CURRENT DEVELOPMENTS IN THE LAW

A Survey of Cases Addressing State Statutes Pertaining to the Treatment, Registration and Community Notification Requirements for Sexual Offenders

This section presents a selection of issues currently being litigated and resolved by courts at various levels of the federal and state systems and is not intended to be a comprehensive collection of cases.

State v. Carpenter, 541 N.W.2d 105 (Wis. 1995). WISCONSIN STATUTE ESTABLISHING A CIVIL COMMITMENT PROCEDURE PRIMARILY INTENDED TO PROTECT THE PUBLIC AND PROVIDE CONCENTRATED TREATMENT TO CONVICTED SEXUALLY VIOLENT PERSONS WITHOUT PUNISHING THE SEX OFFENDERS DOES NOT VIOLATE EITHER THE EX POST FACTO OR DOUBLE JEOPARDY CLAUSES OF THE WISCONSIN AND UNITED STATES CONSTITUTIONS.

I. INTRODUCTION

The Wisconsin Supreme Court, in a ruling combining two distinct underlying criminal cases, affirmed the trial courts' orders finding probable cause for the commitment of two sexually violent offenders.[1] The court reversed the trial courts' conclusion that Wisconsin's Sexually Violent Persons Commitment statute ("Statute")[2] violated the ex post facto and double jeopardy clauses in the Wisconsin and United States Constitutions, and remanded.[3]

II. BACKGROUND

Defendant William Carpenter was convicted of sexual assault of a seven-year-old girl and sentenced to twelve years in prison in 1984.[4] Subsequently, the court stayed the sentence and instead placed Carpenter on probation for ten years.[5] The probation was revoked in 1986 when the defendant had sexual intercourse with his daughter.[6] In 1988, Carpenter was again placed on probation in response to an allegation that the defendant had violated his parole by associating with minors.[7]

Carpenter was eventually paroled in 1993 but was reincarcerated after only nine months based upon a recalculation of his mandatory release date.[8] Carpen-

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[1] *See* State v. Carpenter, 541 N.W.2d 105 (Wis. 1995).

[2] WIS. STAT. ANN. § 980 (West 1995).

[3] *See Carpenter*, 541 N.W.2d at 105.

[4] *See id.* at 108.

[5] *See id.*

[6] *See id.*

[7] *See id.*

[8] *See id.*.

ter was not released even after the Wisconsin Supreme Court overturned the case that provided for the recalculations.[9] The state ultimately filed a petition, pursuant to the Statute,[10] alleging that Carpenter was a sexually violent person.

Carpenter challenged the constitutionality of the Statute on the following grounds: (1) substantive due process; (2) equal protection; (3) vagueness; (4) ex post facto; and (5) double jeopardy.[11] The trial court held that the Statute violated the ex post facto and double jeopardy clauses, and also determined that the Statute conflicted with substantive due process.[12] In addition, Carpenter challenged the factual basis of the petition, which the trial court did not find necessary to reach.[13]

The state obtained a stay pending its appeal of the trial court's order.[14] Carpenter moved to remand for a probable cause hearing, at which the trial court determined that probable cause existed to find that Carpenter is a sexually violent person pursuant to the Statute.[15] Carpenter appealed this order, claiming that no probable cause existed to find him a sexually violent person because he was not within ninety days of discharge or release as required by the Statute.[16] Moreover, Carpenter asserted that the state's petition was deficient because it did not allege an overt act.[17]

Similar facts exist regarding defendant William Schmidt, who was convicted of sexual assault and sentenced to three years probation in 1992.[18] Later, the court revoked the probation.[19] In late 1992, Schmidt was again convicted of first-degree sexual assault, this time for assaulting his two-year-old nephew.[20] He

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[9] *See id.* (citing State ex rel. Parker v. Sullivan, 509 N.W.2d 440 (Wis. Ct. App. 1993)).

[10] *See* WIS. STAT. ANN. § 980.02(1)(b) (West 1995). Generally, the Statute provides for the involuntary commitment of sexually violent individuals. It defines a sexually violent person as one convicted of a sexually violent offense, "who is dangerous because he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." *Id.* § 980.01. An individual found to fit the above description of a sexually violent person will undergo commitment to the Department of Health and Social Services "for control, care and treatment until such time as the person is no longer a sexually violent person." *Id.* § 980.06.

[11] *See Carpenter*, 541 N.W.2d at 107. This case only addresses Carpenter's ex post facto and double jeopardy challenges. In State v. Post, the court held that the statute did not violate either the equal protection clause or substantive due process. *See*State v. Post, 541 N.W.2d 115 (Wis. 1995).

[12] *See Carpenter*, 541 N.W.2d at 108.

[13] *See id.*

[14] *See id.*

[15] *See id.*

[16] *See id.*

[17] *See id.*

[18] *See id.*

[19] *See id.*

[20] *See id.* at 108-09.

was sentenced to three years in prison.[21]

The state filed a petition against Schmidt pursuant to the Statute, alleging that Schmidt had not successfully completed a sex offender treatment program, and had engaged in anal intercourse with a five-year-old boy in 1985.[22] The trial court found probable cause to find that Schmidt is a sexually violent person.[23] Schmidt challenged the constitutionality of the statute.[24] The trial court granted Schmidt's motion to dismiss on the grounds that the statute violated the double jeopardy and ex post facto clauses of the Wisconsin and United States Constitutions.[25] The state obtained a stay of Schmidt's release from prison pending this appeal.[26]

III. ANALYSIS

A. *Double Jeopardy*

First, the Wisconsin Supreme Court noted that Wisconsin's double jeopardy clause is the same in scope and purpose as the federal double jeopardy clause.[27] Thus, the court cited standards laid out by the United States Supreme Court in *United States v. Halper*[28] regarding the scope of protection under the double jeopardy clause.[29] The double jeopardy clause protects against the following: (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense after a conviction; and (3) multiple punishments for the same offense.[30] Carpenter and Schmidt claimed that the Statute subjected them to multiple punishments for the same offense.[31]

1. Statutes Are Presumptively Constitutional

The court pointed out the heavy responsibility borne by a party who challenges the constitutionality of a statute. It explained that "[a] party challenging the statute must show it to be unconstitutional beyond a reasonable doubt."[32] The court then observed that the respondents faced a difficult burden in their claim that the Statute subjected them to multiple punishment.[33]

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[21] *See id.* at 109.

[22] *See id.*

[23] *See id.*

[24] *See id.*

[25] *See id.*

[26] *See id.*

[27] *See id.* (citing State v. Killebrew, 340 N.W.2d 470 (Wis. 1983)).

[28] 490 U.S. 435 (1989).

[29] *See Carpenter*, 541 N.W.2d at 109.

[30] *See id.* (citing *Halper*, 490 U.S. at 440).

[31] *See id.*

[32] *Id.*

[33] *See id.* (citing State v. McManus, 447 N.W.2d 654 (Wis. 1989) (holding that courts cannot reweigh the facts found by the legislature, and that if any facts constitute a reasonable basis for a statute, the statute must stand)).

2. Examination of the Statute's Underlying Purpose

Next, the court examined the underlying purpose of the Statute to determine whether it constituted punishment for the purposes of double jeopardy.[34] The court noted that action constitutes punishment under the double jeopardy clause when "its principal purpose is punishment, retribution, or deterrence."[35] The court further qualified this rule by stating that punitive motives do not alter the state's otherwise nonpunitive purpose into one of punishment.[36] In conclusion, the court observed that civil sanctions only violate the double jeopardy clause if they "may not fairly be characterized as remedial, but only as a deterrent or retribution."[37]

The court countered the respondents' contention that the ultimate purpose of the Statute was punitive by engaging in a textual analysis of the Statute.[38] The court examined the notice provision of the Statute,[39] noting that it requires that the appropriate agency provide the district attorney and the state Department of Justice with documentation of any prior treatment that the subject received while in prison.[40] In addition, the court pointed out that § 980.06(1) provides that a person found to be sexually violent is committed to the Department of Health and Social Service's ("DHSS") custody for "control, care, and treatment, as opposed to the DOC [Department of Corrections] for imprisonment."[41] Furthermore, the court observed that DHSS must use the least restrictive manner for the subject's control, care, and treatment.[42] The court found that sexually violent persons would not simply experience incarceration; rather, they would live separately from the main prison population, constantly undergoing psychological treatment.[43]

3. The Court May Not Speculate as to the Statute's Ulterior Motives

The court emphasized that it must look to the Statute's language as evidence of the legislature's intent, rather than second-guessing the legislature's motives behind the Statute.[44] The court ultimately determined that the Statute's primary purpose was not punitive, notwithstanding the existence of some penal aspects.[45] It pointed out that "the legislature's decision 'to provide some of the safeguards applicable in criminal trials [could] not itself turn [the] proceedings into criminal

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[34] *See id.*
[35] *Id.* at 109-10.
[36] *See id.* at 110.
[37] *Id.* (citing United States v. Halper, 490 U.S. 435, 448-49 (1989)).
[38] *See id.*
[39] WIS. STAT. ANN. § 980.015(3)(b) (West 1995).
[40] *See Carpenter*, 541 N.W.2d at 110.
[41] *Id.*
[42] *See id.*
[43] *See id.* at 111.
[44] *See id.* at 111-12.
[45] *See id.*

prosecutions.' "[46] Moreover, the court found that the Statute was not punitive even though it only applied to those persons already convicted of a crime, rather than to the larger class of mentally ill persons who may share similar sexually violent tendencies.[47] In conclusion, the court found that the respondents failed to meet their burden in overcoming the strong presumption in favor of the Statute's constitutionality.[48] Specifically, the respondents did not show that the Statute contained sufficient punitive characteristics and an insufficient civil commitment purpose to the extent necessary to condemn the Statute.[49]

B. *Ex Post Facto*

The court first observed that the constitutional prohibition against on ex post facto laws only applies to penal statutes.[50] As with double jeopardy, the court noted that Wisconsin's ex post facto law follows the precedents set by the United States Supreme Court.[51] Thus, "[a]n ex post facto law is any law 'which punishes as a crime an act previously committed, which is innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed . . . .' "[52]

1. Test for Determining What Is an Ex Post Facto Law

The court described the test for determining what is an ex post facto law: " 'The question . . . is whether the legislative aim was to punish that individual for past activity, or whether the restriction of the individual comes about as a relevant incident to a regulation of a present situation.' "[53] The court specifically articulated the test as one in which it was necessary "to consider the language and structure of the [Statute] to determine whether it serves a legitimate regulatory public purpose apart from punishment for the predicate act."[54] The court concluded that the legislative intent behind the Statute was not to punish; rather it regulated a present situation because it is designed to protect the public by providing concentrated treatment for convicted sex offenders posing a high risk of recidivism.[55] Thus, the focus is on the offender's present mental condition, not punishment for the offender's past crimes.[56]

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[46] *Id.* (quoting Allen v. Illinois, 478 U.S. 364, 372 (1986)).

[47] *See id.*

[48] *See id.* at 113.

[49] *See id.*

[50] *See id.* (citing Collins v. Youngblood, 497 U.S. 37, 42 (1990)).

[51] *See id.* (citing State v. Thiel, 524 N.W.2d 641 (Wis. 1994)).

[52] *Id.* (quoting *Collins*, 497 U.S. at 42).

[53] *Id.* (quoting *Thiel*, 524 N.W.2d 641).

