APPENDICES

COPY

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
December 5, 2018 Session

BARRY L. CLARK v. MARK GWYN ET AL.

Appeal from the Chancery Court for Davidson County
No. 16-1035-I Claudia Bonnyman, Chancellor

No. M2018-00655-COA-R3-CV

The petitioner was convicted of multiple sexual offenses in Maryland in 1981. Several years after completing his sentence for these convictions, he was incarcerated in Pennsylvania for a different crime. While serving his sentence in Pennsylvania, he received interstate transfer of parole to Tennessee. Thereafter, the petitioner was informed that he must register as a sexual offender in Tennessee. He registered in 2011 and, in 2016, sent the Tennessee Bureau of Investigation ("TBI") a letter requesting termination of his registration. After the TBI denied his request, the petitioner filed a petition for judicial review in the chancery court. The chancery court affirmed the TBI's denial of the petitioner's request, and the petitioner appeals. Finding no error in the chancery court's decision, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the Court, in which RICHARD H. DINKINS and W. NEAL MCBRAYER, JJ., joined.

Barry L. Clark, Camden, Tennessee, pro se.

Herbert H. Slatery, III, Attorney General and Reporter, Andrée S. Blumstein, Solicitor General, and Robert William Mitchell, Assistant Attorney General, for the appellants, Mark Gwyn, Jeanne H. Broadwell, and Tennessee Bureau of Investigation.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

In 1981, Barry L. Clark was convicted of committing multiple sexual offenses in Maryland, and he received a sentence of fifteen years' imprisonment. The most serious

of his convictions was for "first degree sexual offense," which Maryland law defined as follows:

> A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:
>
> (1) With another person by force or threat of force against the will and without the consent of the other person, and:
>
> (i) Employs or displays a dangerous or deadly weapon or an article which the other person reasonably concludes is a dangerous or deadly weapon; or
>
> (ii) Inflicts suffocation, strangulation, disfigurement, or serious physical injury upon the other person or upon anyone else in the course of committing the offense; or
>
> (iii) Threatens or places the victim in fear that the victim or any person known to the victim will be imminently subjected to death, suffocation, strangulation, disfigurement, serious physical injury, or kidnapping; or
>
> (iv) The person commits the offense aided and abetted by one or more other persons.

Md. Code Ann. Art. 27, § 464(a) (Supp. 1981). "Sexual act" was defined as:

> cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Emission of semen is not required. Penetration, however slight, is evidence of anal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body if the penetration can be reasonably construed as being for the purposes of sexual arousal or gratification or for abuse of either party and if the penetration is not for accepted medical purposes.

Md. Code Ann. Art. 27, § 461(e) (Supp. 1981).

After Mr. Clark was granted parole in 1988, he relocated to Pennsylvania, where he was convicted of unlawfully possessing a firearm in 2001. Mr. Clark eventually received probation for this conviction. Before completing the probation, however, he moved to Tennessee. Several years later, Mr. Clark learned that a warrant for his arrest had been issued in Pennsylvania in 2003 for violating the terms of his probation. He returned to Pennsylvania in 2010 and pleaded guilty to the probation violation. Following a brief period of confinement, he was granted interstate transfer of parole from Pennsylvania to Tennessee in 2011.

In 1994, more than a decade after Mr. Clark's conviction, the Tennessee General Assembly enacted the Sexual Offender Registration and Monitoring Act ("1994 Act"),

which created a sex offender registry ("SOR") and required persons convicted of certain offenses to register for a ten-year period. *See* 1994 TENN. PUB. ACTS Ch. 976. The General Assembly amended the 1994 Act several times, including an amendment in 2000 that provided for lifetime registration for persons convicted of violent sexual offenses. In 2004, the Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act of 2004 ("2004 Act"), codified at Tenn. Code Ann. §§ 40-39-201 to -218, replaced the 1994 Act. The 2004 Act established certain geographic restrictions on sexual offenders. For instance, Tenn. Code Ann. § 40-39-211(a) prohibits a person classified as a violent sexual offender from knowingly establishing a primary or secondary residence or accepting employment within 1,000 feet of any school, "licensed day care center, other child care facility, public park, playground, recreation center, or public athletic field available for use by the general public." Subsection (d) of that statute prohibits a sexual offender from being upon or remaining upon the premises of the aforementioned places if the offender has reason to believe children under the age of eighteen are present. Tenn. Code Ann. § 40-39-211(d)(1)(A). In addition to the geographic restrictions, the 2004 Act provides for quarterly reporting by individuals classified as violent sexual offenders. Tenn. Code Ann. § 40-39-204(b)(1). Finally, the 2004 Act applies not only to convictions in Tennessee but also to convictions "in any other state of the United States, other jurisdiction or other country." Tenn. Code Ann. § 40-39-202(1).

The language of the 2004 Act indicates that the General Assembly intended for the registration requirements to be applied retroactively to all sexual offenders.[1] *See* Tenn. Code Ann. §§ 40-39-202(20); 40-39-203(a)(2) & (j)(1) & (2); *see also Ward v. State*, 315 S.W.3d 461, 468 (Tenn. 2010). Thus, Mr. Clark was subject to the registration requirements of the 2004 Act when he returned to Tennessee in 2011. The Tennessee Board of Probation and Parole compelled him to register as a sexual offender pursuant to the 2004 Act. Upon Mr. Clark's registration with the SOR, the TBI classified him as a violent sexual offender due to his conviction for "first degree sexual offense." Because "first degree sexual offense" is not identified as a sexual offense in Tennessee, the TBI made its classification determination by examining the elements of a first degree sexual offense in Maryland to determine if they were the same as the elements for a sexual offense identified in Tennessee.[2] *See* Tenn. Code Ann. § 40-39-207(g)(2)(B) (stating

[1] Because the 2004 Act in its present form applies to Mr. Clark, we apply and construe the 2004 Act as it is currently written rather than the version in effect when he moved to Tennessee or when he initiated this case. *See Ward v. State*, 315 S.W.3d 461, 468 (Tenn. 2010).

[2] Counsel for the TBI submitted an affidavit describing how she researched Md. Code Ann. Art. 27, § 464(a), and how she compared it to Tennessee law. She stated that because, "Westlaw's historical statutes for Maryland only date back to 2001," she researched Maryland cases "involving that code section around the time of Mr. Clark's conviction" and found a definition of Md. Code Ann. Art. 27, § 464(a) in a case from 1984. This court finds it troubling that counsel was satisfied relying on a definition of the statute from "around the time of Mr. Clark's conviction." Although research databases such as Westlaw have made it easier for lawyers to conduct legal research, these databases provide little

"[i]f an offense in a jurisdiction other than this state is not identified as a sexual offense in this state, it shall be considered a prior conviction if the elements of the offense are the same as the elements for a sexual offense"). The TBI determined that, if a first degree sexual offense, as defined by Maryland law, had been committed in Tennessee, it would have constituted "rape,"[3] which Tenn. Code Ann. § 40-39-202(31)(B) identifies as a "violent sexual offense."

On September 12, 2016, Mr. Clark contacted the TBI requesting that he be removed from the SOR. The TBI issued a letter to Mr. Clark denying his request after concluding that he was not eligible for removal from the SOR. The letter stated that his Maryland conviction of first degree sexual offense "is considered a sexually violent offense" in Tennessee and that a person convicted of a sexually violent offense "shall continue to comply with the registration and quarterly monitoring requirements for the life of that person." Mr. Clark then filed a petition for judicial review of the TBI's decision in the Chancery Court for Davidson County, asserting that he should not have to register and that his name should be removed from the SOR. He contended that the classification, registration, and reporting requirements and the work and residential restrictions imposed by the 2004 Act, as applied to him, violated the ex post facto provisions of the federal and state constitutions.

Following a hearing on February 6, 2018, the chancery court entered a memorandum and order on April 6, 2018, affirming the TBI's denial of Mr. Clark's request for removal from the SOR. The court found that there was substantial and material evidence to support the TBI's decision and that the 2004 Act, as applied to Mr. Clark, did not constitute an ex post facto law that inflicted an unlawful punishment upon him. Mr. Clark timely appealed.

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assistance when researching older statutes like the one in this case. These databases are not the only methods available for researching older statutes, however. After making a five-minute telephone call to the law library at Maryland State University, this court received scans of the version of Md. Code Ann. Art. 27, § 464(a) in effect when Mr. Clark was convicted in 1981. Fortunately, the statute was not amended between 1981 and 1984.

[3] Tennessee Code Annotated section 39-13-503(a) defines "rape" as follows:

> Rape is unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by any of the following circumstances:
> (1) Force or coercion is used to accomplish the act;
> (2) The sexual penetration is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent;
> (3) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or
> (4) The sexual penetration is accomplished by fraud.

STANDARD OF REVIEW

The Uniform Administrative Procedures Act ("UAPA"), Tenn. Code Ann. §§ 4-5-101 to -325, governs judicial review of a TBI decision denying a request for termination of registration requirements. *See Miller v. Gywn*, No. E2017-00784-COA-R3-CV, 2018 WL 2332050, at *2 (Tenn. Ct. App. May 23, 2018). Under the UAPA, "[t]he reviewing court's standard of review is narrow and deferential." *StarLink Logistics Inc. v. ACC, LLC,* 494 S.W.3d 659, 668 (Tenn. 2016). The UAPA limits reversal or modification of an agency's decision to situations where the decision is:

> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (5)(A) Unsupported by evidence that is both substantial and material in the light of the entire record.
>
> (B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4-5-322(h).

This standard of review is narrower than what is generally applied in other appeals because it "reflects the general principle that courts should defer to decisions of administrative agencies when they are acting within their area of specialized knowledge, experience, and expertise." *StarLink Logistics Inc.*, 494 S.W.3d at 669. As a result, a reviewing court does not review an agency's factual findings de novo or "second-guess the agency as to the weight of the evidence" even when "the evidence could support a different result." *Id.* Rather, we review an agency's factual findings to determine whether they are supported by substantial and material evidence in the record. Tenn. Code Ann. § 4-5-322(h)(5); *see also Macon v. Shelby Cnty. Gov't Civil Serv. Merit Bd.*, 309 S.W.3d 504, 508 (Tenn. Ct. App. 2009).

Tennessee Code Annotated section 4-5-322(h) does not define "substantial and material evidence," but Tennessee courts have described it as "less than a preponderance of the evidence and more than a 'scintilla or glimmer' of evidence." *StarLink Logistics Inc.*, 494 S.W.3d at 669 (quoting *Wayne Cnty. v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274, 280 (Tenn. Ct. App. 1988)). It is "'such relevant evidence as a reasonable mind might accept to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration.'" *Macon*, 309 S.W.3d at 508 (quoting *Pruitt v. City of Memphis*, No. W2004-01771-COA-R3-CV, 2005 WL 2043542,

at *7 (Tenn. Ct. App. Aug. 24, 2005)). Trial and appellate courts apply the same narrow standard of review to administrative decisions. *StarLink Logistics Inc.*, 494 S.W.3d at 669; *see also Nix v. Tenn. Civil Serv. Comm'n*, No. M2013-00505-COA-R3-CV, 2014 WL 356979, at *3 (Tenn. Ct. App. Jan. 30, 2014).

