2/21/01

**SUPREME COURT OF LOUISIANA**

**No. 00-KH-0172**

**STATE EX REL. WILLIAM OLIVIERI**

**VERSUS**

**STATE OF LOUISIANA**

**c/w**

**00-KP-1767**

**STATE OF LOUISIANA**

**VERSUS**

**MARVIN HUTCHINSON**

**CALOGERO, Chief Justice, concurring in part and dissenting in part.**

The majority today finds that the constitutional prohibitions on ex post facto legislation are not violated by the retroactive application of: (1) the sex offender registration requirements of La. Rev. Stat. § 15:542(A) (applying to all persons pleading guilty or being convicted of a sex offense) or (2) the sex offender notification requirements of three separate statutes: La. Rev. Stat. § 15:542(B) (offenders convicted and later released from prison), § 15:574.4(H)(2) (parolees), and La. Code Crim. Pro. art. 895(H) (probationers). I agree with the first conclusion that requiring sex offenders to register with local law enforcement agencies does not violate the ex post facto provisions of the United States and Louisiana Constitutions. It is the second holding regarding the sex offender notification requirements for parolees, probationers, and persons released from confinement with which I must disagree.

The three sex offender notification statutes before us impose on the offender similar requirements, with minor differences, depending on whether he is placed on

probation, paroled from prison, or released after serving his sentence. A sex offender who has either pleaded guilty or been convicted after trial, upon release from confinement, must give notice of his name, home address, and the crime of which he has been convicted to:

(1) At least one person in every residence or business within a one-mile radius in a rural area or within a three block radius in an urban or suburban area by mail,

(2) The superintendent of the school district where the defendant will reside who then forwards this information to schools within a one mile radius of the defendant's residence and all others he deems appropriate, and

(3) The lessor, landlord, or owner of the residence or the property where he resides.

La. Rev. Stat. § 15:542(B). Additionally, the offender must publish a notification, with a photograph, in the official journal of the parish in which he resides as well as a second newspaper meeting the official journal requirements if so ordered by the sheriff of police department of the area.

Similarly, a sex offender who is paroled from prison must give notice of his name, home address, and the crime of which he has been convicted to:

(1) "People who live within a one-mile radius in a rural area or within a three block radius in an urban or suburban area" by mail,[1]

(2) The superintendent of the school district where the defendant will reside who then forwards this information to schools within a one mile radius of the defendant's residence and all others he deems appropriate along with a photograph of the offender supplied by the offender, and

(3) The superintendent of the park, playground, and recreation districts within a one-mile radius in a rural area or within a three block radius in an urban or suburban area who then forwards this information to the custodians of parks, playgrounds, and recreation districts within the designated area and all other he deems appropriate along with a photograph of the offender supplied by the offender.

[1] The breadth of this language could be read to include every person within the designated area, not simply one person in each residence or business as in the case of persons released from prison after serving their sentence.

La. Rev. Stat. § 15:574(H)(2). Additionally, the offender must publish a notification, with a photograph, in the official journal of the parish in which he resides as well as a second newspaper meeting the official journal requirements.

Finally, a sex offender placed on probation must give notice of his name, home address, and the crime of which he has been convicted to:

(1) "People who live within a one-mile radius in a rural area or within a three block radius in an urban or suburban area" by mail,

(2) The superintendent of the school district where the defendant will reside who then forwards this information to schools within a one mile radius of the defendant's residence and all others he deems appropriate along with a photograph of the offender supplied by the offender, and

(3) The superintendent of the park, playground, and recreation districts within a one-mile radius in a rural area or within a three block radius in an urban or suburban area who then forwards this information to the custodians of parks, playgrounds, and recreation districts within the designated area and all other he deems appropriate along with a photograph of the offender supplied by the offender.

La. Code Crim. Pro. art. 895(H). Additionally, the offender must publish a notification, with a photograph, in the official journal of the parish in which he resides as well as a second newspaper meeting the official journal requirements if so ordered by the court.

