions against … *ex post facto* laws, it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties." *Trop v. Dulles*, 356 U.S. 86, 96 (1958). *Smith v. Doe*, 538 U.S. 84 (2003), was the first case before the U.S. Supreme Court to address an *ex post facto* challenge to the state's retroactive application of sex offender registry laws. There, the respondents were convicted of sexual offenses, served their sentences and completed rehabilitative programs for sex offenders all before the state's passage of the Alaska Sex Offender Registration Act. The act, which was to be applied retroactively, required publication of certain information on the Internet and required respondents to register quarterly for life. The court explained the framework for its analysis of the *ex post facto* challenge:

> We must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and non-punitive, we must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.' " *Ibid.* (quoting *United States v. Ward*, 448 U.S. 242, 248-249, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)). Because we "ordinarily defer to the legislature's stated intent," *Hendricks, supra*, at 361, 117 S.Ct. 2072, "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," *Hudson v. United States*, 522 U.S. 93, 100, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (quoting *Ward, supra*, at 249, 100 S.Ct. 2636).

Id. at 92. After concluding that the Alaska legislature had intended only a civil, non-punitive regulatory law, the court looked to determine whether the law was "so punitive

…in…effect as to negate [the State's] intention to deem [them] civil." *Id.* at 93. Relying on *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), to make this determination, the Supreme Court examined the following factors: "whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a non-punitive purpose; or is excessive with respect to this purpose." *Id*. at 168-69. The court concluded that the effect of Alaska's law was non-punitive and therefore did not violate the federal ban on *ex post facto* laws.

Maryland's prohibition against *ex post facto* laws is found in the first clause of Article 17 of the Maryland Declaration of Rights which provides "[t]hat retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made…" Md. Decl. Rts. Art. 17. This Court has often stated that the *ex post facto* clause in Article 17 "parallels the federal clause" and, generally, is read in *pari materia* with its federal counterpart. *Tichnell v. State,* 287 Md. 695,736, 415 A.2d 830 (1980); *Khalifa v. State*, 382 Md. 400, 425, 855 A.2d 1175 (2004); *Watkins v. Sec'y Dept. of Pub. Safety and Corr. Servs.*, 377 Md. 34, 48, 831 A.2d 1079 (2003); *Frost v. State*, 336 Md. 125, 136-37, 647 A.2d 106 (1994).

While not involving an *ex post facto* challenge to retroactive application of the registry laws, *Young v. State*, 370 Md. 686, 806 A.2d 233 (2002), is important because this Court addressed the punitive nature of Maryland's registry law in effect at that time. The Court examined Md. Ann. Code, Art. 27, §792 (1957, 1998 Repl. Vol.), Maryland's

sex offender registry law, in light of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to determine whether registration was an added penalty that required "its factual conditions precedent to be proven to a jury beyond a reasonable doubt." *Id.* at 690. The Court concluded that *Apprendi* did not apply "because sex offender registration does not constitute punishment in the constitutional sense." *Id.* The Court examined the legislature's purpose when enacting §792 as well as the effect of the statute concluding that the legislature's intent was not punishment but rather "was intended as a regulatory requirement aimed at protection of the public," and that its "intent was not to stigmatize or shame sex offenders." *Id.* at 719. As for the effect of the statute, this Court found that,

> [T]he *registration provisions are tailored to protect the public*, requiring registrants *to supply basic information* to apprise law enforcement officials about an offender residing or working in the area. Registration information is disseminated to local county school superintendents, school principals, and municipal police departments.…*[P]hysical restraints placed by the statute upon offenders are minimal*. *Petitioner's movements and activities are not restricted in any way*. *The focus of § 792 is not on circumscribing the movement of offenders*, but on keeping law enforcement and school officials informed of their location. A registrant need only notify the supervising authority of any change of address upon moving. Furthermore, the *information required to be divulged in registering is not unreasonably burdensome*-a registrant must provide name, address, local place of employment and/or educational enrollment, description of the crime, date of conviction, aliases, and Social Security number. … Perhaps most significantly for the purposes of our analysis, § 792 *is not excessive in relation to its remedial purpose*, particularly given the state interest at stake in preventing repetition of sex offenses. The provisions of § 792 are tailored narrowly to effectuate the goal of protection of the public from sex offenders.

Id. at 712-716 (emphasis added).

