

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 CA 1765

AND

NUMBER 2009 CW 1169

JIMMY L. SMITH

VERSUS

STATE OF LOUISIANA

Judgment Rendered: March 26, 2010

Appealed from the
Twentieth Judicial District Court
In and for the Parish of West Feliciana, Louisiana
Trial Court Number 09-WCR-54

Honorable George H. Ware, Jr., Judge

Charles E. Griffin, II
St. Francisville, LA

Attorney for
Plaintiff – Appellant
Jimmy L. Smith

Harrietta J. Bridges
Baton Rouge, LA

Attorney for
Defendants – Appellees
State of La., Dept. of Public
Safety & Corrections and the
Office of State Police

Haley Major Green
St. Francisville, LA

Attorney for
Defendants – Appellees
West Feliciana Parish D.A.'s
Office and Sheriff's Office

JEW
JEW
JEW

Emma Devillier
Baton Rouge, LA

Attorney for
Defendant – Appellee
Office of Attorney General

Stephen A. Quidd
Baton Rouge, LA

Attorney for
Defendant – Appellee
Office of Motor Vehicles

Debra A. Rutledge
Baton Rouge, LA

Attorney for
Defendant – Appellee
Office of Probation & Parole

* * * * *

BEFORE: WHIPPLE, HUGHES, AND WELCH, JJ.

WELCH, J.

Jimmy L. Smith appeals a judgment of the trial court that ordered him to register as a lifetime sex offender pursuant to the provisions of La. R.S. 15:540, *et seq.*, (commonly referred to as “Louisiana’s Megan’s Law”).¹ Additionally, a supervisory writ application seeking review of the same judgment was referred to this appeal. Because the record in this matter establishes that Mr. Smith has already fulfilled his duty to register as a sex offender for the requisite period of time under the statutes applicable to his case, we reverse the judgment of the trial court and render judgment declaring that Mr. Smith is not required to register as a sex offender for the duration of his lifetime, is not required to have the restriction code for a sex offender on his driver’s license, and is not required to carry the special identification card declaring him to be a sex offender. We also deny the supervisory writ application as moot.

I. FACTUAL AND PROCEDURAL HISTORY

The facts of this case are not in dispute. In 1995, Mr. Smith was convicted of two sex offenses, which arose out of the same incident on the same night involving a date with a girl under the age of 17.² The first conviction, pursuant to a

¹ Megan Kanka was a seven-year-old New Jersey girl who was sexually assaulted and murdered in 1994 by a neighbor who, unknown to the victim’s family, had prior convictions for sex offenses against children. The crime gave impetus to laws for mandatory registration of sex offenders and corresponding community notification. In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Title 17, 108 Stat. 2038, as amended, 42 U.S.C. § 14071, which conditions certain federal law enforcement funding on the States’ adoption of sex offender registration laws and sets minimum standards for state programs. By 1996, every state, the District of Columbia, and the federal government had enacted some variation of Megan’s Law. *See Smith v. Doe*, 538 U.S. 84, 89-90, 123 S.Ct. 1140, 1145, 155 L.Ed.2d164 (2003); and *State ex rel. Olivieri v. State*, 2000-0172, 2000-1767 (La. 2/21/01), 779 So.2d 735, *cert. denied*, 533 U.S. 936, 121 S.Ct. 2566, 150 L.Ed.2d 730 (2001).

Louisiana’s Megan’s Law was originally enacted in 1992. *See* 1992 La. Acts, No. 388.

² According to Mr. Smith’s petition, he and a friend picked up two females from a house in Zachary (located in East Baton Rouge Parish) for a double-date and the four of them drove to East Feliciana Parish. During the drive, Mr. Smith, who was then age 19, had sex with one of the females, who was under the age of 17. Later that night, they brought the females back to Zachary.

plea of *nolo contendere*,³ was entered on June 16, 1995, in the Twentieth Judicial District Court, Parish of East Feliciana, for indecent behavior with a juvenile, a violation of La. R.S. 14:81. Pursuant to a plea bargain, Mr. Smith was sentenced to a term of three years at hard labor. The second conviction, pursuant to a plea of guilty, was entered on July 25, 1995, in the Nineteenth Judicial District Court, Parish of East Baton Rouge, for carnal knowledge of a juvenile, a violation of La. R.S. 14:80. Pursuant to a plea bargain, Mr. Smith was sentenced to a term of three years at hard labor, which was to be served concurrently with the sentence from the Twentieth Judicial District Court. The minutes from the Nineteenth Judicial District Court reflect that, in accordance with La. R.S. 15:543, Mr. Smith was notified of the sex offender registration requirements of La. R.S. 15:540, *et seq.*, he was provided with a copy of La. R.S. 15:540-15:549, and notified that he was required to register as a sex offender within 30 days of his release from prison. The minutes from the Twentieth Judicial District Court do not reflect that Mr. Smith was notified of the sex offender registration requirement or that he was provided a copy of the applicable statutes.

