COMMONWEALTH of KENTUCKY
SUPREME COURT
No. 2007-SC-000347-CL

COMMONWEALTH OF KENTUCKY **APPELLANT**

Appeal from Kenton District Court
Hon. Martin J. Sheehan, Judge
Indictment No. 07-M-604

v.

MICHAEL BAKER **APPELLEE**

BRIEF OF MICHAEL BAKER

Submitted by,

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CERTIFICATE OF SERVICE

I certify that a copy of the Brief for Michael Baker has been mailed this 7th day of March, 2008, via ordinary U.S. Mail service to Hon. Martin J. Sheehan, Judge, Kenton Circuit Court, 500 Justice Center, 230 Madison Ave., Covington, Kentucky 41011, sent regular mail to Hon. Christopher S. Nordloh, Assistant Kenton County Attorney, 28 West Fifth St., Covington, Kentucky 41011, via regular mail to Hon. Jason B. Moore, Assistant Attorney General, 1024 Capital Center Dr., Frankfort, Kentucky 40601, Attorney for Appellant.

Bradley Fox
Counsel for Appellee

INTRODUCTION

Appellee, Michael Baker, a registered sex offender, was charged with a Class A misdemeanor on February 2, 2007, for unknowingly being in violation of KRS section 17.545 which prohibits registered sex offenders from residing within 1,000 feet of a high school, middle school, elementary school, preschool, publicly owned playground, or licensed day care facility. Appellee was allegedly residing within one-thousand feet of the East Covered Bridge Park in Elsmere, Kentucky. Appellee filed a Motion to Dismiss on the basis that KRS section 17.545 violated numerous constitutional provisions. Judge Sheehan, at the trial court level, granted Appellee's Motion to Dismiss on the basis that KRS section 17.545 constituted an ex post facto punishment barred by both the United States Constitution and the Kentucky Constitution. From that decision, the Commonwealth moved this Court for certification of law pursuant to CR 76.37 which was then granted by this Court on August 23, 2007.

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee is not opposed to an oral argument of this matter so the Court may be better advised of the issues presented and the basis for such, and due to the statewide impact the outcome of this matter will have upon all sex offender registrants, their families, and the community.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

I. Procedural History

The Appellee is satisfied and in agreement with the Commonwealth's statement regarding the procedural history of this matter before the Kenton County District Court and now before this Court.

II. Legislative History

The Appellee is satisfied and in agreement with the Commonwealth's citation of the legislative history of KRS 17.545.

ARGUMENT

KRS 17.545 WAS INTENDED TO BE A PUNITIVE AND CRIMINAL ACT AIMED AT PUNISHING SEX OFFENDERS

The Commonwealth correctly states that the United States and the Kentucky Constitutions specifically prohibit the enactment of a law that either increases punishment for criminal acts committed prior to the laws enactment, or creates and imposes a punishment for an act that previously was not criminal when originally committed. U.S. Const., Art. I, Section 10, and Section 19(1) of the Kentucky Constitution. This *Ex Post Facto* clause of the Federal Constitution "forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time is was committed; or imposes additional punishment to that then prescribed.'" Weaver v. Graham, (1981), 450 U.S. 24, quoting Cummings v. Missouri (1867), 4 Wall.277, 325-326. More specifically, the U.S. Constitution, Art. I, Sec. 10 states that: "No state shall...pass any...*ex post facto* law;" and the Kentucky Constitution states that "No *ex post facto* law...shall be enacted." (TR, 32), citing U.S. Constitution, Art. I, Sec. 10. The *ex post facto* clause seeks to require that specific acts or conduct have pre-set penalties or are prescribed punishments, and seeks to restrict potentially vindictive legislation. Mikaloff v. Walsh, et al. (U.S. Dist. Ct., Northern Dist. Of Ohio, Sept. 4, 2007), No. 5:06-CV-96, quoting Weaver, 450 U.S. at 24. Simply stated, the *ex post facto* clause bars application of laws and statutes that change punishment and inflict greater punishment than the law originally annexed to the crime when committed. Id. at 6, citing Johnson v. United States (2000), 529 U.S. 694, quoting Calder v. Bull (1798), 3 U.S. 386.