Similar factors were critical to the Supreme Court's conclusion in *Smith* that Alaska's registration scheme was not punitive in effect. The Court noted that the scheme did not involve restriction on activities that could effectively be considered a physical restraint. Registrants, the court concluded, were "free to move where they wish[ed] and to live and work as other citizens, with no supervision." *Id*. at 101. Nor did it impose any affirmative disabilities or restrictions. The Court pointed out that "[t]he Alaska statute, on its face, does not require…updates to be made in person. And, as respondents conceded at the oral argument before us, the record contains no indication that an in-person appearance requirement has been imposed on any sex offender subject to the Act." *Id*. at 101. Moreover, the requirements of the registration act did not have the hallmarks of acts historically deemed to be punishment such as shaming or banishment. The court noted that "[i]n contrast to the colonial shaming punishments, however, the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme." *Id*. at 99. Additionally, the court explained that Alaska's laws did not impose any occupational or housing disadvantages. "The Act does not restrain activities sex offenders may pursue but leaves them free to change jobs or residences," and further, "[t]he record …contains no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred through the use of routine background checks by employers and landlords." *Id*. at 100. Lastly, the court found no effort to publicly humiliate registrants. The court pointed out that "[b]y contrast, the stigma of Alaska's Megan's Law results not

from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public." *Id*. at 99.

The assumptions on which this Court based its conclusions in *Young* and on which the Supreme Court based its holding in *Smith* as highlighted above, no longer have vitality in light of Maryland's current sex offender registry laws which have spiraled out of control with ever-escalating burdens, restrictions and restraints. Application of the federal and state proscriptions against *ex post facto* laws is now necessary because Maryland's sex offender registry laws have crossed the line from being mere regulatory notifications for community safety purposes to being outright punishment. And even if the intent of the legislature was not to create a punitive scheme, it has effectively done so. No longer is the information provided by a registrant simply "basic information." No longer are restrictions on movement and activities of the registrant non-existent. No longer is dissemination of registration information limited. And no longer is the registration scheme tailored to meet the purpose of protecting the public from dangerous sexual offenders.

The information registrants must supply is not "basic" by any stretch of the imagination. For example, in addition to basic information, under the new law, registrants must provide the name and address of all employers, a description of the place of employment if it differs from the employer's address, all schools the registrant enrolls in, all nicknames he or she is or will be known by, all identifying factors including tattoos, birth marks, physical descriptions, digital photographs that must be updated frequently, a copy of his or her passport or immigration papers, information regarding all

professional licenses held, the registration number of all motor vehicles or boats used, all landline and cellular telephone numbers, fingerprints, palm prints, all arrests and conviction records, all electronic mail or internet identifiers, and a DNA sample. Further, a registrant must provide addresses where the registrant resides or habitually lives. "Habitually lives" is defined so as to include places the registrant regularly visits including "any place where a person visits for longer than 5 hours per visit more than 5 times within a 30-day period." Md. Ann. Code., Crim. Proc. Art. §11-701(d) (2008 Repl. Vol., 2011 Supp.). Finally, local law enforcement agencies have discretion to require a registrant to provide any other information as well. §11-705(c)(2).

Dissemination of all of this information regarding a registrant is no longer limited to "local county school superintendents, school principals, and municipal police departments." The new law greatly expands the universe to whom all of this information **must** be disseminated. For example, once the registrant provides his or her information to a supervising authority, that information is passed onto the local law enforcement unit of each county where the registrant lives, works, and attends school, the campus police where the registrant attends college, and, if the registrant moves to another county, all information is transmitted to the county superintendent, all nonpublic primary and secondary schools in the county within one mile of where the registrant is to live, family day care homes, child care centers, child recreation facilities, faith institutions, and "other organizations that serve children and other individuals vulnerable to sex offenders who victimize children", and the statewide DNA database system of the Department of State Police Crime Laboratory must receive the DNA sample information. §11-717. Also,

institutions of higher education that are required to report campus security crime statistics, which most are, must advise the campus community where law enforcement information concerning sex offenders may be obtained. The DPSCS is also required to transmit conviction data and fingerprint data to the Federal Bureau of Investigation.