After serving eighteen months in prison, on December 12, 1996,⁴ Mr. Smith was released on parole supervision and his parole officer, Janet Williams, reviewed with him the applicable sex offender registration and notification requirements of La. R.S. 15:542-544. At the time of Mr. Smith's release on parole, La. R.S. 15:542 and 544 required him, as an adult convicted of a sex offense, to maintain his

³ See La. C.Cr.P. art. 552(4).

⁴ Mr. Smith states at times that he was released on parole supervision on December 11, 1996, and at other times, he states he was released on December 12, 1996. The Department of Public Safety and Corrections, Division of Probation and Parole stated, in its peremptory exception raising the objection of no cause of action, that Mr. Smith was released on parole supervision on or about December 13, 1996. The documents in the record concerning the notice of sex offender registration and notification requirements executed by Mr. Smith and his parole officer are dated December 12, 1996. Prior to the hearing in this matter, the trial court recited into the record the factual stipulations of the parties, and included therein, was a statement that Mr. Smith was released on parole supervision on December 12, 1996. Therefore, for purposes of clarity for this appeal and in accordance with the previous factual stipulation of the parties, we will refer to December 12, 1996, as the date Mr. Smith was released on parole supervision.

registration as a sex offender for a period of ten years following the initial registration, which was to occur upon his release from prison. Following Mr. Smith's release from prison, he went to live in Woodville, Mississippi. Under the direction and supervision of Mr. Smith's Louisiana parole officer, he registered as a sex offender with the Wilkerson County Sheriff's Office (in Mississippi) on December 24, 1996, and also complied with the applicable community notification requirements. He was also assigned a parole officer in Mississippi.

On August 13, 1998, the Mississippi Department of Corrections notified the State of Louisiana that it was "closing interest" on parolee Jimmy L. Smith "due to expiration."⁵ Between 1998 and 2004, Mr. Smith was not registered as a sex offender in Louisiana. In December 2003, Mr. Smith moved to Louisiana from Mississippi. On January 10, 2005, Mr. Smith was registered as a sex offender in the State of Louisiana. Mr. Smith renewed his sex offender registration in Louisiana in 2006, but did not do so in 2007 or in 2008, as the ten-year period following his initial registration as a sex offender terminated at the end of December 2006.

In 2009, the State of Louisiana, Office of State Police and/or the West Feliciana Parish Sheriff's office contacted Mr. Smith and informed him that the sex offender statute had been amended and he was now required to register as a sex offender for the duration of his lifetime. Additionally, Mr. Smith was informed by the Louisiana Office of Motor Vehicles that he had to have his driver's license marked "sex offender" in orange.

On January 22, 2009, Mr. Smith registered as a sex offender with the West Feliciana Parish Sheriff's Office; however, on February 11, 2009, he commenced these proceedings against the West Feliciana Parish Sheriff, the West Feliciana

⁵ It appears that the State of Mississippi's closure of the matter coincided with the end of Mr. Smith's term of parole supervision, *i.e.*, when he had satisfied his three-year sentence.

Parish District Attorney, the Attorney General of Louisiana, the Louisiana Department of Public Safety and Corrections, the Louisiana State Police, and the Louisiana Office of Motor Vehicles. In Mr. Smith's petition, he asserted that the attempts by the State of Louisiana to apply the amendments to the sex offender registration statutes (the current provisions of La. R.S. 15:544), which amendments came into effect after Mr. Smith's conviction, after he had satisfied his sentence, and after the ten-year period following his initial registration had already lapsed (thereby terminating his obligation to register pursuant to the provisions of former La. R.S. 15:544), were unconstitutionally being applied to him *ex post facto*. Mr. Smith sought a stay order prohibiting the State from enforcing the provisions of the sex offender statute against him, and ultimately, a judgment from the trial court declaring that he did not have to re-register as a sex offender or have his driver's license marked as a sex offender. The Louisiana Department of Public Safety and Corrections, Division of Probation and Parole, filed a peremptory exception raising the objection of no cause of action, asserting that it had not sought to require Mr. Smith to register as a sex offender nor attempted to arrest him, that his case was closed with the Division of Probation and Parole, and therefore, Mr. Smith had not stated a cause of action against it.

By judgment signed on May 12, 2009, the trial court sustained the peremptory exception raising the objection of no cause of action filed by the Louisiana Department of Public Safety and Corrections, Division of Probation and Parole, denied the relief requested by Mr. Smith in his petition, and ordered that Mr. Smith was obligated to register as a lifetime sex offender, pursuant to La. R.S. 15:544, as amended, effective August 15, 2008.⁶ From this judgment, Mr. Smith

⁶ The judgment on appeal orders Mr. Smith to register as a lifetime offender pursuant to "La. R.S. 15:544, as amended on August 15, 2008." La. R.S. 15:544 was not amended on August 15, 2008. It was last amended on July 7, 2008, *effective* August 15, 2008. See 2008 La. Acts, No. 816.

now appeals.⁷ Additionally, Mr. Smith filed a supervisory writ application with this court, seeking both a stay order and review of the May 12, 2009 judgment. By order dated June 26, 2009, this court denied the request for a stay order, and on November 9, 2009, referred the supervisory writ application to this appeal.⁸

II. LAW AND DISCUSSION

At the time Mr. Smith was convicted of the two sex offenses (June and July of 1995), La. R.S. 15:542 provided, in pertinent part, as follows:

A. Any adult residing in this state who has pled guilty or has been convicted of any sex offense shall register with the sheriff of the parish of the person's residence.