[54] *Id.*

[55] *See id.*

[56] *See id.*

The court pointed out that when a Statute serves a legitimate, regulatory, and nonpunitive purpose, it can only violate the ex post facto clause if it is not rationally related to the legislature's purpose.[57] The court determined that there was a rational relationship between the restriction of the sexually violent person's liberty and the Statute's purpose of protecting the public from dangerous sex offenders through preventive treatment programs.[58] Thus, the court held that the Statute is not an ex post facto law.[59]

C. *Probable Cause Determination*

The court observed that for the purposes of the Statute, the sexually violent individual "must be 'within 90 days of discharge or release, on parole or otherwise, from a sentence that was imposed for a conviction for a sexually violent offense.' "[60] The court found that when Carpenter was reincarcerated, the Department of Corrections recalculated a new parole date based on his conviction for a sexually violent offense.[61] The court then noted that Carpenter was within ninety days of discharge from imprisonment based on that sentence.[62] Moreover, the court determined that the state did not have to allege an overt act establishing probable cause of dangerousness, because Carpenter was incarcerated when the petition was filed.[63] Therefore, the court affirmed the trial court's order finding probable cause.[64]

IV. CONCLUSION

The Wisconsin Supreme Court determined that the Statute did not violate either the double jeopardy clause or the ex post facto clause. The respondents did not meet the heavy burden required to overcome the Statute's presumption of validity. Thus, the state may constitutionally apply the Statute to commit sexually violent persons.

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[57] *See id.* at 113-14 (citing Flemming v. Nestor, 363 U.S. 603, 617 (1960)).

[58] *See id.* at 114.

[59] *See id.*

[60] *Id.* (quoting WIS. STAT. ANN. § 980.02(2)(ag) (West 1995)).

[61] *See id.*

[62] *See id.*

[63] *See id.*

[64] *Id.*

State v. Post, 541 N.W.2d 115 (Wis. 1995). STATUTE PROVIDING COMMITMENT PROCEDURES FOR SEXUALLY VIOLENT INDIVIDUALS DOES NOT VIOLATE CONSTITUTIONAL GUARANTEES OF SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION.

I. INTRODUCTION

Defendants, previously convicted of sexual offenses, challenged the constitutionality of the petitions filed by the Wisconsin Department of Justice ("DOJ") pursuant to the Sexually Violent Predators Act ("Statute"),[1] which sought to commit the two as sexually violent persons. The circuit court reversed its initial decision to grant the petitions, citing constitutional defects. The state appealed.

The Wisconsin Supreme Court accepted certification. Finding that the Statute survived defendants' constitutional challenges, the court granted the state's petition as to the two defendants.

II. BACKGROUND

Defendants Samuel E. Post and Ben R. Oldakowski were tried separately for unrelated sexual crimes and convicted.[2] Both were committed to the Wisconsin Department of Health and Social Services ("DHSS") program for sex offenders at Mendota Mental Health Institute ("Mendota").[3] Both Post and Oldakowski were scheduled to be released from Mendota on July 15, 1994.[4] However, on July 12, 1994, the DOJ filed petitions pursuant to the Statute, seeking to commit the two as sexually violent persons.[5] The circuit court found probable cause that Post and Oldakowski were sexually violent persons, and ordered them held at Mendota pending trial.[6] The day of the probable cause hearings, Post and Oldakowski filed motions to dismiss the commitment petitions, alleging constitutional violations.[7] The circuit court granted their respective motions, finding that the Statute violated their constitutional protections against double jeopardy and ex post facto laws, as well as guarantees of substantive due process and equal protection, and ordered their release.[8] The court of appeals ordered the matters consolidated, and stayed the release order pending appellate review.[9] The Wisconsin Supreme Court accepted the certification.[10]

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[1] WIS. STAT. ANN. § 980 (West 1995).

[2] *See* State v. Post, 541 N.W.2d 115, 119 (Wis. 1995).

[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] *See id.*

[7] *See id.*

[8] *See id.* at 120. The court upheld the Statute against constitutional challenges based on alleged violations of double jeopardy and ex post facto protections in a companion case. *See* State v. Carpenter, 541 N.W.2d 105 (Wis. 1995).

[9] *See Post*, 541 N.W.2d at 120.

[10] *See id.* In addition to accepting four constitutional issues, the court also certified the issue as to whether the governor's partial veto created an incomplete and unworkable law

III. ANALYSIS

A. *The Sexually Violent Predators Act*

The Statute requires state agencies with the authority to discharge or release persons fitting the criteria for commitment as a sexually violent person to notify the DOJ or local district attorney of the pending release of such individuals.[11] The agency must provide treatment records and other relevant documents pertaining to the offender.[12] A petition seeking commitment must allege that the person was convicted, found delinquent, or found not guilty by reason of mental disease or defect of a sexually violent offense; that the person is within ninety days of release from a sentence or program arising from the offense; that the person has a mental disorder; and that the person is dangerous because the mental disorder creates a "substantial probability" that the person will again engage in acts of sexual violence.[13] Mental disorder is defined as "a congenital or acquired condition affecting the emotional or volitional capacity that predisposes a person to engage in acts of sexual violence."[14]

A court reviews the petition, and orders detention only upon the establishment of probable cause. A hearing to determine probable cause must be held within seventy-two hours. If probable cause is found, the person undergoes an evaluation,[15] at which time the person may retain an examiner to review to grounds for the petition and past and present treatment records.[16]

The person is entitled to a full adversarial trial on the allegations of the petition, at which the criminal rules of evidence apply. Additionally, the state must prove its case beyond a reasonable doubt.[17] The person has the right to counsel, to remain silent, to present and cross-examine witnesses, and to have the hearing recorded. A jury may be requested, which must arrive at a unanimous verdict to convict.[18]

If found sexually violent under the Statute, the circuit court commits the person to DHSS for control, care, and treatment until it determines that the person is no longer sexually violent.[19] The court may commit the person to secure institutional care, or approve the person for supervised release.[20] If institutionalized, the person may petition for release every six months, and the state must grant

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as applied to persons committed under the Sex Crimes Act. *See* WIS. STAT. ANN. § 975 (West 1985 & Supp. 1995). The court rejected defendants' arguments, concluding that the veto resulted in a complete and workable law. *See Post*, 541 N.W.2d at 133-35.

[11] *See* WIS. STAT. ANN. § 980.015 (West 1995).

[12] *See id.*

[13] *See id.* § 980.02 (laying out the elements of the petition).

[14] *Id.* § 980.01(2).

[15] *See id.* §§ 980.04(1)-(3).

[16] *See id.* § 980.03(4).

[17] *See id.* § 980.05(1m).

[18] *See id.* §§ 980.03(2)-(3).

[19] *See id.* § 980.06(1).

[20] *See id.* § 980.06(2)(b).

the release unless its proves by clear and convincing evidence that the person is still sexually violent and is likely to commit further sexually violent acts if released.[21] While committed, the person undergoes an initial mental reexamination six months after confinement, and every year subsequently to determine whether sufficient progress has been made for supervised release.[22] As with the original examination, the committed person has the right to hire an additional outside examiner to evaluate the examinations.[23] At the time of each examination, the committed person may petition for discharge, or if the court finds probable cause exists that the person is no longer sexually violent, a hearing is held on the issue.[24] At this hearing, the person again has the right to counsel, to remain silent, present and cross-examine witnesses, and have the hearing recorded. If the state cannot prove by clear and convincing evidence that the person remains sexually violent, the person must be discharged.[25]

B. *Substantive Due Process*

Post and Oldakowski alleged that the Statute unconstitutionally violated rights to liberty as provided by due process.[26] They maintained that the Statute's provisions allowing commitment without a showing of mental illness, without an individualized showing of amenability to treatment, and without a sufficient showing of dangerousness all violated their substantive due process rights to freedom from physical restraint imposed by arbitrary governmental actions.[27]

The court applied the strict scrutiny test to defendants' claim. Under strict scrutiny, the challenged statute must further a compelling state interest and be narrowly tailored to serve that interest.[28] The court found that the state's interests here were to protect the community from sexually violent persons and to provide treatment. Citing *Addington v. Texas*,[29] the court found that both interests were legitimate and compelling.[30]

1. Mental Disorder Versus Mental Illness

Defendants alleged that the "mental disorder" required under the Statute was not sufficiently narrowly tailored to survive strict scrutiny, and argued that the appropriate standard for involuntary commitments requires a finding of "mental

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[21] *See id.* §§ 980.08(1), 980.08(4).

[22] *See id.* § 980.07(1).

[23] *See id.*

[24] *See id.* § 980.09.

[25] *See id.* §§ 980.09(2)(b), 980.09(2)(c).

[26] *See* State v. Post, 541 N.W.2d 115, 122 (Wis. 1995). The United States and Wisconsin constitutions provide similar due process guarantees. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV; *See also* WIS. CONST. art. 1, § 8.

[27] *See Post*, 541 N.W.2d at 122.

[28] *See id.* (citing Roe v. Wade, 410 U.S. 113, 155 (1973)).

[29] 441 U.S. 418, 426 (1979).

[30] *See Post*, 541 N.W.2d at 122.

illness."[31] The court found that the definition of "mental disorder" in the Statute was sufficiently narrow, as it only applied to a small group of persons whose mental disorders have the specific effect of predisposing them to acts of sexual violence.[32] The court found that neither the United States or Wisconsin constitutions, nor United States Supreme Court precedent, required "mental illness" as the standard for involuntary mental commitments.[33] Citing federalism concerns, the court noted that the states may choose to develop their own solutions to such issues.[34] The court noted that both the Supreme Court and state legislatures have relied on a variety of terms and definitions to support its decision that the Statute's use of "mental disorder" withstood scrutiny,[35] and made the additional point that such definitions serve a legal, not medical, function.[36] The most important element, the court found, was that the definition of mental disorder does not have significance under the Statute unless a person comes within the reach of the Statute by having been diagnosed with a disorder predisposing them to acts of sexual violence.[37] Therefore, the court found the Statute sufficiently narrowly tailored.[38]

2. Treatment

Post and Oldakowski also argued that their due process rights were violated because treatment was not a serious objective of the Statute.[39] The court first noted that legislation was presumed to have been enacted in good faith.[40] Here, the court found that treatment was a bona fide goal of the legislature. The Statute requires that treatment be made available to sexually violent person,[41] and a preexisting statute also confers the "right to receive prompt and adequate treatment."[42] Additionally, the court noted that treatment, even specialized treatment for sex offenders, is currently available in the regular prison setting, and that the Statute only applies to those for whom previous treatment proved ineffective.[43] Addressing the defendants' claims that the psychiatric community had found

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[31] *See id.*

[32] *See id.*

[33] *See id.* at 123.

[34] *See id.* (citing Addington v. Texas, 441 U.S. 418, 431 (1979)).

[35] *See id.*

[36] *See id.*

[37] *See id.* at 124.

[38] *See id.*

[39] *See id.* The defendants cited as proof (1) the lack of a requirement for an individualized showing of amenability to treatment; (2) the failure to seek commitment until a sentence had been completed; and (3) that the psychiatric-medical community's alleged view that treatment for sex offenders is "largely ineffective." *Id.*

[40] *See id.* (citing State *ex rel.* Thomson v. Zimmerman, 264 Wis. 644, 652, 60 N.W.2d 416 (1953)).

[41] *See id.* at 125 (citing WIS. STAT. ANN. § 980.06(1) (West 1995)).

[42] *Id.* (citing WIS. STAT. ANN. § 51.61(1)(f) (West 1987 & Supp. 1995)).

