

**IN THE SUPREME COURT
STATE OF OKLAHOMA**

JAMES M. STARKEY, SR.,)	
)	
Plaintiff/Appellee,)	
)	Appeal Case No.: SD-109556
v.)	
)	Oklahoma County District Court
OKLAHOMA DEPARTMENT OF)	
CORRECTIONS AND JUSTIN)	Case: CV-2010-21
JONES AS DIRECTOR,)	
)	
Defendants / Appellants.)	
)	

APPELLEE'S RESPONSE BRIEF

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APPELLEE’S RESPONSE BRIEF

COMES NOW the Plaintiff/Appellee, James M. Starkey, Sr., by and through his attorney of record, John M. Dunn and responds to the Appellant’s appeal of the verdict of the District Court of Oklahoma County in CV-2010-21, styled *James M. Starkey v. The Oklahoma Department of Corrections and Justin Jones as Director*. Plaintiff/Appellee requests this Honorable Court to enter an order affirming the verdict of the trial court. In support of which, the Appellee shows the Court as follows:

I. STATEMENT OF FACTS

1. On October 12, 1998, James Starkey pled *nolo contendere* to the charge of sexual assault upon a minor child in the District Court of Calhoun County, Texas and received a deferred sentence. ROAA, Tab 1, Petition, P. 2 ¶¶ 6-8.
2. Mr. Starkey moved to Oklahoma in 1998. At that time, Oklahoma law required him to register as a sex offender for a period of 10 years. ROAA, Tab 7, Order, P.1, ¶ 4.
3. On November 1, 2007, Oklahoma’s Sex Offender Registration law was amended. As a result of the amendments, the State began using a “risk assessment tool” which assigns a

period of time that a sex offender must register, based solely on his crime of conviction.
ROAA, Tab 5, Response to MSJ, P. 1-2.

4. In 2007, an offender could challenge his rating in district court. However, this right was taken away by a subsequent amendment in 2009.
5. Mr. Starkey filed his original *Petition* in Pawnee County District Court on August 7, 2009 in an effort to seek a re-evaluation of his assessed level. The matter was subsequently transferred to Oklahoma County. ROAA, Tab 1, *Petition*.
6. On December 10, 2010, Plaintiff/Appellee filed his first *Motion for Summary Judgement*. ROAA Tab 3, MSJ.
7. On October 28, 2010, the Oklahoma Court of Criminal Appeals decided the case of *State v. Smith*, Appeal No. S-2009-944. In that case, the Oklahoma Court of Criminal Appeals unanimously found that sex offender registration laws may only be applied prospectively. In this opinion, the Court ruled that the defendant gets the benefit of the laws as they were written at the time of his sentencing and could not be prosecuted for failing to register after that time period had run.
8. On February 14, 2011, Division IV of the Court of Civil Appeals decided *Reimers v. State of Oklahoma, ex rel. Department of Corrections and the City of Bethany*, 2011 OK CIV APP 83. In that opinion the Court adopted the logic expressed by the Oklahoma Court of Criminal Appeals in *Smith, Supra*.
9. The State did not appeal *Reimers*, making it persuasive authority such that others may rely upon the logic of its decision.
10. On February 25, 2011, Plaintiff/Appellee filed *Plaintiff's Supplemental Brief* based upon

the decisions in *Smith* and *Reimers*. In this supplement, Mr. Starkey argued that under the law, as expressed in *Smith* and *Reimers*, he should have only been required to register for 10 years because the subsequent changes in the law which ultimately required lifetime registration would not have applied to him. ROAA, Tab 6, Supp MSJ.

11. On March 10, 2011, the Honorable Bill Graves granted Plaintiff/Appellee's *Motion for Summary Judgment*, following the law as articulated in *Smith* and *Reimers*. In his order, Judge Graves stated found that the Sex Offender Registration Law, as stated in *Smith* and *Reimers*, could only be applied prospectively. Therefore, Mr. Starkey only had an obligation to register for 10 years, or until October 12, 2008. ROAA, Tab 7, Order, ¶¶ 8-10.
12. The State has timely appealed, arguing that the Sex Offender Registration Laws are a civil regulatory scheme and must be applied *retrospectively* to preserve the intent of the legislature.

ARGUMENT AND AUTHORITIES

At this moment, the Oklahoma Court of Criminal Appeals and the Oklahoma Court of Civil Appeals have each expressed their opinions concerning the application of the Sex Offender Registration law and their opinions are in harmony. The chief judicial body in Oklahoma for criminal matters has determined that, from a criminal perspective, a person may not be prosecuted for failing to register as a sex offender, if the laws *at the time of his sentencing* did not require him to register. Writing for a unanimous court, Judge Lumpkin found that the changes of the law were substantive, and therefore must only be applied prospectively. (*State v. Smith*, Appeal No. S-2009-944). Even though the opinion in *Smith* was unpublished, the Oklahoma Court of Civil Appeals adopted its reasoning in *Reimers v. State of Oklahoma, ex rel.*

Department of Corrections and the City of Bethany, 2011 OK CIV APP 83, ____ P.3d ____.

In that case, the Court heard the case of Mr. Reimers, who had plead guilty to indecent exposure and received a five year suspended sentence. He completed DOC's sex offender treatment program, registered for two years (as the law required) and stopped. He moved within 2000 feet of a school. In 2009, after having charges alleging various violations of the Sex Offender Registration Act filed against him twice, Reimers filed suit seeking injunctive relief. When the District Court of Oklahoma County ruled against him, he appealed to the Court of Civil Appeals. In a unanimous opinion, the Court adopted the logic offered in *Smith* and found that, from a civil prospective, the Oklahoma Sex Offender Registration Act could only be applied prospectively. The State did not appeal this decision.