In order for a law to be considered in violation of and be prohibited by the *ex post facto* clause, two elements must be present: (1) the law must apply to events occurring prior to or before the laws enactment, and (2) the law must disadvantage the offender affected by the enactment and application of it. United States v. Abbington (6th Cir. 1998), 144 F.3d 1003, United States v. Reese (6th Cir. 1995), 71 F.3d 582, see also Purvis v. Commonwealth (2000), 14 S.W.3d 21.

It is not in dispute that KRS 17.545 applies to conduct by Appellee that occurred well prior to the enactment of the statute. Appellee was convicted by entry of plea of one count of Third Degree Rape on March 31, 1994 in the Kenton Circuit Court, case number 94-CR-00427 (TR, 2). KRS 17.545 was not effective until July 12, 2006, over 12 years after Appellee committed the offenses that led to his sex offender registration. Thus, the first element of the Reese analysis is met.

Next, KRS 17.545 disadvantages Appellee as it is applied to him. Prior to the enactment of KRS 17.545, Appellee could reside within 1,000 feet of a public park and he would not be in violation of any statute. Now, Appellee, residing in the same home, near the same park, is required to vacate his home and move. If he is found to be living there, without any notice, he may be charged criminally with violating KRS 17.545. Forcing offenders to move immediately works a disadvantage on them. With the current housing market; vacating and selling a home immediately is virtually impossible. Furthermore, forcing someone to terminate a lease or apartment rental and find new, adequate living quarters immediately is impossible. How can anyone realistically be expected to ever establish permanent housing for themselves, their family, or their children under these conditions? With the threat of criminal prosecution, forcing such

residency requirements is especially disadvantaging to those offenders no longer under court supervision. KRS 17.545, which requires this immediate activity on the part of offenders, is a law that substantially disadvantages those subject to it; thus, meeting the second element of the Reese analysis.

Appellant argues that KRS 17.545 is not an *ex post facto* violation simply because it is retroactively applied and produces some ambiguous disadvantage on the offender. Smith v. Doe (2003), 538 U.S. 84, 123 S.Ct. 1140. The key issue to examine in determining if KRS 17.545 is an *ex post facto* violation is whether or not the statute is punitive, as only punitive statutes implicate an *ex post facto* violation. Mikaloff (6th Cir. 2007), 5:06-CV-96 at 7. In deciding whether or not a statute imposes punishment that violates the *ex post facto* clause, a two step analysis must occur. First, the Court must consider whether the Kentucky General Assembly either expressly or implicitly indicated a preference for a punitive or civil label to identify the statute. United States v. Ward (1980), 448 U.S. 242. If the Kentucky legislature expressed or implied that their intent by enacting the statute was punitive, "then the inquiry ends and the statute is subject to *ex post facto* prohibition." Mikaloff (6th Cir. 2007), 5:06-CV-96 at 7, citing Kennedy v. Mendoza-Martinez (1963), 372 U.S. 144.

If the Kentucky legislature did not indicate, either expressly or impliedly, that the statute was intended to be punitive, or if the legislatures intent is ambiguous, then the Court must examine whether or not the statute is "so punitive either in purpose or effect" that is should be considered to constitute punishment. Mikaloff (6th Cir. 2007), 5:06-CV-96 at 7, citing Ward, 448 U.S. at 249. Regardless of the legislature's intent, if the

[illegible] (3) if the law imposes an affirmative disability or

purpose or effect of the statute is punitive as retroactively applied; the statute is subject to *ex post facto* prohibition.

In this second phase of the "intent-effects" analysis set forth by the Supreme Court in Smith, this Court must examine five factors in order to determine if KRS 17.545 is prohibited by the *ex post facto* clause. Smith outlines theses factors as: (1) if the law has been regarded in our history and traditions as a punishment; (2) if the law promotes the traditional aims of punishment (3) if the law imposes an affirmative disability or restraint on the offender; (4) if the law has a rational connection to a non-punitive purpose; and (5) if the law is excessive with respect to this purpose. These five factors are "neither exhaustive nor dispositive." Ward, 448 U.S. at 242.

