

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS (EX POST FACTO- FAILURE TO REGISTER AS SEX OFFENDER)

I. Statement of Facts and Argument

[Insert applicable facts, such as: (1) when the offense was committed; (2) when the defendant was convicted; (3) when he was sentenced; (4) when he was released from prison; and (5) when charged with failure to register].

II. Law

The United States Constitution proved that “no state shall . . . pass any . . . ex post facto Law.” U.S. Const. Art. I, § 10. The Indiana Constitution provides that “[n]o *ex post facto* . . . shall ever be passed.” Ind. Const. Art. I, § 24. Among other things “[t]he ex post facto prohibition forbids the Congress and the State to enact any law ‘which imposes a punishment for an act which is not punishable at the time it was committed; or imposes additional punishment to that then prescribed.’” Wallace v. State, 905 N.E.2d 371, 377 (Ind. 2009). The Indiana Supreme Court has stated that “[T]he underlying purpose of the Ex Post Facto Clause is to give effect to the fundamental principle that person have a right to fair warning of that conduct which will give rise to criminal penalties.” Armstrong v. State, 848 N.E.2d 1088, 1093 (Ind. 2006).

In 1994, the Indiana General Assembly passed the Act that required probationers and parolees convicted of child molesting on or after June 30, 1994 to register as sex offenders. Id. In 2001, the Act was amended to require all offenders convicted of certain sex offenses to register as sex offender regardless of conviction date.

On April 30, 2009, the Indiana Supreme Court issued its decision in Wallace v. State, 905 N.E.2d 371 (Ind. 2009). In Wallace, the Defendant was convicted of and sentenced in 1988 for one (1) count of Child Molesting, a Class “C” Felony. Id. at 373. In Wallace, the Defendant refused to register as a sex offender. Id. The State then charged the Defendant with Failing to Register as a Sex Offender, a Class “D” Felony. Id. The Defendant filed a motion to dismiss, which was denied by the trial court. Id. The Defendant was found guilty as charged by a jury. Id. The Defendant was sentenced to a 545 day term of

probation. Id. The Defendant appealed, claiming, *inter alia*, that the Sex Offender Registry Act violates the ex post facto provisions of both the Indiana and Federal Constitutions. Id.

The Wallace Court adopted and applied the “intent-effects” test in analyzing ex post facto claims under the Indiana Constitution. Following a lengthy analysis utilizing the “intent-effects” test as applied to the Defendant therein, the Indiana Supreme Court concluded that “as applied to Wallace, the Act violates the prohibition on ex post facto laws contained in the Indiana Constitution because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed when his crime was committed.” Id. at 384.

III. Conclusion and Request for Relief

For the above and foregoing reasons, the Defendant, by counsel, respectfully requests the Court to dismiss the Information charging the Defendant with failure to register as a sex offender with prejudice, and for all other just and proper relief in the premises.

(Signature)

CASE LAW

Jensen v. State, 905 N.E.2d 384 (Ind. 2009) (application of 2006 amendment to Indiana Sex Offender Registration Act requiring lifetime registration to Defendant who was previously only subjected to a ten-year registrations and who completed his executed sentence prior to amendment did not violate prohibition against ex post facto laws).

Hevner v. State, 919 N.E.2d 109 (Ind. 2010) (requiring the Defendant who was convicted of an offense that was added to the registry after he committed his offense but before his sentencing to register violates the Indiana constitutional protection against ex post facto laws; although a defendant cannot be convicted of crime under the residency restriction statute, I.C. 35-42-5-11, the court can restrict where the defendant lives as a condition of probation).

State v. Pollard, 908 N.E.2d 1145 (Ind. 2009) (retroactive application of the residency restrictions statute violates the Ex Post Facto Clause contained in the Indiana Constitution). But see Sewell v. State, 973 N.E.2d 96 (Ind.Ct.App. 2012) (Defendant's prosecution under 2006 amendment prohibiting sex offender to take up residence within 1,000 feet of youth program center did not violate state or federal ex post facto provisions; although Defendant was convicted before enactment of residency requirement, his residency decision occurred after the enactment of the statute).

Blakemore v. State, 925 N.E.2d 759 (Ind.Ct.App. 2010) (fact that Defendant agreed to "comply with the statutory requirements of registering with local law enforcement as a sex offender" in 1998 did not waive his future ex post facto argument under Wallace).

Lemon v. Harris, 949 N.E.2d 803 (Ind. 2011) (even though Defendant committed his crimes before Legislature created status of "sexually violent predator," the 2007 amendment to I.C. 35-38-1-7.5(b) makes him an SVP by operation of law, and the change in status does not violate Indiana's prohibition on ex post facto laws or the doctrine of separation of powers). See also Seales v. State, 4 N.E.3d 821 (Ind.Ct.App. 2014); Hollen v. State, 994 N.E.2d 1166 (Ind.Ct.App. 2013).

Gonzalez v. State, 980 N.E.2d 312 (Ind. 2013) (retroactive imposition of lifetime registration period under amended SORA as applied to Defendant, who had been convicted of soliciting a minor and completed his 10 year registration requirement under prior version of Act, violated ex post facto clause of Indiana Constitution).

Healey v. State, 986 N.E.2d 825 (Ind.Ct.App. 2013) (1995 amendment to SORA, which resulted in extending Defendant's sex offender registration requirement for 10 years, was punitive in effect and thus constituted ex post factor punishment in violation of state constitution; because Defendant was not permitted to seek review of the extension of his reporting requirement to 10 years, the extension appeared excessive in relation to purpose of public protection). But see Harlan v. State, 971 N.E.2d 163 (Ind.Ct.App. 2012) (application of SVP registration requirement to Defendant, following guilty plea to child molesting, did not violate state constitution's ex post facto clause; sex offender registration requirements had already taken effect at time of last incident of molestation, and there was no evidence that addition of SVP registration requirements were intended to constitute a punishment).

Gaither v. Indiana Dept. of Correction, 971 N.E.2d 690 (Ind.Ct.App. 2012) (probation condition requiring Defendant, a sex offender, to not reside within 1000 feet of a school, did not violate prohibition on ex post facto laws, even though statute requiring sex offenders to register was not enacted until several years after Defendant committed offenses, because the only limitation on trial court's discretion in fashioning terms of probation is that conditions reasonably relate to Defendant's treatment and public safety).

Tyson v. State, 51 N.E.3d 88 (Ind. 2016) (a sex offender required to register in any other state must also register in Indiana if he or she relocates to Indiana, regardless of when the initial sex crime was committed; requirement does not violate ex post facto clause); see also State v. Zerbe, 50 N.E.2d 368 (Ind. 2016).

Patrick v. Butts, 12 N.E.3d 270 (Ind.Ct.App. 2014) (Parole Board's order that Defendant participate in Sex Offender Management and Monitoring program did not violate ex post facto clause of Indiana constitution).