IN THE ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. DAVID CHARLES HENRY, Appellant.	)	No. CR-18-0081-PR Court of Appeals No. 2 CA-CR 2016-0405 Pima County Superior Court No. CR2016-1041

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF APPELLANT

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INTRODUCTION

No class of offenders is so easily cast aside as sex offenders. The Legislature regularly expands the scope of who must register, how they must register, and how the community must be notified. Now, even misdemeanants must register as sex offenders, even if their offense was not sexual at all. *See State v. Coleman*, 241 Ariz. 190 (App. 2016) (permitting expansion of list of offenses requiring registration to include unlawful imprisonment). A.R.S. §§13-3821(P) and 13-3822(C) even require offenders to register when using the Internet. *But see Packingham v. North Carolina*, 137 S.Ct. 1730 (2017) (sex offenders who have completed sentences may not be forbidden from using Internet).

When this Court held that sex offender registration was administrative and not punitive in *State v. Noble*, 171 Ariz. 171 (1992), it interpreted a very different registration scheme. A quarter-century later, the scheme has become so onerous that this Court must revisit *Noble*. Applying Arizona's scheme to offenders whose convictions occurred prior to such statutory changes violates the prohibition on *ex post facto* laws. It is especially unfair when applied to persons who accepted plea agreements to avoid the risk of guilty verdicts and harsh sentencing laws. Furthermore, this Court should give primacy to article 2, section 25 of the Arizona Constitution and interpret that provision as protecting such members of our community from continued punishment.

INTERESTS OF *AMICUS CURIAE*

Arizona Attorneys for Criminal Justice (AACJ), the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend them. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

AACJ offers this brief because the issues presented concern the right of those convicted of crimes to move on with their lives after fulfilling their debt to society. AACJ has also submitted a brief supporting another petition that raises a similar issue, *see State v. Light,* CR-18-0075. AACJ asks this Court to grant review because defendants also deserve finality in their convictions and sentences. As the Legislature continues to make registration and notification requirements more onerous for such persons, it creates a permanent underclass of persons who will never be able to obtain stable housing or employment. *See State v. Burbey*, 243 Ariz. 145 (2017) (homeless registration). When this same Appellant challenged his previous conviction for failure to register, the court of appeals published an opinion

suggesting that it would have found an *ex post facto* violation but for binding precedent of this Court and the United States Supreme Court. *State v. Henry*, 224 Ariz. 164 (App. 2010) (*Henry I*). These requirements can no longer be viewed as anything other than penalties for convictions, and thus this Court must extend the protections against *ex post facto* laws to persons such as Henry and Light whose offense dates, convictions, and completion of sentences all occurred prior to the respective expansions of the registration statutes that later encompassed them.[1]

ARGUMENTS

I. This Court should reconsider and overrule *State v. Noble* because the expansion of penalties under the current legal framework demonstrates violation of the prohibition on *ex post facto* laws.

A. Arizona's registration scheme has evolved and become more punitive.

Since *Noble* was decided, the Arizona Legislature has amended A.R.S. §13-3821 twenty-nine times. During the intervening time, Internet use has transformed from being generally unavailable in 1992 to the cornerstone of all communication today. These considerable changes merit reconsideration of *Noble*.

The analytical framework utilized by *Noble* is the same as that utilized by the

[1] Henry's later convictions for failure to register should not serve as the basis for a new conviction for failure to register, since he never should have been ordered to register in the first place—even if such convictions are not yet vacated. *See State v. Espinoza*, 229 Ariz. 421 (App. 2012) (trial court properly dismissed indictment for failure to register when original order to register was without jurisdiction, even though defendant had later been convicted twice by plea of failure to register).

United States Supreme Court in *Smith v. Doe*, 538 U.S. 84 (2003) (retroactive application of Alaska Sex Offender Registration Act did not violate the *ex post facto* clause of the U.S. Constitution). *Noble* found that the legislative history of §13-3821 did not indicate whether the statute was intended to be punitive or regulatory. 171 Ariz. at 175. Therefore, this Court continued the analysis to the seven factors enumerated in *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-69 (1963):

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

See Id. After remarking that several of the *Mendoza-Martinez* factors suggested that §13-3821 was punitive, this Court noted:

> The most significant factor in this case is our determination that, as noted, the overriding purpose of § 13-3821 is facilitating the location of child sex offenders by law enforcement personnel, a purpose unrelated to punishing Noble and McCuin for past offenses. In addition, potentially punitive aspects of the statute have been mitigated. Registrants are not forced to display a scarlet letter to the world; outside of a few regulatory exceptions, the information provided by sex offenders pursuant to the registration statute is kept confidential. See supra note 8 and accompanying text.

Id. at 178.