A. Legislative Intent

This Court must determine if the Kentucky legislature intended KRS 17.545 to be civil or criminal. Smith, 538 U.S. at 85. This is a question of statutory construction. Kansas v. Hendricks (1997), 521 U.S. 361, 117 S.Ct. 2072. First, the statutory construction can be examined by asking "whether the legislature, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." Hudson v. United States (1997), 522 U.S. 93, 99, 118 S.Ct. 488. If expressly stated that the legislature labeled the law criminal with the purpose of imposing punishment, then the inquiry ends and this Court must look no further. Smith, 538 U.S. at 85. If, however, the legislature does not expressly label the law as civil or criminal, then the implied intent of the legislature must be examined and this Court must consider the attributes of the law; as denoted in Smith, this includes the manner of the law's codification and the enforcement procedures the law establishes. Smith; 538 U.S. at 94.

KRS 17.545 was originally enacted as House Bill 3 of the 2006 legislative Regular Session. At that time the Kentucky General Assembly enacted the following title for the law; "An Act related to sex offenses and the punishment therefore." (TR, 26) The terms "offenses" and "punishment" are labels placed upon criminal and punitive legislation. It cannot be anymore clearly stated that the legislature intended anything else other than a punitive, criminal scheme. The face of the legislation contains such criminal labels. The General Assembly, from the onset of KRS 17.545, expressly labeled that the law was to be punitive and intended as a criminal measure; thus, ending the inquiry.

If the expressed labeling of KRS 17.545 as criminal is not enough to convey the legislature's intent, then the implied intent of the legislature must be examined. Evidence of the legislature's intent to create a punitive scheme as opposed to a civil remedy can be found in the law's codification. Hendricks states that where a legislature chooses to codify a statute is suggestive of its intent. Hendricks, 521 U.S. at 361. The law is situated in the section of the KRS for crimes and punishments; that being the criminal code, similar to that of section 2950 in the Ohio Revised Code. Mikaloff (6th Cir. 2007), 5:06-CV-96 at 10. When originally proposed as House Bill 3, the General Assembly called for "Corrections Impact Statements" and "Local Mandate Fiscal Impact Estimates" to determine the potential cost of enforcing such legislation through the Kentucky criminal system. These estimates focus on the possibility of increased costs to sheriff's offices, jail housing, and probation and parole officers. Further, the law's enforcement procedures and mechanisms call for filing a criminal complaint on the part of the prosecutor's office of each county. Prosecutor's, who are typically authorized to enforce criminal measures and to maneuver the steps of the criminal process in bringing someone

to justice. KRS 17.545 does not call for the prosecutor's office to take civil action in order to enforce the residency restrictions; instead, it calls for the prosecutor's office to initiate criminal charges;' these being a Class A misdemeanor for first time offenders, and for a Class D felony for second time and subsequent offenders. KRS 17.545 specifically makes failing to comply with its provisions a crime. The law also contains certain sentencing provisions for such misdemeanor and felony classifications. As the Ohio Supreme Court noted in Mikaloff, such law "cannot be civil when it includes such provisions." Supra, at 9. The sole enforcement procedure contained in KRS 17.545 is criminal in nature and in label.

The Commonwealth argues that the Kentucky General Assembly did not intend to create a punitive scheme, but instead, by passing KRS 17.545, they created a non-punitive, regulatory civil scheme with the goal of protecting society. The Commonwealth argues that the laws at question Miller, Lee, Leroy, Mann, and Seering are similar to the provisions in KRS 17.545. In Cutshall v. Sundquist, the Sixth Circuit found Tennessee's sex offender registration law to be non-punitive, despite its placement in the criminal code and without any expressed legislative intent. Mikaloff (6th Cir. 2007), 5:06-CV-96 at 11, citing Cutshall v. Sundquist (6th Cir. 1999), 193 F.3d 466. But like the Mikaloff Court pointed out when it declared the Ohio legislature intended to create a punitive scheme, the "Ohio residency restriction, however, manifests an intent far beyond monitoring the whereabouts of sex offenders" as was the focus of the Tennessee law. Id. "Tennessee sex offenders could move anywhere, provided they kept the authorities informed of their movements. Ohio, on the other hand restricts its sex offenders' behavior beyond requiring they notify the authorities of their whereabouts." Id. Like the