Additionally, and most importantly, information is posted on the internet for worldwide public consumption. The DPSCS website provides a direct link to Maryland's sex offender registry which allows viewers to search by name or zip code and, once a registrant is found, the website permits the user to search an Interactive Map of Registered Sex Offenders. The website allows users to "sign up for telephone notification any time a registered sex offender moves in your area." http://www.socem.info. And, finally, there is the carte blanch provision that allows local law enforcement officials who find it necessary "to protect the public from a specific registrant" to give registration information "to a particular person not otherwise identified" under the statute as a lawful recipient. §11-718(a)(1). In short, the considerations relied upon by this Court in reaching its conclusion that the sex offender registration laws in Maryland are not punitive in purpose have drastically changed and those changes have resulted in highly punitive and onerous laws being applied retroactively in violation of Article 17 of the Maryland Declaration of Rights and Article 1, Section 10 of the United States Constitution.

Even were this Court to conclude that the legislature did not intend the registry laws to be punitive, they have that necessary effect. Examination of the *Mendoza-*

Martinez factors points ineluctably to the conclusion that the registry laws are punitive in effect.

1. History and Traditions

Sex offender registry laws in Maryland are akin to the shaming punishments of the colonial period which included humiliation like requiring offenders to "stand in public with signs cataloguing their offenses." Hirsch, From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts, 80 Mich. L.Rev. 1179, 1226 (1982). The worst of these offenders were often banished from their communities. T. Blomberg & K. Lucken, American Penology: A History of Control 30-31 (2000). The Supreme Court addressed this argument in *Smith*, stating that these types of punishments "such as public shaming, humiliation, and banishment involved more than the dissemination of information. They either held the person up before his fellow citizens for face-to-face shaming or expelled him from the community." *Id*. at 99. The Court concluded that "[i]n contrast to the colonial shaming punishments, however, *the State does not make the publicity and the resulting stigma an integral part of the objective of the regulatory scheme*." *Id.* (emphasis added). And, "[t]he purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender." *Id*.

The court in *Smith* defined the hallmarks of shaming punishments to include banishment, loss of freedom of movement, public shame and humiliation, occupational or housing disadvantages, and conditions analogous to probation or supervised release. *Id.* at 99-100. These also happen to be the hallmarks of registry laws. Banishment historically involved "[expulsion] from the community." *Id*. at 98. The severe residency

restrictions as well as restrictions on freedom of movement effectively amount to expulsion from one's community. Often, registrants are made homeless or transient because of the restrictions on residency and employment. *See, e.g.*, Catherine Skipp, *A Bridge Too Far*, Newsweek (July 25, 2009), http://www.newsweek.com/2009/07/24/a-bridge-too-far.html chronicling the group of convicted offenders who live beneath the Julia Tuttle Causeway in Miami because there is no place where they can reside without violating residency restrictions.

There is also little logical difference between "face-to-face shaming" in colonial days and today's posting of a digital color photograph of a registrant on the internet for anyone to see. Significantly, the shaming inflicted by registration laws is far more damaging as it reaches many more people than just those who bother walking to the village square to view the person being shamed.

2. Imposes An Affirmative Disability: Severe Restrictions on Movement and Activities.

Registrants also suffer severe restrictions on their ability to move about freely.[2] Registrants must register *in person* with local law enforcement and must pose for a digital photograph every six months. In order to travel, registrants must provide extensive information prior to embarking on the travel. Before a registrant "obtains a temporary residence or alters the location where the registrant resides or habitually lives for more than 5 days or when the registrant will be absent from the registrant's residence

[2] In fact, if the Maryland legislature had had its way during the 2011 legislative session, lifetime GPS monitoring would have been mandatory for some offenders. http://mgahouse.maryland.gov/House/Catalog/catalogs/default.aspx In discussing HB 594, the sponsor noted that "[i]f we're going to let them walk the streets we want to know where they are 24/7, 365 days" because "they can't be trusted." March 1, 2011.

or location where the registrant resides or habitually lives for more than 7 days," the registrant must "notify each local law enforcement unit where the registrant resides or habitually lives" in person or in writing. The notice must "include the temporary address or detailed description of the temporary location where the registrant will reside or habitually live" and must "contain the anticipated dates that the temporary residence or location will be used by the registrant and the anticipated dates that the registrant will be absent from the registrant's permanent residence or locations where the registrant regularly resides or habitually lives." §11-705(i). Should a registrant wish or need to leave the United States, he must "notify each local law enforcement unit where the registrant resides or habitually lives at least 3 days prior to leaving…" §11-705(h). Registrants may not enter property used for elementary or secondary education or on which a child care facility is located unless given prior permission to do so. §11-722. Any time a registrant changes his cell phone number or e-mail address, this must be reported as well. A failure to abide by these reporting requirements subjects the registrant to criminal prosecution and imprisonment.