[43] *See id.*

treatment for sex offenders ineffective, the court stated that no consensus was visible within that community, and that the state had provided its own studies showing that several programs provided useful treatment.[44]

3. Dangerousness

Finally, Post and Oldakowski maintained that the Statute's definition of dangerousness set an impermissibly low standard of "substantial risk" and was therefore unconstitutional.[45] Again noting that legislatures were free to find their own determinations within Supreme Court guidelines, the court found that Wisconsin's choice was legitimate and constitutionally sound.[46]

4. Nature and Duration of Commitment

The defendants argued that the commitment provided by the Statute bore no reasonable relation to the purposes of commitment, and was contrary to the Supreme Court's holding in *Foucha v. Louisiana*.[47] The court found that the nature of the commitment was consistent with the dual state purposes of protecting the community and providing treatment for mentally disordered sexual offenders.[48] Addressing the contention that the potentially indefinite nature of the commitment made it unreasonable, the court held that the duration was reasonably related to the purposes of the commitment, for the commitment was "intimately linked to treatment" of the mental condition.[49] The court also rebutted defendants' arguments based on *Foucha*, citing *State v. Randall*,[50] which held that continued commitment of insanity acquitees under Wisconsin's statute was permissible because such individuals were treated in a manner consistent with the purposes of their commitment.[51]

5. Conclusion

Finally, the court pointed out that substantive due process analysis requires the balancing of individual liberties against the demands of society.[52] This balancing

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[44] *See id.*

[45] *See id.* at 126. A sexually violent person is considered dangerous under the Statute if "he or she suffers from a mental disorder that makes it substantially probable that the person will engage in acts of sexual violence." WIS. STAT. ANN. § 980.01(7) (West 1995).

[46] *See Post*, 541 N.W.2d at 126.

[47] 504 U.S. 71 (1992) (finding Louisiana's statutory scheme for the continued confinement of insanity acquittees violated substantive due process and equal protection guarantees).

[48] *See Post*, 541 N.W.2d at 126.

[49] *See id.*

[50] 532 N.W.2d 94 (Wis. 1995).

[51] *See Post*, 541 N.W.2d at 128.

[52] *See id.* (citation omitted).

can permit "danger-preempting" confinement in some circumstances.[53] Therefore, the court found that the Statute "permissibly balances the individual's liberty interest with the public's right to be protected from the dangers posed by persons who have already demonstrated their propensity and willingness to commit sexually violent acts."[54]

C. *Equal Protection*

Post and Oldakowski also challenged the Statute on equal protection grounds, alleging substantive differences between the two Wisconsin statutes for initial commitment.[55] The defendants also alleged a number of procedural differences between the two statutes.[56] The parties and the court all agreed that the persons committed under the two statutes are similarly situated for purposes of an equal protection comparison.[57]

The court noted that no clear articulation exists in Supreme Court jurisprudence regarding whether to apply the rational basis test, as argued by the state, or the strict scrutiny test, as maintained by the defendants.[58] Wisconsin, however, in a similar commitment statute, has applied the rational basis test.[59] The court acknowledged that the Supreme Court's introduction of the "intermediate" level of scrutiny also muddied the issue of which standard to apply.[60] Having laid out

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[53] *See id.*

[54] *Id.*

[55] *See id.* at 128. The defendants claimed the following differences between chapter 51 and the Statute: (1) Section 51.20(1)(a)1 requires a showing of "mental illness," whereas the Statute only requires "mental disorder;" (2) the Statute, unlike chapter 51, contains no requirement for an individualized finding of suitability for treatment; and (3) the Statute's standard for dangerousness is insufficient because it contains no overt act requirement, as does chapter 51. *See id.*

[56] *See id.* Defendants claimed the following procedural differences between the statues violated equal protection guarantees: (1) the Statute's commitments are indefinite, as opposed to chapter 51's automatic expiration requirement; (2) a person committed under the Statute must affirmatively petition for discharge; (3) the petitioner carries the burden of proof at probable cause hearings for discharge; (4) no jury is provided at discharge trials; (5) persons filing petitions without the department's approval and denied must allege "new factors" in subsequent petitions. *See id.*

[57] *See id.* at 129.

[58] *See id.* The "rational basis test" provides that classifications do not violate equal protection if a rational relationship exists between the disparity of treatment and some legitimate governmental purpose. *See id.* (citing Heller v. Doe, 113 S. Ct. 2637, 2642 (1993)). Strict scrutiny applies to classifications based on suspect classes, such as race and national origin, and to classifications that arbitrarily deprive one class of persons, but not another similarly situated, of a fundamental right. *See id.* (citing Graham v. Richardson, 403 U.S. 365, 376 (1971); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942)).

[59] *See id.* (citing State *ex rel.* Farrell v. Stovall, 207 N.W.2d 809 (1973) (interpreting chapter 975, the Sex Crimes Act)).

[60] *See id.* (citing Plyler v. Doe, 457 U.S. 202, 217-18 (1982) (intermediate level of

the three tests, the court declined to choose a specific level of scrutiny, finding that all but one of the alleged disparities would withstand even the strict scrutiny test, finding that "[t]he state's compelling interest in protecting the public provides the necessary justification for the differential treatment of the class of sexually violent persons whose mental disorders make them distinctively dangerous because of the substantial probability that they will commit future crimes of sexual violence."[61]

1. Equal Protection Challenges to Substantive Standards for Commitment

The court stated that the defendants' equal protection challenge regarding the distinction between "mental disorder" and "mental illness," as described in its discussion of substantive due process, was simply a difference in nomenclature, not substance.[62] Therefore, this argument failed. The court next addressed the contention that the lack of a "suitability for treatment" requirement violated equal protection.[63] The court found that "broad leeway is particularly appropriate in the treatment of those prone to sexual violence," and because those afflicted may require non-traditional means of treatment, the legislature was justified in not requiring a showing of amenability to treatment.[64] Finally, the court concluded that the lack of an overt act requirement in the Statute's definition of dangerousness did not violate equal protection.[65] The court noted that other statutes have different requirements of dangerousness; the legislature here only placed those convicted of specific sexually violent acts in the past and are likely to commit such acts in the future.[66] The public interest in protecting the public from such persons justified the legislature's choice in this instance.[67]

2. Equal Protection Challenges to Procedures to Commitment

The court agreed with the state's argument that the procedural safeguards required by the Statute were justified by the state's compelling interest in protecting society from those who are dangerous due to a mental disorder that creates a substantial probability of future violent acts.[68] The court stated that the strict procedural requirements of the Statute at the initial commitment stage reduced the need for some of the additional protections provided by other statutes.[69] The court also rejected defendants' argument that the procedures established for peti-

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scrutiny applied where a classification need only further a "substantial interest of the State").

[61] *Id.* at 130.

[62] *See id.*

[63] *See id.*

[64] *Id.* at 131.

[65] *See id.*

[66] *See id.*

[67] *See id.*

[68] *See id.*

[69] *See id.* at 132.

tions for discharge were impermissibly onerous. The court held that the opportunities to seek release every six months, and to seek discharge annually, were sufficient to meet constitutional requirements.[70]

The court also denied defendants' challenge based on the possibility of indefinite confinement, stating that "release properly hinges on the progress of treatment rather than any arbitrary date in time."[71] Post and Oldakowski next argued that the Statute must fail because it does not provide for jury trials at discharge hearings. The court agreed that there was no grounds for distinction between the Statute and chapter 51 on this issue. However, this did not render the Statute defective; rather, the court noted that it "has previously construed deficient statutes to include constitutionally required procedures."[72] Therefore, the court held that persons committed under the Statute must be afforded the right to a jury at discharge hearings.[73] Finally, the defendants challenged the Statute on the grounds that persons who might be equally dangerous but are not currently incarcerated are not affected by the Statute.[74] The court rejected this argument, stating that is would not subscribe to an "all or nothing" approach; instead, it pointed out that the legislature was free to recognize degrees of harm, and direct its efforts at the severest problems.[75]

IV. CONCLUSION

In *State v. Post*, the Wisconsin Supreme Court held that the Sexually Violent Predators act withstood constitutional challenges based on substantive due process and equal protection grounds. The state is allowed to develop differing statutory schemes and definitions to provide protection to the public, and provide treatment for persons suffering from mental disorders.

David G. Braithwaite

Young v. Weston, 898 F. Supp. 744 (W.D. Wash. 1995). WASHINGTON'S SEXUALLY VIOLENT PREDATOR LAW, WHICH ALLOWS INVOLUNTARY CONFINEMENT OF DANGEROUS CRIMINALS WHO ARE NOT MENTALLY ILL, VIOLATES THE DUE PROCESS, EX POST FACTO AND DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES CONSTITUTION.

I. INTRODUCTION

The District Court for the Western District of Washington found that the Sex-

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[70] *See id.* The court noted that some of the protections provided committed persons include the rights available to a defendant at a criminal trial. *See id.* (citing WIS. STAT. ANN. §§ 980.05(1m), 980.03(3) (West 1995)). The court also stated that chapter 51's automatic expiration provision was not a universal requirement. *See id.*

[71] *Id.*

[72] *Id.* at 133 (citing State *ex rel.* Terry v. Schubert, 498, 247 N.W.2d 109 (Wis. 1976)).

[73] *See id.*

[74] *See id.*

[75] *See id.*

ually Violent Predator Statute ("Statute")[1] is unconstitutional on its face and granted petitioner Young's summary judgment motion for a writ of habeas corpus.

II. BACKGROUND

The petitioner, Andre Brigham Young, served three sentences for three separate rape convictions over a period of twenty-two years.[2] The day before his release from a 1985 rape conviction, the State of Washington ("State") filed a petition for involuntary commitment under Washington's Sexually Violent Predator Statute.[3] The State transferred Young to the Special Commitment Center and held him until his trial in February, 1991.[4] At trial, the jury found that Young fit the statute's definition of a sexually violent predator and the State had him committed.[5]

The state trial court denied Young's personal restraint petition and he appealed to the Washington Supreme Court, which held that the statute was constitutional.[6] Young then petitioned for a writ of habeas corpus, arguing that his confinement was unconstitutional and that the Statute is unconstitutional on its face because it violates, among other things, the ex post facto clause of Article 1 of the United States Constitution, the due process clause of the Fourteenth Amendment, and the double jeopardy clause of the Fifth Amendment.[7] Both parties filed motions for summary judgment and Young additionally requested an evidentiary hearing in the event the state supreme court did not grant his summary judgment motion.[8]

III. ANALYSIS

A. *The Statute*

The Statute provides for increased sentences for sex offenders, community registration of sex offenders, and compensation for victims of sex crimes.[9] The

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[1] WASH. REV. CODE § 71.09 (1990).

[2] *See* Young v. Weston, 898 F. Supp. 744, 748 (W.D. Wash. 1995).

[3] *See id.*

[4] *See id.*

[5] *See id.*

[6] *See id.* (citing *In re* Personal Restraint of Young, 857 P.2d 989 (Wash. 1993)).

[7] *See id.* at 745-46.

[8] *See id.* at 746.