* * *

E. "Sex offense" for the purpose of this Chapter means a violation of any provision of Subpart C of Part II, Subpart B of Part IV, or Subpart A(1) or A(4) of Part V, of Chapter 1 of Title 14 of the Louisiana Revised Statutes of 1950,....⁹
(Footnote omitted).

Additionally, at that time, La. R.S. 15:544 (referred to as "former R.S. 15:544") provided:

A. A person required to register under R.S. 15:542 shall comply with the requirement for a period of ten years after the conviction, if not imprisoned during that period in a penal institution, full-time residential treatment facility, hospital, or other facility or institution pursuant to the conviction. If the person required to register is imprisoned or confined to a penal institution, full-time residential facility, hospital, or other facility or institution pursuant to the conviction, he shall comply with the registration provision for a period of ten years after release from his confinement or imprisonment. A convicted sex offender's duty to register terminates at the expiration of ten years from the date of initial registration, provided that during the ten-year period the convicted sex offender

⁷ Mr. Smith timely filed a motion for new trial, which the trial court denied by judgment signed on June 24, 2009.

⁸ Mr. Smith has not challenged, either on appeal or in his supervisory writ application, the trial court's ruling sustaining the Department of Public Safety and Corrections, Division of Probation and Parole's peremptory exception raising the objection of no cause of action.

⁹ There is no dispute that Mr. Smith's convictions were for sex offenses under this provision, as Mr. Smith's conviction for indecent behavior with a juvenile was a violation of La. R.S. 14:81 and his conviction for carnal knowledge of a juvenile was a violation of La. R.S. 14:80. Both La. R.S. 14:80 and 14:81 are found in Subpart A(1) of Part V, of Chapter 1 of Title 14 of the Louisiana Revised Statutes of 1950.

does not again become subject to this Chapter.

The substantive provisions of these statutes were the same when Mr. Smith was released on parole supervision (December 1996) and when he had satisfied his sentence (when his parole supervision ended, June 1998). Based on these two former statutes, Mr. Smith contends that his duty to register terminated at the end of December 2006, ten years following his release from prison and initial registration as a sex offender in Wilkerson County, Mississippi. Mr. Smith contends that the State's attempt to apply any subsequent version of La. R.S. 15:542 and 544 is a violation of the *ex post facto* clauses of the constitutions of Louisiana and the United States.¹⁰

The State contends that Mr. Smith is required to register for the duration of his life, or alternatively, for fifteen years, based on subsequent amendments to Megan's Law. Specifically, the State relies on 1999 La. Acts, No. 594 and 2007 La. Acts, No. 460. Accordingly, we will address the applicability of each of these amendments separately.

1999 La. Acts, No. 594

The State contends that in 1999 La. Acts, No. 594, the Louisiana legislature amended La. R.S. 15:542.1(H) and required lifetime registration for any person with a prior conviction for an offense for which registration was required under the sex offender statute. The State contends that since Mr. Smith had not completed his registration term of ten years by the time the 1999 amendment came into effect, the 1999 amendment providing for lifetime registration (for those convicted of more than one sex offense) applies to him due to his prior conviction in East Feliciana for a sex offense at the time of his conviction in East Baton Rouge for a sex offense.

¹⁰ See La. Const. Art. I, § 23 and U.S. Const. Art. I, § 10.

The 1999 La. Acts, No. 594, amended La. R.S. 15:542.1(H)¹¹ to provide, in pertinent part as follows:

(3) The following persons shall be required to register for life:

(a) Any person with a prior conviction for an offense for which registration under this chapter is required.

However, this amendment pertained to La. R.S. 15:542.1—not La. R.S. 15:542. Louisiana Revised Statutes 15:542.1 was originally enacted by 1997 La. Acts, No. 1147, and provided, in pertinent part as follows:

A. Duties. Any person convicted of a sex offense as defined in R.S. 15:542 (E) or of a criminal offense against a victim who is a minor as defined in R.S. 15:541 (14) after July 1, 1997 shall have the duty to register and report under the provisions of this Chapter.

H. Duty to register. (1) A person required to register under this Section as a sex offender or child predator shall register and maintain his registration pursuant to the provisions of this Section for a period of ten years after the date on which the person was released from prison, placed on parole, supervised release or probation for a conviction giving rise to the requirement to register.

Notably, the amendment to La. R.S. 15:542.1(H) by 1999 La. Acts, No. 594 did not alter paragraph (A) of this statute, which provided its provisions were applicable to persons convicted of a sex offense as defined in La. R.S. 15:542(E) or of a criminal offense against a victim who is a minor as defined in La. R.S. 15:541(E) *after July 1, 1997*. Thus reading the provisions of La. R.S. 15:542.1 as a whole, including the amendment to it by 1999 La. Acts, No. 594, it is clear that La. R.S. 15:542.1(H) is inapplicable to Mr. Smith, as both of his convictions occurred *prior to July 1, 1997*.