On July 21, 2011, Division IV of the Oklahoma Court of Civil Appeals issued a similar holding in the case of *Minyard v. State ex. rel. Department of Corrections*, Case No. 108,963, which concluded that the Plaintiff had not registered for the 10 years that was required when she became subject to the law, but affirmatively stated that Plaintiff would only have to register for the remaining balance of ten years, as opposed to lifetime requirement of current law.

Essentially, the State is asking this Court to overrule both the Oklahoma Court of Civil Appeals and the Oklahoma Court of Criminal Appeals and enter an order finding the Oklahoma Sex Offender Registration Act is a civil regulatory scheme which applies retrospectively. Such a holding would be a violation of established legal principles, as well as statutory construction. In addition, such a holding would create nonsense by *requiring registration* after the Oklahoma Court of Criminal Appeals has said that *failure to comply could not be punished*. Finally, such a holding would make the law unconstitutional as violating the State and Federal Constitutional

prohibitions of *ex post facto* laws. As such, the District Court of Oklahoma County should be affirmed.

Proposition 1: Affirming the Oklahoma County District Court’s Ruling Prevents the Legislature from Speaking Nonsense.

It is well established that the role of the legislature is to write laws, the role of the executive branch is to enforce the laws, and the role of the judiciary is to interpret the laws. Certain rules of statutory construction have been established to assist the courts in their role. One of those rules is “the Legislature is never presumed to have done a vain thing, effect must be given to all language in a statute unless to do so would accomplish an absurd result; and, in construing a statute it is presumed that every provision was intended to have some useful purpose and that all provisions should be given effect.” *Loffland Brothers Equipment v. White*, 1984 OK 69, ¶ 7 689 P.2d 311, 314. See also *State ex rel. Prater v. District Court of Oklahoma County*, 2008 OK CR 21 ¶13, 188 P.3d 1281, 1284 (“This Court will not presume the Legislature to have done a vain thing. We are mindful that elementary rules of statutory interpretation require us to avoid any statutory construction which would render any part of a statute superfluous or useless.”).

Oklahoma courts are bound to a statutory construction which will give a meaning free from "constitutional doubt rather than one which would leave [a statute] fraught with some lingering fundamental-law infirmities." *Baptist Medical Center of Oklahoma v Aquirre*, 1996 OK 133 ¶ 11, 930 P2d 213, 219. The rules of statutory construction should be used by this court to determine whether the Sex Offender Registration laws should be applied prospectively - as urged by Mr Starkey, or retrospectively - as urged by the State. This is especially so because "[w]here constitutional interpretations can be avoided and the rights of parties preserved under statutory construction, such course should be pursued." *Cameron v State*, 1961 OK CR 97 ¶ 53, 365 P2d

576, 587. From the state's brief it is apparent that the state is asking this Court to reach the constitutional question of whether the retroactive application of the law is a violation of the *ex post facto* clause of the Oklahoma and Federal constitutions. However, the rules of statutory construction cited above make such a determination unnecessary because the Act would be applied prospectively only. Under such an interpretation, the Court will never reach the constitutional question because in order for a law to violate the *ex post facto* clause, it must be applied retrospectively. Such a path is precisely what is called for under law. For the same reason, if this Court were to decide the law applies retrospectively without reaching the constitutional questions, the Court would have left the law fraught with lingering fundamental infirmities. Therefore, if the Court were to determine that the Legislature intended the law to apply retrospectively, the Court must also decide the constitutional issues.

It is a firmly established rule of statutory construction that statutes are not given retroactive effect unless a legislature has made its intent to do so clear and that any doubt must be resolved against giving retroactive effect to a statute. See *CAN Insurance Company v Ellis*, 2006 OK 81, 148 P3d 874, *Barnhill v Multiple Injury Trust Fund*, 2001 OK 114, 37 P3d 890; *State v Watkins*, 1992 OK CR 50, 837 P2d 477. With regard to questions of whether a legislative enactment was intended to be applied retroactively or prospectively, it is a long standing rule that, "the doubt must be resolved against retrospective effect." *State v Bailey*, 1956 OK 338 ¶7, 305 P.2d 548, 550. "Intervening changes in the law and new legislative enactments should only be applied prospectively from their effective date, unless they are specifically declared to have retroactive effect." *Nestell v State*, 1998 OK CR 6 ¶5, 954 P2d 143, 144. It is interesting to note that even in the cases cited by the State, the changing body of law is clearly contemplated, and none stand

for the proposition that the law *should* be applied retroactively.

The Court has been confronted before with the application of amendments to existing law. In those instances the Court has stated that the “rule of construction allows for legislative refinement of an existing scheme of codification which the law favors, while at the same time it protects the individual against retrospective application of laws, since only pre-existing provisions in the new statute are given retrospective operation.” *Wickham v. Gulf Oil Corp.*, 1981 OK 8 ¶ 19, 623 P.2d 613, 617. It should be noted that the State, in an effort to demonstrate the retroactive nature of the Act, points out that DOC de-listed offenders who were on the list merely because of kidnapping (not involving a sexual abuse or sexual exploitation) when the law changed. However, that does not demonstrate the legislative intent, rather it shows DOC’s misunderstanding of the law. There was never a case brought that resulted in this de-listing, and to the personal knowledge of counsel, there was no legislative intent to bring about the retroactive application that resulted in de-listing.

