

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

JOSEPH W. HENDRICKS.)	
)	
Plaintiff/Appellee,)	
)	
v.)	No. 108,797
)	
JUSTIN JONES ex rel. STATE OF)	
OKLAHOMA, ex rel. OKLAHOMA)	
DEPARTMENT OF CORRECTIONS,)	
)	
Defendant/Appellant.)	
)	
)	
MICHAEL BOLLIN,)	
)	
Plaintiff/Appellee,)	
)	
v.)	No. 108,819
)	
JUSTIN JONES ex rel. STATE OF)	
OKLAHOMA, ex rel. OKLAHOMA)	
DEPARTMENT OF CORRECTIONS,)	
)	
Defendant/Appellant.)	

SUPPLEMENTAL BRIEF

Appellees Hendricks and Bollin respectfully request this Court consider the following authorities in deciding their appeals in the captioned matters.

1. On December 3, 2012, the Court of Appeals of the State of Indiana issued its decision in *Indiana v. Hough*, 978 N.E.2d 505 (Ind. 2012). Hough was convicted

in Pennsylvania of rape prior to enactment of Indiana’s Sex Offender Registration Act (INSORA). The Court of Appeals held that under state constitutional prohibition on *ex post facto* laws, defendant could not be required to register as sex offender in Indiana. The *Hough* court said: **“The underlying purpose of the [Indiana Constitution’s] 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.”** *Id.* at 507. Like Alaska,¹ Indiana has held that its Constitution affords broader protection than the United States Constitution as to the *ex post facto* clause, Art. 1, clauses 9 and 10. Further, Indiana made the important point that whether an offender must register in another state is not relevant to whether Hough should remain on the Indiana registry:

As a resident of Indiana since 1998, Hough is entitled to the protections afforded to him by the Indiana Constitution. Therefore, even though he would be required to register as a sex offender under Pennsylvania's laws, Indiana's law controls. Because he was convicted of a sex offense before Indiana enacted INSORA, requiring Hough to register as a sex offender would violate Indiana's constitutional prohibition against *ex post facto* laws.

Hough at 510. Finally, *Hough* articulates the principle of the sovereignty of a State to interpret its own Constitution in similar matters:

After acknowledging that our state sex offender registry law does not run afoul of the Ex Post Facto Clause of the United States Constitution,

¹Doe v. Alaska, 199 P.3d 999 (Alaska 2008).

our supreme court concluded in Wallace that Hoosiers are entitled to greater protection under the prohibition on ex post facto laws contained in the Indiana Constitution. Greater protection of Hoosiers's rights under the Indiana Constitution is not an uncommon principle in our state's jurisprudence. See *Wallace*, 905 N.E.2d [371]at 378 [Ind. 2009] (quoting *State v. Gerschoffer*, 763 N.E.2d 960, 965 (Ind.2002)) (stating “[t]he Indiana Constitution has unique vitality, even where its words parallel federal language”).

Hough at 510.

2. In *Doe v. Alaska*, see citation in footnote 1 below, the Alaska Supreme Court found that *ex post facto* applied to the ASORA, expressly disagreeing with the U.S. Supreme Court in *Smith v. Doe*, 538 U.S. 84 (2003), and holding that under Alaska’s constitutional *ex post facto* provision the ASORA was punitive in effect regardless of the Legislature’s civil intent:

Summing up the effects under the seven factors [set forth in the U.S. Supreme Court decision in *Kennedy v. Mendoza–Martinez*, 372 U.S. 144, 168–69 (1963)] we conclude that ASORA's effects are punitive, and convincingly outweigh the statute's non-punitive purposes and effects. We recognize that several of the factors seem closely related, and that discussion of one may overlap discussion of another. Nonetheless it is not the mere number of factors that leads us to our conclusion, but our assessment of those factors and their relative weight. Six of those factors lead us to disagree, respectfully but firmly, with the Supreme Court's analysis and its ultimate conclusion that ASORA is not penal.

3. In *Vida v. State*, 946 N.E.2d 664 (Ind. Ct. App. 2011), Indiana’s Court of Appeals in an unpublished opinion said “that the date to consider is the date on which the crime was committed, when determining whether registration under [the Act]

constitutes an Ex Post Facto violation. . . . Because Vida committed his sex offenses before the Act became effective, the Act is unconstitutional as applied to him.” Thus in Indiana it is not the date of entry into the state, but the date of the commission of the offense which controls. Certainly in Oklahoma it would not be unreasonable to hold that the date of conviction which follows the commission of the offense is at the latest the date to be considered.

Respectfully submitted,

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CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK

I hereby certify that a true and correct copy of the foregoing motion was mailed this 20th day of December, 2012, to Larry Foster, II, Assistant General Counsel, Oklahoma Department of Corrections, 3400 Martin Luther King Avenue, Oklahoma City, Oklahoma 73111, by depositing it in the U.S. Mails, postage prepaid. I further certify that the original and 10 copies of foregoing motion were filed in the Office of the Court Clerk of the Supreme Court on the 2nd day of January, 2013.

JAMES ALEXANDER DRUMMOND