Ohio residency restriction, the KRS 17.545 restricts the behavior of sex offenders well beyond just requiring they notify authorities of their whereabouts; it restricts where they can live and how much time they have to move if a new facility opens up that is within the restricted residency zone. The Ohio Revised Code, Section 2950 is even less intrusive than KRS 17.545, in that it does not restrict sex offenders living near public parks and playgrounds, nor does it call for immediate criminal sanctions on the part of the prosecutor.

As Judge Sheehan pointed out, the Courts in each of the cases relied upon by the Commonwealth were "unable to reach a definitive conclusion under the first prong of the Smith" analysis, failing to establish that the legislature of each state expressly intended to create a punitive scheme. (TR, 37). It was not clear in each of those cases cited by the Commonwealth that the laws met the first prong of the analysis. The Courts had to examine the five factors set forth under the second prong of the Smith analysis in order to determine if the law was an *ex post facto* violation. Thus, even if this Court does not determine that the General Assembly expressly stated, or was ambiguous in stating, its intent to create a civil or punitive scheme, the implied intent of the legislature can be determined by analyzing the five factors in Smith, and the same conclusion will be reached that KRS 17.545 is punitive and an *ex post facto* violation.

B. Punitive in Purpose and Effect

1. KRS 17.545 is punishment and the requirements and punitive enforcement measures have historically and traditionally been deemed punishment.

The United States District Court for the Northern District of Ohio in its Mikaloff decision that: "The Court finds the residency restriction analogous to the residency restrictions typical to probation and parole. Probation and Parole are regarded by our

history and traditions as punishment." Mikaloff (6th Cir. 2007), 5:06-CV-96 at 14. They further stated that residency restrictions impose an affirmative disability and restraint upon an offender, similar to disabilities and restraints placed upon offenders under parole and probation. Id. "The residency restriction actually provides for a more onerous punishment than parole because it is a blanket prohibition. In determining whether a particular home is suitable for a particular parolee, the parole officer or board undertakes a case-specific analysis. The residency restriction engages in no such case-by-case analysis." Mikaloff (6th Cir. 2007), 5:06-CV-96 at 17. Having a blanket residency restriction in place regardless of the offender's original conviction or rehabilitation, actually is more restrictive and punitive than the requirements of parole and probation in that it never takes into consideration the progress of the offender in becoming a safe and productive member of society.

Violating Ohio's residency restriction only triggers the prosecutor filing an injunction forcing the offender to move, must less of a penalty than offenders face when violating KRS 17.545. O.R.C. section 2950. The State argued this point to the court in Mikaloff by stating how a violation of probation or parole triggers a criminal sanction while the residency restriction does not. The Federal District Court still stated that Ohio's residency restriction was sufficiently similar to that of probation and parole. Mikaloff (6th Cir. 2007), 5:06-CV-96 at 17. Kentucky's KRS 17.545 does trigger criminal sanctions and charges when an offender is in violation of the residency restriction; making it even more similar to probation and parole than O.R.C. 2950.

Residency restrictions placed upon offenders are in effect the equivalent of banishment, which has been historically regarded as a form of punishment. Smith, 538