3. Promotes Traditional Aims of Punishment

The most traditional aim of punishment by a state is to deter future crime. This Court in *Young* acknowledged that the registry law "promotes deterrence." *Young*, 370 Md. at 715. A further aim of punishment is retribution. Given that Maryland's statutes tie the length of time one is required to remain on the registry to the crime for which one has been convicted and not to the type of risk posed by that particular person, retribution seems to be established.

4. Rational Connection to a Non-punitive Purpose

The alleged non-punitive purpose of protecting communities from sex offenders is only rationally connected to the state's registration requirements if public safety is at risk by having a convicted sex offender in its midst. Because there is nothing at all in the statutes requiring an assessment of one's risk to public safety, it seems hardly connected to this alleged purpose. The statutes presume dangerousness where, in fact, none may exist.

5. Regulatory Scheme is Excessive with Respect to Non-punitive Purpose

The *Young* Court relied heavily on its conclusion that "[t]he provisions of §792 are tailored narrowly to effectuate the goal of protection of the public from sex offenders." This is simply no longer the case. "Individualized risk assessment…has been replaced by offense-based assessment, where individuals are assigned to tiers based on the crimes for which they were convicted." Catherine Carpenter, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, http://ssm.com/abstract=1916726. Justice Ginsburg in her dissent in *Smith* expressed trepidation regarding the constitutionality of laws that fail to allow for individualized assessments of dangerousness or offer registrants an opportunity to prove rehabilitation. *Smith*, 538 U.S. at 117 (Ginsburg, J., dissenting) ("And meriting heaviest weight in my judgment, the Act makes no provision whatever for the possibility of rehabilitation. Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation."); *see also State v. Letalien*, 985 A. 2d 4, 23 (Maine 2009); ("No statistics have been offered to suggest that every registered offender of a

substantial majority of registered offenders will pose a substantial risk of re-offending long after they have completed their sentences and probation, including any required treatment. The registry, however, makes no such distinctions."). This is precisely the situation Mr. Doe finds himself in given that it had been 22 years between the date of his offense and conviction with absolutely no intervening crimes or arrests. Indeed, at sentencing the trial judge acknowledged that Mr. Doe had been "rehabilitated" during this time.

Nor can one say that the non-punitive goal of protecting the public is achieved through registry laws that are so over-inclusive that they sweep into their tiers the most minor, non-dangerous offenses and offenders. "[T]he number of people listed in public sex offender registries is growing rapidly: 740,000 at latest count, more than the population of Boston or Seattle." Roger Lancaster, Sex Offenders: The Last Pariahs, New York Times, August 20, 2011. As succinctly stated in Human Rights Watch, *No Easy Answers: Sex Offender Laws in the U.S.* , 30-31 (Sept. 2007):

> Legislators, public officials, and members of the public routinely claim that people who have committed sex offenses pose a great risk to the public because they have "astronomically high" recidivism rates. For example, federal legislators justified the need for federal sex offender laws by asserting sex offender recidivism rates of 40 percent, 74 percent, and even 90 percent. Legislators rarely cite, nor are they asked for, the source and credibility of such figures. In addition, most of those who make public assertions about the recidivism rates of sex offenders take a "one-size-fits-all" approach; they do not acknowledge the marked variation in recidivism rates among offenders who have committed different kinds of sex offenses, nor the influence of other factors on recidivism. The US Department of Justice tracked 9,691 male sex offenders in 15 states who were released from prison in 1994 and found that within three years only 5.3

> percent of all sex offenders were arrested, and 3.5 percent convicted, for a new sex crime; 2.2 percent were rearrested for a sex offense against a child. Among the released child molesters (defined in the study as someone convicted of a forcible or non-forcible sex crime against a child), 3.3 percent were rearrested for a sex crime against a child.42 Sex offenders with prior histories of sex offenses had somewhat higher rates of rearrest: 7.3 percent of child molesters and 8.3 percent of all sex offenders with more than one prior conviction for a sex offense were rearrested for another sex crime. The most comprehensive study of sex offender recidivism to date consists of a metaanalysis of numerous studies yielding recidivism rates for a period of up to 15 years post-release for people convicted of such serious offenses as rape and child molesting. The analysis, which included over 29,000 sex offenders, found that within four to six years of release, 14 percent of all sex offenders will be arrested or convicted for a new sex crime.45 Over a 15-year period, recidivism rates for all sex offenders averaged 24 percent. This is not a trivial rate by any means, given the seriousness of the offenses committed. Yet *it also indicates that three out of four sexually violent offenders do not reoffend*.