[9] *See id.*

Statute authorizes the indefinite commitment of sex offenders that the State determines are "sexually violent predators."[10] The legislature's findings indicate that the Statute applies to sex offenders who would not be covered under the then existing involuntary treatment act because they are not mentally ill.[11] The legislature considered that these sex offenders, even though not technically mentally ill, are extremely dangerous and "unamenable to existing mental illness treatment modalities."[12] In addition, the legislature found the existing involuntary commitment act insufficient because it did not address the specific treatment needs of sexually violent predators.[13]

The Statute defines a sexually violent predator as one who has been convicted of a sexually violent crime and suffers from a "mental abnormality" or "personality disorder" which makes them likely to engage in predatory sexually violent acts.[14] The definition of a sexually violent offense includes virtually any violent crime that is sexually motivated.[15] The legislature defined mental abnormality as a condition that predisposes a person to commit criminal sexual acts that violate the public's health and safety.[16]

At the expiration of a convicted sex offender's sentence, the State can petition the court to involuntarily commit the offender.[17] A judge must determine whether probable cause exists to demonstrate that the offender fits the statute's definition of a sexually violent predator.[18] After the judge's determination, a professional evaluates the offender under Department of Social and Health Services ("DSHS") rules.[19] The Statute provides for a jury trial within forty-five days, and the right to counsel and experts at the trial.[20] If the jury finds, beyond a reasonable doubt, that the offender is a "sexually violent predator," the State can commit the offender to a secure facility within a correctional institution.[21] The Statute's only requirements for treatment are that care and treatment conform to "constitutional requirements."[22]

A detainee may petition the court for release in only two circumstances. First, if the Secretary of the DSHS believes that the detainee's abnormality or personality disorder has changed so that the detainee will not commit more predatory

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[10] *Id.* (citing WASH. REV. CODE § 71.09 (1990)).

[11] *See id.* (citing WASH. REV. CODE § 71.09.010 (1990)).

[12] *Id.* (citing WASH. REV. CODE § 71.09.010 (1990)).

[13] *See id.* (citing WASH. REV. CODE § 71.09.010 (1990)).

[14] *Id.* (citing WASH. REV. CODE § 71.09.020(1) (1990)).

[15] *See id.* at 746-47 (citing WASH. REV. CODE § 71.09.020(4) (1990)).

[16] *See id.* at 747 (citing WASH. REV. CODE § 71.09.020(3) (1990)).

[17] *See id.* (citing WASH. REV. CODE § 71.09.030 (1990)).

[18] *See id.* (citing WASH. REV. CODE § 71.09.030 (1990)).

[19] *See id.* (citing WASH. REV. CODE § 71.09.030 (1990)).

[20] *See id.* (citing WASH. REV. CODE § 71.09.050 (1990)).

[21] *Id.* (citing WASH. REV. CODE § 71.09.060 (1990)). State mental facilities and regional rehabilitation centers were considered by the legislature to be too insecure for sexually violent predators. *See* WASH. REV. CODE § 71.09.060(3) (1990).

[22] *See Young*, 898 F. Supp. at 747. (citing WASH. REV. CODE § 71.09.080 (1990)).

acts, then the Secretary can authorize the detainee's petition.[23] The court must hold a hearing on the petition within forty-five days and the State has the burden of proving the petitioner is not safe to be released.[24] Second, even if the Secretary does not authorize a petition, the Secretary must inform the detainee annually of the detainee's right to petition.[25] A judge will decide if the petition shows probable cause for a hearing to determine if the detainee's condition has changed.[26] Without probable cause for a hearing, the Statute requires that the court summarily deny the petition.[27] The second hearing, if the judge grants it, is similar in operation to the original commitment hearing.[28]

B. *Substantive Due Process*

The district court held that the Sexually Violent Predator Statute violated the due process clause of the Fourteenth Amendment because it committed sex offenders who are not mentally ill.[29] Finding that substantive due process bars interference with liberty interests, the court held that freedom from bodily restraint was at the "heart of liberty interests protected from arbitrary government actions."[30] The court examined Supreme Court precedent and determined that a State can only detain a person for non-punitive reasons in limited circumstances.[31] While the Supreme Court has recognized that a State can act to protect the public from a dangerous individual who is mentally ill, the district court held that "[a]bsent clear and convincing evidence of both mental illness and dangerousness . . . detention is impermissible."[32] Since a detainee is incarcerated for an indefinite time, the court distinguished the Statute from pre-trial detention schemes authorized in *United States v. Salerno*.[33]

Because the Statute did not require that the detainee be mentally ill before the State could indefinitely incarcerate the individual, the court rejected the State's argument that the Statute followed a traditional civil commitment scheme.[34] The court examined the Statute's language and legislative history and determined that the Statute did not require a finding of mental illness.[35] The legislative findings expressly state that the Statute is aimed at individuals "who do not have a

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[23] *See id.*

[24] *See id.* (citing WASH. REV. CODE § 71.09.090 (1990)).

[25] *See id.* at 747-48 (citing WASH. REV. CODE § 71.09.090(2) (1990)).

[26] *See id.* at 748 (citing WASH. REV. CODE § 71.09.090(2) (1990)).

[27] *See id.* (citing WASH. REV. CODE § 71.09.100 (1990)).

[28] *See id.* (citing WASH. REV. CODE § 71.09.090(2) (1990)).

[29] *See id.* at 748-51.

[30] *Id.* at 748 (citing Youngberg v. Romero, 457 U.S. 307, 316 (1982)).

[31] *See id.* at 748-49 (citations omitted).

[32] *Id.* at 749 (citing Foucha v. Louisiana, 504 U.S. 71, 80 (1992); Addington v. Texas, 441 U.S. 418, 426 (1979)).

[33] *See id.* (citing United States v. Salerno, 481 U.S. 739 (1987)).

[34] *See id.*

[35] *See id.*

mental disease."[36] Additionally, the Statute's use of "mental abnormality" and "personality disorder" as the requirements for a "sexually violent predator" makes it clear that the Statute does not require mental illness.[37] The court held that the terms "mental abnormality" and "personality disorder" are not accepted in the psychiatric community and instead evoke "a circular definitional structure in which the only observed characteristic of the disorder is the predisposition to commit sex crimes."[38]

The legislative history also revealed to the court that the purpose of the statute was not to commit dangerous mentally ill persons.[39] The Governor's Task Force that drafted a bill similar to the final enacted Statute intended to draft legislation that permitted a State to involuntarily commit non-mentally ill sex offenders.[40] The court concluded that the Statute applies to people with antisocial behaviors falling short of mental illness.[41] Having an antisocial personality, the court held, "is constitutionally insufficient to support indefinite confinement."[42]

C. *Ex Post Facto*

The court also held that the Statute violated the ex post facto clause in Article I of the United States Constitution.[43] It noted that the Supreme Court of the United States had described ex post facto laws as criminal laws that are retrospective and disadvantage the offender.[44] Since the Statute is retrospective and disadvantages offenders, the only question the court considered was whether the Statute was criminal or civil in nature.[45] Even if the legislature characterizes a statute as "civil," the court held that it must consider whether the statute is actually so punitive in its effect and purpose that it negates the civil intention.[46] To determine whether the Statute was criminal or civil the court looked at the factors articulated by the Supreme Court in *Kennedy v. Mendoza-Martinez*;[47] after weighing these factors, the district court held that the Statute was criminal.[48]

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[36] *Id.* (citing WASH. REV. CODE § 71.09.010 (1990)).

[37] *See id.* at 750.

[38] *Id.*

[39] *See id.*

[40] *See id.*

[41] *See id.*

[42] *Id.*

[43] *See id.* at 751-53.

[44] *See id.* at 751 (quoting Weaver v. Graham, 450 U.S. 24, 28 (1981)).

[45] *See id.*

[46] *Id.* (quoting United States v. Ward, 448 U.S. 242, 248 (1980)).

[47] 372 U.S. 144, 168-69 (1963) (factors to consider include whether the sanction involves an affirmative restraint, whether the sanction has historically been regarded as punishment, whether a finding of scienter is necessary, whether the statute promotes deterrence and retribution, whether the statute applies to behavior that is already a crime, whether there is an alternative purpose which can be rationally connected to the statute, and whether the sanction is excessive considering the alternative purpose).

[48] *See Young*, 898 F. Supp. at 752-53.

First, because the Statute authorizes the State to detain a person for an indefinite amount of time, the Statute "subjects individuals to an affirmative restraint," a complete loss of freedom for an indefinite period of time.[49] The court distinguished the Statute from a similar Illinois statute, which the Supreme Court determined was civil, finding that the Illinois statute allowed detainees to be released after a brief confinement, the detainees could apply for release at any time, and the statute provided for conditional release provisions if the court could not be certain the offenders were dangerous.[50] In contrast, under the Statute, a detainee can only receive a release hearing if the Secretary authorizes a petition or the detainee can establish probable cause.[51] Also, the Statute does not contain a conditional release provision similar to the Illinois statute.[52]

Second, the Court held that the Statute was criminal in nature because it only applied to people convicted of a crime, and was therefore limited in application to behavior that was already criminal.[53] Third, according to the court, the Statute promoted both deterrence and retribution by requiring that the offender "serve his entire criminal sentence prior to being committed."[54] This requirement distinguished the Statute from the Illinois statute which required that the state choose either punishment or treatment at the time the offender is charged.[55] The court rejected claims that the Statute also focused on treatment, holding that it "is inextricably linked to traditional goals of punishment."[56] By mandating that an offender serve his sentence before making any treatment available to him, the court felt that punishment was the Statute's primary concern and treatment was secondary.[57] Weighing all of these factors together, the court concluded that, although the statute has an alternative purpose and the indefinite commitment is not necessarily excessive in relation to that purpose, the Statute is criminal in nature and therefore violates the Constitution's prohibition of ex post facto laws.[58]

D. *Double Jeopardy*

Lastly, the court held that the Statute violated the double jeopardy clause[59] of

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[49] *Id.* at 752.

[50] *See id.* (citing Allen v. Illinois, 478 U.S. 364 (1986)).

[51] *See id.* (citing WASH. REV. CODE § 71.09.090 (1990)).

[52] *See id.*

[53] *See id.*

[54] *Id.* at 753.

[55] *See id.* at 752-53 (citing *Allen*, 478 U.S. at 373).

[56] *Id.* at 753.

[57] *See id.*

[58] *See id.*

[59] The double jeopardy clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *See* United States v. Halper, 490 U.S. 435, 440 (1989).

the Fifth Amendment by providing multiple punishments for the same offense.[60] The court concluded that double jeopardy applies in civil as well as criminal cases if "the character of the actual sanctions imposed on the individual" serves the goals of punishment.[61] Reiterating its ex post facto holding that the Statute promotes deterrence and retribution, the court found that the Statute does serve punishment goals.[62] The State punished the offender twice, once for the violent sexual offense and then again under the Statute's incarceration scheme.[63]

Due to these constitutional violations the court did not reach any of Young's other claims or his request for an evidentiary hearing.[64] The court granted his writ of habeas corpus.[65]

IV. CONCLUSION

The court held that Washington's Sexually Violent Predator Law is unconstitutional. It violates the due process clause by authorizing the state to incarcerate sex offenders even though they are not mentally ill. For the purposes of the ex post facto and double jeopardy clauses, the Statute is criminal in nature because it promotes the punishment goals of deterrence and retribution. The Statute violates the ex post facto clause's prohibition on laws that are retrospective and that disadvantage offenders. Finally, the Statute's authorization of multiple punishments for the same offense violates the double jeopardy clause. The court, therefore, granted Young's motion for summary judgment on his writ for habeas corpus.

