

## SUPPLEMENTAL AUTHORITY

The prosecution relies extensively on Smith v. Doe 538 U.S. 84, 123 S.Ct. 1140 (2003) in its argument that Oklahoma's Sex Offender Registration Act is regulatory and not punitive in application. As such, if said act is regulatory then its retrospective application does not violate the *ex post facto* clause of the United States or Oklahoma Constitutions. In This premise, the prosecution's argument must fail based on Oklahoma Constitutional Law, and the 2008 Alaska case of Doe v. State which imparts lucid sanity in describing the obvious penal provisions of sex offender registration statutes.

### PROPOSITION ONE:

#### ANALYSIS OF DOE V. STATE, IN LIGHT OF SMITH V. DOE

Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140 (2003) was the United States Supreme Court's decision finding that Alaska's sex offender registration statute was regulatory and not punitive, therefore holding that the U.S. Constitution's *ex post facto* clause was not violated by retroactive application. The Smith case was only decided however, pursuant to a Federal Constitutional *ex post facto* claim. In 2008, the Alaska Supreme Court explicitly rejected the U.S. Supreme Court's analysis and decision, finding that pursuant to Alaska's constitution its sex offender registration statute was punitive. Doe v. State 189 P.3d 999, S-12150 (Alaska 2008), attached hereto and incorporated herein by reference. As the Alaska Supreme Court held in Doe at pg. 1006,

“As to the first question, Smith's holding is not *stare decisis* here because Doe's claims are based on the Alaska Constitution, whereas Smith was based exclusively on the Federal Constitution. **Smith did not apply state law or decide state law issues.**” (emphasis added)

In deciding Doe, the Alaska Supreme Court construes the Alaska Constitution as more protective of individual rights, than the U.S. Constitution. As stated in Doe, at pg. 1005,

“Nonetheless, we have never endorsed federal ex post facto analysis as superseding or limiting or independent consideration of Alaska’s ex post facto prohibition. Nor have we indicated that federal interpretation of the federal ex post facto prohibition prevents us from reaching a different, and more protective, result under the Alaska Constitution. Stare decisis therefore has no application here.”

For the sake of brevity, the Alaska Supreme Court used an “Intent-effects” test, analyzing seven (7) factors, in finding that Alaska’s sex offender registration statute is punitive and violates the Alaskan Constitution. In explicit terms, the Alaska Supreme Court states in Doe, at pg. 1018-1019.

“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...

Because ASORA compels (Under threat of conviction) intrusive affirmative conduct, because this conduct is equivalent to that required by criminal judgments, because ASORA makes the disclosed information public and required its broad dissemination without limitation, because ASORA applies only to those convicted of crime, and because ASORA neither meaningfully distinguishes between classes of sex offenses on the basis of risk nor give offenders any opportunity to demonstrate their lack of risk, **ASORA’s effects are punitive. We therefore conclude that the statute violates Alaska’s ex post facto clause.**” (emphasis added)

**PROPOSITION TWO:**

**OKLAHOMA EX POST FACTO LAW OFFERS GREATER PROTECTION  
THAN ITS FEDERAL COUNTERPART; AND IN LIGHT OF DOW,  
OKLAHOMA’S SEX OFFENDER REGISTRATION IS PUNITIVE**

It is well settled in Oklahoma Jurisprudence that the Oklahoma Court of Criminal Appeals’ “independent interpretation of Oklahoma constitutional provisions is not circumscribed by United States Supreme Court interpretations of similar federal provisions”, and that Oklahoma may grant protections to its citizens “that are more expansive than those conferred by federal law”. Gomez v. State, 2007 OK CR 33, 168 P.3d 1139; Dennis v. State, 1999 OK CR 23, 990 P.2d 277. This basic principle of Oklahoma Law was eloquently stated by Justice Kauger in Turner v. City of Lawton, 1986 OK 51, 733 P.2d 375, at ¶ 10,

“State statutes or state constitutions which afford greater rights than the federal constitution must be determined by following state law. The state of Oklahoma in the exercise of its sovereign power may provide more expansive individual liberties than those conferred by the United States Constitution – it is only when state law provides less protection that the question much be determined by federal law. The Constitution of the State of Oklahoma contains independent sources of rights and liberties, which may, under some circumstances, offer more protection than the federal constitution. The Oklahoma Constitution does not merely project a mirror image of the federal constitution. The people of this state are governed by the Oklahoma Constitution, and when it grants a right or provides a principle of law or procedure beyond the protections supplied by the federal constitution, it speaks for every person as the supreme law and final authority for everything which is done in pursuance of its provisions”.

The seminal case of Anderson v. Ritterbusch, 1908 OK 250, 98 P. 1002 (cited favorably in Jacobs Ranch, L.L.C. v. Smith, 2006 OK 24, 148 P.3d 842), states the basic premise for Oklahoma *ex post facto* law, at ¶ 54,

“A law is not *ex post facto* merely when it is criminal in character, **but that doctrine extends to laws which are penal in any form, which provides the imposition of some punitive consequence for its violation**, whether it is a fine assessed in a criminal prosecution or a sum to be taken forcibly for the violation of any other process prescribed”. (emphasis added).

In Re: M.C., 1999 OK CIV APP 128, 993 P.2d 137, specifically applies the Turner and Anderson holdings in finding an *ex post facto* violation in a termination of parental proceeding. As stated in M.C., *id.* at ¶4,

“The State has responded that the *ex post facto* prohibitions in the United States Constitution apply only to criminal statutes. **While we agree that the State has correctly stated the application of federal constitutional protected from *ex post facto* laws, this court must also consider the constitutional protection from *ex post facto* laws provided by article 2, Section 15 of the Oklahoma Constitution.**” (emphasis added)

In applying the Oklahoma Constitution to the state law claim, the M.C. Court states, 7-8

“Applying the 1998 amendment under such circumstances leave father, or any other parent similarly situated, no fair opportunity to avoid the consequence of termination. **The failure to afford an opportunity to avoid the punitive consequences of a retroactive statute is the chief evil that Oklahoma’s *ex post facto* provision seeks to prohibit.**”

The 1998 amendment has a ‘punitive consequence’ that did not exist either at the time the State initiated the deprived proceedings, or when it began its quest to terminate father’s parental rights. **The 1998 amendment also ‘chang[ed] the obligation [of father] and impos[ed]...a liability which did not theretofore exist.’** It clearly has the type of ex post facto effect forbidden by the Oklahoma Constitution as applied to this case and any other case of a parent faced with termination for failure to correct deprived conditions whose exercise of their right to trial causes foster care to extend for the period specified in 10 O.S. Supp. 1998 s7006-1.1(A(15).” (emphasis added)

It is clear that Oklahoma Constitutional Law grants a more expansive protection of rights in *ex post facto* analysis than does the federal counterpart. As such, and in light of the Alaska Supreme Court decision in Doe v. State, Oklahoma’s sex offender registration is punitive and cannot be applied retroactively.

### CONCLUSION

The trial court’s previous order in this case is correct, obviating sex offender registration based upon the law as it was at the time the crime was committed. Any extensions of registration time, or any further registration requirement is punitive and violates the ex post facto clause of the Oklahoma Constitution. This case should be dismissed.

Defendant respectfully submitted the above supplemental authority, requests this case be dismiss, and for any further relief this Honorable Court deems just and proper.

Respectfully submitted:

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Douglas Parr, OBA# 6907

228 Robert S. Kerr, Suite 715  
Oklahoma City, OK 73102  
405-528-1018 telephone  
405-602-2850 fax  
Attorney for Defendant