These statistics would no doubt come as a shock to some Maryland legislators who, as recently as the 2011 legislative session, were making specious claims during testimony in support of more supervision and control over offenders. For instance, the sponsor of Senate Bill 134, Senator Norman Stone, sought to require those convicted of indecent exposure to register and stated that "[a]ccording to a 2008 report, exhibitionists have a 35% recidivism rate, the highest of all sex offenders." http://mlis.state.md.us/mgaweb/senatecmtaudio.aspx. He continued to assert, with no empirical data to support his claims that "these people graduate on to more serious crimes and then we have the Jessicas and the Megans and so forth."[3]

[3] During the 2010 legislative session when discussing Senate Bill 280 regarding lifetime supervision for some offenders, Senator Nancy Jacobs stated "It sounds great, lifetime supervision, but when they can get off it is not

Finally, the widespread dissemination of sex offender information is wholly disproportionate to the claimed non-punitive purpose of protecting the public. Unlike in *Doe*, where the Alaskan statute at issue was found not to be excessive in part because of "grave concerns over the high rate of recidivism among convicted sex offenders" citing Department of Justice statistics from 1997, there is substantial and more current evidence that sex offenders are amenable to treatment and are less likely to re-offend than non-sex offenders. Elizabeth B. Megale, *From Innocent Boys To Dirty Old Men: Amending The Sex Offender Registry To Actually Protect Children From Dangerous Predators*, http://works.bepress.com/elizabeth_megale/2 Moreover, the Supreme Court upheld Alaska's statute in *Smith*, in part, because it found Alaska's notification system to be "a passive one: An individual must seek access to the information." *Id*. at 105. In Maryland, by contrast, communities are often peppered with fliers announcing the name and residence of the local sex offender. And, recently, on Halloween, registered sex offenders were required to place "No Candy" signs in their windows and keep their porch lights turned out indicating that children should not trick or treat there. Additionally, letters were sent to neighbors explaining that the sex offenders would be doing this.

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really lifetime supervision. We have a lot of sex offenders, it has been proven over the years there is a very high recidivism rate." Senator Jacobs continued this theme when hearing testimony on Senate Bill 472 dealing with child pornography. She stated, "It is a known fact that people who have these kind of cravings move up in their cravings and many of them eventually go on to be sex offenders."

Associated Press, *Baltimore Distributes 'No Candy' Home Signs to Sex Offenders for Halloween*, October 11, 2007. Maryland's sex offender registry laws are so punitive in effect as to negate any possible suggestion that they are merely regulatory in nature.

C. Retroactive Application of Maryland's Sex Offender Registry Laws Violates the Article 17 Prohibition On Imposing or Requiring Retrospective Restrictions.

Unlike its federal counterpart, Article 17 of the Declaration of Rights contains a second clause stating, "nor [shall] any retrospective oath or restriction be imposed, or required." Historical events animating inclusion of the restrictions clause in Article 17 prove it is not limited to punishment and deserves far broader application. The oath and restrictions clause was added to Article 17 in 1867 in the aftermath of the Civil War and in response to the loyalty oaths that Union supporters demanded as a condition of voting or holding office. Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 Temp. L. Rev. 637, 642 (1998). Prior to the addition of language prohibiting "any retrospective oath or restriction," in 1864 the General Assembly of Maryland, composed mostly of members of the Unionist party, held a constitutional convention with a goal of placing restrictions on Southern sympathizers. William Starr Myers, The Self-Reconstruction of Maryland, 1864-1867, at 10 (1909). The newly created constitution included Article I, Section 4 prohibiting those who supported the South from voting or holding any office "of honor, profit or trust." Md. Const. art I §4 (1864); *See also* Myers, *supra* at 12. Indeed, "iron-clad" oaths were created that required, before being allowed to vote or hold office, one to swear he had

never supported those hostile to or in rebellion against the United States. Md. Const. art I §§4 and 7.