Maya D. Bazar

In re Twining, 894 P.2d 1331 (Wash. Ct. App. 1995). THE SEXUALLY VIOLENT PREDATORS STATUTE DOES NOT VIOLATE EQUAL PROTECTION GUARANTEES BY DISTINGUISHING BETWEEN INDIVIDUALS WHO HAVE BEEN CHARGED OR CONVICTED OF CRIMES OF SEXUAL VIOLENCE AND THOSE WHO HAVE NOT.

I. INTRODUCTION

The State of Washington ("State") filed a petition in superior court to have Stephen Twining declared a "sexually violent predator" under the Sexually Violent Predators Statute ("Statute")[1] and to have him committed.[2] The case was tried in front of a jury which determined, beyond a reasonable doubt, that Twining was a "sexually violent predator."[3] The court ordered that he be "committed

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[60] *See Young*, 898 F. Supp. at 753-54.

[61] *Id.* at 753 (citing *Halper*, 490 U.S. at 446).

[62] *See id.*

[63] *See id.* at 754.

[64] *See id.* at 745.

[65] *See id.* at 754.

[1] *See* WASH. REV. CODE § 71.09 (1990).

[2] *See In re* Twining, 894 P.2d 1331, 1333 (Wash. Ct. App. 1995).

[3] *Id.* at 1335.

to the custody of the department of social and health services in a secure facility for control, care, and treatment until such time as [his] mental abnormality or personality disorder has so changed that [he] is safe to be at large."[4] Twining appealed the decision.[5] The court of appeals affirmed.[6]

II. BACKGROUND

When Stephen Twining was seventeen years old, he was convicted of having taken indecent liberties with an eight-year-old girl.[7] He was released in August 1986 and, within a month, raped a four-year-old boy.[8] "This was not discovered for some time," and in October 1986 he fondled a four-year-old girl.[9] He was apprehended and pled guilty to this charge.[10] Subsequent to his release in February 1987, he attacked an eight-year-old girl in a public library restroom.[11] A passerby rescued the girl, and the police apprehended Twining.[12] He pled guilty to attempted indecent liberties with the eight-year-old girl and to the earlier rape of the four-year-old boy.[13]

Prior to his March 1991 release, the state filed a petition pursuant to the Statute[14] to have him committed as a sexually violent predator.[15] The state presented the testimony of Dr. Irwin Dreiblatt, a clinical psychologist who specializes in deviant behavior.[16] Based on various reports, records, and evaluations, Dr. Dreiblatt formed a "diagnostic impression" that Twining suffered from paraphilia, a mental abnormality, as well as an unspecified personality disorder, and would continue to engage in predatory acts of sexual violence.[17]

In response, Twining attempted to introduce the opinion testimony of Dr. Henry Cellini, who had a Ph.D. in educational psychology but was not a board certified psychologist in any state.[18] However, the trial court refused to permit this testimony because the opinion was not based on demonstrably reliable methodology or principles.[19] Twining was declared a sexually violent predator, and was committed to the custody of the Department of Social and Health Services for the treatment and control of his disorder until such time that he could safely

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[4] WASH. REV. CODE § 71.09.060 (1990).
[5] *See Twining*, 894 P.2d at 1333.
[6] *See id.*
[7] *See id.* at 1334.
[8] *See id.*
[9] *Id.*
[10] *See id.*
[11] *See id.*
[12] *See id.*
[13] *See id.*
[14] WASH. REV. CODE § 71.09.030 (1990).
[15] *See Twining*, 894 P.2d at 1334.
[16] *See id.*
[17] *Id.*
[18] *See id.*
[19] *See id.*

be released into the general public.[20]

On appeal, Twining raised several contentions. First, he alleged that the Statute violated his equal protection guarantees.[21] Second, he claimed that the trial court improperly admitted the state's expert and excluded his own.[22] Third, Twining argued that the trial court improperly refused to instruct the jury that he was presumed not to be a "sexually violent predator."[23] The court of appeals rejected these arguments and affirmed the trial court's decision.[24]

III. ANALYSIS

A. *Equal Protection*

Under the Statute, a "sexually violent predator" is defined as "any person who has been convicted of or charged with a crime of sexual violence and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in predatory acts of sexual violence."[25] When a person who has been convicted of or charged with a sexually violent offense is about to be released, the state may file a petition to have the individual committed as a "sexually violent predator."[26] "If [a] court or jury determines that the person is a sexually violent predator, the person shall be committed to the custody of the department of social and health services in a secure facility for control, care, and treatment until such time as the person's mental abnormality or personality disorder has so changed that the person is safe to be at large."[27]

The court first analyzed the contention that the Statute violated the equal protection clauses of the Fourteenth Amendment of the United States Constitution and Article I, section 12 of the Washington Constitution.[28] The court noted that persons similarly situated with respect to the legitimate purpose of a law must receive like treatment.[29] Twining maintained that his equal protection guarantees had been violated because the Statute "distinguishes between those individuals likely to engage in sexually violent predatory acts who were charged or convicted with a crime of sexual violence, and those individuals likely to engage in sexually violent predation whose crimes were not discovered until after the statute of limitations had run."[30]

The court determined that Twining did not have a valid equal protection

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[20] *See id.* at 1335.

[21] *See id.*

[22] *See id.*

[23] *Id.* at 1338.

[24] *See id.*

[25] WASH. REV. CODE § 71.09.020 (1990).

[26] WASH. REV. CODE § 71.09.030 (1990).

[27] WASH. REV. CODE § 71.09.060 (1990).

[28] *See Twining*, 894 P.2d at 1335.

[29] *See id.* (citing *In re* Knapp, 687 P.2d 1145 (Wash. 1984)).

[30] *Id.*

claim.[31] The legislature intended to commit those individuals who present the most significant threat to society.[32] The court held that limiting the class of individuals to those who actually have been charged or convicted assures that this interest will be met.[33] Therefore, the distinction was relevant to the legislative intent and was permissible.[34]

B. *Expert Testimony*

The court next analyzed Twining's contention that the trial court abused its discretion by admitting the state's expert witness while excluding his expert witness, Dr. Cellini.[35] Twining maintained that he had a statutory right to obtain an expert.[36] Moreover, he contended that the trial court should not have permitted the state's expert witness, Dr. Dreiblatt, to testify about his "diagnostic impression" of Twining because he did not interpret "reasonable psychological certainty" to mean "more likely than not."[37]

The court first pointed out that the legislature recognized the significance of expert testimony in these cases by explicitly giving individuals the right to be examined by a qualified expert.[38] Psychiatric or psychological testimony is central in these determinations because the state has to demonstrate that the individual suffers from a mental abnormality or personality disorder.[39] Expert testimony is therefore crucial.

However, the court noted that in order for expert testimony to be admissible, a proper foundation must first be established.[40] Expert testimony will only be admissible if "(1) the witness qualifies as an expert and (2) the expert testimony is helpful to the trier of fact."[41] In this instance, Twining's witness was neither qualified as a psychologist nor as a psychiatrist.[42] Moreover, the witness admitted that he had not read all the appropriate materials on the future dangerousness of sexually violent individuals.[43] Therefore, the expert's exclusion for improper foundation was the result of his inadequate preparation and knowledge.[44] Such exclusions are not tantamount to the denial of an individual's right to an expert under the Statute.[45]

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[31] *See id.*
[32] *See id.* (citing WASH. REV. CODE § 71.09.010 (1990)).
[33] *See id.*
[34] *See id.*
[35] *See id.*
[36] *See id.*
[37] *Id.* at 1336.
[38] *See id.* at 1335 (citing WASH. REV. CODE § 71.09.050 (1990)).
[39] *See id.* at 1336.
[40] *See id.* at 1335.
[41] *Id.* (citing FED. R. EVID. 702).
[42] *See id.* at 1336.
[43] *See id.*
[44] *See id.*
[45] *See id.*

In addition to the two foundational requirements for the use of expert testimony, the court noted that under Washington law, "[e]xpert testimony concerning a person's mental status is not admissible unless the expert holds his or her opinion with a reasonable medical and psychological certainty."[46] The court of appeals therefore rejected Twining's reliance on a case in which the term "reasonable medical certainty" had been interpreted to mean "more likely than not," finding its reasoning unpersuasive.[47] The court stated that expert testimony is admissible only if it exhibits "reasonable medical certainty."[48] Therefore, because Dr. Dreiblatt, a qualified expert under Washington standards, had testified that the reports, records, and evaluations that he had reviewed had led him to form his opinion with a "reasonable degree of psychological certainty," the court found that Dr. Dreiblatt's testimony had been properly admitted over Twining's objections.[49]

The court then shifted its attention to Twining's last contention.[50] Twining argued that the trial court should have instructed the jury that he was presumed not to be a "sexually violent predator."[51] He maintained that the trial court's refusal to do so amounted to an abuse of discretion.[52]

The court noted that although the commitment proceeding is civil in nature, the Statute does afford defendants certain criminal rights, such as the requirement of using the "beyond a reasonable doubt" standard, the consideration of other, less restrictive alternatives to commitment, and the requirement of unanimity of the verdict.[53] However, the court noted that the Statute does not recognize the presumption of innocence as one of these "criminal" rights.[54] The court refused to apply any criminal constitutional protections beyond those already recognized in the Statute.[55] The court therefore determined that the trial court's decision was not an abuse of discretion.[56]

IV. CONCLUSION

The court of appeals found little merit in Stephen Twining's appeal of his civil commitment as a "sexually violent predator" and affirmed the trial court's decision. The distinction that the Statute makes between individuals who have been charged or convict of crimes of sexual violence and those who have not does not violate equal protection guarantees and is not constitutionally impermis-

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[46] *Id.* (citing State v. Martin, 538 P.2d 873 (Wash. 1975)).

[47] *Id.* at 1336-37 (citing Orcutt v. Spokane Cy., 364 P.2d 1102 (Wash. 1961)).

[48] *Id.* at 1337 (citing *Martin*, 538 P.2d 873; State v. Terry, 520 P.2d 1397 (Wash. 1974)).

[49] *See id.*

[50] *See id.* at 1338.

[51] *Id.*

[52] *See id.*

[53] *See id.* at 1339.

[54] *See id.*

[55] *See id.*

[56] *See id.*

sible. Moreover, the court found no error in the trial court's application of the Statute regarding expert testimony and the presumption of innocence.

Jonathan B. Lehto

E.B. v. Poritz, 914 F. Supp. 85 (D.N.J. 1996). TEMPORARY INJUNCTION ISSUED PREVENTING IMPLEMENTATION OF TIER TWO AND TIER THREE NOTIFICATIONS UNDER MEGAN'S LAW UNTIL FURTHER ORDER OF THIS COURT.

I. BACKGROUND

In 1974, plaintiff E.B. was sentenced to thirty-three years in the Adult Diagnostic and Treatment Center ("ADTC") after pleading guilty in New Jersey Superior Court to three separate offenses of sexual abuse against young boys.[1] On June 5, 1979, plaintiff was paroled and extradited to Virginia to serve time pursuant to an unrelated 1976 guilty plea for murder.[2] Plaintiff was paroled by Virginia in June 1989.[3]

Plaintiff is now married and owns a home in Englewood, New Jersey. In accordance with Megan's Law,[4] which requires registration of certain sex offenders,[5] plaintiff registered with the Englewood Police Department on February 25, 1995 and was classified as a Tier Three Offender.[6] As a result of this classification, the Prosecutor's Office proposed to notify all public and private educational institutions and organizations within a one-half mile radius of plaintiff's home as well as people who reside or work within a one-block radius of plaintiff's house of E.B.'s prior sexual offenses.[7]

Plaintiff filed a Notice of Appeal and Emergent Application for a Stay of Notification with the New Jersey Superior Court, Appellate Division, which was granted on December 20, 1995.[8] Upon the expiration of the court-ordered stay,

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[1] *See* E.B. v. Poritz, 914 F. Supp. 85, 87 (D.N.J. 1996).