ANALYSIS

As a preliminary matter, we note that Mr. Clark is a pro se litigant. This court has stated the following principles about pro se litigants:

> Parties who decide to represent themselves are entitled to fair and equal treatment by the courts. The courts should take into account that many pro se litigants have no legal training and little familiarity with the judicial system. However, the courts must also be mindful of the boundary between fairness to a pro se litigant and unfairness to the pro se litigant's adversary. Thus, the courts must not excuse pro se litigants from complying with the same substantive and procedural rules that represented parties are expected to observe.

Young v. Barrow, 130 S.W.3d 59, 62-63 (Tenn. Ct. App. 2003) (citations omitted); *see also Hessmer v. Hessmer*, 138 S.W.3d 901, 903 (Tenn. Ct App. 2003). Additionally, we allow pro se litigants some latitude in preparing their briefs and endeavor to "give effect to the substance, rather than the form or terminology," of their court filings. *Young*, 130 S.W.3d at 63.

I. Ex Post Facto Argument.

Mr. Clark asserts that the 2004 Act, as applied to him, violates the ex post facto provisions of both the United States Constitution and the Tennessee Constitution. *See* U.S. Const. art. I, § 10, cl. 1; Tenn. Const. art. I, § 11. Specifically, he challenges the classification, registration, and reporting requirements of the 2004 Act. He also challenges the restraints on his freedom to live and work wherever he chooses. To constitute an ex post facto prohibition, "a law must be retrospective—that is, 'it must apply to events occurring before its enactment'—and it 'must disadvantage the offender affected by it,' . . . by altering the definition of criminal conduct or increasing the punishment for the crime . . . ." *State v. Pruitt*, 510 S.W.3d 398, 416-17 (Tenn. 2016) (quoting *Lynce v. Mathis*, 519 U.S. 433, 441 (1997)). A party may assert two types of constitutional challenges: facial challenges and "as applied" challenges. *Waters v. Farr*, 291 S.W.3d 873, 921 (Tenn. 2009). "A facial challenge to a statute involves a claim that the statute fails an applicable constitutional test and should be found invalid in all applications." *Id.* An "as applied" challenge, like the one asserted here, "presumes that the statute is generally valid" and "merely asserts that specific applications of the statute

are unconstitutional." *Id.* at 923. To prevail, Mr. Clark must "demonstrate that the statute operates unconstitutionally when applied to [his] particular circumstances." *Id.*

The United States Supreme Court considered an "as applied" ex post facto challenge to Alaska's SOR act in *Smith v. Doe*, 538 U.S. 84 (2003). The Court formulated the following two-prong test for analyzing the issue:

> We must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Kansas v. Hendricks,* 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Ibid.* (quoting *United States v. Ward,* 448 U.S. 242, 248-249, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)). Because we "ordinarily defer to the legislature's stated intent," *Hendricks, supra,* at 361, 117 S.Ct. 2072, "'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty," *Hudson v. United States,* 522 U.S. 93, 100, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997) (quoting *Ward, supra,* at 249, 100 S.Ct. 2636); *see also Hendricks, supra,* at 361, 117 S.Ct. 2072; *United States v. Ursery,* 518 U.S. 267, 290, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996); *United States v. One Assortment of 89 Firearms,* 465 U.S. 354, 365, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984).

Smith, 538 U.S. at 92. After applying this test to Alaska's SOR act, the United States Supreme Court concluded that the act did not violate the ex post facto provision of the United States Constitution. *Id.* at 105-06. The Tennessee Supreme Court has held that the Tennessee Constitution provides the same ex post facto prohibitions that the United States Constitution provides. *See Pruitt*, 510 S.W.3d at 416. Thus, the two-prong test articulated in *Smith* also applies to ex post facto challenges under the Tennessee Constitution.

A. Whether the legislature intended to establish civil proceedings.

Under the first prong of the test, several courts have already interpreted the 2004 Act and determined that it was not the intention of the General Assembly to impose punishment. In fact, the Tennessee Supreme Court has specifically held that "the registration requirements imposed by the sex offender registration act are nonpunitive." *Ward*, 315 S.W.3d at 472. This holding is consistent with the General Assembly's express intent found in Tenn. Code Ann. § 40-39-201(b), which provides, in pertinent part:

> (1) . . . Sexual offenders pose a high risk of engaging in further offenses after release from incarceration or commitment and protection of the public from these offenders is of paramount public interest;
> (2) It is a compelling and necessary public interest that the public have information concerning persons convicted of sexual offenses collected pursuant to this part, to allow members of the public to adequately protect themselves and their children from these persons;
> (3) Persons convicted of these sexual offenses have a reduced expectation of privacy because of the public's interest in public safety;
> (4) In balancing the sexual offender's and violent sexual offender's due process and other rights against the interests of public security, the general assembly finds that releasing information about offenders under the circumstances specified in this part will further the primary governmental interest of protecting vulnerable populations from potential harm;
> . . . .
> (6) To protect the safety and general welfare of the people of this state, it is necessary to provide for continued registration of offenders and for the public release of specified information regarding offenders. This policy of authorizing the release of necessary and relevant information about offenders to members of the general public is a means of assuring public protection and *shall not be construed as punitive*;
> . . . .
> (8) The general assembly also declares, however, that in making information about certain offenders available to the public, *the general assembly does not intend that the information be used to inflict retribution or additional punishment on those offenders.*

(Emphasis added). Thus, it is evident that the General Assembly intended to create a civil, nonpunitive regime.

B. Whether the 2004 Act, as applied to Mr. Clark, is punitive in effect.

Having determined that the General Assembly did not intend for the 2004 Act to inflict punishment, we proceed to the second prong of the test: whether the specific provisions are "'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Smith*, 538 U.S. at 92 (quoting *Ward*, 448 U.S. at 248-49). When determining whether a law has a punitive effect, the United States Supreme Court directs courts to use the following factors:

> [W]hether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of

> punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.

Id. at 97.

We note that the United States Supreme Court, the United States Court of Appeals for the Sixth Circuit, the Tennessee Court of Appeals, and the Tennessee Court of Criminal Appeals have already applied the second prong of this test to Tennessee's SOR laws and have consistently upheld them against ex post facto challenges. *Ward*, 315 S.W. 3d at 472; *Doe v. Cooper*, No. M2009-00915-COA-R3-CV, 2010 WL 2730583, at *7 (Tenn. Ct. App. July 9, 2010) (citing *Smith v. Doe*, 538 U.S. 84 (2003); *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003); *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999); *Doe v. Bredesen*, No. 3:04-CV-566, 2006 WL 849849 (E.D. Tenn. Mar. 28, 2006), *aff'd* 507 F.3d 998 (6th Cir. 2007), *cert. denied*, 555 U.S. 921 (2008); *Strain v. Tenn. Bureau of Investigation*, No. M2007-01621-COA-R3-CV, 2009 WL 137210 (Tenn. Ct. App. Jan. 20, 2009); *State v. Gibson*, No. E2003-02102-CCA-R3-CD, 2004 WL 2827000 (Tenn. Crim. App. Dec. 9, 2004)). In fact, "[t]o date, every *ex post facto* challenge of Tennessee's statutory scheme requiring persons classified as sexual offenders to register with the TBI sex offender registry has been rejected." *Id.*

The classification, registration, and reporting provisions of the 2004 Act were before the federal Eastern District Court of Tennessee in *Doe v. Bredesen*, 2006 WL 849849, at *7. After determining that the General Assembly "intended to implement a civil regulatory scheme, not one of punishment," the court went on to apply the second prong of the test and concluded that "[t]he classification of sexual offenders under the Act is part of a nonpunitive regulatory framework." *Bredesen*, 2006 WL 849849, at *7, *10. Of particular importance to the present case, the court noted that, under the 2004 Act:

> John Doe's federal conviction remains the same, and his punishment for the crime did not change. What did change is the classification of that crime within a nonpunitive regulatory scheme designed to address the danger of recidivism and to protect the health and safety of the public. John Doe's reclassification within the Act's framework is not punishment; rather it is a function of a changing and evolving regulatory scheme that applies to him because of the particular crime he committed. "The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith*, 538 U.S. at 103, 123 S.Ct. at 1153.

Id. at *10.

To support his argument that the specific provisions of the 2004 Act are punitive in effect, as applied to him, Mr. Clark relies almost exclusively on *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016). In *Snyder*, the plaintiffs challenged Michigan's SOR act under multiple legal theories including that the act, as retroactively applied to them, was punitive in effect and violated the ex post facto provision of the federal constitution. *Snyder*, 834 F.3d at 698. The Michigan act, like the Tennessee act, included a provision prohibiting sexual offenders from living or working within 1,000 feet of a school. *Id.* The plaintiffs presented maps, data, and expert testimony demonstrating that this restriction was "very burdensome, especially in densely populated areas." *Id.* at 701. For instance, they were "forced to tailor much of their lives around these school zones," and "they often ha[d] great difficulty in finding a place where they may legally live or work." *Id.* 702. The plaintiffs also presented evidence that Michigan's act had little impact on recidivism rates. *Id.* at 704-05.

Based on this evidence, the *Snyder* court concluded that Michigan's act was punitive in effect and violated the ex post facto provision of the federal constitution. *Id.* 705-06. The court stated:

> A regulatory regime that severely restricts where people can live, work and "loiter," that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska's first-generation registry law. [The Michigan act] brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live. It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information.
>
> We conclude that Michigan's [act] imposes punishment. And while many (certainly not all) sex offenses involve abominable, almost unspeakable, conduct that deserves severe legal penalties, punishment may never be retroactively imposed or increased.

Id. 705.

Although we recognize that the *Snyder* decision is worthy of examination, Mr. Clark's reliance on it is misplaced. As a decision of the Court of Appeals for the Sixth

Circuit, it is merely persuasive authority; we are not bound by its ruling. *See Hughes v. Tenn. Bd. of Prob. & Parole*, 514 S.W.3d 707, 713 n.8 (Tenn. 2017) (noting that we are "'not bound by decisions of the federal district and circuit courts. We are bound only by decisions of the United States Supreme Court.'") (quoting *State v. Carruthers*, 35 S.W.3d 516, 561 n.45 (Tenn. 2000)). Moreover, Mr. Clark is challenging Tennessee's SOR act, not Michigan's SOR act. That means he must demonstrate by the "clearest proof" that the challenged provisions of the 2004 Act, as applied to him, are so punitive in effect that they constitute punishment in violation of the ex post facto provisions of the federal and state constitutions. *See Smith*, 538 U.S. at 92. In other words, he must show how his circumstances under the 2004 Act constitute impermissible punishment. The *Snyder* court's findings with regard to the plaintiffs' circumstances under Michigan's SOR act demonstrate how those particular plaintiffs were impermissibly punished by Michigan's act. They do not demonstrate that Mr. Clark was impermissibly punished by the 2004 Act.

An examination of the record shows that, unlike the plaintiffs in *Snyder*, Mr. Clark presented little evidence of how the 2004 Act punished him. For instance, the record contains no evidence that Mr. Clark was unable to find a home or a job due to the 2004 Act's restrictions on where registrants may live and work. In fact, he stated that he managed to find housing and that he was a published author. Mr. Clark asserts that the 2004 Act had a punitive effect on him as a published author because he was unable to consider "publishing in print" due to the 2004 Act's prohibition of access to libraries. Although Mr. Clark is correct that Tenn. Code Ann. § 40-39-216(a) provides that "[p]ublic library boards shall have the authority to reasonably restrict the access of any person listed on the sexual offender registry," he failed to present proof that any libraries actually restricted his access. Moreover, he presented no evidence that this restriction or any other restriction prevented him from publishing in print or obtaining a job.