These restrictions were enforced through the Registry Act which authorized the Governor to appoint "from among the citizens of the State most known for loyalty, firmness and uprightness, three persons for each ward in the city of Baltimore, and for each election district in the several counties of the State, who shall be styled officers of registration." *Anderson v. Baker*, 23 Md. 531 (1865). These 'officers of registration,' as described by the appellant in *Anderson*, were vested "with the most despotic powers, including not only the ordinary judicial powers, which belong to officers of election, of determining the usual qualifications of age, color, residence, alienage,… but the unusual functions of trying citizens judicially for disloyalty, and if in their judgment the guilt of the citizen be established, then to forfeit his franchise of voting." *Id.* Anderson challenged the Registration Act on grounds, *inter alia*, that it violated the prohibition against *ex post facto* laws. This Court turned aside Anderson's challenge holding that the Registration Act's purpose was non-punitive. *Id.* at 625.

When, in 1866, the once despised Southern sympathizers took control of the General Assembly, they passed laws returning the right to vote and hold office to those who had been disenfranchised under Article I, §4 of the 1864 Constitution. Myers, *supra* at 83-84. An entirely new constitution was drafted in 1867 omitting the offensive provisions of the prior constitution. Specifically, the framers added the second clause to Article 17 prohibiting imposition of "any retrospective oath or restriction."

Given the history that was the driving force behind the restrictions clause in Article 17, it is true beyond peradventure that it is not limited to retroactive punishment. The restrictions clause of Article 17 is plainly meant to be broader than the punishment clause and the federal provision. Oaths and restrictions are not, in fact, punishment. Rather, historically, they were limitations placed on individuals as a means of controlling their conduct and their access to rights enjoyed by others. And while, historically, iron-clad oaths were used to prevent Confederate sympathizers from voting or holding office, those who wrote the second clause of Article 17 did not limit its reach to oaths imposed when voting or holding office. If the sole purpose was to prevent the use of oaths in order to vote or hold office, the language would have so stated. It did not. Instead, the language went beyond retrospective oaths to include retrospective restrictions as well. Clearly, the reference to 'restrictions' means something other than an oath. Moreover, the language does not limit the prohibition against retrospective restrictions or oaths to one's right to vote or seek office. The carefully chosen language was plainly meant to be broad.

It can hardly be argued that Maryland's sex offender registry laws do not impose or require restrictions. Mr. Doe may not travel freely without having to report his whereabouts; he may not move without having to report his new residence; he may not live in areas close to schools or day care centers where children may be; he may not purchase a new or different car without having to report this fact; he may not change his cell phone number without reporting it; he may not change jobs without reporting the new place of employment; he may not join any social networking sites without reporting

this fact; he may not change a computer log-in or screen name, e-mail address or computer identity password without reporting that fact; and he must report any nicknames he is given. None of these restrictions existed in 1983 when Mr. Doe committed the crime to which he pled guilty and for which he was incarcerated. None of these restrictions applied to Mr. Doe in 2006 when he pled guilty or on the date he was sentenced. Instead, three years after pleading guilty and 26 years after committing the offense, the Maryland legislature passed a law making all of the above noted restrictions and requirements suddenly applicable to Mr. Doe for ten years. And, in 2010, the legislature passed another retroactive law that now requires Mr. Doe to comply with these restrictions and requirements for the remainder of his life. Maryland should join the growing number of states relying on their own constitutions to find similar laws violative of *ex post facto* prohibitions.[4] The retroactive restrictions in Maryland's sex offender registry statutes violate Article 17.

II. MARYLAND'S SEX OFFENDER REGISTRATION LAWS VIOLATE MR. DOE'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS.

The due process provisions under the Maryland Declaration of Rights are to be interpreted in *pari materia* with the Due Process Clause of the Fourteenth Amendment. *See Doe v. Dep't of Pub. Safety & Corr.Servs.*, 185 Md. App. 625, 635, 971 A.2d 975

[4] See for example, *Blakemore v. State*, 925 N.E.2d 759 (Ind. 2010); *State v. Letalien*, 985 A. 2d 4 (Maine 2009); *People v. DiPiazza*, 778 N.W. 2d 264 (Mich. 2009); *State v. Williams*, 952 N.E.2d. 1108 (Ohio 2011); *Doe v. State*, 189 P.3d 999 (Alaska 2008); *Riley v. New Jersey State Board of Parole*, ___A.3d___, 2011 WL 4388170 (N.J. Super. A.D. 2011); *Commonwealth v. Cory*, 454 *Mass.* 559, 911 *N.E.*2d 187 (Mass.2009); *Commonwealth v. Baker*, 295 S.W.3d 437 (Kent. 2009); *People v. DiPiazza*, 778 N.W.2d 264 (Mich. 2009). .