U.S. at 98. Banishment has been defined as "punishment inflicted on criminals by compelling them to quit a city, place, or county for a specified period of time, or for life." United States v. Ju Toy (1905), 198 U.S. 253, 25 S.Ct. 644. The Commonwealth argues that like the Iowa Courts opinioned in Doe v. Miller (8th Cir. 2005), 405 F.3d 700, the residency restrictions are unlike banishment in that they only prevent an offender from residing in certain areas, but do not prevent that offender from being employed, engaging in community activities, and visiting those same prohibited areas. As the Honorable Judge Sheehan pointed out in his Kenton County District Court decision, courts have sidestepped the issue by exclaiming that offenders can always find another place to live and therefore the residency restrictions are not similar to banishment. (TR, 39). The dissenting opinions in the cases relied upon by the Commonwealth to this point are as Judge Sheehan states, "far more intellectually honest concluding that residency restrictions constitute banishment." (TR, 40). In Miller, the dissent concluded that an offender may have difficulty finding proper housing in many communities effectively banishes them from all cities and towns. Miller, 405 F.3d at 724. This "not in my backyard" mentality acts to shun sex offenders. The dissent in Leroy and Seering also pointed out how indefinite expulsion of a person from their home by such residency restrictions causes the offender to be shunned by society and creates other difficulties for the offender in being close to stable employment, family, and treatment centers. People v. Leroy (Ill. App. 2005) 828 N.E.2d 769, 787; State v. Seering (Iowa 2005), 701 N.W.2d 655, 671.

The Commonwealth argues that many Courts have historically upheld residency restrictions as not being criminal and punitive. However, recently the trend has changed

in that the Ohio Supreme Court in Mikaloff found residency restrictions to be similar to probation and parole. Mikaloff (6th Cir. 2007), 5:06-CV-96 at 18. In Smith, Alaska's sex offender registration law was upheld by the Supreme Court as being non-punitive; however, under Alaska's law, an offender is not subject to residency restrictions and is free to reside anywhere fit without limitation, so long as their registration is kept updated. Smith, 538 U.S. at 101. In Cutshall, the Sixth Circuit upheld Tennessee's sex offender registration law; again however, sex offenders in Tennessee are free of residency restrictions and can move anywhere they want provided they notify authorities of their movements. Cutshall, 193 F.3d at 474.

The residency restrictions in KRS 17.545 act as a form of punishment similar to probation, parole, and banishment; all which are traditional and historical means of criminal punishment.

2. KRS 17.545 promotes the traditional aims of punishment.

The traditional goal and aim of punishment is to impose retribution and deterrence upon those being punished. Smith, 538 U.S. 102; Hendricks, 521 U.S. at 373. The Commonwealth argues that the purpose of KRS 17.545 is to deter future criminal conduct of sex offenders in lessoning the temptation to re-offend by limiting their residency to those areas outside of where children frequently gather. This theory is flawed. Does placing a residency restriction upon an adult victim sex offender further the goal of protecting children where they frequently congregate; what temptation is removed from these offenders? The Commonwealth relies heavily on Miller by stating, "The primary purpose of the law is not to alter the offender's incentive structure by demonstrating the negative consequences that will flow from committing a sex offense. The Iowa statute is

designed to reduce the likelihood of re-offense by limiting the offender's temptation and reducing the opportunity to commit a new crime." Miller, 405 F.3d at 720.

Miller sets forth that the Iowa law was designed to reduce, or more clearly stated, "deter," the re-offending of sex offenders. This deterrence being a traditional aim of punishment. KRS 17.545 aims at deterring sex offenders from re-offending in that the only means of enforcement set forth in the law are accomplished by the filing of a criminal complaint, and the threat of possible incarceration. Offenders will abide by the law in order to avoid new criminal charges, thus, deterring their future conduct. For those adult victim sex offenders, the residency restrictions in KRS 17.545 aims solely at retribution. "Retribution is vengeance for its own sake. It does not seek to affect future conduct or solve any problem except realizing justice." State v. Cook (Ohio 1998), 700 N.E.2d 570. Keeping an adult victim sex offender from residing near a child's place of gathering does not deter any conduct toward re-offending, it is simply retribution for being a sex offender. The blanket classification of sex offender subjects the entire class to residency restrictions regardless of their victim, type of offense, level of offense, classification level, or recidivism level. This blanket classification and residency restriction serves no purpose toward reducing temptation, nor protecting society and children. As stated in Mikaloff, "[t]his lack of any case-by-case determination demonstrates that the restriction is 'vengeance for its own sake.'" Mikaloff (6th Cir. 2007), 5:06-CV-96 at 18.