In its April 6, 2018 memorandum and order, the chancery court stated that Mr. Clark presented "some legal articles and academic studies on the effects of recidivism rates with relation to sex offender registration laws." These articles and academic studies were documents the *Snyder* court considered when making its decision. When Mr. Clark introduced these documents at trial, he explained that he was introducing them because he wanted the chancery court "to review the same information the Sixth Circuit reviewed in order to come to their decision." After considering this evidence, the chancery court concluded that it "was inconclusive as to whether Tennessee's laws were in effect punitive." The record on appeal does not contain these documents, but we do not find their absence fatal to our review of the issue. As discussed above, evidence demonstrating that Michigan's SOR laws were punitive in effect does not satisfy Mr. Clark's burden of proving by "the clearest proof" that Tennessee's SOR laws, as applied to him, are punitive in effect.

Finally, Mr. Clark presented a 2007 recidivism study issued by the TBI. This study examined 1,116 male offenders who were released in 2001 over a three-year period. Of the offenders studied, 557 had committed a crime involving a sexual component and 559 of them had committed nonsexual felonies. According to this study, those who had committed sexual offenses had a lower recidivism rate than those who had committed nonsexual felonies. We, like the chancery court, conclude that this evidence is inconclusive as to whether Tennessee's SOR laws were punitive in effect. As the TBI pointed out to the chancery court, there had been SOR laws in effect in Tennessee for thirteen years at the time this recidivism study was released. The lower recidivism rates could have been due to the effectiveness of Tennessee's SOR laws rather than due to sexual offenders not posing a high risk of reoffending. Without additional studies or expert testimony concerning this issue, we cannot conclude that significant doubt has been cast on the General Assembly's pronouncement that "[s]exual offenders pose a high risk of engaging in further offenses after release from incarceration or commitment . . . ." Tenn. Code Ann. § 40-39-201(b)(1). The meager evidence presented by Mr. Clark falls short of the "clearest proof" required to demonstrate that the 2004 Act, as applied to him, imposed an impermissible punishment.

In light of the foregoing, we conclude that the chancery court did not err in finding that the challenged provisions of the 2004 Act did not violate the ex post facto clauses of the federal and state constitutions.

II. Additional Constitutional Challenges.

Although not clearly articulated in his appellate brief, it appears that Mr. Clark also asserts vagueness, First Amendment, and due process challenges to the 2004 Act. Specifically, he asserts that the geographic restrictions in the 2004 Act are vague because property lines are not clearly marked and that they violate the First Amendment because they prevent him from gathering with others in a public library or public park. He also asserts that he was denied due process because he was not informed that he would have to register pursuant to the 2004 Act before he accepted interstate transfer of parole.

It is well-settled in Tennessee that "'[a]n issue not raised nor considered in the trial court but raised for the first time on appeal will not be considered by this Court.'" *Denver Area Meat Cutters & Emp'rs Pension Plan v. Clayton*, 209 S.W.3d 584, 594 (Tenn. Ct. App. 2006) (quoting *Hobson v. First State Bank*, 801 S.W.2d 807, 812 (Tenn. Ct. App. 1990)). Here, a thorough examination of the record shows that Mr. Clark did not raise his vagueness or First Amendment challenges in the chancery court. Accordingly, we conclude that these issues are waived.

Mr. Clark initially raised his due process claim in the complaint he filed in the chancery court. In his complaint, he contended that the Tennessee Board of Probation and Parole failed to notify him "that should [he] accept interstate transfer of parole to

Tennessee [he] would be required to register as a sex offender." He later filed a supporting brief expressly abandoning this claim "so that a full examination of [the ex post facto challenge]" could occur. Despite abandoning the due process claim in his supporting brief, however, he presented argument at the February 6, 2018 hearing concerning due process. He stated, in pertinent part, as follows:

> THE COURT: Did you say that there was a denial of due process because you didn't get notice of something?
> MR. CLARK: Yes. . . . the interstate transfer of parole from Pennsylvania to Tennessee, which is parole for a probation violation, required that there be vetting by the Interstate Compact Agency, a person assigned from Tennessee to that, as well as the person from the Tennessee Board of Parole and Probation assigned to investigate before interstate transfer of [parole] is permitted, allowed.
>
> During that vetting, during this process, no one from Maryland or Tennessee notified me that if I chose to accept interstate transfer of parole, I would be subject to register with Tennessee on the sex offender registry.

In its memorandum and order, the chancery court declined to consider Mr. Clark's due process claims because "he did not brief his due process claims, and they appear to be directed to the Tennessee Board of Parole, and not the [TBI]." It is clear from Mr. Clark's complaint and his statements at the February 6, 2018 hearing that his due process claims were directed at the Tennessee Board of Probation and Parole, not at the TBI. He did not identify the Tennessee Board of Probation and Parole as a defendant in this case. Thus, the chancery court properly declined to consider Mr. Clark's due process claim, and we will not consider it here.

Due to the foregoing reasons, we conclude that the chancery court did not err in affirming the TBI's denial of Mr. Clark's request to have his registration requirements terminated.

CONCLUSION

The judgment of the chancery court is affirmed, and this matter is remanded with costs of appeal assessed against the appellant, Barry L. Clark, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY, TENNESSEE

BARRY L. CLARK,	)	
	)	
Petitioner,	)	
	)	
v.	)	**CASE No. 16-1035-I**
	)	
MARK GWYN, Director TBI, JEANNE BROADWELL, General Counsel,	)	
	)	
Respondent.	)	

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MEMORANDUM AND ORDER OF DISMISSAL

I. Statement of the Case

The Petitioner seeks judicial review of the TBI administrative decision that the Petitioner's registration as a violent sex offender is required by the Tennessee Sexual Offender Registration Verification and Tracking Act of 2004, (hereafter referred to as the SOR Act). The Petitioner also seeks judicial review of the TBI finding that he does not qualify for termination of the registration requirements that are being applied to him. The Petitioner believes that his name should be removed from the registry, and that he should not be required to register at all. In both instances, the Petitioner's sole legal theory is that Tennessee's SOR Act, as it applies to him, is an ex post facto law that inflicts unlawful punishment upon him.

While the Petitioner initially raised due process claims in his Petition for Judicial Review, he did not brief his due process claims, and they appear to be directed to the Tennessee Board of Parole, and not the Respondent in this case. Moreover, the Petitioner

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does not challenge the decision by the TBI that his Maryland sexual offense convictions are analogous to the offense of rape in this state.

The Administrative Record was filed with the Court. The Affidavit of the TBI's General Counsel, Jeanne Broadwell, setting forth the TBI's reason for denying the Petitioner's request for removal from the SOR was also filed.

II. Contentions of the Parties and Issues for the Court

The Petitioner initially complains that TBI records of his Maryland criminal record are hearsay, but he does not explain how his convictions for sexual assault in Maryland in 1981 should be understood any differently than the way the convictions were interpreted and applied by the TBI in his case.

The Petitioner's primary claim is that it was error for the TBI to require him to register and comply with the Tennessee SOR Act. To support this claim, the Petitioner argues that the Tennessee SOR Act requiring that he register as a sex offender is unconstitutional because the requirements amount to an ex post facto law that unlawfully increases his punishment.

The Petitioner claims that his interpretation is "settled law" in Tennessee based on the 2016 federal case of *Does v. Snyder*, reported at 834 Fed. 3d 696. In making his argument, the Petitioner points out the "punitive" nature of three parts of Tennessee's 2004 SOR Act, as amended, which he argues are identical or very similar to the provisions in Michigan's SOR law that the 6th Circuit struck down: First, sex offenders are classified in the Tennessee SOR Act without being assessed individually for risk. Second, the Tennessee registration and reporting requirements for sex offenders are like the Michigan laws, and third, the residence and work restrictions under the Tennessee

SOR Act are likewise, very similar to the Michigan statutes examined by the *Snyder* court and found to be punitive.

In essence, the Petitioner argues that the 2004 requirements of the Tennessee SOR Act as part of the 1981 Maryland criminal sentence is ex post facto punishment, and is therefore, unconstitutional.

The State contends that the record contains sufficient evidence to support the TBI's decision to deny the Petitioner's request to be removed from the Sexual Offender Registry. The TBI confirmed that the Petitioner was convicted of a Sexual Offense of the First Degree in Maryland in 1981; that this offense is a violent sexual offense that requires registration under Tennessee's SOR per Tenn. Code Ann. § 40-39-202(1); and that the Petitioner required to register for life due to the nature of his offense per Tenn. Code Ann. § 40-39-207. Accordingly, argues the State, the Petitioner is not eligible for removal from the SOR list.

The State asserts that it did not violate any of the Petitioner's constitutional rights when denying his request to be removed from the SOR. As to the primary issue in this case, the State claims that the Tennessee SOR Act's classification, registration and reporting requirements do not impose punishment and therefore do not violate the Ex Post Facto Clause of either the federal or state constitution. The State also asserts that the Petitioner fails to meet his burden of bringing a cognizable ex post facto claim because he has not shown any evidence of injury.

The State supports its claims by arguing that the United States Supreme Court, the Tennessee Supreme Court, and more than one panel of the Sixth Circuit upheld the same or similar provisions of the Tennessee SOR Act now challenged by the Petitioner. The

State also distinguishes the 6th Circuit *Snyder* case upon which the Petitioner relies, noting that *Snyder* was decided on narrow grounds specifically related to the facts in that case as they related to Michigan law. Moreover, argues the State, the *Snyder* ruling is not binding law in Tennessee.

The issues for the Court to decide are:

1. Did the Tennessee legislature intend for the Tennessee SOR Act to establish a regulatory and administrative registry, or to impose punishment?
2. Has the Petitioner carried his burden to show that, the Tennessee SOR Act, as amended, on its face or as applied to him, is punitive in its effect?
3. Taking into account the two step process adopted in *Smith v. Doe*, 538 U.S. 84 (2003), has the Petitioner carried his burden to show, in a clear way, that Tennessee's SOR Act violates the Ex Post Facto Clause of the federal or state constitution?
4. Does the Ex Post Facto Clause in the Tennessee Constitution, Article 1, Section 11, afford broader protection than the federal constitution?
5. Applying the law to the facts, is the Petitioner entitled to be terminated from the registration requirements of Tennessee's SOR Act contrary to the decision made by the TBI?

III. Standard of Review

Judicial review of the TBI decision is found at Tenn. Code Ann. 40-39-207(g), which states, in pertinent part,

An offender whose request for termination of registration requirements is

> denied by a TBI official may petition the chancery court of Davidson County or the chancery court of the county where the offender resides, if the county is in Tennessee, for review of the decision.
>
> The review shall be on the record used by the TBI to deny the request. The TBI official who denied the request for termination of registration requirements may submit an affidavit to the court detailing the reasons the request was denied.

Tenn. Code Ann. § 4–5–322 sets forth the standard for courts reviewing an agency's decision:

> The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (5)(A) Unsupported by evidence that is both substantial and material in light of the entire record.
>
> (B) In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Tenn. Code Ann. § 4–5–322(h).