In 1989 the Oklahoma Legislature passed the Oklahoma Sex Offender Registration Act (“Act”). The original Act was signed by the Governor and went into effect on November 1, 1989, and applied to persons who after November 1, 1989, the effective date of the Act, were convicted or received a suspended sentence for violation of specifically enumerated crimes in Title 21 of the Oklahoma Statutes. See 57 O.S. Supp 1989 § 582. The 1989 Act required registration for ten (10) years or for two (2) years if the person convicted had successfully completed the sex offender treatment program provided by the Oklahoma Department of Corrections, 57 O.S. Supp 1989 § 583. Under the 1989 Act, failure to comply with the registration requirements was a misdemeanor offense carrying up to one (1) year incarceration

and/or a fine of up to \$1,000.00. See 57 O.S. Supp 1989 § 587.

Since 1989, and over the years, the Act has been amended on numerous occasions (1993, 1995, 1997, 1998, 1999, 2002, 2005, 2007, 2009). Neither any of the amendments to the Act nor any of the bills containing amendments to the Oklahoma Sex Offender Registration Act have ever had a provision indicating that any of the changes or amendments to the Act were to be applied retroactively. The State requests this Court rewrite the laws, to substitute its intent that the law be applied retrospectively for the intent of the legislature. The Legislature has never inserted language that would permit the Court to determine that the law was intended to be applied retrospectively. This Court should not interject language the legislature chose to omit. Under the rules of statutory construction, it may be presumed that the legislature purposefully chose not to make the law retroactive in order to maintain its constitutionality. Clearly, it may not be presumed that the Legislature intended to enact a law that was unconstitutional at its inception. Under the Appellee's analysis, the effective date of both the statute *and each of the amendments* is given meaning. The State's interpretation ignores the effective date of the amendments to achieve its desired result.

Because the Legislature, in making changes, additions, or amendments to the Act, has never included language making provisions for retroactive application of those amendments, none of the changes, additions, or amendments to the Oklahoma Sex Offender Registration Act that became effective after October of 1998 are applicable to the situation of Mr. Starkey, the Appellee in this case. The provisions of the Act that apply to Appellee's situation are the provisions that were in effect in October of 1998. The version of the Act that was in effect when Appellee moved to Oklahoma from Texas was the 1997 version of the Act. The section of

Oklahoma law that governs the period of time Mr. Starkey would have been required to register did not change again until November 1, 1999. Therefore, at the time Mr. Starkey became subject to the Act, he was only obligated to register for a period of ten years, which ended in October 2008. Mr. Starkey should be de-listed.

Proposition 2: Affirming the Oklahoma County District Court's Ruling Preserves the Unity Between the Two Courts and Gives the Law a Clear Meaning.

The Oklahoma Constitution divides Oklahoma's Court system into two co-extensive branches. The branch that contains the Oklahoma Supreme Court handles all questions of law not relating to criminal matters. The Oklahoma Court of Criminal Appeals has exclusive appellate jurisdiction over all criminal matters. Okla.Const. Art. 7 § 4. In the past, when this Court has received inquiry as to the meaning of Oklahoma law regarding a criminal matter, said inquiry is passed to the Court of Criminal Appeals. See *Nichols v. Jackson*, 2001 OK CR 35, 38 P.3d 228 (the Oklahoma Supreme Court certifies a question to the Oklahoma Court of Criminal Appeals when the issue to be decided lies within its jurisdiction.) In instances where a decision made by one court could have an impact on the decisions to be made by another court, such as the case that bar, the court making the decision should consider previous decisions made by the other court to keep the two courts speaking with one voice. In the instant case, as has been mentioned above, the Court of Criminal Appeals has decided in *State v. Smith, supra*, that the Sex Offender Registration Act cannot be applied retroactively. To be more precise, that court held that a person cannot be prosecuted for failing to register if they were not required to register at the time they were sentenced and the only reason they would be subject to the Act now is as a result of a subsequent change being given retroactive effect.

If this court were to rule in favor of the State, essentially a nonsensical statutory scheme

would be created. The civil side of the court system would have determined that the Sex Offender Registration Act applies retrospectively and imposes certain obligations on affected persons while the criminal court would prevent the imposition of punishment if those persons refuse to comply . Such an interpretation must be avoided as it makes the law do nonsense. Rather an approach that is consistent with the position taken by the Oklahoma Court of Criminal Appeals is warranted and supported by law.

Proposition 3: The Retroactive Application of the Sex Offender Registration Act Represents Punishment, which Violates the State and Federal Prohibitions of *Ex Post Facto* Laws.

In its brief, the State has argued that the retroactive application of the Oklahoma Sex Offender Registration Act does not violate the constitutional prohibition against the enactment of *ex post facto* laws. This was not an issue decided by the district court and therefore is not properly before this Court. In fact, none of the decisions relied upon by the Oklahoma County District Court relied on the finding that the retroactive application of the Act would be an unconstitutional *ex post facto* law. However, as argued above, in the event the Court were to determine that the Act applies retroactively, Appellee believes that the law would then be an unconstitutional *ex post facto* law. Since there are two interpretations of the Act from which the Court may choose, one of which is clearly constitutional and the other of which is in doubt, there is a higher burden of proof placed on the State in order to support retroactive application of the statute .