As set forth in the dissenting opinion in Leroy and articulated in Judge Sheehan's decision; the blanket residency restriction is not remedial in that it does nothing to lesson the risk of re-offending. (TR, 48) An offender can sit at a public park, playground, or near

a school all day long, while children are in attendance and present, as long as the offender does not "reside" or sleep at that location when school is not in session and parks are closed. They can sit there, **legally**, an exercise whatever deviant mental behavior they so desire. (Emphasis added). This does not remedy the risk of re-offending, nor does it limit the temptation to re-offend.

Arguing the law is remedial by removing temptation is invalidated by the lack of differentiation between offenders. Why are there not similar remedial measures for other groups of criminal offenders such as bank robbers, alcohol offenders, and drug offenders? Why are persons who have committed alcohol or drug offenses not subject to residency restrictions that prohibit them from living within a certain distance from liquor establishments or high drug-crime neighborhoods? Why are convicted bank robbers not required to live a set distance from banks or financial institutions? The remedial measure argument lacks common sense in that the residency restriction is a "**political feel good**," that in reality accomplishes nothing. (Emphasis added). There are no statistics to show that residency restriction actually lesson the number of sex crimes, sex offenses, or the number of sex offenders that re-offend. The residency restrictions of KRS 17.545 promote the traditional aims of punishment in attempting to deter criminal conduct and make offenders "pay" by being restricted in their residency. (Emphasis added).

3. KRS 17.545 imposes an affirmative disability and restraint on sex offenders which renders the statute punitive.

KRS 17.545 imposes a substantial housing disadvantage upon sex offenders by limiting where they may reside. A sex offender is prohibited from residing within 1,000 feet of a school, daycare center, and a publicly owned playground or preschool. Judge Sheehan correctly articulated that "imposition of an affirmative restraint is intrinsic with

SORR's, i.e. the offender cannot reside in the prohibited zone." (TR, 43). Being prohibited from residing within certain zones is without argument a disability and restraint. Even if the offender owned, or resided in, the home prior to a new school, preschool, playground, or park being erected within the prohibited 1,000 feet area; they are forced to vacate their home and move. Provided the cost of moving, re-leasing, terminating a lease, selling a home and purchasing a new home. The unpredictability of when an offender may have to act in any of these manners is a disability and restraint. A sex offender is not free to establish permanent housing for themselves or their families. If an offender has children who attend and are very active in a certain school district and a new school, park or daycare opens near the offender's home; the offender's entire family is force to uproot and move. The offender can move away from the rest of their family in order to allow the children to remain in the same school, or their spouse to maintain ownership of their home; as occurred to Appellee who was forced to move back to Kentucky from Ohio due to the increase residency restrictions in the City of Reading, Ohio which prohibited him from living in his home with his family. This may not be an option available to other sex offenders who may find themselves faced with the possibility of dividing their family up in order to comply with the residency restrictions. This forced family split is without a doubt a disadvantage and disability upon sex offenders.

KRS 17.545 creates unpredictability and endless uncertainty for sex offenders regarding the stability of their housing. At any time a new school, daycare, or park may open which then requires the offender to move in order to comply with the residency restrictions. As the Mikaloff Court stated; "[a] sex offender is subject to constant

eviction, and there is no way for him or her to find a permanent home. For, there are no guarantees a school or daycare will not open up within 1,000 feet of anywhere." Mikaloff (6th Cir. 2007), 5:06-CV-96 at 15. This kind of uncertainty permanently restrains sex offenders from being settled. The residency restrictions affect numerous avenues of the offender's life above and beyond the location of their home, including but not limited to: schools for their children, public transportation, access to treatment centers, employment opportunities, compliance with probation or parole, assisted senior care facilities, retirement communities and nursing homes, and access to medical care facilities. Mikaloff (6th Cir. 2007), 5:06-CV-96 at 16, citing (TR, 50).