Moreover, Tennessee law is clear that "[n]o agency decision pursuant to a hearing in a contested case shall be reversed, remanded or modified by the reviewing court unless for errors that affect the merits of such decision." Tenn. Code Ann. § 4–5–322(i).

IV. Principles of Law

> (1) A conviction, whether upon a plea of guilty, a plea of nolo contendere, or a finding of guilt by a jury or the court, for an offense committed in another jurisdiction that would be classified as a sexual offense, or a violent sexual offense, if committed in this state, shall be considered a conviction for the purposes of this part.
>
> . . .
>
> (30) "Violent sexual offender" means a person who's been convicted in this state of committing a violent sexual offense or has another qualifying conviction.
>
> (31) "Violent sexual offense" means the commission of any act that constitutes the criminal offense of (B,) Rape, under § 39-13-503.

Tenn. Code Ann. § 40-39-202 (1), (30) and (31).

"An offender required to register under this part may file a request for termination of registration requirements with TBI headquarters in Nashville."

Tenn. Code Ann. § 40-39-207(a)(1).

> The offender required to register under this part shall continue to comply with the registration, verification, and tracking requirements for the life of the offender if that offender:
>
> > (A) Has one (1) or more prior convictions for a sexual offense, as defined in Section 40-39-202, regardless of when the conviction or convictions occurred;
> > (B) Has been convicted of a violent sexual offense as defined in TCA Section 40-39-202.

Tenn. Code Ann. § 40-39-207 (g)(1)

> . . .
>
> (c) An offender from another state, jurisdiction or country who has established a primary or secondary residence within this state or has established a physical presence at a particular location shall, within forty-eight (48) hours of establishing residency or a physical presence, register or report in person with the designated

law enforcement agency, completing and signing a TBI registration form, under penalty of perjury, pursuant to § 39-16-702(b)(3).

Tenn. Code Ann. § 40-39-203(c).

. . .

(b)(1) Violent sexual offenders shall report in person during the months of March, June, September, and December of each calendar year, to the designated law enforcement agency, on a date established by such agency, to update the offender's fingerprints, palm prints and photograph, as determined necessary by the agency, and to verify the continued accuracy of the information in the TBI registration form.

Tenn. Code Ann. § 40-39-204(b)(1).

(a) Using information received or collected pursuant to this part, the TBI shall establish, maintain and update a centralized record system of offender registration, verification and tracking information.

. . .

(d) . . . If an offender from another state establishes a residence in this state and is required to register in this state pursuant to § 40-39-203, the information concerning the registered offender set out in subdivisions (d)(1)-(16) shall be considered public information regardless of the date of conviction of the offender in the other state. In addition to making the information available in the same manner as public records, the TBI shall prepare and place the information on the state's Internet home page. This information shall become a part of the Tennessee internet criminal information center when that center is created within the TBI. The TBI shall also establish and operate a toll-free telephone number, to be known as the "Tennessee Internet Criminal Information Center Hotline," to permit members of the public to call and inquire as to whether a named individual is listed among those who have registered as offenders as required by this part.

Tenn. Code Ann. § 40-39-206(a) and (d).

. . .

(2) While mandated to comply with the requirements of this chapter, no sexual offender, as defined in § 40-39-202, or violent sexual offender, as defined in § 40-39-202, whose victim was an adult, shall knowingly establish a primary or secondary residence or any other living accommodation or knowingly accept employment within one thousand feet (1,000') of the property line of any public school, private or parochial school, licensed day care center, other child care

> facility, public park, playground, recreation center or public athletic field available for use by the general public.

Tenn. Code Ann. § 40-39-211(a)(2).

"(a) Public library boards shall have the authority to reasonably restrict the access of any person listed on the sexual offender registry. Such authority may be delegated by the board to a library administrator."

. . .

Tenn. Code Ann. § 40-39-216.

> Any county, metropolitan form of government or municipality may, by a two-thirds (2/3) vote of the legislative body, choose to establish a community notification system whereby certain residences, schools and child-care facilities within the county, metropolitan form of government or municipality are notified when a person required to register pursuant to this part as a sexual offender or violent sexual offender resides, intends to reside, or, upon registration, declares to reside within a certain distance of such residences, schools and child-care facilities . . . .

Tenn. Code Ann. § 40-39-217(a)(1)

> Both the federal and state constitutions prohibit ex post facto laws. The United States Constitution has two clauses containing the prohibition, one aimed at Congress, Article 1, Section 9, Clause 3; the other aimed at the states, Article 1, section 2, clause 1, which provides that, "[n]o State shall ... pass any ... ex post facto law."
>
> . . .
>
> The animating principle of the prohibition against ex post facto laws is basic fairness, as the United States Supreme Court has consistently decided.
>
> * * * *
>
> [w]e hold that the ex post facto clause of the Tennessee Constitution has the same definition and scope as the federal clause.

State v. Pruitt, 510 S.W.3d 398, 410, 416 (Tenn. 2016).

"That laws made for punishment of acts committed previous to the existence of such laws, and by them only declared criminal, are contrary to the principles of a free Government; wherefore, no ex post facto law shall be made."

Tennessee Constitution Article I, § 11.

As to ex post facto challenges to sexual offender registry laws, the United States Supreme Court adopted a two-step test to be applied when examining whether a law constitutes retroactive punishment forbidden by the ex post facto clause. A court must first determine whether the legislature meant the statute to establish civil proceedings. If to the contrary the legislative intention was to impose punishment, that ends the inquiry and the law violates the ex post facto clause. However, if the intention was to enact a regulatory scheme that is civil in nature, then the court must analyze the effects of the law to see if the statute is punitive in effect. Only the "clearest proof" can transform a civil remedy into a criminal one.

See *Smith v Doe*, 538 U.S. 84, 92 (2003).

> The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.

Smith v. Doe, 538 U.S. 84, 97, (2003).

> The Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences. We have upheld against *ex post facto* challenges laws imposing regulatory burdens on individuals convicted of crimes without any corresponding risk assessment. As stated in *Hawker:* "Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind to make a rule of universal application...."

> *Ibid.* The State's determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the *Ex Post Facto* Clause.

Smith v. Doe, 538 U.S. 84, 103–04, (2003) (internal citations removed).

"[t]he plain language of this statute expresses a nonpunitive intent to protect the public. In addition, as noted by the General Assembly, the registration requirement does not inflict additional punishment . . . nor does it alter the range of punishment."

Ward v. State, 315 S.W.3d 461, 470 (Tenn. 2010).

> (1) the underlying intent of sex offender registration is public protection and safety, and registration requirements assist law enforcement agencies in protecting the health, safety, and welfare of members of the community and state; (2) the registration requirement does not impose such a substantial additional disability or restraint on an offender, such as lengthening his or her sentence or significantly restricting freedom of movement, as to render the effect of the otherwise remedial statute punitive; (3) registration requirements in general have not been traditionally and historically considered punishment; and (4) the overwhelming importance of protecting the public safety outweighs the discomfort or inconvenience imposed upon a sex offender by requiring compliance with the registration requirement. Simply stated, the overwhelming majority of courts considering this issue have concluded that a sex offender registration requirement does not impose additional punishment on the offender.

Ward v. State, 315 S.W.3d 461, 470–72 (Tenn. 2010).

"We conclude, once again, that the Act was not intended to punish, and its requirements do not transform the law into punishment. Because the Act imposes no punishment, the *Ex Post Facto* Clause is not implicated." *Cutshall v. Sundquist*, 193 F.3d 466, 477 (6th Cir. 1999).

"[i]n light of this clear declaration of legislative intent, the district court correctly found that the Tennessee General Assembly intended to implement a civil regulatory scheme, not a punitive scheme." *Doe v. Bredesen*, 507 F.3d 998, 1004 (6th Cir. 2007).

"[t]he Acts' registration, reporting, and surveillance components are not of a type that we have traditionally considered as a punishment, and the district court further correctly found that they do not constitute an affirmative disability or restraint in light of the legislature's intent." *Id.* at 1005.

> Furthermore, although the Acts may have some deterrent effects and deterrence is one purpose of punishment, that does not render the Acts punitive for purposes of the *Ex Post Facto* Clause. As we explained when we upheld an earlier Tennessee sex offender registration act, '[t]o hold that the mere presence of a deterrent purpose renders ... sanctions 'criminal' would severely undermine the government's ability to engage in effective regulation.

Id.

> The Tennessee General Assembly could rationally conclude that sex offenders present an unusually high risk of recidivism, and that stringent registration, reporting, and electronic surveillance requirements can reduce that risk and thereby protect the public without further "punishing" the offenders. Where there is such a rational connection to a nonpunitive purpose, it is not for the courts to second-guess the state legislature's policy decision as to which measures best effectuate that purpose.

Id. at 1006.

There was "[n]o basis for us to conclude that the Acts' requirements are excessive in relation to its legitimate nonpunitive purpose of protecting the public from the undisputed high risk of recidivism." *Id.*

V. Findings of Fact

Based upon the entire record and the Affidavit of the TBI General Counsel, the Court finds as follows:

The TBI provided the administrative record containing Mr. Clark's 1981 Maryland

criminal conviction for sexual assault in the 1st, 2nd, 3rd and 4th degrees. The TBI concluded that comparing the Maryland criminal code Art. 27, § 464(a) to Tenn. Code Ann. § 40-39-202 (31)(B), the Petitioner's 1981 conviction of Sexual Offense-First Degree is comparable to rape in the state of Tennessee. These comparable offenses, enacted respectively in Maryland and Tennessee, are violent crimes. The comparable offenses enacted in Maryland and Tennessee require penetration and require force or intense coercion by physical threat or otherwise.

The Petitioner moved to Pennsylvania from Maryland and then to Tennessee. Upon the move to Tennessee, the Petitioner became subject to Tennessee's SOR Act. He first registered in Tennessee in 2011, but he began writing the TBI requesting that he be removed from the SOR thereafter. (Affidavit of TBI general counsel.) At one meeting with the TBI, it appears that the Petitioner was advised that he could be terminated from the requirement to register as a sexual offender after ten years based upon the TBI's then informal analysis of his Maryland offense. At any rate, the petitioner registered because he understood that he had to do so.

The TBI sent the Petitioner a letter dated September 19, 2016, stating that because of the violent nature of his offense he was not eligible for removal from the SOR "unless [his] conviction is overturned or you receive exoneration." Several days later, the Petitioner filed a Petition for Judicial Review in this Court challenging the denial of his request for removal from the Tennessee SOR.

VI. Discussion of *Does v. Snyder*

This Court first recognizes that while the Sixth Circuit case of *Does v, Snyder,* upon which the Petitioner heavily if not exclusively relies, is certainly worthy of examination,

the ruling in that case is not binding upon this Court. "We note that although they are persuasive authority when interpreting the United States Constitution, this court is not bound by decisions by the federal district and circuit courts. We are bound only by decisions of the United States Supreme Court." *Hughes v. Tennessee Board of Probation and Parole*, 514 S.W.3d 707 (Tenn. 2017) footnote *8.