2007 La. Acts, No. 460

Alternatively, the State contends that if Mr. Smith is not subject to the

¹¹ We note that the substance of La. R.S. 15:542.1, including the amendment to section (H) by 1999 La. Acts, No. 594, was amended and reenacted into an entirely different substantive statute by 2007 La. Acts, No. 460 and now contains the provisions concerning the applicable community notification requirements.

lifetime registration requirement provided for by the 1999 La. Acts, No. 594 amendment to La. R.S. 15:542.1(H), because Mr. Smith knowingly failed to register or update his registration as required when he returned to Louisiana, he failed to complete a full ten-year period of registration, and therefore, La. R.S. 15:544, as amended by 2007 La. Acts, No. 460, is applicable to Mr. Smith. Additionally, the State contends that the application of the amended provisions of La. R.S. 15:544 is not a violation of the prohibition against *ex post facto* laws under **State ex rel. Olivieri v. State**, 2000-0172, 2000-1767 (La. 2/21/01), 779 So.2d 735, cert. denied, 533 U.S. 936, 121 S.Ct. 2566, 150 L.Ed.2d 730 (2001) and **Smith v. Doe**, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d164 (2003).

By 2007 La. Acts, No. 460, the Louisiana legislature amended and re-enacted, among other statutes, La. R.S. 15:544 to provide, in pertinent part, as follows:

A. Except as provided for in Subsection B of this Section, a person required to register and provide notification pursuant to the provisions of this Chapter shall comply with the requirement for a period of fifteen years from the date of the initial registration, unless the underlying conviction is reversed, set aside or vacated. The requirement to register shall apply to an offender who is pardoned.

B. (1) A person required to register pursuant to this Chapter who was convicted of a sexual offense against a victim who is a minor as defined in R.S. 15:541(14.2) shall register and maintain his registration and provide community notification pursuant to the provisions of this Chapter for a period of twenty-five years from the date of initial registration, unless the underlying conviction is reversed, set aside or vacated. The requirement to register shall apply to an offender who is pardoned.

(2) A person required to register pursuant to this Chapter who was convicted of an aggravated offense as defined in R.S. 15:541(1) or a person with a prior conviction for an offense for which registration is required by the provisions of this Chapter shall register and maintain his registration and provide community notification pursuant to the provisions of this Chapter for the duration of the lifetime of the offender, unless the underlying conviction is reversed, set aside or vacated. The requirement to register shall apply to an offender who is pardoned.

* * *

D. (1) The registration period of fifteen years established in Subsection A of this Section shall be reduced to a period of ten years if the offender maintains a clean record for the entire ten-year period of registration.

(2) The lifetime registration period established in Paragraph (B)(2) of this Section shall be reduced to a period of twenty-five years if the offender was adjudicated delinquent for the offense which requires registration and maintains a clean record for twenty-five years.

Interestingly, however, the trial court determined that current provisions of La. R.S. 15:544 (*i.e.*, the provisions following its amendment by 2008 La. Acts, Nos. 462 and 816), were applicable to Mr. Smith, and pursuant to those provisions, concluded that Mr. Smith was obligated to register as a sex offender for the duration of his life. Louisiana Revised Statutes 15:544 currently provides, in pertinent part as follows:

A. Except as provided for in Subsection B of this Section, a person required to register and provide notification pursuant to the provisions of this Chapter shall comply with the requirement for a period of fifteen years from the date of the initial registration, or the duration of the lifetime of the offender as provided in Subsection E of this Section, unless the underlying conviction is reversed, set aside, or vacated. The requirement to register shall apply to an offender who is pardoned.

B. (1) A person required to register pursuant to this Chapter who was convicted of a sexual offense against a victim who is a minor as defined in R.S. 15:541 shall register and maintain his registration and provide community notification pursuant to the provisions of this Chapter for a period of twenty-five years from the date of initial registration, or the duration of the lifetime of the offender as provided in Subsection E of this Section, unless the underlying conviction is reversed, set aside, or vacated. The requirement to register shall apply to an offender who is pardoned.

(2) Any of the following persons required to register pursuant to this Chapter shall register and provide notification for the duration of their lifetime, even if granted a first offender pardon, unless the underlying conviction is reversed, set aside, or vacated:

* * *

(c) A person with a prior conviction or adjudication for an offense for which registration is required by the provisions of this Chapter, whether or not the prior offense required registration at the

time of commission or conviction, who subsequently is convicted of or adjudicated for an offense which requires registration under the provisions of this Chapter.

* * *

D. (1) The registration period of fifteen years established in Subsection A of this Section shall be reduced to a period of ten years if the offender maintains a clean record for the entire ten-year period of registration.

(2) The lifetime registration period established in Paragraph (B)(2) of this Section shall be reduced to a period of twenty-five years if the offender was adjudicated delinquent for the offense which requires registration and maintains a clean record for twenty-five years.