Further restraint and disability is evidenced in that non-compliance with the residency restriction provides for incarceration as a form of enforcement of the statute. Imposing potentially new criminal charges and punishment upon an offender is very disadvantageous, especially for those no longer under the supervision of the courts. Offenders may lose their employment, family, children, housing and so forth if incarcerated due to failing to comply with the residence restriction. Layne v. Mathis (1997), 519 U.S. 433, 117 S.Ct. 891, notes that the United States Constitution prohibits legislatures from singling out disfavored person and meting out summary punishments for past conduct. By applying a new blanket criminal punishment upon all sex offenders for non-compliance with the residency restrictions years after the acts were committed that led to their original convictions; the legislature is imposing punishment upon a disfavored person.

Lastly, the General Assembly did not create a proper mechanism by which sex offenders would be able to determine if they were in compliance with the residency

restrictions of KRS 17.545. The sole burden of determining compliance with the residency restriction is placed upon the offenders themselves. The probation and parole department provided Appellee with a website address, "linkgis.org", in order that he may inquire as to whether or not he was in compliance with the residency restrictions. The park, East Covered Bridge, in which Appellee was alleged to have lived within 1,000 feet of, was not listed or shaded on the website. Appellee was unaware that he was in violation of KRS 17.545, but yet was held accountable and charged with a Class "A" criminal offense for violating such law. It is unreasonable to lay such burden upon offenders who may not have the ability to access the internet, who do not own a computer, or who are unable to realistically continually monitor if a new park, school, or daycare has been licensed to open up within the restricted area near their home. This is an unrealistic burden upon the offender and subjects them to unknowing violation of the statute, to which they have no relief. This burden unduly restraints and creates a disability for offenders.

KRS 17.545 imposes a disability and restraint upon offenders by preventing them from establishing permanent and stable housing, and by exposing them to criminal sanctions and punishment regardless of their knowledge or effort to be in compliance with the statute. These restraints act as a punishment to sex offenders and are punitive in that it places further burdens upon the offender above those of their original sentence.

4. KRS 17.545 does not have a rational connection to a legitimate non-punitive purpose.

The Commonwealth relies upon Smith in stating "The risk of recidivism posed by sex offenders is 'frightening and high.'" Smith, 538 U.S. at 103. However, the Smith Court made this generalized assumption without any statistical or scientific proof and

support. In reality, studies refute this claim and show that sex offenders actually have a lower recidivism rate than other criminal offenders. U.S. Dep't of Justice, Reentry Trends In the U.S.: Recidivism (2002), at www.ojp.usdoj.gov/bjs/reentry/recidivism.htm.

The Commonwealth argues that the non-punitive purpose of the law is to protect the safety of children from the dangers of sexual abuse and that this "public safety" goal is the heart of the legislation. Again, what is ironic is that KRS 17.545 prevents offenders from residing, or sleeping, within 1,000 feet of a school, park, or daycare. Yet, "It does not limit the offender's ability to occupy a residence in proximity to the school during school hours. It does not limit the offender's ability to go to any public park or drive on any street within 1,000 feet of a school. And it does not limit the offender's access to children in the offender's own neighborhood...While school is in session...instead; [it] forces him to sleep in his truck at night, when presumably, the children are safely at home. Mikaloff (6th Cir. 2007), 5:06-CV-96 at 19, citing (TR, 46). The offender has every legal right to frequent these prohibited places during the hours and times when children are most likely to be present there, so long as that offender does not sleep or make his home within 1,000 feet of that place. How again does this limit or reduce the temptation for a sex offender not to re-offend? It provides a "**false sense of security**" when realistically there is not security. (Emphasis added).

Even more drastically unrelated to this "public safety goal" of protecting children is the residency restriction being broadly imposed upon all sex offenders, even those with adult victims. Not all sex offenders seek to offend or abuse children, thus, even further reducing the need to impose residency restrictions on this specific class of offenders.

However, KRS 17.545 is "**blanket**" legislation that applies to **ALL** sex offenders regardless of who their victim was. (Emphasis added).