The Sixth Circuit, upon examining the specific facts before it in the *Snyder* case, found the Michigan SOR Act's retroactive application to the Plaintiff was punitive in effect and therefore violated the Ex Post Facto Clause. The Sixth Circuit stated:

> A regulatory regime that severely restricts where people can live, work, and "loiter," that categorizes them into tiers ostensibly corresponding to present dangerousness without any individualized assessment thereof, and that requires time-consuming and cumbersome in-person reporting, all supported by—at best—scant evidence that such restrictions serve the professed purpose of keeping Michigan communities safe, is something altogether different from and more troubling than Alaska's first-generation registry law. SORA brands registrants as moral lepers solely on the basis of a prior conviction. It consigns them to years, if not a lifetime, of existence on the margins, not only of society, but often, as the record in this case makes painfully evident, from their own families, with whom, due to school zone restrictions, they may not even live. It directly regulates where registrants may go in their daily lives and compels them to interrupt those lives with great frequency in order to appear in person before law enforcement to report even minor changes to their information.
>
> We conclude that Michigan's SOR imposes punishment. And while many (certainly not all) sex offenses involve abominable, almost unspeakable, conduct that deserves severe legal penalties, punishment may never be retroactively imposed or increased.

Does #1-5 v. Snyder, 834 F.3d 696, 705 (6th Cir. 2016).

Several states have declined to follow the Sixth Circuit's *Snyder* ruling or found it to be inapplicable to their SOR laws. *See*: *Illinois in People v. Parker*, 2016 IL App (1st) 141597, ¶¶ 64-65, 70 N.E.3d 734, 751–52, appeal denied, 80 N.E.3d 5 (Ill. 2017)

(holding *Snyder* was "not binding on this court" and was also distinguishable because the record before it "simply does not contain the extensive demonstration—including maps visually depicting the effects of the Michigan law's geographical restrictions—that was relied on by the Sixth Circuit in *Does* to show the significant punitive effects of the Michigan law").

Virginia in *Baugh v. Commonwealth*, No. 0152-17-2, 2018 WL 611743, at *6–8 (Va. Ct. App. Jan. 30, 2018) (holding that "*Snyder* is factually distinguishable from the instant case in several significant ways," including the fact that the Michigan SOR statutes struck down were more restrictive.).

The District of Columbia in *United States v. Morgan*, 255 F. Supp. 3d 221, 231 (D.D.C. 2017) (holding that "[t]he most significant burden" imposed by the Michigan statute was its "regulation of where registrants may live, work, and 'loiter.' " which the Sixth Circuit concluded "resembled the traditional punishment of banishment, constituted an affirmative restraint, and were excessive in relation to the nonpunitive purpose," but that its SOR law "[i]n contrast . . . does not restrict where registrants can live, work, or loiter . . . and therefore, the reasoning in *Snyder* does not apply.").

New York in *Devine v. Annucci*, 150 A.D.3d 1104, 1107, 56 N.Y.S.3d 149, 152 (N.Y. App. Div. 2017) (acknowledging the Sixth Circuit ruling in *Snyder* but nonetheless concluding that in its case "the petitioner has not shown that the restrictions [the New York SOR law]imposed, as applied to him, violate the Ex Post Facto Clause" and further noting that "issues regarding whether there are better or wiser ways to achieve the law's stated objectives are policy decisions belonging to the legislature and not the court.").

VII. Resolution of the Issues

In his initial request for termination at the agency level, and in his Petition and briefing before this Court, the Petitioner has relied primarily upon the theory that Tennessee's SOR Act is a punitive ex post facto law enacted by the Tennessee legislature after his 1981 conviction of sexual offenses in Maryland. The Petitioner did not argue that his request for termination of the registration requirements was based upon any of the other criteria in Tenn. Code Ann. § 40-39-207.

The TBI responded to the Petitioner's request for termination of the registration requirements, relying upon Tenn. Code Ann. § 40-39-207(g)(1)(b), in ruling that a person required to register must continue to comply with the registration and quarterly monitoring requirements for the life of that offender if that offender has been convicted of a violent sexual offense as defined in TCA Section 40-39-202(28). The TBI's counsel filed an affidavit in this Court showing in detail why a first-degree sexual assault conviction in Maryland is closely analogous to the violent offense of rape in Tennessee. The TBI is allowed to supplement the record based upon Tenn. Code Ann. § 40-39-207(g) where the purpose of the affidavit is to explain the denial of the request for termination. Finding no evidence to the contrary, this Court holds that there is substantial and material evidence to support the Agency's ruling that the Petitioner is subject to the registration requirements of the Tennessee SOR Act and is not entitled to be terminated from the registration requirements absent a finding that the Act is itself unconstitutional. The constitutionality of the Tennessee SOR Act, as applied to the Petitioner, is addressed below.

Issue Number one: Did the Tennessee legislature intend for the 2004 Tennessee SOR Act, as amended, to establish a regulatory proceeding or to impose punishment? The Court finds that this issue has already been decided on several occasions by courts interpreting the Tennessee Act, including our state Supreme Court. The SOR Act does not impose punishment, but rather is civil in its intention. The Tennessee General Assembly clearly indicated its intent that the SOR Act was a remedial and regulatory measure, and that the Act's registration requirements were never intended to inflict additional punishment on a registrant or alter the range of punishment previously imposed. *See Ward v. State*, 315 S.W.3d 461, 468 (Tenn. 2010).

Additionally, the Sixth Circuit, in interpreting Tennessee's SOR Act, has on two separate occasions found the Act had no punitive intent. In *Cutshall*, the Court found the Tennessee legislature intended for the Tennessee SOR Act to have a regulatory purpose, and the language of the Act evidenced the intent of the legislature to monitor the whereabouts of convicted sex offenders. The Court held that, upon examining the statute in light of the factors to be considered in *ex post facto* analysis, the Tennessee SOR Act did not violate this prohibition. *Cutshall v. Sunquist*, 193 F3d 466 (6th Cir. 1999).

Again in 2008, the Sixth Circuit found that the Tennessee legislature's purpose in enacting the challenged provisions of the SOR Act was to create a civil, nonpunitive regime. The Court found the effect of the measures adopted in the Tennessee SOR Act were reasonable and were not punitive. *Doe v. Bredesen*, 507 F.3d 998, 1007 (6th Cir 2008).

While these two Sixth Circuit rulings are not binding, this Court finds them persuasive because they are addressing the legislative intent behind the same Tennessee

SOR Act now challenged by the Petitioner in this case. Moreover, the Tennessee Supreme Court ruling in *Ward*, also finding no punitive intent, is binding on this Court. Accordingly, this Court likewise holds that the version of the Tennessee SOR Act at bar has no punitive legislative intent. Having addressed the first of the two-steps of the ex post facto analysis set forth in *Smith v. Doe*, 538 U.S. 84, 97, (2003), the Court now reaches the second step.

Issue Number two: Has the Petitioner carried his burden to show that, regardless of legislative intent, the Tennessee SOR Act as amended and applied to him, is punitive in its effect? This second step in the ex post facto analysis has also already been applied to the Tennessee SOR Act by numerous courts on multiple occasions, and the consistent holding is that the effect of the Act is not punitive. Various iterations of the Tennessee SOR registration and reporting provisions, either identical or very similar to the version at issue in this case, have been found to have no punitive effect. *See Doe v. Bredesen*, 507 F.3d 998 (6th Cir. 2007) and *Cutshall v. Sundquist*, 193 F.3d 466 (6th Cir. 1999). In both cases, the analysis used was the two-step process set forth in *Doe v. Smith*, including the application of the *Kennedy* factors. And, in both cases, the conclusion was that the Tennessee SOR Act did not have a punitive effect.

More significant than the persuasive reasoning of the Sixth Circuit in the two cases in which it upheld Tennessee's SOR law, is binding case precedent from the Tennessee Supreme Court. Our highest state court has held that the Tennessee SOR Act was a remedial regulatory measure, and not a punitive measure. *Ward v. State*, 315 S.W.3d 461, 470 (Tenn. 2010) (finding that "the overwhelming majority of courts considering this issue have concluded that a sex offender registration requirements does

not impose additional punishment on the offender," and concluding Tennessee's SOR Act was not punitive in effect). Additionally, the Tennessee Court of Appeals has reached the same conclusion in several unreported intermediate appellate rulings. *See,* among others, *Strain v. Tennessee Bureau of Investigation*, 2009 WL 137210 (Tenn. Ct. App. Jan. 20, 2009) and *Doe v. Cooper*, 2010 WL 2730583 (Tenn. Ct. App. July 9, 2010). In short, Tennessee appellate courts have, in holdings binding upon this Court, examined the Tennessee SOR laws and have consistently found they do not have punitive effect.

The Petitioner relies almost exclusively on a 2016 Sixth Circuit ruling interpreting Michigan's SOR laws. In *Does v. Snyder*, the Sixth Circuit found that Michigan's SOR laws were punitive and violated ex post facto constitutional prohibitions because: 1) they resemble this country's traditional punishment of banishment; 2) they are an affirmative restraint; and 3) the registration requirements were excessive in relation to the nonpunitive intent. Most significantly, the extensive record in that case, which contained maps, data and expert testimony, convinced the federal appellate court that Michigan's SOR Act was constitutionally infirm and could not be enforced. See *Does v. Snyder*, 834 F.3d 696 (6th Cir 2016).

The Petitioner in this case is not challenging the Michigan SOR laws; he is challenging Tennessee's SOR Act, and he has failed to demonstrate how Tennessee's registration and reporting requirements rise beyond mere inconvenience to the level of having punitive effect, such as those addressed in *Snyder*.

Issue Number three: Taking into account the two-issue process, has the Petitioner carried his burden to show in, a clear way, that Tennessee's SOR Act violates the Ex Post Facto Clause in the federal or state constitution? The Petitioner has the burden to

demonstrate by the "clearest proof" that the challenged provisions of the Tennessee SOR Act, as applied to him, are so punitive in their effect and consequences as to transform the registration and reporting requirements into impermissible punishment. See *Smith v Doe*, 538 U.S. 84, 92 (2003). Unlike the facts in *Does v Snyder*, the record here does not contain voluminous evidence of how Tennessee's SOR Act punished the Petitioner.

Furthermore, unlike the plaintiffs in the *Snyder* case, the Petitioner did not present evidence that he was adversely punished by geographic restrictions, such as being unable to find a home or job. The Petitioner does have a residence in Tennessee and testified that he is a published author. He complains of inconvenience because of restrictions to some public libraries, but has failed to present any evidence that these or any other restrictions prevented him from gainful employment. The Petitioner included some legal articles and academic studies on the effects of recidivism rates with relation to sex offender registration laws, but such evidence was inconclusive as to whether Tennessee's laws were in effect punitive. More significantly, the little evidence that was presented failed to show how the SOR Act, as applied to the Petitioner, is in fact punitive. The Petitioner failed to meet his burden of showing by "clearest proof" that Tennessee's SOR Act, as applied to him, is punitive and thus a violation of his right against ex post facto laws.

Issue Number four: Does the Ex Post Facto Clause in the Tennessee Constitution afford broader protection than the federal constitution? In 2016 the Tennessee Supreme Court decided that the Tennessee state and federal constitutions provide the same ex post facto prohibitions. *See State v. Pruitt*, 510 S.W.3d 398, (Tenn. 2016). Accordingly, the two-step *Doe v Smith* federal standard utilized in all of the cases cited above is the proper

standard for examining an ex post facto challenge under both the United States Constitution and the Tennessee Constitution.