Importantly, in all three notification statutes, the cost for providing all of the notices to the individuals (address lists, photographs, writing materials, letters or postcards, postage, etc.) must be borne by the offender.[2] Additionally, the costs of publication in the official journal of the parish as well as a second newspaper (a total of four advertisements) must be borne by the offender. Finally, these notification provisions additionally require a sex offender to give notice in the form of "signs,

[2] Incidentally, all states and the federal government have passed some form of these notification requirements, but only Louisiana and Alabama require that notification be given directly to neighborhood residents and Alabama's designated area for notification is not as broad as Louisiana's. See Ala. Code § 15-20-21(a)(2).

handbills, bumper stickers, or clothing labeled to that effect" when directed to do so by the court or, in the case of parolees, the Board of Parole. While the record does not indicate exactly what amount of costs will be borne by an offender complying with these extensive notification requirements, they can reasonably be expected to run into the hundreds of dollars; even the majority admits that they will be "weighty." See ante p. 23.

Today, in response to recent pronouncements by the United States Supreme Court, we adopt the analysis used by that court in determining whether a statute violates the ex post facto provisions of the United States or Louisiana Constitutions.[3] Under this analysis, a court must first determine whether the statute at issue is intended to be punitive or regulatory. See Hudson v. United States, 522 U.S. 93, 99 (1997). If intended to be punitive, retroactive application of the statute runs afoul of the ex post facto clauses and the inquiry ends. On the other hand, if the statute has a non-punitive purpose, we are required to determine whether the statutory scheme is so punitive in effect as to "transform what was clearly intended as a civil remedy into a criminal penalty." Hudson, 522 U.S. at 99 (quoting Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)). The determination of whether an intended civil remedy has

[3] For over one-hundred years, both federal and Louisiana jurisprudence interpreted the ex post facto clauses of the United States and Louisiana constitutions to prohibit legislation which altered the situation of the accused to his disadvantage. See, e.g., State v. Glover, 93-2330, p. 19 (La. 09/05/95), 660 So. 2d 1189, 1200; State v. Sepulvado, 342 So. 2d 630, 635 (La. 1977); State v. Ardoin, 24 So. 802, 802 (La. 1899). The United States Supreme Court, in Collins v. Youngblood, 497 U.S. 37, 52 (1990), reversed this "disadvantage" definition of ex post facto legislation in favor of the more narrow inquiry that we make today, i.e., does the provision at issue punish the individual in some way. The United States Supreme Court, needless to say, has the last say when it comes to the interpretation of federal rights and guarantees under the United States Constitution. Further, it is incumbent on the states, including Louisiana, to respect the United States Supreme Court's precedent in that regard especially when the United States Constitution, which is ultimately interpreted by that Court, specifically provides that "No state shall . . . make any . . . ex post facto law." Accordingly, unlike certain areas of state constitutional law which provide greater protections to the individual than its federal counterpart, see, e.g., State v. Perry, 610 So. 2d 746, 750 (La. 1992) (cruel and unusual punishment); State v. Hernandez, 410 So. 2d 1381, 1385 (La. 1982) (search and seizure), we must follow the United States Supreme Court's jurisprudence in this area and therefore adopt this line of reasoning.

a punitive effect is made by the consideration of seven factors:

> [1] Whether the sanction involves an affirmative disability or restraint, [2] whether it has historically been regarded as a punishment, [3] whether it comes into play only on a finding of scienter, [4] whether its operation will promote the traditional aims of punishment -- retribution and deterrence, [5] whether the behavior to which it applies is already a crime, [6] whether an alternative purpose to which it may rationally be connected is assignable for it, and [7] whether it appears excessive in relation to the alternative purpose assigned . . . .

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (footnotes omitted), cited in, Hudson, 522 U.S. at 99-100. In my view, despite the majority's conclusion to the contrary, the notification provisions of the statutes at issue are so punitive in effect so as to transform what may have been intended as a civil remedy into a punitive one.

First, in this case, the Legislature has stated that the registration and notification provisions are intended to "protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses and crimes against victims who are minors." La. Rev. Stat. § 15:540. This is an avowedly non-punitive purpose and there has been no evidence that the Legislature in fact intended otherwise. Therefore, the first prong of the federal analysis is satisfied and we must further examine whether the statutory scheme is so punitive in effect as to "transform what was clearly intended as a civil remedy into a criminal penalty." Hudson, 522 U.S. at 99 (quoting Rex Trailer Co. v. United States, 350 U.S. 148, 154 (1956)). Of the Kennedy factors outlined above, the first and the second of these considerations in particular support the conclusion that the notification requirements of the statutes at issue are so burdensome as to transform them into a punitive penalty.