Where there are two possible interpretations in the construction of a statute, one of which would render the statute unconstitutional, the Court should adopt the construction which upholds the statute, unless the repugnancy to the constitution is shown beyond a reasonable doubt. This court is bound to accept an interpretation that avoids constitutional doubt as to the validity of the provision.

Gilbert Central Corp. v. State, 1986 OK 6 ¶ 7, 716 P.2d 654, 658.

Both Article I § 9 of the United States Constitution and Article II, § 15 of the Oklahoma Constitution prohibit the enactment of *ex post facto* laws. The dispute here depends on whether an act is regulatory or punitive in nature. Further analysis requires a determination of whether the amendments are merely changes in procedure or whether they are substantive in nature. An affirmative answer to either of these questions could result in the act being unconstitutional.

There is no concrete definition as to what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition rather, the distinction is one of degree. It has been the rule in Oklahoma that a law is within the protection of the provision when it inflicts a greater punishment than the law annexed to the crime at the time it was committed or alters the situation of accused to his disadvantage.

Spitznas v. State, 1982 OK CR 115 ¶ 16, 648 P.2d 1271, 1275-1276 (Internal Citations Omitted)

For the State to prevail, it must prove beyond a reasonable doubt that the changes in the Act, if applied retroactively, are not punitive in nature and therefore do not trigger the constitutional question. If the State fails to show beyond a reasonable doubt that the law is not *ex post facto* the Court must resort to using the rules of statutory construction and find the Act prospective in nature only, as that interpretation is clearly constitutional.

The State argues that a retroactive application of the Act does not violate the *ex post facto* prohibitions of the United States or Oklahoma constitutions citing to the Division III of the Oklahoma Court of Civil Appeals case of *Freeman v. Hon. Brad Henry*, Case No.107, 645. That case relied heavily on two federal cases, *United States v. Hinkley*, 550 F.3d 926 (10th Cir. 2008) and internally on the United States Supreme Court decision of *Smith v. Doe* 538 U.S. 84, 123 S.Ct. 1140, 155 L. Ed.2d 164 (2003). The *Freeman* case used the United States Supreme Court opinion in *Smith v. Doe* to justify a finding that the Sex Offender Registration Act was a civil

regulatory scheme and was not a punitive statute . However there is no evidence that the Court of Civil Appeals considered the second part of the Alaska case. In 2008, the Alaska Supreme Court addressed exactly the same issue as the United States Supreme Court had considered five years earlier in the case of *Doe v. State of Alaska*, 189 P. 3d 999 (Alaska 2008). Because the State has argued that the retroactive application of the law does not violate *ex post facto* laws, but fails to provide any analysis that supports this assertion, Appellee offers the following analysis which clearly demonstrates that the retroactive application of the Sex Offender Registration Act is punitive, and would violate the prohibitions against *ex post facto* laws. This fact has been recognized by several other state supreme courts as well as federal courts and the United States Supreme Court.

A. Ex Post Facto Analysis

Before proceeding onward, it is necessary to draw some distinctions between Alaska’s Sex Offender Registration Act and Oklahoma’s Sex Offender Registration Act, as analyzed by the United States Supreme Court. For purposes of that case, Alaska’s act is only a registration act. It does not contain language limiting residency, employment, family rights, electronic monitoring, affirmative limitations on driver’s licenses, or increased costs that are borne as a result of being forced to register as a sex offender as does its Oklahoma counterpart.

As noted above the *ex post facto* prohibition bars the legislature from enacting any law that punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime after its commission; or deprives one charged with a crime of any defense available according to law at the time when the act was committed. *Dobbert v. Florida*, 432 U.S. 282, 292, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977). In making the

determination of whether a statute is penal, Appellee shows the Court the federal court's model of the "intent-effects" test. This test was articulated in the United States Supreme Court case of *United States v. Ward*, 448 U.S. 242, 248–49, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980) and contains seven components, each of which will be analyzed below.

1. Does the Act involve affirmative disability or restraint?

In the United States Supreme Court case of *Smith*, Justice Stevens, in his dissenting opinion, stated sex offender registration "imposes a significant affirmative obligation and a severe stigma on every person to whom it applies." *Smith*, 538 U.S. at 100, 123 S.Ct. 1140. Oklahoma's law compels an affirmative post discharge conduct (mandating registration, re-registration, disclosure of public and private information, and updating of that information) under threat of prosecution. 57 O.S. § 584. Additionally, Oklahoma law requires the offender to provide advanced notice of a move (57 O.S. § 584(E)), DNA testing - which is paid for by the offender (57 O.S. § 584(M)), and allows the offender to be visited by local law enforcement at their residence or employment to verify the information provided. If the offender is paroled, they are required to subject themselves to GPS monitoring (57 O.S. § 510.10(C)). In many ways, sex offenders are treated no different than persons who are under rules and conditions of supervised probation. Additionally, Oklahoma law provides restrictions on where a sex offender may live (21 O.S. § 1125, 57 O.S. § 590), with whom a sex offender may live (57 O.S. § 290.1), prevents them from engaging in certain occupations or occupations in certain locations (21 O.S. § 2100.1, 57 O.S. § 589, 10 O.S. § 404), and creates a presumption against them having guardianship or even the right to visit their own children (43 O.S. § 112.5, 43 O.S. § 112.2, 43 O.S. § 150.8). Further, Oklahoma law requires that a sex offenders driver's license or state issue identification expires

annually, and the offender must pay the full cost to have the license or identification renewed (47 O.S. § 6-115(G), 47 O.S. § 6-105.3(D)). This results in the offender paying four times the amount of that any other citizen would pay for a license or identification valid over the same time period. Additionally the Department Public Safety is required to stamp the words “sex offender” on the driver’s licenses of certain sex offenders so that they may be readily identified (47 O.S. § 6-111). Clearly, Oklahoma law imposes an affirmative disability and restraint on those that are affected by it.