E. (1) Notwithstanding the provisions of Subsection A or Paragraph (B)(1) of this Section, the court, upon motion of the district attorney, and after a contradictory hearing, shall have the authority to order a person required to register and provide notification pursuant to the provisions of this Chapter to register and notify for the duration of the lifetime of the offender upon a showing by a preponderance of the evidence that the offender poses a substantial risk of committing another offense requiring registration pursuant to this Chapter. The district attorney and the offender may enter into a plea agreement requiring the offender to register and provide notification for the duration of the lifetime of the offender without a contradictory hearing.

(2) Whenever the registration and notification period of a sex offender has been increased to lifetime pursuant to the provisions of Paragraph (1) of this Subsection, upon maintenance of a clean record for the minimum time period applicable to the offense of conviction as provided by the provisions of Subsection A or Paragraph (B)(1) of this Section, the offender may petition the court in the jurisdiction of conviction, or if convicted out of state, in the jurisdiction of the offender's residence, to be relieved of the registration and notification requirements of this Chapter. The district attorney shall be served with the petition and the matter shall be set for contradictory hearing. Upon a finding by clear and convincing evidence that the offender has maintained a "clean record" as defined in this Section and that the offender does not pose a substantial risk of committing another offense requiring registration pursuant to this Chapter, the court may order that the offender be relieved of the obligation to register and notify pursuant to this Chapter.

At the outset, we note that the only provisions of these statutes providing for registration as a sex offender for the duration of the lifetime of the offender is either La. R.S. 15:544(B)(2) as amended by 2007 La. Acts, No. 460 (the substance

of which is no longer in effect because it was subsequently amended) and the current provisions of La. R.S. 15:544(B)(2) and (E), which requires a contradictory hearing where evidence establishing that the offender poses a substantial risk of committing another offense requiring registration must be offered. There is no dispute that no such hearing was held in this matter, and therefore, the current provisions of La. R.S. 15:544(B)(2) and (E) are not applicable and could not be used as a basis for the trial court to order Mr. Smith to register for the duration of his lifetime.

Therefore, the issue to be resolved is whether the retroactive application of La. R.S. 15:544(B)(2), as amended by 2007 La. Acts, No. 460 (which is no longer in effect, and provides for lifetime for offenders with a prior conviction for an offense for which registration is required) or the current provisions of La. R.S. 15:544(A), as amended by 2008 La. Acts, Nos. 462 and 816 (providing for a registration period of fifteen years to sex offenders), to Mr. Smith violates the *ex post facto* clauses of the United States and Louisiana Constitutions.

Both of the above amendments to La. R.S. 15:544 came into effect after Mr. Smith was convicted, after Mr. Smith was released on parole supervision, after Mr. Smith had satisfied his three-year sentence, and after Mr. Smith's duty to maintain his registration for ten years following his initial registration as a sex-offender had already terminated under the provisions of former La. R.S. 15:544.

The State contends that because Mr. Smith knowingly failed to register or update his registration as required when he returned to Louisiana in 2003, he failed to complete a full ten-year period of registration by the time the amended versions of La. R.S. 15:544 came into effect, and therefore, those amended provisions should be applied. However, we find the record before us devoid of any evidence affirmatively establishing that Mr. Smith knowingly failed to register or update his registration as required when he returned to Louisiana. Mr. Smith testified that

when he was released on parole supervision, he moved to Woodville, Mississippi, and that his probation and parole officer, Janet Williams, was aware that he would be living in Mississippi. According to Mr. Smith, Ms. Williams sent his information to the probation and parole offices in Wilkerson County, Mississippi, he was assigned a probation and parole officer in Mississippi, and he registered as a sex offender in Mississippi. Mr. Smith testified that he lived in Mississippi and maintained his registration there from the time he was released on parole supervision until the end of 2003, when he returned to live in Louisiana. Mr. Smith further testified that when he informed the State of Mississippi that he was moving, they notified him that he would have to register with the West Feliciana Parish Sheriff's office and the town police department. Mr. Smith testified that he did so. However, according to the documentation of the State, Mr. Smith's registry as a sex offender was not received or processed by the State until January 2005, almost a year following his return to Louisiana.

Based on this evidence, we cannot conclude that Mr. Smith *knowingly* failed to register or maintain his registry as a sex offender. Although there appears to be a lapse between Mr. Smith's return to Louisiana and the receipt of his registration by the State, we note that the only penalty provided for in the sex offender statutory scheme for any person who fails to register as a sex offender as required by the sex offender statutes is that they shall be convicted, fined, and imprisoned. See La. R.S. 15:542.1.4. Notably, Mr. Smith has not been convicted nor have criminal charges been brought against him for any alleged failure to register or maintain his registry as a sex offender. Accordingly, we find no merit to the State's argument that the amended versions of La. R.S. 15:544 should be applied because Mr. Smith knowingly failed to register or update his registration as required when he returned to Louisiana.