The first factor in this analysis (whether the sanction in this case operates as an affirmative disability and restraint) is evident in this case. As pointed out above, the cost required for undertaking this notification will likely run into the hundreds of dollars. The majority is correct when they point out that not all changes in an

offender's burdens constitute an ex post facto violation; on the other hand, in my view, the substantial nature of this financial burden (in the hundreds of dollars) would indicate that it is an affirmative disability amounting to punishment. Unlike the minimal costs and reporting requirements cited by the majority, the notification requirements under these statutes require the offender to go through great pain, financial and otherwise, in satisfaction of those provisions.[4] For ten years, the offender is subject to these notification requirements and, under them, must contact a wide range of people through both mailings and the advertising media. In short, this expensive burden, in my view, is the equivalent of a fine. It is not simply a regulatory cost.[5] Therefore, the notification requirements of the statutes at issue operate as an affirmative disability to a defendant because of the financial and other burdens they impose. The notification requirements, as imposed by the statutes at issue, therefore, constitute a punitive penalty.

The second factor in this analysis asks us to determine whether the burden placed on the offender has been historically regarded as punishment. In this case, that factor is present as well.

> One such practice historically utilized for punishing criminals was public humiliation and degradation. Such method of punishment, developed during the seventeenth century, was branding, in which a single letter representing the first letter of the crime committed was burned onto the wrongdoer's face. Murderers were branded with the letter "M," thieves with a "T," fighters and brawlers with an "F," and vagrants with a "V." Historians note the branding had the effect of a spell. It took the criminal out of ordinary relations with humanity, and enclosed him in a sphere by

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[4] The issue presented in this case is not whether the notification provisions at issue here are inhumane, unfair, or should be imposed at all. Instead, the narrow issue presented in this case is only whether the retroactive application of the notification and registration requirements offends the ex post facto prohibitions of the United States and Louisiana Constitution.

[5] Assuming for the moment that the majority is correct when it concludes that these burdens are similar to those already imposed upon probationers and parolees and, thus, are permissible, that analogy cannot logically apply to sex offenders who serve their sentence and are then released. Under La. Rev. Stat. § 15:542, an offender who serves the entirety of his sentence, upon release, is subjected to these additional financial burdens that were not in place when he committed his crime.

himself.

> The purpose of branding in the seventeenth century was to make certain persons or groups of persons easily identifiable and thus, easily ostracized or set apart. An example of branding (without fire) was the requirement in Nazi Germany that Jewish persons wear the Star of David on a sleeve so they might be easily identified.

Note, Doe v. Poritz: a Constitutional Yield to an Angry Society, 32 Cal. W. L. Rev. 331, 347-48 (1996) (footnotes collecting authorities omitted). The statutory scheme created by Louisiana's notification laws specifically permit a court or, in the case of a parolee, the Board of Pardons, to order the offender to place notifications of his status as a sex offender on his car in the form of bumper stickers or even on the offender's clothing. It is hard to imagine a more punitive method of public humiliation or degradation than requiring an offender to wear a Scarlet Letter notifying the public of his past wrongs. Therefore, the burden placed on the offender is one which has been historically regarded as punishment. Consequently, the notification provisions of La. Rev. Stat. §§ 15:542(B), 574.4(H)(2), and La. Code Crim. Pro. art. 895(H) constitute punishment in violation of the ex post facto clauses of the United States and Louisiana Constitutions.

In light of the above analysis, I would find that the sex offender notification laws transform what may have been intended as a civil remedy into a punitive one. Therefore, retroactive application of this new punishment attendant to community notification on sex offenders who have committed their crimes prior the enactment of these notification provisions violates the United State and Louisiana Constitutional prohibitions on ex post facto legislation.

Accordingly, I concur in the majority's holding concerning the registration requirements of Louisiana's Megan's laws, but I respectfully dissent from the finding by the majority that the notification requirements of these laws do not pose an ex post

facto violation.