This Court recognizes that other states, including Maryland, have state constitutions that have been interpreted to provide broader protections against ex post facto laws than those contained in the U.S. Constitution and the Tennessee Constitution. In 2013, the Maryland Court of Appeals held that the imposition of registration requirements upon a Maryland resident due to a SOR law passed over a decade after petitioner's commission of a crime was a violation of the ex post facto prohibition contained in Article 17 of the Maryland Declaration of Rights. The Maryland court reached that conclusion because its common law "recognized that, in many contexts, the protections provided by the Maryland Declaration of Rights are broader than the protections provided by the parallel federal provision," including its ex post facto protections. *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 62 A.3d 123, 131 (2013). In so ruling, Maryland expressly declined to "follow the Supreme Court's analysis of the parallel federal protection applied in *Smith*, thereby narrowing the scope of Article 17's protections." *Id.* at 136. Such is not the case in Tennessee.

It appears to this Court that the Petitioner may not be required to register with Maryland's SOR if he was to reside in Maryland. However, this fact does not negate his requirement to register with Tennessee's SOR now that he resides in Tennessee, nor does it render Tennessee's SOR Act unconstitutional.

Issue Number five: Is the Petitioner entitled to be terminated from the registration requirements of the Tennessee SOR Act? For all of the reasons articulated above, this Court must find that the Petitioner did not carry his burden, and the denial by the TBI of

his request to be terminated from the registration requirements must be affirmed.

VIII. Decree

Although the Tennessee Supreme Court may change its positon based upon the passage of time, the changes in culture, and the reasoning of other courts whose states have SOR legislation similar to that of Tennessee, this trial court must accept the decision of the superior courts of this state as it stands today. The Court respectfully dismisses the Petitioner's complaint for judicial review of the TBI denial of his request to terminate the registration requirements of the Tennessee SOR Act.

Court costs are taxed to the Petitioner.

CLAUDIA C. BONNYMAN, CHANCELLOR
CHANCERY COURT, PART I

RULE 58 CERTIFICATION
CERTIFICATE OF THE CLERK

A copy of this order has been served by U. S. Mail and Email upon all parties or their counsel named below.

Deputy Clerk and Master — Date: 4/6/18

Mr. Barry L. Clark, *Pro se*
267 Mabry Street
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IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

BARRY L. CLARK v. MARK GWYN ET AL.

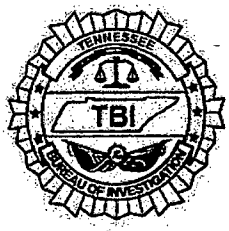
Chancery Court for Davidson County
No. 16-1035-I

No. M2018-00655-SC-R11-CV

ORDER

Upon consideration of the application for permission to appeal of Barry L. Clark and the record before us, the application is denied.

PER CURIAM



Tennessee Bureau of Investigation
Crime Statistics Unit

Recidivism Study

Release Date: August 17, 2007

Overview

Purpose of the Study:

The Tennessee Statistical Analysis Center (TSAC) was one of eleven state SAC's chosen to participate in a multi-state study. The study focused on all male sex offenders who were released from incarceration during calendar year 2001. The offenders were tracked for three years after their release to determine the recidivism rate of the group. A stratified sample based on primary incarceration offense of non-sex offenders released was also tracked for three years as a comparison. State and national criminal histories were generated for both groups of offenders. Additionally, data was obtained from the Tennessee Department of Correction's Tennessee Offender Management Information System (TOMIS) to identify offenders recommitted for technical violations of supervised release.

Description of the Study:

A database was obtained from the Tennessee Department of Correction that contained all felony offenders released from Tennessee jails and prisons during the year of 2001. All sex offenders were studied and a stratified sample was generated of released offenders with other offenses. For both studies only male subjects were tracked. The offenders studied were released from prison or jail to parole, probation, community corrections, or released after the expiration of their sentence. The study did not include offenders who were initially sentenced to community correction or probation without serving a period of incarceration.

Recidivism is defined as the return to criminal habits, including recommitment for new offenses or a technical violation of supervised release. To determine the rate of recidivism, the records of 557 Sex Offenders were examined for a three year period following the date of their release from custody. A stratified sample of 559 male felons based on proportion of the offense group within all releases was studied for comparison purposes.

The study includes information on offenders who were rearrested and recommitted as well as those who had no further known contact with the criminal justice system. For the purpose of this study "recommitted" was defined as offenders who were committed for a new conviction or recommitted as a result of a technical violation of the rules of their supervision within three years of their release from incarceration. "Rearrested" was defined as offenders who were arrested for a new offense, but were not recommitted within three years following the date of their release. Recommitment and rearrest information was obtained from the Tennessee Offender Management Information System (TOMIS) of the Tennessee Department of Correction and from criminal history information obtained from the National Crime Information Center (NCIC) and the Tennessee Criminal History System (TCHS). The recommitment and rearrest may have occurred in Tennessee or in any other jurisdiction and are noted if the arrest occurred outside Tennessee.

For the purpose of this study, technical violations were counted for those offenders who did not commit a new offense and were only committed for a technical violation of supervision the three year period. If the offender returned on a technical violation because of a new offense conviction the new sentence would have been counted and the technical violation would have been disregarded.

Layout of Study:

The body of the report contains analysis based on offenders recommitted, rearrested, or those offenders who did not recidivate within the three year time frame. The report contains information on various data elements including release type, race characteristics, age, days between arrests, number of offenders rearrested but not incarcerated and the average number of offenses committed.

Comparison Summary

Category	Sex Offenders		Other Offenders	
Offenders	**506**		**523**	
Total Recidivated	283	55.9%	407	77.8%
Success	223	44.1%	116	22.2%
Arrested With No Recommit	141	27.9%	137	26.2%
Recommitted	142	28.1%	270	51.6%
Released to Expiration of Sentence	299	59.1%	149	28.5%
Released to Regular Probation	134	26.5%	191	36.5%
Released to Regular Parole	31	6.1%	142	27.2%
Released to Community Correction	24	4.7%	38	7.3%
Released to Interstate Compact Transfer	5	0.9%	3	0.5%
Released to Mandatory Parole	4	0.7%	0	0.0%
Released to Illness	9	1.8%	0	0.0%
Average Age at Recommit	38		33	
Average Number of Days Between Release and Arrest	375		322	
Average Number of Days Between Release and Recommit	460		429	
Recommit with a Similar Offense	20		41	
Recommit with a Similar / Lesser Offense	4		9	
Recommit with a Similar / Higher Offense	4		9	
Out of State Re-Arrested or Recommitted	20		27	

The study demonstrated a marked difference between the recidivism of sex offenders and offenders with other primary offenses who were released. The sex offender group showed a success rate of 44.1%, almost double the rate of the other release group. Only 28.1% of the sex offenders released were recommitted into the prison system while 51.6% of all other releases were recommitted. Both groups showed similar arrest rates with no readmission into the prison system.

Sex offenders were more likely to serve their entire sentence when compared to offenders released with other sentences. Other offenders were more likely to be released to some type of supervision.

The average age at recommitment was 38 years of age for sex offenders compared to 33 years for the other offenders. Sex offenders, on average, were on the street longer before being rearrested or recommitted.

Tennessee Bureau of Investigation

Tennessee Criminal History Database Analysis

Evaluating: DUI, Rape and Robbery

2002 - 2007

Published by:
Tennessee Bureau of Investigation
Crime Statistics Unit
July 2009

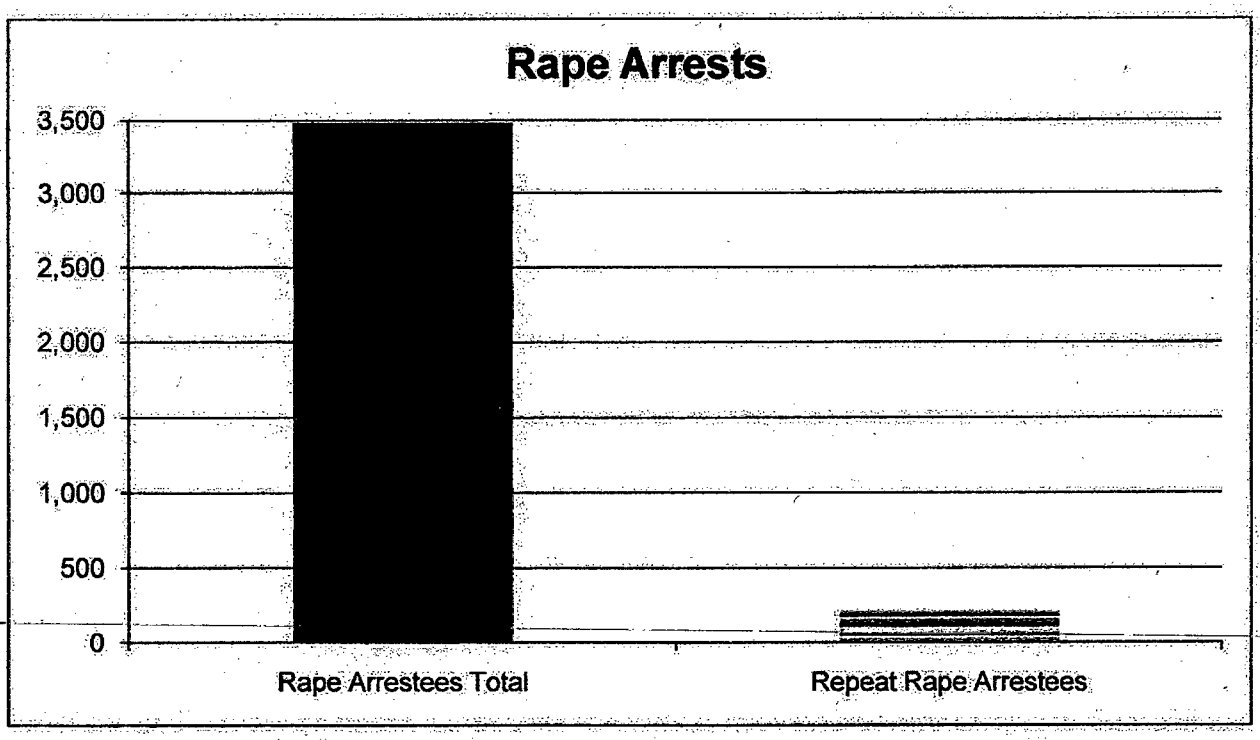
Rape Characteristics

Rape is defined by TCA § 39 – 13 – 503 as:

Rape is unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by any of the following circumstances:

(a) Force or coercion is used to accomplish the act;
(b) The sexual penetration is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent;
(c) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or
(d) The sexual penetration is accomplished by fraud.

During the time period covered by the study, there were a total of 3,483 arrests for Rape. A total of 3,269 or 93.9% had one arrest for the offense of Rape. Only 214 or 6.1% were rearrested for the offense of Rape during the study period.