(2009). Albeit in *dicta,* in *Young, supra,* this Court spoke of due process challenges to sex offender registry laws and stated:

> [S]exual offender registration imposes other affirmative disabilities on registrants, particularly in light of the newly initiated Internet notification, which threatens widespread disclosure of highly personal data and may implicate social ostracism, loss of employment opportunities, and possibly verbal and physical harassment. It is arguable that widespread Internet community notification stigmatizes registrants and implicates liberty and privacy interests that would satisfy the "stigma plus" test utilized to analyze civil due process challenges in many of the federal circuits, therefore requiring certain procedural due process protections beyond those provided in the statute prior to community notification.

Young, supra at 713. At the hearing on his declaratory judgment action, Mr. Doe testified in detail about how, after the 1984 incident, he served honorably in the U.S. Air Force for five years. He went on to have a successful career as a financial advisor for more than fifteen years. He also served as an active, honored member of his church, helping the homeless. After the State's belated imposition of sex offender registration, Mr. Doe lost his position as a financial advisor, was ostracized by his church and lost his own housing. He has also become detested by his community, and has been unable to obtain gainful and reasonable employment. After registration, he has been turned down for almost every employment and housing application he has turned in. He has only been able to find work as a food server making $3.67 per hour. He was offered a job with the Merchant Marines, but due to the requirement that he register in person every three months, he is unable to take the job. Mr. Does has also only been able to rent housing at 200% of its market value, which puts him in constant financial straits.

When damage to reputation is alleged as a result of government action, as it is here, courts have utilized the "stigma-plus" test to address due process challenges. *Doe v. Department of Public Safety & Correctional Services*, 185 Md. App. 625, 644-45, 971 A.2d 975 (2009). In raising a due process challenge, in addition to demonstrating injury to reputation, one must also show harm due to the state's conduct. *Id.* Fundamental rights or interests are those "explicitly or implicitly guaranteed" by the federal constitution. *Id* at. 639-40. In *Young*, the Court noted that such harm might be shown by sex offender registration, as it "may implicate social ostracism, loss of employment opportunities, and possibly verbal and physical harassment, which could "satisfy the 'stigma plus' test." *Young*, 370 Md. at 718. As noted above, Mr. Doe's fundamental rights to liberty, property, privacy and employment have been damaged by the State's action, in addition to damage to his reputation. Mr. Doe has been unable to find a job even close to the level that he had previously, forcing him to work at menial positions. While he once made a decent salary, as a result of State action he now makes less than minimum wage.

In *Paul v. Davis*, 424 U.S. 693, 705 (1976), where the court concluded that in a procedural due process challenge, stigma alone is insufficient, Justice Rehnquist writing for the majority wrote, "it is to be noted that [Paul is not] a case where government action has operated to bestow a badge of disloyalty or *infamy, with an attendant foreclosure from other employment opportunity."* (emphasis added). As presented in Argument I above, Maryland's registry laws do indeed foreclose employment opportunities and brand offenders as infamous. Moreover, substantive due process principles are also involved here. In its landmark decision of *Rochin v. California*, 342 U.S. 165, 169 (1952), the

Supreme Court held that adhering to substantive due process principles requires that governmental actions not "offend cannons of decency and fairness…even toward those charged with the most heinous offenses." The far-reaching burdens imposed by the registry law, the world-wide dissemination of registry information, and the inability to establish non-dangerousness most assuredly offends cannons of decency and fairness.

III. AT THE PLEA HEARING, THE PLEA AGREEMENT ENTERED INTO BY MR. DOE DID NOT MANDATE REGISTRATION AS A SEX OFFENDER, AND HE IS ENTITLED TO SPECIFIC PERFORMANCE OF THE AGREEMENT AND SHOULD BE REMOVED FROM THE REGISTRY.