[2] *See id.*

[3] *See id.*

[4] *See* N.J. STAT. ANN. § 2C:7 (West 1995).

[5] *See id.* § 2C:7-2.

[6] Megan's Law provides for three levels of notification depending on the risk of re-offense:

> (1) If risk of re-offense is low, law enforcement agencies likely to encounter the person registered shall be notified; (2) If risk of re-offense is moderate, organizations in the community including schools, religious and youth organizations shall be notified in accordance with the Attorney General's guidelines, in addition to the notice required by paragraph (1) of this subsection; (3) If risk of re-offense is high, the public shall be notified through means in accordance with the Attorney General's guidelines designed to reach members of the public likely to encounter the person registered, in addition to the notice required by paragraphs (1) and (2) of this subsection.

N.J. Stat. Ann. § 2C:7-8c (West 1995).

[7] *See E.B.*, 914 F. Supp. at 87-88.

[8] *See id.* at 88.

the parties entered into a Consent Order staying notification until further order by the New Jersey Supreme Court.[9] The New Jersey Supreme Court denied plaintiff's petition for certification of appeal on January 18, 1996.[10]

Plaintiff then filed suit in the United States District Court, District of New Jersey on January 19, 1996, challenging the constitutionality of the notification requirement of Megan's Law.[11] A Consent Order staying the notification until further Order of the Court was entered into by the parties.[12] Oral argument was heard on February 1, 1996.[13]

II. ANALYSIS

The United States District Court for the District of New Jersey previously analyzed Megan's Law and concluded that "the retrospective application of Megan's Law violates the ex post facto clause of the United States Constitution."[14] Subsequently, the New Jersey Supreme Court concluded that Megan's Law is constitutional.[15] *E.B. v. Poritz* again presented the district court with the question of the constitutionality of Megan's Law.

A. *Jurisdiction*

The court held that it had subject matter jurisdiction to decide this case as an exception to the Rooker-Feldman doctrine.[16] Ordinarily, the Rooker-Feldman doctrine bars direct review in the lower federal courts of a decision reached by the highest state court.[17] Under this doctrine, the district court does not have subject matter jurisdiction to review a state court determination or to "evaluate constitutional claims that are inextricably intertwined with the state court's decision."[18] The court cited two justifications for this doctrine. First, federal district courts should presume that completed state court proceedings have correctly resolved the issues.[19] Second, parties are entitled to finality to ensure that litigants "do not take multiple bites from the same apple."[20]

District courts are not always required to abstain under the Rooker-Feldman doctrine. Where a party in federal district court is not a party to the state court action and therefore could not litigate the issue, the district court has jurisdiction

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[9] *See id.*

[10] *See id.*

[11] *See id.*

[12] *See id.*

[13] *See id.*

[14] Artway v. Attorney Gen. of N.J., 876 F. Supp. 666, 692 (D.N.J. 1995).

[15] *See* Doe v. Poritz, 662 A.2d 367 (N.J. 1995).

[16] *See E.B.*, 914 F. Supp. at 90.

[17] *See id.* (citing Asarco Inc. v. Kadish, 490 U.S. 605, 622 (1988)).

[18] *Id.* at 89.

[19] *See id.*

[20] *Id.* (quoting Valenti v. Mitchell, 962 F.2d 288, 297 (3d Cir. 1992)).

despite the Rooker-Feldman doctrine.[21] In addition, the federal district court has jurisdiction where the claims in that court have not been determined by the state court and the claims are not inextricably intertwined with a prior state court decision.[22] Similarly, where a plaintiff does not have a realistic opportunity to fully and fairly litigate constitutional claims in state court, the federal district court will not be deprived of subject matter jurisdiction by the Rooker-Feldman doctrine.[23]

In this case, the court found that "plaintiff E.B. was denied an opportunity to meaningfully raise constitutional challenges to Megan's Law."[24] The court stated that the state court proceeding was a summary proceeding, limited in nature and scope, designed to provide only review of Tier classification and extent of notification.[25] Plaintiff's district court complaint asserted that Megan's Law violates the ex post facto clause, prohibition against double jeopardy, and protection of due process rights under the United States Constitution.[26] Because these claims were not raised in the New Jersey Supreme Court hearing, the court held that the Rooker-Feldman doctrine did not deprive the federal district court of subject matter jurisdiction in this case.[27]

B. *Preliminary Injunction*

The court granted plaintiff's application for a preliminary judgment.[28] In order to issue a preliminary injunction, a court must consider:

> (1) the likelihood that the plaintiff will prevail on the merits; (2) the extent to which the plaintiff is being irreparably harmed; and, where relevant, (3) the extent to which the defendant or other interested persons will suffer irreparable harm if the injunction is issued; and (4) the extent to which the public interest favors the granting of the requested relief.[29]

The plaintiff must produce evidence sufficient to convince the court that all four factors favor preliminary relief in order for an injunction to be issued.[30]

The court found that plaintiff established the first element by relying on the *Artway* decision that Tier Two and Tier Three notification provisions in Megan's

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[21] *See id.* (citing Johnson v. DeGrandy, 114 S. Ct. 2647 (1994)).

[22] *See id.* (citing Marks v. Stinson, 19 F.3d 873, 886 n.11 (3d Cir. 1994)).

[23] *See id.* (citing Centifanti v. Nix, 865 F.2d 1422, 1433 (3d Cir. 1989)).

[24] *Id.*

[25] *See id.* at 90.

[26] *See id.*

[27] *See id.*

[28] *See id.* at 91.

[29] *Id.* at 90 (citing Merchant & Evans, Inc. v. Roosevelt Bldg. Prods., 963 F.2d 628, 632-33 (3d Cir.), *on remand*, 1992 WL 160880 (E.D. Pa. June 24, 1992); Hoxworth v. Blinder, Robinson & Co., Inc., 903 F.2d 186, 197-98 (3d Cir. 1990)).

[30] *See id.* (citing Opticians Ass'n of Amer. v. Independent Opticians of Amer., 920 F.2d 187, 192 (3d Cir. 1990)).

Law are unconstitutional.[31] The court "stands by its decision in *Artway*, and therefore finds that plaintiff does have a reasonable probability of eventual success on the merits."[32] The court also concluded that the plaintiff established the second element by demonstrating that he will suffer irreparable injury if a preliminary injunction is not issued.[33] The harm must be such that monetary compensation is insufficient.[34] The court noted that "[w]here constitutional rights have been infringed upon, the threat of irreparable injury and disservice to the public interest is clear."[35] Citing *Artway*, the court noted that it previously recognized that publication of registrant information " 'may well affect his employability, his business associations with his neighbors, and thus, his ability to return to a normal private law abiding life in the community.' "[36] The court also noted that a threatening letter received by plaintiff was further evidence that plaintiff would be subject to irreparable harm if the injunction were not issued.[37] The court further noted that there is no way to retract the notification once given.[38] For these reasons, the court concluded that plaintiff demonstrated that he would suffer irreparable injury if a preliminary injunction is not issued.[39]

The court also examined the third element and found that the state will not suffer irreparable injury if a preliminary injunction is issued.[40] Concerning the fourth element, the defendants argued that legislative intent and citizen safety are paramount.[41] However, the court found that an individual's constitutional rights must not be subrogated to the public interest.[42] The court noted that since his release from prison in 1989, "plaintiff has been a law-abiding and productive member of society" and granted a preliminary injunction.[43]

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[31] *See id.* (citing Artway v. Attorney Gen. of N.J., 876 F. Supp. 666, 692 (D.N.J. 1995).

[32] *Id.*

[33] *See id.* at 91.

[34] *See id.*

[35] *Id.* (citing Doe v. Duncanville Indep. Sch. Dist., 994 F.2d 160, 166 (5th Cir. 1993)).

[36] *Id.* (quoting Artway v. Attorney Gen. of N.J., 876 F. Supp. 666, 689 (D.N.J. 1995).

[37] *See id.* The letter stated in part:

> They should have sent you to the gas chamber. You deserved to die. Anyone who assaults children does not have the right to live . . . . You know that you are not normal and you know you need to die. Kill yourself and end the misery you have caused so many people.

Id. at 91 n.3.

[38] *See id.*

[39] *See id.*

[40] *Id.* Defendants did not argue that they would suffer irreparable harm if a preliminary injunction was issued. *See id.*

[41] *See id.*

[42] *See id.*

[43] *Id.*

III. CONCLUSION

The District Court for the District of New Jersey reaffirmed its previous decision in *Artway*, holding that the retrospective application of Megan's Law violates the ex post facto clause of the United States Constitution.[44] The court found that it had jurisdiction over the case because the plaintiff's constitutional claims at issue here were not considered by the state courts. The court held that there was sufficient evidence for issuance of a preliminary injunction and therefore issued the injunction.

Amy E. Mulligan

In the Matter of Registrant E.A., 667 A.2d 1077 (N.J. Super. Ct. App. Div. 1995). PROSECUTOR'S DETERMINATIONS UNDER THE SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION STATUTE WERE REASONABLE AS TO GEOGRAPHIC SCOPE TO PRIVATE RESIDENCES, SCHOOLS AND DAY-CARE CENTERS, BUT REMAND IS REQUIRED FOR THE PROSECUTOR TO DEVELOP AND DISCLOSE THE LIST OF COMMUNITY ORGANIZATIONS TO BE NOTIFIED TO PROVIDE OFFENDERS THE OPPORTUNITY TO CHALLENGE THE NOTIFICATION.

I. INTRODUCTION

A convicted sex offender, E.A., sought judicial review of the prosecutor's determinations under the sex offender registration and community notification statute ("RCNL" or "Megan's Law").[1] The trial court approved the prosecutor's risk of reoffense assessment and scope of notification determinations. The offender appealed.[2]

II. BACKGROUND

E.A., a convicted sex offender whose conduct subjected him to the provisions of Megan's Law, appealed the portion of the trial court order that approved the prosecutor's scope of public notification.[3] E.A. was convicted of sex offenses against teenage boys and had recently been released from the Adult Diagnostic and Treatment Center after serving the maximum time permitted for sexual assault convictions.[4] The prosecutor, pursuant to provisions regarding community notification in Megan's Law,[5] notified E.A. that he had been classified as a Tier

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[44] *See id.* at 90.

[1] *See* In the Matter of Registrant E.A., 667 A.2d 1077, 1078 (N.J. Super. Ct. App. Div. 1995) (citing N.J. STAT. ANN. §§ 2C:7-1 to 2C:7-11 (West 1995)).

[2] *See id.*

[3] *See id.*

[4] *See id.*

[5] The state based the scope of notification on the density of the population as well as the offender's individual characteristics, such as whether the offender was a repetitive, compulsive pedophile, and whether the offender had sought out children in areas outside the offender's immediate community or children who were strangers in his community.