U.S. Department of Justice
Office of Justice Programs
Bureau of Justice Statistics

SPECIAL REPORT

MAY 2019 NCJ 251773

Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow-Up (2005-14)

Mariel Alper, Ph.D., and Matthew R. Durose, *BJS Statisticians*

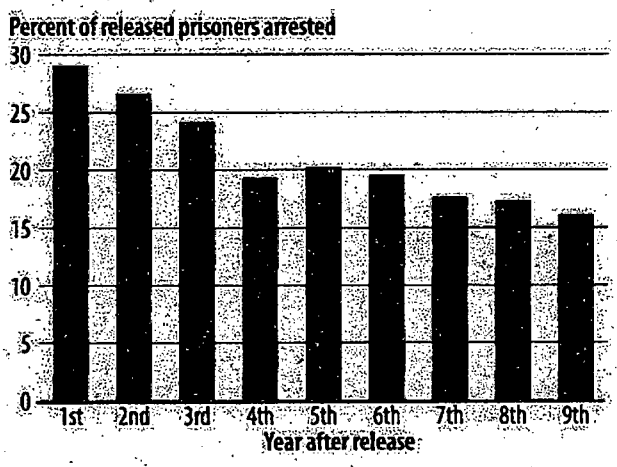
Among persons released from state prisons in 2005 across 30 states after serving a sentence for rape or sexual assault, 8% were arrested for rape or sexual assault during the 9 years after their release. Overall, 67% of sex offenders released in 2005 were arrested at least once for any type of crime during the 9-year follow-up period.[1]

About 3 in 10 (29%) sex offenders released in 2005 were arrested during their first year after release (figure 1). About 1 in 5 (20%) were arrested during their fifth year after release, and nearly 1 in 6 (16%) were arrested during their ninth year.

The Bureau of Justice Statistics (BJS) used criminal-history data and prisoner records to analyze the post-release offending patterns of former prisoners both within and outside of the state where they were imprisoned. This is BJS's first recidivism study on sex offenders with a 9-year follow-up period.

[1]For this report, "sex offenders" refers to released prisoners whose most serious commitment offense was rape or sexual assault.

FIGURE 1
Annual arrest percentage of prisoners released in 30 states in 2005 after serving a sentence for rape/sexual assault



Note: The denominator is the 20,195 prisoners released in 30 states in 2005 after serving a sentence for rape/sexual assault. See table 7 for estimates and appendix table 9 for standard errors.
Source: Bureau of Justice Statistics, Recidivism of State Prisoners Released in 2005 data collection, 2005–2014.

HIGHLIGHTS

Within 9 years of their release from prison in 2005—

- Rape and sexual assault offenders were less likely than other released prisoners to be arrested, but they were more likely than other released prisoners to be arrested for rape or sexual assault.
- Released sex offenders were more than three times as likely as other released prisoners to be arrested for rape or sexual assault (7.7% versus 2.3%).
- About two-thirds (67%) of released sex offenders were arrested for any crime, compared to about five-sixths (84%) of other released prisoners.
- Half of released sex offenders had a subsequent arrest that led to a conviction.
- Released sex offenders accounted for 5% of releases in 2005 and 16% of arrests for rape or sexual assault during the 9-year follow-up period.
- Less than half of released sex offenders were arrested for any crime within the first 3 years, while more than two-thirds were arrested within 9 years.
- Eleven percent of released sex offenders were arrested at least once for any crime outside the state of release.
- Among released prisoners who had a prior arrest for a sex offense but were serving time for an offense other than a sex offense, 6.7% were subsequently arrested for rape or sexual assault.

I swear that the following transcription of oral argument before the Tennessee Court of Appeals for the Middle District, December 5th session, audio markers of 30:05 through 30:32 is accurate and truthful. Sworn before a Notary Public on 25 September, 2019

Barry L. Clark
4485 Old Natchez Trace Trail
Camden, TN 38320
731-220-6188

Wanda Mali
8-31-22

"Every study that the sixth circuit,,,,,the sixth circuit used to make their evaluation that the recidivism is a joke..what they say about recidivism is wrong…legislatures scare the public saying well there's this high..this high risk of recidivism..there isn't..not in..there was a Tennessee study put into the record..the transcript of this…the lower hearing will explain that."

Tenn. Code Ann. § 40-39-201

40-39-201. Short title -- Legislative findings.

(a) This part shall be known as and may be cited as the "Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification and Tracking Act of 2004."

(b) The general assembly finds and declares that:

(1) Repeat sexual offenders, sexual offenders who use physical violence and sexual offenders who prey on children are violent sexual offenders who present an extreme threat to the public safety. Sexual offenders pose a **high risk** of engaging in further offenses after release from incarceration or commitment and protection of the public from these offenders is of paramount public interest;

(2) It is a compelling and necessary public interest that the public have information concerning persons convicted of sexual offenses collected pursuant to this part, to allow members of the public to adequately protect themselves and their children from these persons;

(3) Persons convicted of these sexual offenses have a reduced expectation of privacy because of the public's interest in public safety;

(4) In balancing the sexual offender's and violent sexual offender's due process and other rights against the interests of public security, the general assembly finds that releasing information about offenders under the circumstances specified in this part will further the primary governmental interest of protecting vulnerable populations from potential harm;

(5) The registration of offenders, utilizing complete and accurate information, along with the public release of specified information concerning offenders, will further the governmental interests of public safety and public scrutiny of the criminal and mental health systems that deal with these offenders;

(6) To protect the safety and general welfare of the people of this state, it is necessary to provide for continued registration of offenders and for the public release of specified information regarding offenders. This policy of authorizing the release of necessary and relevant information about offenders to members of the general public is a means of assuring public protection and shall not be construed as punitive;

(7) The offender is subject to specified terms and conditions that are implemented at sentencing or, at the time of release from incarceration, that require that those who are financially able must pay specified administrative costs to the appropriate registering agency, which shall retain one hundred dollars ($100) of these costs for the administration of this part and shall be reserved for the purposes authorized by this part at the end of each fiscal year, with the remaining fifty dollars ($50.00) of fees to be remitted to the Tennessee bureau of investigation's sex offender registry; provided, that a juvenile offender required to register under this part shall not be required to pay the administrative fee until the offender reaches eighteen (18) years of age; and

(8) The general assembly also declares, however, that in making information about certain offenders available to the public, the general assembly does not intend that the information be used to inflict retribution or additional punishment on those offenders.

History

Acts 2004, ch. 921, § 1; 2005, ch. 316, § 1; 2008, ch. 1164, § 1; 2011, ch. 483, § 4.

Tenn. Code Ann. § 4-5-312

Current through the 2019 Regular Session.

- TN - Tennessee Code Annotated
- Title 4 State Government
- Chapter 5 Uniform Administrative Procedures Act
- Part 3 Contested Cases

4-5-312. Procedure at hearing.

(a) The administrative judge or hearing officer shall regulate the course of the proceedings, in conformity with the prehearing order if any.

(b) To the extent necessary for full disclosure of all relevant facts and issues, the administrative judge or hearing officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, except as restricted by a limited grant of intervention or by the prehearing order.

(c) In the discretion of the administrative judge or hearing officer and agency members and by agreement of the parties, all or part of the hearing may be conducted by telephone, television or other electronic means, if each participant in the hearing has an opportunity to participate in, to hear, and, if technically feasible, to see the entire proceedings while taking place.

(d) The hearing shall be open to public observation pursuant to title 8, chapter 44, unless otherwise provided by state or federal law. To the extent that a hearing is conducted by telephone, television or other electronic means, the availability of public observation shall be satisfied by giving members of the public an opportunity, at reasonable times, to hear the tape recording and to inspect any transcript obtained by the agency, except as otherwise provided by § 50-7-701.

History

Acts 1982, ch. 874, § 51.

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
20TH JUDICIAL DISTRICT, DAVIDSON COUNTY

Barry L. Clark *
Plaintiff *
*
vs. * Docket No. 16-1035-I
*
Mark Gwyn, et/. al. *

DESIGNATION OF RECORD ON APPEALING

Comes now the Plaintiff, Barry L. Clark, and hereby designates Under rule 24 of the Tennessee Rules of Appellant Procedures for the following Documents be included in the record on appeal:

1. Tenn. Code Ann. § 40-39-201 (2014
2. Michigan's Sex Offenders Registration Act, Act 295 of 1994.
3. *Smith v. Doe*, 538 U.S. 84, 100 (2003)
4. Do Sex Offender Registration and Notification Laws Affect Criminal Behavior? by JJ Prescott
5. Recidivism of Sex Offenders Released from Prison in 1994 by Lawrence A. Grenfeld, Director Bureau of Justic Statistics
6. "Frightening and High" The Supreme Court's Crucial Mistake About Sex Crime Statistics by Ira Mark Ellman

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been forwarded by Certified U.S. mail, postage paid, to:

LINDA D. KIRKLEN
Assistant Attorney General
Office of the Attorney General of Tennessee
500 Charlotte Ave.
Nashville, TN 37243

On this the 8th day of December, 2016

BARRY L. CLARK
Plaintiff
P. O. Box 103
Camden, Tennessee 38320
(731) 220-6188

By Maynard Law Office; reprinted with permission . . . Recently, the Bureau of Justice Statistics released a report entitled, "Recidivism of Sex Offenders Released from State Prison: A 9-Year Follow Up (2005-2014)."

"Notwithstanding the sensationalist headline ("three times as likely"), the statistics reported are actually quite favorable.

First, it's important to note that this BOJ report is not based on samples of offender populations, as is the case in most of the academic research in this area. Rather, the report relies on data from the entire population of prisoners released from state facilities in 2005 (30 state, including NJ, were included in the analysis).

This means that when the report says there is a 7.7% sex offense recidivism rate among those with prior sex offense convictions, it is not an estimate of the recidivism rate based on statistical sampling, it's the actual rate of recidivism for the population (in this case, as measured by arrests for a new sex offense).

Second, the arrest-based sex offense recidivism rate reported (7.7% over 9 years) is lower than the estimated rates obtained by most meta-analytic studies (ranging from 5-15% over 5 years). This means that the data most of us working in sex offense law have been sharing with prosecutors and the courts are **overestimating the actual recidivism rate.**

Third, there are other details in the study that impact our presentation of recidivism rates. While felons without a sex offense conviction were less likely to be arrested for a subsequent sex offense (2.3% v. 7.7%), there are a lot more of those ex-felons (381,093) than sex offenders (20,195) being released into the community. So in terms of risk to the public, a citizen is much more likely (six times more likely) to be sexually assaulted by an ex-felon **without** a sex offense than one with a sex offense.

Fourth, the BOJ study also reports that sex offenders who are arrested are less likely to be convicted (50%) than ex-felons with no sex offense history (70%) suggesting a law enforcement bias leading to more unjustified arrests of sex offenders, perhaps due to their higher visibility to law enforcement because of Megan's Law. The reality is, in criminology research, it is well established for all types of offenses, that an individual convicted of a particular type of offense is more likely to re-offend with the same type of offense than with a different type of offense, which explains why sex offenders are 3 times more likely to commit a future sex offense than an ex-felon without a sex offense history. Nevertheless, the BOJ study reports that only 16% of all arrests for a sex offense by any ex-felon were committed by a sex offender. 84% of all such arrests were committed by an ex-felon with no sex offense history. Context matters, and statistics can easily mislead the public, law enforcement and even the Courts.

In fact, it was the prior 1997 BOJ study tracking offenders released in 1983 that resulted in Justice Kennedy's assertion:

"When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." ***McKune v. Lile***, 536 U.S. 24, 33, 122 S. Ct. 2017, 2024, 153 L. Ed. 2d 47 (2002). While a true statement, it ignored the fact that the reported recidivism rate for rape at the time was 7.7% — far from the 80% recidivism rate Justice Kennedy

cited to (and ultimately sourced to a ***Psychology Today*** article, not a scientific study) in ***McKune v. Lile.***

Finally, the BOJ study also establishes a baseline rate of sex offending (2.3%) among a non-sex offending population of ex-felons. This is very consistent with the research of Hanson, et al. (Reductions in Risk Based on Time Offense-free in the Community..., Psych., Pub. Ply. & Law, 24, 48-63), which found that over time, sex offenders reach a level of offending indistinguishable from the general population of ex-felons (a level he calls "desistance") and thus cannot be justifiably treated differently from other ex-felons. For example, most lower risk sex offenders will reach that 2.3% recidivism rate five years after release, calling into question why they are treated differently than the 2.3% of non-sex offending ex-felons not subject to Megan's Law.Properly analyzed, the 2019 BOJ study provides very useful data to counter prevalent assumptions and myths about sex offending.