The Mikaloff Court took conflicting expert testimony, from both sides, regarding the efficacy of the residency restriction in reducing recidivism rates for sex offenders. Mikaloff (6th Cir. 2007), 5:06-CV-96 at 19. In Mikaloff, "Both experts agreed that an important question asks whether many children reside around the sex offender's house, not that home's proximity to a school. Id, at 20. According to these same experts, "The overwhelming majority of child sex abuse cases involve an abuser who is related to or acquainted with the child victim." Id. Being that the majority of sex abuse cases occur inside the home or the home of someone the child believes in whom they are safe, it would be rational to impose some "stay away order" or "victim residency restriction" upon the offenders to prevent them from re-residing with their victims who may be their own children, nephew, niece, or step-child. Yet, this is not the case. Instead, the legislature focuses upon residency restrictions to protect children who are the victim of the "**exception, not the rule**" when it comes to sex abuse cases. (Emphasis added). According to the Office of Juvenile Justice and Delinquency Programs, Offenders Incarcerated for Crimes against Juveniles, (2001), over 80% of the victims are offended by a household member or by acquaintances of the juvenile themselves.

The statute provides a "**false sense of security**" for those placing trust in it. (Emphasis added). KRS 17.545 purports to be rationally related to the non-punitive purpose of protecting society and children, yet it does not accomplish that end. The statute is not rationally related to protecting children, nor society, in that there are numerous other ways to address this concern. Again, the Smith Court and the Cutshall

Court upheld sex offender registration laws with the same public safety interest at heart, without having the same residency restrictions at issue before this Court.

5. KRS 17.545 is excessive with respect to the purpose of protecting the public and safety of children.

It is excessive to placed residency restrictions and burdens upon **ALL** sex offenders, without regard for their individual recidivism rates and victims; and then to impose criminal charges for non-compliance of such restrictions. (Emphasis added). The Mikaloff Court was troubled by the "complete lack of individualized risk assessment" in imposing O.R.C. 2950. Mikaloff (6th Cir. 2007), 5:06-CV-96 at 21. The law makes all offenders subject to a "blanket" restriction regardless if there is an actual and realistic need for such restriction on each individual offender. The even more concerning aspect of the "blanket" residency restriction is that it is not open to modification or removal if an offender has "proven" themselves with years of law abiding, rehabilitated life. KRS 17.545 is a "catch-all" that sex offenders cannot escape regardless of their risk of recidivism. "The fact that [the residency restriction and registration law] uses past crimes as the touchstone, probably sweeping in a significant number of people who pose no read threat to the community, serves to feed suspicion that something more than regulation of safety is going on." Smith, 538 U.S. at 109.

It is also excessive to attach criminal liability to the public safety concern where other means of enforcement are available and adequate to accomplish the same purpose. KRS 17.545 creates "immediate" criminal liability for an offender who is not in compliance with the residency restriction. Injunctions, evictions, and the contempt powers of the courts afford an alternative and less punitive means of effectively promoting public safety and enforcing registration requirements. This statute does not

exercise those alternatives. Under the previous residency restrictions, an offender was provided 90 days in order to move and become compliant before criminal sanctions were filed. Under KRS 17.545 there is no warning and no opportunity to move or vacate your property before criminal charges are filed. This immediate imposition of criminal liability with the threat of incarceration is excessive in regards to the purpose proposed by the Commonwealth.

It undoubtedly weighs toward finding that KRS 17.545 is so punitive in its effect and purpose as to negate the non-punitive purpose the General Assembly intended for in passing the law. For such reason, KRS 17.545 is not a proper civil, non-punitive regulatory scheme. Instead, KRS 17.545 is a punitive, criminal punishment prohibited by the *ex post facto* clause.

CONCLUSION

Based upon the arguments set forth herein, Michael Baker requests that this Court affirm the Opinion of the Court and Order of Judge Sheehan, Kenton County District Court, Fourth Division. Further, Michael Baker requests that this Court find that KRS 17.545 is a punitive scheme as expressed and implied by the General Assembly, and that KRS 17.545 is an *ex post facto* criminal punishment in purpose and effect.

Respectfully Submitted,

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