Further restraints impose to the aggressive public notification requirements imposed by statute these requirements permit law enforcement to inform schools, neighbors, and communities of the presence of the offender, as well as the criminal history and picture of the offender (57 O.S. § 584 (N)(3)). Such publicity subjects the offender to housing problems, employment problems, and community hostility.¹ Additionally, courts have noted incidences of suicide by and vigilantism against offenders on state registries.² Courts have further noted

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Smith, 538 U.S. at 109, 123 S.Ct. at 1156 n. * (Souter, J., concurring); see also *E.B. v. Verniero*, 119 F.3d 1077, 1102 (3d Cir.1997) ("Employment and employment opportunities have been jeopardized or lost. Housing and housing opportunities have suffered a similar fate."); *Doe v. Pataki*, 120 F.3d 1263, 1279 (2d Cir.1997) (noting that "sex offenders have suffered harm in the aftermath of public dissemination-ranging from public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson").

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See, e.g., *Neighbor Convicted of Stalking Sex Offender*, AKRON BEACON JOURNAL, Dec. 13, 2007, available at EBSCO, 2W62W62425089428 (vigilantism); John R. Ellement & Suzanne Smalley, Sex Crime Disclosure Questioned: *Maine Killings Refuel Debate Over Registries*, BOSTON GLOBE, Apr. 18, 2006, at A1, available at 2006 WLNR 6463014 (vigilantism); *Kira Millage, Killer of 2 Sex Offenders Pleads Guilty*, BELLINGHAM HERALD (Wash.), Mar. 10, 2006, at 1A, available at 2006 WLNR 5238375 (vigilantism); Carolyn Starks & Jeff Long, *Abuser Killed Self, Family Says*, CHICAGO TRIB., May 27, 2005, at 1, available at 2005 WLNR 23429797 (suicide); Cara Buckley, *Town Torn Over Molester's Suicide*, MIAMI

published reports that offenders are sometimes subjected to protest and group actions designed to force them out of their jobs and homes.³ While the State may contend that this is merely the logical culmination of information that is publicly available, it is important to note that the

HERALD, Apr. 23, 2005, at 1A, available at 2005 WLNR 23022255 (suicide); Brian MacQuarrie, *Man Defends Attacks on Sex Offenders, Crusader Gets Jail Term*, BOSTON GLOBE, Dec. 5, 2004, at A1, available at 2004 WLNR 13142566 (vigilantism); see also Richard Tewksbury, *Collateral Consequences of Sex Offender Registration*, 21 J. CONTEMP. CRIM. JUST. 67, 75 (2005) (noting that in a study of 121 registered sex offenders in Kentucky, 47 percent reported being harassed in person, 16.2 percent reported being assaulted, 28.2 percent reported receiving harassing or threatening telephone calls, and 24.8 percent reported receiving harassing or threatening mail as a result of being listed on publicly accessible registries); Alvin Malesky & Jeanmarie Keim, *Mental Health Professionals' Perspectives on Sex Offender Registry Web Sites*, 13 SEXUAL ABUSE: J. RES. & TREATMENT 53, 59 (2001) (reporting that in a study of 133 mental health professionals who work with sex offenders, 62.9 percent of respondents believed that sex offenders listed in public sex offender registry web-sites will become targets of vigilantism in the community).

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See, e.g., Jan Hollingsworth, *Protesters Hound Owner of Pet Shop*, TAMPA TRIB., Jan. 27, 2008, available at EBSCO, 2W62W62852777149 (describing community protests that forced registered sex offender to close his business); Corey Kilgannon, *Threats of Violence as Homes for Sex Offenders Cluster in Suffolk*, N.Y. TIMES, Oct. 9, 2006, at B1, available at 2006 WLNR 17438262 (recounting neighborhood's efforts to drive out registrants); Emily Ramshaw, *'Sex Offender' Label Makes No Distinction: For Many Men, Registry Has Lasting and Devastating Effects*, DALLAS MORNING NEWS, Oct. 2, 2006, available at EBSCO, 2W62W61689001016 (stating that registrant has lost multiple jobs after employers learned he was on sex offender registry); Carolyn Marshall, *Taking the Law into their Own Hands*, N.Y. TIMES, Apr. 20, 2004, at A12, available at 2004 WLNR 4787938 (describing how residents put pressure on landlords to refuse housing to registered offenders); see also Tewksbury, *supra* note 2, at 75 (noting that 42.7 percent of respondents reported loss of job and 45.3 percent of respondents reported loss or denial of place to live after being listed on publicly accessible registries); Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?*, 18 BEHAV. SCI. & LAWW 375, 381 (2000) (describing a study consisting of face-to-face interviews with thirty sex offenders throughout Wisconsin subject to various forms of community notification, and noting that 83 percent of respondents reported exclusion of residence and 57 percent reported loss of employment as a direct result of notification).