It is well established that plea agreements are governed by the law of contracts, which require that both parties comply with the terms of their agreement. *Rankin v. State*, 174 Md. App. 404, 408 (2007); *Hillard v. State*, 141 Md. App. 199, 207 (2001). When assessing whether a plea agreement is in fact valid, this Court has made clear that the principles of fair play and equity are key. *Jackson v. State*, 358 Md. 259 (2000). Consequently, "once the State has made a bargain, it is bound to adhere to the agreement *so long as the accused performs his part*.'" *Jackson*, 358 Md. at 275-76 (internal citations omitted). Mr. Doe and the state agreed that in exchange for a plea of guilty to one count of child abuse, Mr. Doe would be subjected to a maximum period of incarceration of five years as well as a term of probation. (E.12-30). The agreement did *not* contemplate registration as a sex offender for any period of time let alone for a lifetime. That registration as a sex offender was specifically *not* a part of the bargain is reflected in the Motion to Correct an Illegal Sentence that was filed immediately by defense counsel when, during sentencing, the court ordered Mr. Doe to register as a child sexual offender. (E-63-66). It is also reflected in the fact that the court immediately struck this provision of the sentence. (E-66). Mr. Doe pled guilty to child abuse, served several years in prison and successfully completed his term of probation. (E-125-141). He has held up his end of the bargain, and the State should therefore be ordered to uphold its bargain. In this

case, it means the State removing Mr. Doe from the sex offender registry and halting the requirement that he appear for registration for the rest of his life.

The terms of a plea agreement must be explicitly explained on the record, in order to ensure that a defendant's guilty plea is knowing and voluntary. *Cuffley v. State*, 416 Md. 568 (2010). In *Cuffley*, the parties agreed that Mr. Cuffley would plead guilty to a charge of robbery if the state agreed to recommend a sentence "within the guidelines" of "four to eight years." *Id*. at 584-85. The prosecutor at the plea hearing explained on the record that the charge of robbery has a maximum penalty of fifteen years incarceration. The trial judge explained that the court would "impose a sentence somewhere within the guidelines" and that the terms of probation were "entirely within its discretion." *Id*. The trial judge then sentenced Mr. Cuffley to fifteen years, with all but six years suspended. Mr. Cuffley later filed a motion to correct his sentence, alleging that his sentence was illegal and that the unsuspended portion of the sentence, although within the guidelines, exceeded the terms of his plea agreement of four to eight years. *Id*. at 575. The trial court denied Cuffley's motion, and the Court of Special Appeals affirmed that decision. In overruling the Court of Special Appeals, this Court explained that Md. Rule 4-243 expressly requires that *all* terms of a criminal plea agreement be made plain on the record during the plea hearing, and that they be "express" and "clearly agreed upon before the guilty plea" is entered. *Id.* at 579.

Importantly, this Court held in *Cuffley*:

> If the record of the plea proceeding clearly discloses what the defendant reasonably understood to be the terms of the agreement, then the defendant is entitled to the benefit of the

> bargain, which, at the defendant's option, is either specific enforcement of the agreement or withdrawal of the plea. *Solorzano,* 397 Md. at 667-68, 919 A.2d at 656. If examination of the record leaves ambiguous the sentence agreed upon by the parties, then the ambiguity must be resolved in the defendant's favor.

Id. at 583. The record clearly discloses that being ordered to register as a sex offender was contemplated and discussed between defense counsel and Mr. Doe. (E-128-130). It was *specifically because he could not be ordered to register* that Mr. Doe accepted the plea bargain. This was also borne out by the filing of the Motion to Correct an Illegal Sentence once the court imposed registration. (E-63-66). The fact that the court granted this motion further anchors this point. (E-66). As the record is clear, Mr. Doe is entitled either to specific performance or to withdraw his guilty plea. The decision is solely Mr. Doe's and he chooses specific performance and thus must be removed from the registry.

CONCLUSION

For the foregoing reasons, Mr. Doe respectfully requests that this Court reverse the judgment of the Court of Special Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this day of April, 2012 a copy of the Brief of Petitioner in John Doe v. Dept. of Public Safety & Correctional Services, No. 125 was

hand delivered to Stuart M. Nathan, Assistant Attorney General, 115 Sudbrook Lane, Pikesville, Maryland 21208.

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