The State also contends that the amended versions of La. R.S. 15:544 should

be applied retroactively to Mr. Smith without violating the *ex post facto* clauses of the Louisiana and United States Constitution based on the Louisiana Supreme Court holding in **Olivieri** and the United States Supreme Court holding in **Smith**.

Article I, § 10 of the United States Constitution and Article I, § 23 of the Louisiana Constitution prohibit applying criminal laws *ex post facto*. Traditionally, Louisiana courts have held that in order for a criminal or penal law to fall within this prohibition, the law had to be passed after the date of the offense, relate to that offense or its punishment, and alter the situation of the accused to his disadvantage. **Olivieri**, 2000-0172 at p.14, 779 So.2d at 743-744. However, in **Olivieri**, the supreme court narrowed the focus of *ex post facto* analyses in Louisiana. While the court recognized that, in previous *ex post facto* analysis, Louisiana jurisprudence had broadly focused on whether the change in a law operated to the disadvantage of an accused, the court adopted the current federal approach to *ex post facto* analysis, which focuses on whether any change in the law altered the definition of criminal conduct or increased the penalty by which the crime was punishable. **Olivieri**, 2000-0172 at pp.14-16, 779 So.2d at 743-744.

The **Olivieri** case involved two consolidated criminal cases. The first case involved William Olivieri, who was convicted on May 9, 1990, of forcible rape and sentenced to twenty years at hard labor without benefit of parole, probation, or suspension of sentence for two years. In 1998, anticipating a scheduled good time release in August 2000 (which was granted in November 2000, subject to supervision as though on parole), Mr. Olivieri filed a motion to be relieved of the registration and notification requirements on the basis that the provisions of La. R.S. 15:540, *et seq.* were enacted after his crime, and therefore, violated *ex post facto* principles. **Olivieri**, 2000-0172 at pp. 2-3, 779 So.2d at 737.

The second case involved Marvin Hutchinson, who pleaded guilty on June 4, 1996, to oral sexual battery of a juvenile, which was committed in 1990, and was

sentenced to seven years imprisonment at hard labor, suspended, and placed on five years active probation subject to special conditions, one of which was the notice requirements of La. C.Cr.P. art. 895(H) (to register as a sex offender in accordance with La. R.S. 15:540, *et seq.*), which was enacted by 1992 La. Acts, No. 962 (after his crime was committed). Mr. Hutchinson filed a motion opposing his compliance with La. C.Cr.P. art. 895 and a motion to correct an illegal sentence, essentially arguing that enforcing La. C.Cr.P. art. 895 against him violated *ex post facto* principles. **Olivieri**, 2000-0172 at pp. 3-4, 779 So.2d at 737-738. Thus, both of the cases raised the issue of whether the State could require sex offenders (probationers or those released on parole) to comply with the sex offender notification provisions the Louisiana Legislature enacted after they committed their offenses. The supreme court granted the writ applications in order to address the issue of whether the retroactive application of those statutes violated the *ex post facto* clauses of the United States and Louisiana Constitutions. **Olivieri**, 2000-0172 at pp. 1-2, 779 So.2d at 736-737.

After carefully evaluating the provisions of the sex offender statutes, the majority first noted that the legislative intent behind the statutes was to alert the public for the purpose of public safety, a remedial intent, and not to punish convicted sex offenders. **Olivieri**, 2000-0172 at p. 20, 779 So.2d at 747. The court further noted that while some of the provisions of the sex offender statutes may be remotely similar to historical forms of punishment, such as public humiliation, the immediate need for public protection was a corollary of rather than an addendum to the punishment of sex offenders. **Olivieri**, 2000-0172 at pp. 21-22, 779 So.2d at 748. Lastly, the court recognized that although the sex offender statutes imposed the burden of the public and community notification process on the convicted sex offenders, which caused them to have to expend money which they were not obligated to pay at the time they committed their respective offenses,

the onus placed on them by the legislation did not constitute a separate punishment for their offense, but rather, a condition of their release—parole and probation respectively. Therefore, any costs associated with the conditions of their release were a necessary part of the regulatory scheme of the legislation at the time of that release. **Olivieri**, 2000-0172 at pp. 23-24, 779 So.2d at 748-749.

Accordingly, the majority concluded that the sex offender statutes were not so obtrusive as to find them punitive rather than remedial or regulatory, as was the intention of the Legislature. The court recognized that while the legislation may be harsh, may impact a sex-offender's life in a long-lived and intense matter, and be burdensome to the sex offender, it was not an infringement of the principles of *ex post facto*. **Olivieri**, 2000-0172 at pp. 24-25, 779 So.2d at 749-750.

In **Smith**, the United States Supreme Court considered the issue of whether the application of Alaska's Sex Offender Registration Act (Alaska's Megan's Law) retroactively to sex offenders convicted before the act's passage constituted retroactive punishment forbidden by the *ex post facto* clause of the United States Constitution.