Oklahoma Sex Offender Registration Act affects not only persons who were convicted of crimes, but also persons who have received deferred sentences and whose criminal history has a sine been expunged.

2. Has the Act historically been regarded as punishment?

Previous courts dealing with this question have found it difficult to answer because sex offender registration is so new to American jurisprudence. So for purposes of analyzing whether the Act should be regarded as punishment, Appellee notes that the conditions that sex offender subject to the Act live under are similar in many ways and more oppressive than rules and conditions of persons who are subject to supervised probation. This alone has been enough to find that being subjected to the act constitutes punishment. *Doe v. State*, 189 P.3d 999, 1012 (Alaska 2008).

Additionally, Appellee contends by virtue of the fact that the state statute requires certain sex offenders to be so labeled on their driver's licenses and state issued identification cards that it is akin to the 'scarlet letter'. The 'scarlet letter' was a means of punishment through public ridicule and humiliation which was described by author Nathaniel Hawthorne. "There can be no outrage ... against our common nature, whatever be the delinquencies of the individual, no outrage more flagrant than to forbid the culprit to hide his face for shame; as it was the essence of this punishment to do." Nathaniel Hawthorne, *The Scarlet Letter* 63-64 (Random House 1950) (1850). Clearly there can be no purpose other than humiliation achieved by forcing someone to have the words "sex offender" printed in scarlet letters on their driver's license or ID since it is highly unlikely that the offender showed any of their victims their driver's license prior to committing an act which made them subject to the law. However, we note that in order to get

a job, cash a check, use a credit card, enter many courthouses, or get on an airplane one must show a photo ID, thus subjecting those persons who are so labeled to public humiliation and shame, which has long been a method of punishment.

As noted above, Oklahoma's law requires those paroled who are subject to the Sex Offender Registration Act to subject themselves to monitoring by GPS. (57 O.S. § 510.10 (C)) . On September 22, 2011, the Superior Court of New Jersey, Appellate Division, found - based on the same analysis put forth here - that the retroactive application of a monitoring statute, despite the legislature's stated intent that the act was civil and non-punitive, was so punitive as to violate the *Ex Post Facto* Clause. *Riley v. New Jersey State Parole Board*, ___ A.3d ___, 2011 WL 4388170 *5 (N.J.Super.A.D. 2011).

A final method of punishment that was thought to be long abandoned was the practice of banishment. Oklahoma's law requires that a person subject to the Act cannot live within 2,000 feet of a school, park, daycare, or other place children might be and cannot even be present within 500 feet of these areas, under penalty of prosecution. The Kentucky Supreme Court, when analyzing its state statute, which prohibits sex offenders from living within 1,000 feet of any such place (**half the distance as Oklahoma's law**) found, "Traditionally, the colonial era practice of banishing an offender from the community has been regarded as a form of punishment. Banishment has been defined as "punishment inflicted upon criminals by compelling them to quit a city, place, or country, for a specified period of time, or for life." *Commonwealth v. Baker*, 295 S.W.3d 437, 444 (Ky 2009). In that case, the Kentucky Supreme Court found that such a prohibition constituted banishment, making it "punishment" in the traditional sense of the word.

3. Does the Act come into play only on a finding of scienter?

It is noted the Oklahoma Sex Offender Registration Act does not apply only on the finding a scienter. This is because there are some crimes, i.e. statutory rape, that are strict liability in nature and do not require the court to find that the defendant committed the crime with evil intent. However these few exceptions should not overturn the general rule that the vast majority of crimes that would make a person subject to the act require a finding of scienter. This factor should therefore received little weight in the analysis.

4. Through its operation, will the Act promote the traditional means of punishment - retribution and deterrence?

The Act applies broadly across the entire spectrum of sex offenses regardless of the inherent or comparative seriousness of the offense. The only difference in how offenders are treated is how often they must register . However, all offenders are required to provide the same information, suffer the same living arrangements, and the same restrictions on employment. It cannot be argued that the express and unlimited public dissemination requirements provide a deterrent and retributive effect that goes beyond any non-punitive purpose and essentially serves the traditional goals of punishment. *Doe v. State*, 189 P.3d 999, 1013-1014 (Alaska 2008).

The Act makes no individualized determination of the dangerousness of a particular registrant. Even those registrants whose victims were adults are prohibited from living near an area where children gather. When a restriction is imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses than a regulation intended to prevent future ones. Thus it appears that this factor is also decided in favor of punishment.

5. Is the behavior to which the Act applies already a crime?

The Act on its face applies only to specifically listed crimes. In fact, the only way the Act applies is if the person has been involved in a criminal proceeding and received a conviction or deferred sentence for a specifically listed crime (57 O.S. § 582). The Act does not apply to persons who were acquitted, who were found not guilty by reason of insanity, or who are not competent to stand trial. If the Act were merely intended to address recidivism or new sexual misconduct, it is logical to believe that the legislature would have made it apply not just to those who were convicted but also to individuals who may pose a threat to society even if they were not convicted. Clearly such a fact shows that the effects of the Act are punitive. Perhaps a clearer way of asking the question might be, “But for the predicate conviction / deferred sentence, would the registering party be subject to the Act?” Because the answer to this question is clearly, “No”, this condition is clearly satisfied.