The study clearly demonstrates that most sex offense recidivism is committed by young offenders (under 25 years old) and within the first 3 years of release. Rates of re-offense decline steadily over time offense-free in the community, and with age. This data would support various types of as-applied and facial challenges to Megan's Law-type statutes and can be a useful tool in the arsenal of defense attorneys working in this area.

registration requirement does not impose additional punishment on the offender" (*id at* 11) have dramatically changed as the Plaintiff/Appellant addresses below.

It is noteworthy that the Tennessee Supreme Court reversed the judgment of the Court of Criminal Appeals and ordered Mr. Ward's conviction to be vacated and allowed him to withdraw his guilty plea.

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[10] As the Court is aware, a properly filed grievance is protected by due process rights.

****

4. THE CHANCERY COURT ERRED BY NOT GIVING DUE CONSIDERATION TO THE FALSE REPORTING OF INACCURATE RECIDIVISM STATISTICS WHICH BY EFFECT NULLIFY THE AVOWED PURPOSE OF LEGISLATION THAT IMPOSES STRICT LIABILITIES ON SEX OFFENDER REGISTRANTS AS "HIGH RISK" RECIDIVATES.

The Plaintiff/Appellant, during oral argument, brought to the Chancery Court's attention the inaccuracies of recidivism rates of sex offender's that are now factually known through studies and surveys, including a large three year study in Tennessee. (JR. at 7) (Tr. at 20) The Sixth Circuit Court of Appeals, in reviewing the information provided with regards to recidivism rates in rendering their decision in *Snyder* determined;

> "The record below gives a thorough accounting of the significant doubt cast by recent empirical studies on the pronouncement in Smith that "'[t]he risk of recidivism posed by sex offenders is 'frightening and high'." 538 U.S. at 103 (quoting McKune v. Lile, 536 U.S. 24, 34 (2002)) (*Snyder* at 11)

Appendix I-1

The information the Sixth Circuit examined to make this assessment was not exclusive to Michigan. (*BSC* at 11) The same information and data the Sixth Circuit examined was provided the Chancery Court and the Defendants which the lower court permitted to supplement the Record. (Memo at 19; Tr. at 38)

Tennessee Code Annotated § 40-39-201, (2017) Short title – -Legislative findings, section b. (1) declares in part:

> ".....Sexual offenders pose a **high risk** of engaging in further offenses after release from incarceration or commitment and protection of the public from these offenders is of paramount public interest:" (Bold added by Plaintiff/Appellant) (Tr. At 19, 20.)

It is now known this is inaccurate as a broad declaration, and as such, should be determined so by this Court of Appeals as the presumed risk factor of registrants was the avowed purpose for such harsh burdens and restrictions.

A three year recidivism study conducted by the Tennessee Bureau of Investigation involving over 1000 individuals, half being individuals with a sex offense, the other half being individuals convicted of high profile crimes, reported in 2007 under the signature of Defendant Gwyn, revealed that the sex offender group was half again less likely to recidivate as the other grouping. (Memo at 19; JR. at 7) (Tr. at 34, 35 by reference.)

A review of any annual TBI Crime Statistics Report reveal that sex crimes show no higher rates of recidivism than other high profile crimes, and in some years of reporting, were lower. Continuing to maintain and/or increase the burdens and restrictions on registrants is not warranted by the facts that are now certifiably known. (See *Snyder* at 11, & R. at CID 83) It falls upon the Courts, this Court of Appeals, to address and rule on this issue.

To date 13 states have used the reality of recidivism as one consideration in finding their individual sex offender registry schemes in part, or in total, unconstitutional, [11] with several other states currently in litigation to address *ex post facto* violations as applied to preact offenders. (Tr. at 10) The facts considered in *Ward* as to the majority of states affirming their individual legislative registry schemes being a civil remedy are far different today as several states have **amended** their individual legislative registry schemes which has led to multiple court rulings of unconstitutionality for breeching the divide between civil remedy and the imposition of punishment. (*Ward* at 11)

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[11] **New Hampshire** – *Doe v. State*, 111 A.3d 1077,1100 (N.H. 2015), **Maine** – *State v. Letalien* 985 A.2d 4,26 (Me. 2009), **Oklahoma** - *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004 (Okla. 2013), **Kentucky** – *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009), **Alaska** – *Doe v. State*, 189 P.3d 999,1017 (Alaska 2008.), **Maryland** – *John Doe v. Department of Public Safety and Correctional Services*, case No. 125, Plurality Opinion by Greene, J. (Maryland 2013.), **Ohio** – *State v. Williams*, 952 N.E.2d 1103 (Ohio 2011), **Indiana** – *Wallace v. State*, 905 N.E. 2D 371 (Indiana 2009),**Pennsylvania** – *COMMONWEALTH of Pennsylvania v Jose M. Muniz*, 164 A.3d 1189 (2017), **Michigan** – *Does #1-5 v. Snyder*, 834 F.3d 696 (Sixth Cir. 2016), **Nebraska** – *Doe v. Nebraska*, 898 F.Supp.2d 1086 (2012), **California** – In re. *William Taylor, et. Al. on Habeas Corp*, San Diego County Super. Ct. Nos HC 19743, HC 19742, HC 19731, HC19612, **North Carolina** – *Packingham v. North Carolina* 582 U.S._(2017)

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

BARRY L. CLARK, Plaintiff, vs. MARK GWYN, DIRECTOR TBI, JEANNE BROADWELL, GENERAL COUNSEL, Defendants.	)	No. 16-1035-I

Transcript of Proceedings

Before Hon. Claudia Bonnyman

Thursday, February 6, 2018

Elmore Court Reporting
511 River Front Drive
Sparta, Tennessee 378583
Phone: 615.289.3663

Reported By: Kathleen Elmore, RPR, CCR, LCR

a mixed bag of not knowing how to do things. They first said they registered me as a nonviolent offender.

But, anyway, the purpose of bringing this up is, the grievance that was officially filed, in the proper format was denied, and instead, I was told, as the transcript says, they were bringing it up to the boss to see what happens. That's not the way the system works. That's not the way the procedure works.

Any further questions on that, Your Honor?

THE COURT: No. Thank you.

MR. CLARK: I will not use the Court's time to voice my strong objections to the continued promotion of false recidivism rates among registrants in order to frighten the public. I will say, as I stand here today, there are multiple studies and surveys that refute, in the strongest terms, the high-risk proclamations of lawmakers, including those here in Tennessee, in their legislative findings.

The facts are now known, as referenced in the Snyder decision, when stating, and I quote, "The record below gives a thorough accounting of the significant doubts cast by recent empirical studies on the pronouncement in Smith that the risk of recidivism posed by sex offenders is frightening and high."

I think that's in other information to you that detailed that it was false. It was false then. It's false now. The TBI put out a 2007 recidivism study that involved 1,100 individuals over three years. Half of those were from crimes with a sexual component. The other half were Class I crimes: murder, attempted murder.

And what the TBI determined, after a three-year study, is that those involved in sex crimes were half again less likely to reoffend than those that were not.

So it's not a secret to the TBI that the recidivism rates are false. In fact, Tennessee, if you want to run the numbers, falls right in the middle of the average on the upper stage, with the average around 3.5 percent. Compare that to murder. Compare that to other crimes. It's not me saying that. These are studies and surveys that have been clinically taken.

I personally believe the time will come when the Supreme Court will revisit this issue, but not, in my opinion, until Justice Kennedy retires, for it was his words that instigated these false pronouncements of frightening and high recidivism rates, which have affected hundreds of cases since.

In conclusion, for reasons stated, I ask

And with regard to the tiered system, the court was especially concerned with regard to two of the Does in that case because one had committed a nonsexual robbery and was forced into the tier system, and another had actually pled guilty under a juvenile statute that reported to seal records and ended up being under the system and forced to register.

And those were two of the big reasons why the court was concerned about the lack of individual assessment. None of those Does were in a position such as petitioner here, being actually convicted of a violent sexual offense, a rape for which he served 15 years.

With regard to effectiveness, that was also important to the Does v. Snyder for there was expert testimony concerning the effect of the registry and the recidivism in Michigan.

The record before Your Honor has a single recidivism study, which I have stated my objection to being included in the record. But actually taking a look at the study, certainly, it could be argued either way, and what I heard petitioner arguing is that this shows lower rates of recidivism for sex offenders. I submit to Your Honor that that's in 2007. That's after Tennessee has had the sex

offender registry since 1994, and the current act has been in effect since 2004.

So there's a plausible argument that these lower recidivism rates are actually the result of having a sex offender registry act that's currently in place. And in order to make any argument to the contrary, there would have to be additional studies or expert testimony.

The standard before this case, I submit to Your Honor, is on the record, but Smith v. Doe gives us the standard to use when someone is challenging a civil statute alleging that it has a punitive effect, and that standard is that the petitioner has to submit the clearest proof to show that what was denominated as a civil remedy is, in fact, a criminal penalty.

The petitioner in this case has not put on any proof or submitted a single allegation to show how the act has a punitive effect on him. He has not met this burden. He's not provided the court with a single legal reason why TBI's decision should be reversed, and for those reasons, I'm asking the court to affirm TBI's decision to deny his request for removal.

THE COURT: Thank you. Now, Mr. Clark, you have about five minutes to rebut because you have

your request to be removed from the registry, and the court went on to say that in addition, the records are denied and disallowed, and I also explained this morning that I am giving the plaintiff leeway to present any proof that he wants to so that I can be sure that I've seen everything I need to see, as the trial judge and the judge sitting to review this appeal of an administrative decision, but I'm giving the plaintiff leeway because the plaintiff is self-represented and because I think that's probably the best thing to do under the circumstances.

MR. CLARK: I appreciate it, Your Honor.

THE COURT: And so what I've confirmed is that the documents filed in December 2016 have been filed, the court allowed those to be filed, and even though that's contrary to my October 2017 position, and it was after I looked at the parties' briefs, after I looked at the record, after I looked at the statutes, that I thought I wasn't real sure how the plaintiff was traveling and what sort of vehicle the plaintiff intended to use.

So I think just in terms of this particular case -- and all cases are different -- I am going to look at these papers that the plaintiff provided, and one reason I'm doing that is that, very

I swear that the following transcription of oral argument before the Tennessee Court of Appeals for the Middle District, December 5th session, audio markers of 30:05 through 30:32 is accurate and truthful. Sworn before a Notary Public on 25 September, 2019

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Wanda Mali
8/31/22

"Every study that the sixth circuit,,,,,the sixth circuit used to make their evaluation that the recidivism is a joke..what they say about recidivism is wrong…legislatures scare the public saying well there's this high..this high risk of recidivism..there isn't..not in..there was a Tennessee study put into the record..the transcript of this…the lower hearing will explain that."