Three registrant.[6] The prosecutor informed E.A. of his intent to notify public and private schools, licensed day care centers, registered community organizations, and members of the public that the prosecutor believed were likely to encounter E.A.[7]

E.A. appealed the trial court's order approving the prosecutor's risk of reoffense assessment and scope of notification determinations.[8] E.A. challenged the order on two grounds. First, he appealed the notification of the proposed community organizations because of their failure to register pursuant to the Attorney General's Guidelines, thus preventing E.A. from determining whether these organizations were entitled to notification.[9] Second, E.A. challenged the geographical scope of notification, claiming that the scope had been arbitrarily conceived and was void of expert analysis, and therefore was contrary to the Attorney General's Guidelines.[10]

III. ANALYSIS

A. *Judicial Review Process*

The court began its analysis by referring to *Doe v. Poritz*,[11] which held that to safeguard a registrant's rights under procedural due process and the state fairness doctrine, judicial review must be extended to "assure that the risk of reoffense and the extent of notification are fairly evaluated before Tier Two [moderate risk of reoffense] or Tier Three [high risk of reoffense] notification is implemented."[12] In *Doe v. Poritz*, the New Jersey Supreme Court established an evidence production format, in which the state has the burden of production to show that there is sufficient evidence to justify the proposed level and manner of notification.[13] The burden of proof and persuasion then shifts to the registrant to show by a preponderance of the evidence that the prosecutors's determination does not conform to Megan's Law and the Attorney General's Guidelines.[14]

The court noted that the *Doe v. Poritz* judicial review process is in some respects unique to American jurisprudence, for it is not governed by the usual rules of evidence, but instead relies on a summary format that affords the trial

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See id. (citing N.J. STAT. ANN. § 2C:7-8(c)(3) (West 1995) (explaining the factors upon which the state's scope of notification is based)).

[6] *See id.* Tier Three registrants are those considered to have a high risk of reoffense. *See id.* (citing N.J. STAT. ANN. § 2C:7-8(c)(3) (West 1995)).

[7] *See id.*

[8] The prosecutor's scope of notification determinations were not based on the reasonableness of the distances from E.A.'s workplace and residence, but rather on the reasonableness of those criteria as they related to the "likely to encounter" standard of N.J. STAT. ANN. § 2C:7-8(c)(3). *Id.* at 1079.

[9] *See id.* at 1077.

[10] *See id.*

[11] 662 A.2d 367 (N.J. 1995).

[12] *In the Matter of Registrant E.A.*, 667 A.2d at 1079.

[13] *See id.* (citing *Doe v. Poritz*, 142 N.J. at 32, 662 A.2d 367).

[14] *See id.*

court substantial discretion which far exceeds the judicial norm.[15] For example, the trial court has the authority to determine the extent of witness production, whether or not to permit cross-examination, and to allow, reject, control, and limit expert testimony.[16] The court observed that this type of judicial review does have precedent in the jurisprudential process; the judicial review procedure uses criteria similar to instances in which courts review decisions of state and local agencies that are vested with legislatively delegated authority.[17]

B. *Factors For Scope of Notification*

Following the *Doe v. Poritz* court's requirements, the court noted that the first step of the two-step judicial review process must begin with the prosecutor's presentation of a *prima facie* case, based on the comparable evidentiary format used in plenary discriminatory employment civil litigation.[18] The court, in considering whether the prosecutor had established an appropriate scope of notification, must then analyze the pertinent factors that provide the requisite proof to establish the *prima facie* case. To do so, both variable and nonvariable factors must be examined.[19] Variable factors are those that relate specifically to the registrant and his community, such as the proclivity to frequent a certain area.[20] They recognize case-by-case factors pertaining to a registrant, and take into account the individualized circumstances of each community when attempting to provide the public with proper notice.[21] Nonvariable factors, in contrast, pertain to all registrants, and are based on "common sense."[22] Some factors listed by the *Doe v. Poritz* court include geographical proximity or closeness, understood by this court to include population concentration and density, and the mobility of adults and children in today's society.[23] The wide variety and differing degrees of importance that can be attributed to the variable and nonvariable factors necessarily gives prosecutors wide latitude in establishing the scope of notification.[24]

Using the *Doe v. Poritz* factors in conjunction with the definitions of "likely to encounter" and "fair chance to encounter" contained in Guideline V of the Attorney General's Guidelines, the court found that the prosecutor was entitled to deference in his knowledge of particular areas in proving that a fair scope of

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[15] *See id.* (citing *Doe v. Poritz*, 142 N.J. at 31, 35, 662 A.2d 367).

[16] *See id.*

[17] *See id.* at 1080 (citing Mayflower Sec. Co. v. Bureau of Sec., 64 N.J. 85, 92-93, 312 A.2d 497 (1973); Kramer v. Board of Adjustment, 45 N.J. 268, 296, 212 A.2d 153 (1965)).

[18] *See id.* (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973)).

[19] *See id.*

[20] *See id.*

[21] *See id.*

[22] *Id.* at 1081.

[23] *See id.* (citing *Doe v. Poritz*, 142 N.J at 32, 662 A.2d 367).

[24] *See id.*

notification had been established.[25] The court concluded that common sense dictated reasonableness, a concept that when applied to E.A.'s case demonstrated "the establishment of a *prima facie* case for the scope of notification determinations to residents in the area of E.A.'s places of residence and work."[26] Finally, the court held that from a sufficient credible evidence standpoint, E.A.'s individual characteristics supported the conclusion that the two mile radius adopted satisfied the fairness test.[27] Evidence existed that E.A. had sought out strangers, including children in other communities, stalked targets, and engaged in other threatening behavior, which all supported the prosecutor's decision to establish a two mile notification radius.[28]

C. *Rules Governing Unregistered Community Organizations*

The court again relied on *Doe v. Poritz* to address the issue of giving notice to unregistered community organizations that might register in the future pursuant to the Attorney General's Guidelines.[29] The court stated that *Doe v. Poritz*[30] did not provide for the automatic inclusion of an organization simply because it registered pursuant to the Guidelines, and found that the decision also limited notice to community organizations owning or operating establishments where women or children are cared for.[31] The court observed that the Guidelines reflect this approach.[32]

Based on the requirements of *Doe v. Poritz*, the court held that notification must satisfy the parameters of procedural due process and the fairness doctrine.[33] The court rejected the prosecutor's contention that he possessed open-ended authority to give notification without allowing the registrant to challenge the notification given to those organizations.[34] The court, therefore, remanded this issue, directing that the prosecutor develop a list of registered community organizations to be notified.[35] Once prepared, E.A. would then be afforded the opportunity to challenge notification of the organizations on the list.[36]

IV. CONCLUSION

The appellate court affirmed the trial court's determination that the geographic scope of notification to private residences, schools, and day-care centers was jus-

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[25] *Id.* at 1080-81.
[26] *Id.* at 1081.
[27] *See id.* at 1082.
[28] *See id.*
[29] *See id.*
[30] 662 A.2d 367 (N.J. 1995).
[31] *See* In the Matter of Registrant E.A., 667 A.2d at 1082.
[32] *See id.*
[33] *See id.*
[34] *See id.*
[35] *See id.*
[36] *See id.*

tified under the RCNL and *Doe v. Poritz*. However, to protect E.A.'s rights under procedural due process and the fairness doctrine, the court remanded to permit the prosecutor to develop and disclose a list of community organizations to be notified, which E.A. would then have the opportunity to challenge.

Nancy Ozimek

State v. Manning, 532 N.W.2d 244 (Minn. Ct. App. 1995). THE MINNESOTA SEX OFFENDERS' REGISTRATION STATUTE IS NOT AN IMPERMISSIBLE EX POST FACTO LAW AND DOES NOT VIOLATE THE UNITED STATES AND MINNESOTA CONSTITUTIONS.

I. INTRODUCTION

The court of appeals upheld the trial court conviction of Otis Manning for failure to comply with the state's sex offender registration statute[1] when Manning neglected to inform his corrections agent that he had moved.[2]

II. BACKGROUND

In 1988, Otis Manning ("Manning" or "defendant") was convicted of fourth degree criminal sexual conduct.[3] His fifteen month sentence was stayed and he was placed on probation for five years.[4] In January, 1991, Manning violated his probation terms and was ordered to serve the fifteen month sentence.[5] As required when the registration law took effect, Manning completed the requisite registration form[6] and signed it, indicating his understanding of the registration requirements.[7]

On January 20, 1994, Manning was charged with violating the registration statute because he moved without notifying his corrections agent.[8] Manning moved for dismissal of the charge, arguing the law as applied was an ex post facto law because it took effect after his original conviction.[9] The trial court denied the motion to dismiss and the defendant was found guilty after trial.[10]

III. ANALYSIS

The Minnesota statute, which took effect August 1, 1991,[11] requires convicted

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[1] MINN. STAT. § 243.166 (1992 & Supp. 1995).

[2] State v. Manning, 532 N.W.2d 244, 245-246 (Minn. Ct. App. 1995).

[3] *See id.* at 245.

[4] *See id.*

[5] *See id.*

[6] The form included the registrant's physical description, address, and information about his conviction. *See id.* at 246.

[7] *See id.*

[8] *See id.*

[9] *See id.* at 245.

[10] *See id.* at 247.

[11] Manning was convicted in 1988, three years prior to the effective date of the statute.

sex offenders and other felons to register with a corrections agent.[12] The agent must be notified if the registrant moves within ten years of assignment to the agent or upon release from probation, whichever is later.[13] In addition to the information on the form, the corrections agent also obtains fingerprints and a photograph of the registrant.[14] The corrections agent provides the information to the state bureau of criminal apprehension.[15] The information may only be used for "law enforcement purposes."[16] Violation of the statute is a misdemeanor.[17]

In determining the constitutionality of the defendant's conviction, the appeals court looked first to the standard of review. The interpretation of a statute is a question of law.[18] Statutes are presumed constitutional and are declared unconstitutional " 'only when absolutely necessary.' "[19] A decision of the Supreme Court of the United States interpreting a federal provision that parallels a state provision is of "persuasive, although not controlling, force."[20]

There are three possible ways a statute may be an ex post facto law.[21] First, the statute may punish an act which was innocent when committed as a crime.[22] Second, the statute may increase the burden of punishment for a crime after it was committed.[23] Finally, the statute may deprive one charged with a crime of a defense that was available when committed.[24] The defendant argued that the statute was an ex post facto law due to its increasing the burden of punishment through registration.[25]

After noting that the statute was specifically intended to apply retroactively,[26] the court turned to the issue of whether the statute was punitive or regulatory in order to determine whether the statute increased the burden of punishment.[27] Because the legislature did not indicate whether the statute was punitive or regulatory, the court used the factors listed by the Supreme Court in *Kennedy v. Mendoza-Martinez*[28] to make the determination.[29] The *Mendoza-Martinez* court listed

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See id. at 245.

[12] *See* MINN. STAT. § 243.166(3)(a) (1992 & Supp. 1995).

[13] *See id.* § 243.166(6)(a).

[14] *See id.* § 243.166(4).

[15] *See id.*

[16] *Id.* § 243.166(7).

[17] *See id.* § 243.166(5).

[18] *See* State v. Manning, 532 N.W.2d 244, 247 (Minn. App. Ct. 1995).

[19] *Id.* (quoting *In re* Haggerty, 448 N.W. 2d 363, 364 (Minn. 1989) (citation omitted)).

[20] *Id.* (citing State v. Fuller, 374 N.W.2d 722, 727 (Minn. 1985)).

[21] *See id.*

[22] *See id.*

[23] *See id.*

[24] *See id.* (citing Collins v. Youngblood, 497 U.S. 37, 52 (1990)).

[25] *See id.*

[26] *See id.* The legislature provided that the statute would apply to all offenders released from prison after August 1, 1991, regardless of the date of the offense. 1991 MINN. LAWS ch. 285, § 13(a).