6. Does the Act advance a legitimate regulatory purpose?

This factor requires us to analyze whether there is a non punitive effect to the Act. In other words is there a rational relationship between the intent of the Act and a state interest. If the restraints imposed were limited to registration, as other states are, Appellee would be forced to concede that there is a strong relationship between the intent of the Act and one of the effects of the Act. However, much of the Act deals with where a sex offender can live, how long the sex offender must register, and where he can work, based *exclusively* on the crime of conviction. There has been no logic offered as to how this serves to protect the public from future offenses, when there is no determination made as to whether the specific offender actually presents a continuing threat to public safety. Any part of the Act that does not advance that purpose, is punitive in nature.

7. Does the Act appear excessive in relation to the alternative purpose assigned?

The Legislature has told us, and the State has confirmed on many occasions, that the intent of the Sex Offender Registration Act is to protect the public from sex offenders. Further that it is the intent of the Legislature as expressed in the text of the statute. However the purpose of this inquiry is to determine whether the means chosen to carry out the stated purpose are excessive in light of the stated purpose. Appellee would contend they are.

It is significant to note that the Act provides no mechanism by which a registered sex offender can petition the state or the court for relief from the obligations of continued registration and disclosure. Offenders cannot shorten their registration or notification even on the clearest determination of rehabilitation or conclusive proof of physical incapacitation. It is worth noting that at one point in time, a person on the list could petition the court to have their level changed downward, although the individual could not be removed from the list. This option was eliminated by the 2009 amendments to the Act. It is further interesting to note that the only factor that is considered by the Act is the crime of conviction. There is absolutely no consideration given to any determination of whether a person is likely to re-offend, or whether the person is a continuing threat to the public.

It could also be said that the purpose of the statute is to protect the public from people who might commit sex crimes. To these ends, the statute is additionally under inclusive . It is important to remember the only way that somebody can be affected by the Act is to be convicted of or receive a deferred sentence for a specified offense. The Act therefore excludes from its requirements individuals who may have committed the same act and may pose a threat to the public, that have avoided conviction by pleading to a lesser charge, being acquitted, winning on

a technicality, or whose convictions were overturned .

When we compare the stated purpose of the Act to the effects that the Act has on people who are subject to it, it is obvious that the means chosen to protect the public have consequences that significantly go beyond the State's valid interest in public safety. Further, the Act excludes individuals who may pose the equivalent threat to public safety. Although the non-punitive aims are undeniably legitimate and important, the Act has provisions which have consequences that go beyond the State's interest in public safety. Further the requirements dealing with residency, employment, family rights, as well as the economic ramifications of being forced to more frequently update driver's licenses and other state issued identifications, as well as the continued exposure to public shame that is forced by having "sex offender" stamped on one's driver's license clearly have no rational relationship to public safety.

Because the Act compels, under threat of conviction, intrusive affirmative conduct, because this conduct is equivalent to what is required by criminal judgments, because the Act makes the disclosed information public and requires broad dissemination without limitation, because the Act applies only to those convicted of a crime, and because the Act neither meaningfully distinguishes between classes of sex offenses on the basis of risk, nor gives offenders any opportunity to demonstrate their lack of future risk, the Act is punitive. Any retroactive application of the Act would be a violation of the *ex post facto* clauses of both the Oklahoma and United States constitutions.

B. Other State's Decisions

Oklahoma is not alone in wrestling with the issue of whether sex offender registration is punitive and whether the retroactive application is barred by *ex post facto* prohibitions. In

increasing numbers both federal and state courts have determined that it does. In addition to the rulings cited above by the Supreme Court of Alaska, the Supreme Court of Kentucky and the New Jersey Superior Court, more and more courts are finding the various sex offender registration acts have long abandoned the “regulatory scheme” touted by the State and have become punitive in nature, prohibiting their retroactive application. On May 19, 2011 the Supreme Court of Kentucky followed up with this holding with the case of *Commonwealth v. Nash*, 338 S.W.3d 267 (KY 2011), in which it determined the requirement to register could not be applied retroactively. On August 5, 2011 the Sixth Circuit Court of Appeals decided in *United States v. Trent*, ___ F.3d ___, (6th Cir. 2011), that the Federal Sex Offender Registration Act does not apply retroactively. This holding is consistent with the United States Supreme Court’s holding in *Carr v. United States*, ___ U.S. ___, 130 S.Ct. 229, 176 L.Ed.2d 1152, (2010). On January 12, 2010 the Supreme Court of Missouri decided the case of *F.R. v. St. Charles County Sheriff’s Department*, 301 S.W.3d 56 (MO 2010), which relied on several previous cases in determining that a person who was already subject to the sex offender registration act was not subject to later enacted provisions which prohibited registrants from celebrating Halloween. The court held that such an application was a violation of that state’s constitution which prohibits enactment of retrospective laws. Ohio’s Supreme Court agreed in the case of *State v. Williams*, ___ N.E.2d ___, 2011 W.L. 2732261 (Ohio 2011) holding that the changes made to its sex offender law could not be applied retroactively because of a similar constitutional prohibition. While none of these cases is binding on this Court, they should, at a minimum, be thought of as being persuasive.

The courts of Oklahoma have been involved in a trend that follows the trend occurring nationwide. There have been two decisions from the Oklahoma Court of Civil Appeals Division Four, which have directly or indirectly determined the Sex Offender Registration Act did not apply retroactively. Prior to that determination, the Oklahoma Court of Criminal Appeals determined that the requirements of the Sex Offender Registration Act did not apply retroactively. However, against the weight of the reasoning and logic offered by each of the state supreme courts cited above, as well as the Oklahoma Court of Criminal Appeals, and the Oklahoma Court of Civil Appeals, the State's chief concern mentioned in its brief appears to be the "administrative nightmare" that would result if the law was not applied retroactively. Essentially, the State is seeking expediency over the rule of law.