Alaska's Megan's Law contains two components: a registration requirement and a notification system, both of which were retroactive. **Smith**, 538 U.S. at 90, 123 S.Ct. at 1145. John Doe I and John Doe II were convicted of sexual abuse of a minor, an aggravated sex offense. John Doe I pleaded *nolo contendere* after a court determination that he had sexually abused his daughter for two years, when she was between the ages of 9 and 11; John Doe II entered a *nolo contendere* plea to sexual abuse of a 14-year-old child. Both were released from prison in 1990 and completed rehabilitative programs for sex offenders. Although both were convicted before the passage of Alaska's Megan's Law, they became subject to its provisions. John Doe I, John Doe II, and Jane Doe (John Doe I's wife) brought an action seeking the act void as to them under the *ex post facto* clause and due

process clause of the United States Constitution. **Smith**, 538 U.S. at 91, 123 S.Ct. at 1146.

The Supreme Court noted that the first inquiry was to ascertain whether the legislature meant the statute to establish civil proceedings. **Smith**, 538 U.S. at 92, 123 S.Ct. at 1146-1147. 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 non-punitive, whether the statutory scheme is so punitive either in purpose or effect as to negate the State's intention to deem it civil, must be examined. **Smith**, 538 U.S. at 92, 123 S.Ct. at 1147. Because deference must be given to the legislature's stated intent, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty. **Smith**, 538 U.S. at 92, 123 S.Ct. at 1147. After evaluating the specific provisions of Alaska's Megan's Law, the Supreme Court concluded that the intent of Alaska's legislature was to create a civil, non-punitive regime. **Smith**, 538 U.S. at 96, 123 S.Ct. at 1149.

In analyzing the effects of the Megan's Law, the Supreme Court noted that the most relevant factors to consider are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as punishment; imposes an affirmative disability or restraint; promotes traditional aims of punishment; has a rational connection to a non-punitive purpose; or is excessive with respect to this purpose. **Smith**, 538 U.S. at 97, 123 S.Ct. at 1149. After examining the effects of Alaska's Megan's Law in regard to these factors, the Supreme Court determined that it was not shown that the effects of Megan's Law negated Alaska's intention to establish a civil regulatory scheme, that the act was non-punitive, and that its retroactive application did not violate the *ex post facto* clause of the United States Constitution. **Smith**, 538 U.S. at 105-106, 123 S.Ct. at 1154.

After carefully considering these cases in light of the particular facts of the case before us, we find them distinguishable from our determination herein of whether the application of La. R.S. 15:544, as amended by 2007 La. Acts, No. 460 and/or as amended by 2008 La. Acts, Nos. 462 and 816, to Mr. Smith violates the principles of *ex post facto*. First and foremost, Louisiana's Megan's Law was originally enacted by 1992 La. Acts, No. 388, before Mr. Smith committed (in September 1994) and was convicted of (in June and July 1995) the two sexual offenses. Mr. Smith does not challenge or dispute the *initial* applicability of or imposition of the sex offender registration and notification provisions on him, as the offenders in both **Smith** and **Olivieri** did. Indeed, the sex offender registration and community and public notifications requirements were imposed on and complied with by Mr. Smith.

Additionally, in this case, the State is not seeking to enforce the provisions of Megan's Law that were in effect at the time Mr. Smith was released on parole supervision (as in **Olivieri**) or the provisions of Megan's Law that were in effect following Mr. Smith's release from parole supervision/satisfaction of sentence, (as in **Smith**). In fact, Mr. Smith essentially argues that those provisions (the provisions of former La. R.S. 15:544) should be applied to him. Instead, however, the State seeks to enforce the provisions of amended La. R.S. 15:544, which came into effect not only after Mr. Smith's parole supervision had ended and after he had satisfied his three-year sentence, but which came into effect after his duty to maintain his registration had already been terminated by the expiration of ten years under the provisions of former La. R.S. 15:544. At the time Mr. Smith was released on parole supervision and at the time he had satisfied his sentence and was released from parole supervision, La. R.S. 15:542 required him to register as a sex offender and La. R.S. 15:544 provided that his duty to maintain that registry terminated ten years from the date of that initial registration (as long as he did not

again become subject to the registration provisions during that ten-year period). Mr. Smith initially registered as a sex offender on December 24, 1996. Ten years later, on December 24, 2006, Mr. Smith's duty to register as a sex offender terminated, as he, undisputedly, did not again become subject to the registration provisions during that ten-year period. When Mr. Smith's duty to register as a sex offender terminated on December 24, 2006, the provisions of former La. R.S. 15:544 *were still in effect*. The amended provisions of La. R.S. 15:542 which the State seeks to enforce against Mr. Smith, *i.e.*, 2007 La. Acts, No. 460 and/or as amended by 2008 La. Acts, Nos. 462 and 816, came into effect on January 1, 2008, June 25, 2008, and August 15, 2008, respectively.