[27] *See Manning*, 532 N.W.2d at 247.

[28] 372 U.S. 144 (1963).

seven factors to determine whether the statute is punitive or regulatory: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether its operation will promote traditional aims of punishment, retribution and deterrence; (5) whether the behavior to which it is applied is already a crime; (6) whether an alternative purpose to which it may be rationally connected is assignable to it; and (7) whether it appears excessive in relation to the alternative purpose assigned.[30]

Looking at the *Mendoza-Martinez* factors, the court rejected Manning's claim that the sentence disabled him by restricting his freedom of movement.[31] Because the offender's conviction is a matter of public record and registration information is private and may only be used for law enforcement purposes, "this requirement alone does not restrain their movement."[32] Furthermore, since government uses registration for various ways of law enforcement information access, it has not "traditionally been viewed as punishment."[33] Because the registration requirement necessarily depends on upon the conviction of another specific crime, however, "there will necessarily be a finding of scienter and the underlying behavior is of course criminal."[34] The court also acknowledged that there was probably minimal deterrent effect[35] but also that an offender could be deterred by the fact of conviction and punishment served.[36]

Looking to the statute's relationship to nonpunitive purposes, the court found a clear nonpunitive purpose: "to help police investigations."[37] Finally, the fact that similar sex offender statutes have been upheld in other states that allow access to information less restrictive than the Minnesota statute persuaded the court that it was not overly burdensome.[38] The court concluded by emphasizing that registrants are still entitled to the same due process rights they would be absent the registration.[39]

The weighing of all these findings led the court to conclude that the statute is regulatory instead of punitive and that any additional burden on the offenders is outweighed by the important regulatory function served.[40]

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[29] *See Manning*, 532 N.W.2d at 247.

[30] *See id.* (citing *Mendoza-Martinez*, 372 U.S. at 169).

[31] *See id.* at 248.

[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *See id.*

[36] *See id.* (citing State v. Ward, 869 P.2d. 1062, 1073 (Wash. 1994)).

[37] *Id.*

[38] *See id.*

[39] *See id.*

[40] *See id.*

IV. CONCLUSION

The court of appeals found that Minnesota's sex offender statute is regulatory rather than punitive. Therefore, it does not increase the punishment of a sex offender convicted before the statute took effect and is not an ex post facto law in violation of the state or federal constitution.

Amy B. Offenberg

People v. Starnes, 653 N.E.2d 4 (Ill.App.3d), *rev. denied*, 657 N.E.2d 635 (Ill. 1995). REGISTRATION AND CERTIFICATION UNDER THE CHILD SEX OFFENDER REGISTRATION ACT CONSTITUTES A COLLATERAL CONSEQUENCE OF CONVICTION; THEREFORE, IT CAN BE APPLIED RETROACTIVELY WHEN IT INVOLVES NO PUNISHMENT AND FURTHERS A LEGITIMATE PUBLIC INTEREST.

I. INTRODUCTION

The Circuit Court for Cook County Illinois acquitted the defendant, James P. Flannery, Jr. ("Defendant"), of two counts of criminal sexual assault and one count of aggravated criminal sexual abuse, but found him guilty of two counts of aggravated criminal sexual abuse.[1] The circuit court sentenced Defendant to probation for four years and required him to certify as a child sex offender under the Child Sex Offender Registration Act ("Act").[2] Defendant appealed retroactive application of the Act.[3] The Appellate Court of Illinois found that Defendant had waived his challenge to the Act's applicability and that the Act did not violate the ex post facto clauses of the United States Constitution[4] and the Illinois Constitution of 1970.[5] Therefore, the appellate court affirmed the judgment of the circuit court.[6]

II. BACKGROUND

The State charged Defendant with two counts of criminal sexual assault and three counts of aggravated criminal sexual abuse against his deaf and mute niece, K.Y.[7] Evidence showed that when Defendant was forty-five years old, he had vaginal and anal intercourse nine times with his 15 year old niece from approximately March 16, 1990, through August 5, 1991.[8] Defendant waived his right to a jury trial and the circuit court conducted a bench trial in February and

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[1] *See* People v. Starnes, 653 N.E.2d 4, 5 (Ill.App.3d 1995).

[2] *See id.*

[3] *See id.* The Act was amended January 1, 1993 to require first-time offenders to be certified and register; defendant committed the offense before this amendment.

[4] *See id.* (citing U.S. CONST., art. I, § 10).

[5] *See id.* (citing ILL. CONST., art. I, § 16 (1970)).

[6] *See id.* at 7.

[7] *See id.* at 5.

[8] *See id.*

April 1994.[9] The circuit court acquitted Defendant of the criminal sexual assault charges and one of the two aggravated criminal sexual abuse charges.[10] The circuit court convicted Defendant of two counts of aggravated criminal sexual abuse, but only entered judgment on one of the counts.[11] The circuit court sentenced Defendant to four years probation, counseling, and a $20 per month probation fee.[12] The court also forbade Defendant from having any contact with K.Y.[13] In addition, the circuit court granted the State's motion to obtain a specimen of Defendant's blood and to certify him as a child sex offender pursuant to the Act.[14] The Act also requires convicted sex offenders to register with the police chief in the municipality in which he resides.[15] Defendant did not object to the certification or registration during the sentencing phase in the circuit court.[16]

On June 17, 1994, Defendant appealed his certification and registration under the Act to the appellate court.[17] Defendant did not appeal his conviction, but contended that retroactive application of the Act against him violated the ex post facto clauses of the United States and Illinois Constitutions.[18] Prior to January 1, 1993, the Act only required certification and registration after conviction of a second offense.[19] The Act, as amended, currently requires certification and registration after conviction of a first offense.[20] Defendant claims that retroactive certification and registration requirements of the Act constitute punishment, prohibited by state and federal ex post facto clauses.[21] Because Defendant did not raise this claim during the sentencing phase, the state contended that Defendant waived this challenge.[22] Further, the State asserted that an ex post facto claim did not apply in this case because the Act imposes no punishment.[23]

III. ANALYSIS

A. *Waiver*

The court began its analysis of Defendant's claim by addressing the issue of waiver. In *People v. Bryant*,[24] the state supreme court ruled that the constitution-

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[9] *See id.*
[10] *See id.*
[11] *See id.*
[12] *See id.* at 6.
[13] *See id.*
[14] *See id.*
[15] *See id.* (citing ILL. ANN. STAT. ch. 730, para. 15/1 (Smith-Hurd 1995)).
[16] *See id.*
[17] *See id.*
[18] *See id.*
[19] *See id.* The Act's predecessor was called the Habitual Child Sex Offender Registration Act.
[20] *See id.*
[21] *See id.*
[22] *See id.*
[23] *See id.*
[24] 539 N.E.2d 1221, 1224 (Ill. 1989).

ality of a statute can be raised at any time.[25] In *People v. Sales*,[26] the appellate court convicted a defendant of aggravated criminal sexual assault, which resulted in the revocation of his drivers license as required by a state statute.[27] On appeal, the defendant attacked the constitutionality of the statute.[28] The appellate court held that when a statute concerns collateral matters and the defendant fails to raise the issue of constitutionality in the circuit court, waiver applies.[29] The State asserted that *Sales* dealt with the constitutionality of a collateral statute, whereas Bryant concerned a statute under which a defendant was convicted.[30] Because this case also dealt with a collateral statute, the State contended that *Sales* should be applied to this case.[31] The circuit court agreed with the State and held that Defendant had waived his constitutional challenge.[32]

B. *Ex Post Facto Law*

Notwithstanding this ruling, the court went on to conclude that Defendant's claim would have failed even if it had not been waived.[33] The court concluded that a statute cannot be considered an ex post facto law unless it makes previously legal conduct criminal or increases the punishment for an existing crime.[34] The court found that in order for a statute to constitute punishment, the duty imposed by the statute on the basis of a criminal conviction must be punishment.[35]

The court stated that the Act simply requires a child sex offender to complete a form notifying the local chief of police of his residence.[36] The legislative history of the Act reveals that the Act was intended to aid law enforcement in keeping track of child sex offenders.[37] A duty to register does not imprison or fine a defendant and imposes no restraints on liberty or property, and thus does not constitute punishment.[38]

Furthermore, the court found that certification and registration constitute a collateral consequence of a defendant's conviction and not a penalty because these requirements are not part of the sentencing procedure.[39] Retroactive application

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[25] *See Starnes*, 653 N.E.2d at 6 (citing *Bryant*, 539 N.E.2d at 1224.).

[26] 551 N.E.2d 1359 (Ill.App.3d 1990).

[27] *See Starnes*, 653 N.E.2d at 6 (citing *Sales*, 551 N.E.2d at 1360).

[28] *See id.* (citing *Sales*, 551 N.E.2d at 1360).

[29] *See id.* (citing *Sales*, 551 N.E.2d at 1360).

[30] *See id.*

[31] *See id.*

[32] *See id.*

[33] *See id.*

[34] *See id.* (citing Dobbert v. Florida, 432 U.S. 282, 292 (1977); Barger v. Peters, 645 N.E.2d 175, 177 (Ill. 1994); People v. Witt, 592 N.E.2d 402, 407 (Ill. 1992)).

[35] *See id.* (quoting People v. Adams, 581 N.E.2d 637, 640-41 (Ill. 1991)).

[36] *See id.* at 7.

[37] *See id.*

[38] *See id.* at 6 (quoting *Adams*, 581 N.E.2d at 640-41).

[39] *See id.* at 7 (quoting People v. Murphy, 565 N.E.2d 1359, 1360 (Ill. 1991); People v. Taylor, 561 N.E.2d 393 (Ill. 1990)).

of a statute is permissible when it has collateral effects upon a conviction and its goal is to protect a legitimate public interest rather than to punish the offender.[40] The court determined that the protection of the public from sex offenders outweighed the limitations of the rights of an offender forced to comply with the Act.[41] Moreover, the court concluded that a defendant does not have an absolute right to be tried or sentenced under the law existing at the time of the offense.[42] Disadvantageous procedural changes can be applied retroactively unless they are penal in nature.[43] Thus, the duty to certify and register under the Act did not violate the ex post facto clauses of the United States and Illinois Constitutions.[44]

IV. CONCLUSION

The Act imposes a collateral consequence upon a convicted child sex offender. It does not constitute punishment and furthers a legitimate public interest; therefore, it can be applied retroactively against defendants without violating the United States or Illinois Constitutions.

Zionne N. Pressley

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[40] *See id.* (citing *In re* Estate of Roy, 637 N.E.2d 1228, 1232 (Ill. 1994) (holding that retroactive application of a statute that prohibits convicted felons from acting as guardians of the disabled did not violate ex post facto law because its goal was to protect disabled persons and not to punish felons); People v. Smith, 465 N.E.2d 101, 104-05 (Ill. 1984) (holding that retroactive application of a statute that provides for a verdict of guilty but mentally ill in criminal cases did not violate the ex post facto clauses because it did not increase punishment for an offense)).

[41] *See id.* (quoting *Taylor*, 561 N.E.2d at 394).

[42] *See id.* (citing *Dobbert v. Florida*,, 432 U.S. 282, 293 (1977); People v. Fellela, 546 N.E.2d 492, 497 (Ill. 1989); Williams v. Klincar, 604 N.E.2d 986, 988 (Ill. 1992)).

[43] *See id.* (citing *Dobbert*, 432 U.S. at 293; *Fellela*, 546 N.E.2d at 497; *Williams*, 604 N.E.2d at 988).

[44] *See id.*