Proposition 4: The Summary Use of the Screening Tool Violates the Procedural Due Process Provisions of the Oklahoma and Federal Constitutions.

This Court should disregard Proposition II of the State's brief, as the issue of the application of the summary application of the "Three-level screening tool" is not properly before this Court. The order entered by the Oklahoma County District Court did not rely on the summary use of the screening tool. This issue was not raised in the Appellee's *Motion for Summary Judgment*, nor was it raised at oral argument on said Motion. Because of the timing of Mr. Starkey's *Petition*, he would still have the right to a hearing by a court to adjust his registration level. Since, this matter is not actually ripe for decision, any ruling here would amount to an advisory opinion.

In the event the Court were to reach this argument, it will be a matter of first impression. Admittedly, the unpublished 10th Circuit Court of Appeals opinion in *Gautier v. Jones*, No. 09-6123, would be persuasive, it is not binding on this Court when dealing with matters of state law.

Specifically, the question posed is whether the summary use of the ‘screening tool’ violates Article II, Section VII of the Oklahoma Constitution, which guarantees the people’s right to due process of law.

The State relies on the 10th Circuit Court of Appeals opinion in *Gautier v. Jones*, No. 09-6123, which relies upon the United States Supreme Court case of *Connecticut Dept. of Public Safety v. Doe*, 583 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003). In that case, the United States Supreme Court found that the listing of sex offenders merely as a result of the crime of conviction did not violate procedural due process. The Court never reached the issue of substantive due process. *Id.* at 8. In reaching this opinion, the Court reasoned that there was no requirement for procedural due process when any findings of the procedure would not affect the outcome or be relevant to the statutory scheme. *Id.* at 7. Such a reliance is misplaced, as it has no bearing on the duration of the requirement to register, merely the applicability of the act. “Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.” *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515, 519 (1971). “[C]ertainly where the State attaches ‘a badge of infamy’ to the citizen, due process comes into play.” *Id.*

It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either “liberty” or “property” as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.

Paul v. Davis, 424 U.S. 693, 710-711, 96 S.Ct. 1155, 1165, 47 L.Ed.2d 405 (1976).

Mr. Starkey is in a class of people who was only required to register for a certain period of time.

The State summarily changed that status and imposed the additional burden of complying with the restrictions imposed by the Sex Offender Registration laws, above and beyond the requirement to register for life, imposes on a protected liberty interest. These steps were taken, admittedly, with **no** notice and **no** opportunity to be heard.

It is expected the State will take the position that the offender received their due process at the time of trial - as this is the same logic advanced by the Supreme Court in *Connecticut Dept. of Public Safety v. Doe*, Supra. While this argument may help them here, it clearly marries the criminal proceeding to the Act, further strengthening Appellee's analysis above that the Act is punitive in nature and therefore cannot be applied retrospectively.

CONCLUSION

The matter properly before the court is the question of whether Oklahoma Sex Offender Registration Act applies retroactively. Under the rules of statutory construction there are two possible interpretations. The version advocated by the Appellee gives meaning to every single word including the words of the amendments that set effective dates for each of the amendments. Under this interpretation, a person is only subject to the law as it was at the time the Act became applicable to him. The person is not subject to any amendments or changes to the law which occurred after he became subject to the law. In this manner, the statute is giving only prospective effect. Under this interpretation, persons who became subject to the law, like Mr. Starkey, whose requirement to register as a sex offender has long since passed, would be de-listed. This interpretation avoids reaching a constitutional question, complies with the rules of statutory construction, and does not leave the final product infirm as a result of constitutional questions.

The State offers a second interpretation of the law. Under its interpretation, the law applies the same to each offender, regardless of whether the person has already been de-listed, whether the person's requirement to register has already expired, and regardless of when that person became subject to the law. This interpretation ignores the effective dates of the amendments, and does not follow the rules of statutory construction, as a retroactive application makes a constitutional analysis necessary. In order to support its interpretation, and force the Court to reach the constitutional analysis, the State must prove beyond a reasonable doubt that its interpretation of the law does not offend the Constitution.

Should the court reach the *ex post facto* discussion, the Court should note that while the State has requested an analysis be done, the State has failed to do any analysis. Instead the State relies on an unpublished opinion of the Oklahoma Court of Civil Appeals, which relies on the Tenth Circuit Court of Appeals case discussing the retroactive application of the federal sex offender law, which was postdated by the United States Supreme Court holding that the Federal Sex Offender Registration Act was not applied retroactively. Additionally, the State ignores the growing weight of jurisprudence across the nation holding sex offender registration laws are punitive in nature, and therefore cannot be applied retroactively without violating the prohibition on *ex post facto* laws.

Appellee respectfully requests this Court issued a published opinion that the Oklahoma Sex Offender Registration Act should be interpreted and applied prospectively only. While it is not required, Appellee would request this court additionally find that the retrospective application of the sex offender registration law violates the Oklahoma constitutional prohibition on the enactment of *ex post facto* laws.

Respectfully Submitted,

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CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 27th day of September, 2011, he caused a true and correct copy of the above and foregoing to be mailed in a sealed envelope with proper postage affixed thereon to:

John D. Hadden
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