We acknowledge, as pointed out by the Louisiana Supreme Court in **Olivieri** (and by the United States Supreme Court in **Smith**), that Louisiana's Megan's Law (like Alaska's Megan's law) was enacted by our legislature with an avowedly non-punitive, remedial intent—to protect communities, to aid police in their investigation of sex offenders, and to enable quick apprehension of sex offenders. La. R.S. 15:540; **Olivieri**, 2000-0172 at pp.19-20, 779 So.2d at 747. We also recognize that in general, the effect of Louisiana's Megan's Law on convicted sex offenders is not so obtrusive as to be punitive rather than remedial or regulatory, and therefore, may be applied to sex offenders without violating the *ex post facto* clauses of the United States and Louisiana Constitutions.

However, based on the *particular facts of this case*, we find that the application of the amended provisions of La. R.S. 15:544 (as amended by 2007 La. Acts, No. 460 and/or as amended by 2008 La. Acts, Nos. 462 and 816) to Mr. Smith is so punitive in effect as to transform what was intended as a civil remedy into an additional punishment for him. Louisiana's Megan's Law has a legitimate civil purpose—to alert and protect the public from sex offenders who may offend again. The provisions of Megan's Law were already imposed on, complied with,

and fulfilled by Mr. Smith. Thus, the purpose of Megan's Law has been served. To now impose additional time on Mr. Smith's duty to register—after his duty had already terminated—either for his lifetime or for an additional five years imposes a significant affirmative obligation on him. Because Megan's Law's non-punitive purpose has already been served by Mr. Smith's compliance with the statute, this new additional affirmative obligation is excessive in relation to Megan's Law's non-punitive purpose, as it is being applied without regard to Mr. Smith's risk of re-offending. Thus, placing the burden on Mr. Smith to re-register as a sex offender for the duration of his life or for an additional five years, after his duty to register had already terminated, constitutes another punishment for his offense.

Additionally, requiring Mr. Smith—either for the duration of his lifetime or for an additional five years—to re-register as a sex offender and to comply with the community and public notification procedures would also impose a new financial burden on Mr. Smith. Unlike the circumstances in **Olivieri**, neither the lifetime registration provisions nor the fifteen-year registration provisions were a condition of Mr. Smith's release on parole, and therefore, were not part of the regulatory scheme in existence at the time of his release on parole supervision or when he was released from parole supervision because he satisfied his sentence. In **Olivieri**, the Supreme Court concluded that these financial burdens are similar to those financial burdens already imposed upon probationers and parolees, and were thus permissible. However, that analogy cannot be applied to sex offenders who serve their sentence and are then released. An offender who serves the entirety of his sentence and upon release is subjected to a new financial burden that was not in place when he committed his crime, is not merely subjected to a regulatory cost, but rather an affirmative disability amounting to punishment. See Olivieri, 779 So.2d at 753, n.5 (Calogero concurring in part, dissenting in part).

As we have concluded that the application of the amended provisions of La.

R.S. 15:544 (as amended by 2007 La. Acts, No. 460 and/or as amended by 2008 La. Acts, Nos. 462 and 816) transforms what was intended as a civil remedy into a punitive one *for him*, thereby increasing the penalty by which his crime is punishable, the retroactive application of those amendments to Mr. Smith violates the United States and Louisiana constitutional prohibitions of *ex post facto*. Accordingly, the judgment of the trial court ordering Mr. Smith to register as a lifetime sex offender pursuant to the amended provisions of La. R.S. 15:544 is hereby reversed.

Furthermore, because we can find no statutory authority, nor have we been directed to any other applicable statutory authority by which the State can command Mr. Smith to re-register as a sex offender for the duration of his life or any further time period (as Mr. Smith has already fulfilled his duty to register as a sex offender for the requisite period of time under the provisions of former La. R.S. 15:544 applicable to his case), we hereby render judgment prohibiting the State from enforcing the provisions of La. R.S. 15:540, *et seq.* against Mr. Smith, with regard to the convictions for the two sexual offenses addressed herein.

In accordance with La. R.S. 32:412(I) and La. R.S. 40:1321(J), the State of Louisiana, Office of Motor Vehicles has marked Mr. Smith's driver's license "sex offender" in orange. However, the provisions of La. R.S. 32:412(I) and La. R.S. 40:1321(J) are only applicable to persons required to register as a sex offender in accordance with La. R.S. 15:542, *et seq.* Because we have concluded that Mr. Smith is no longer required to register as a sex offender in accordance with La. R.S. 15:542, *et seq.*, having completed his registration requirements and duty under the applicable statutes, Mr. Smith is not required to have the restriction code for a sex offender on his driver's license, and is not required to carry the special identification card declaring him to be a sex offender.

Lastly, given this court's ruling herein on the appeal on the merits, as

expressed in this opinion, Mr. Smith's application for supervisory writ is now moot. Therefore, we deny the supervisory writ as moot.

III. CONCLUSION

For all of the above and foregoing reasons, the June 24, 2009 judgment of the trial court is hereby reversed and judgment is rendered in accordance with the views expressed in this opinion. Mr. Smith's application for supervisory writ is denied as moot.

All costs of this appeal in the amount of \$1,100.00 are hereby assessed to the State of Louisiana, Department of Public Safety and Corrections, Office of State Police.

REVERSED AND RENDERED; WRIT DENIED AS MOOT.