In 1995, the Legislature enacted A.R.S. §13-3825, entitled "Community Notification." The statute currently requires that notification for Level 2 and 3

offenders be disseminated in nonelectronic format to surrounding neighborhoods, area schools, appropriate community groups, and prospective employers that must include the offender's photograph, exact address, and summary of the offender's status and criminal background. Moreover, a press release and the notification containing all required offender information must be given to the local electronic and print media to promote local publication. This ensures that sex offenders' neighbors will be fully informed about the status of any sex offenders who move into the neighborhood. This community notification is a Scarlet Letter directly impacting all Level 2 and 3 offenders.

Ariz. Dept. of Public Safety v. Superior Court, 190 Ariz. 490 (App. 1997), held that A.R.S. §13-3825's notification requirements did not violate *ex post facto* prohibitions. But, it was decided before the Legislature enacted A.R.S. §13-3827 in 1998, requiring the Department of Public Safety (DPS) to "establish and maintain an internet sex offender website for the purpose of providing sex offender information to the public." The website includes virtually all sex offenders and the following information for each: the offender's name, address, and age; a current photograph; and the offense committed and notification level pursuant to §13-3825(C) if DPS completed a risk assessment. §13-3827(A)(1)-(2), (B)(1)-(3).

DPS does not currently maintain a registration profile for Henry since he will not be released from the Department of Corrections until September 29, 2018.[2] *See* A.R.S. §13-3827(J) (provision not applicable to offenders incarcerated in Department of Corrections). Upon release, his DPS website entry will show: his photo; full name; aliases; level; status; physical description including sex, race, hair color, eye color, height, weight, and detailed description of tattoos; address and other known addresses; and original charged counts (first-degree armed rape and four counts of failure to register as a sex offender). One will also be able to click on a "View Map" option to see his address on a map. The only identifying information that the Details page will withhold are Henry's phone number, email address, and Internet identifiers (assuming he has them). Henry's "Details" and Map pages on the website will be his enduring Scarlet Letter. Essentially, Henry, and all other Arizona sex offenders, will and do have unwanted *de facto* Facebook pages for the entire world to view and act upon for any reason.

Also within the Details page are links entitled "Submit a tip or correction for this offender" and "Register to track this offender." Anyone in the world could submit a tip or correction or register to track him. The tip or correction may be neither truthful nor correct. There is no process available to Henry wherein he can

[2] https://corrections.az.gov/public-resources/inmate-datasearch (last visited May 11, 2018).

learn about submitted tips or corrections or submit his own correction. "Register to track this offender" feels disturbingly like an unwanted Twitter account that could be used for stalking. These interactive features are additional Scarlet Letters.

When applying the *Noble* factors to today's statutory and regulatory scheme, the result is far different. As to factors (b) and (c), *Noble* correctly stated that registration has traditionally been viewed as punitive and that it serves the traditional deterrent function of punishment. 171 Ariz. at 176-77. Regarding factor (d), *Noble* found A.R.S. §13-3821 was not excessive in relation to the purpose of assisting law enforcement officers investigate and prosecute crimes, *id*. at 177-78, but that finding must be reversed under the current scheme.

As stated above, the Legislature has expanded the list of offenses qualifying an offender for registration. *See Coleman*, 241 Ariz. 190 (list includes unlawful imprisonment of a minor, a class six felony potentially charged and convicted as a misdemeanor is registerable). Furthermore, in 1995 the Legislature added A.R.S. §13-118, which allows a trial judge to order sex offender registration for any offense that is determined to be sexually motivated. In *Fushek v. State*, 218 Ariz. 285 (2008), this Court held that the allegation of sexual motivation carried so severe a penalty—sex offender registration—that even misdemeanor offenses that did not otherwise qualify defendants for the right to a jury trial guaranteed such a right under article 2, section 24 of the Arizona Constitution. This Court rejected the argument that *Noble*

controlled the outcome of that question because it was not deciding "whether sex offender registration is criminal punishment for ex post facto purposes." *Id*. at 290 ¶¶18-19.

In *Henry I*, the court found that *Smith* undermined *Noble*'s finding that sex offender registration was a traditional form of punishment under the *ex post facto* clause of the U.S. Constitution. Comparing the two states' sex offender registration schemes, *Henry I* determined Arizona's was "even more analogous to probation or supervised release than the Alaska scheme addressed in *Smith*." *Id*. at 170-71 ¶¶20-21. The court reluctantly held that §13-3821 did not violate the *ex post facto* clauses of the federal and state constitutions:

> We recognize, as discussed earlier, that the registration requirements have become decidedly more burdensome since *Noble* addressed the issue. However, because *Smith* controls our analysis here, we are compelled to conclude that Arizona's sex offender registration and notification statutes do not constitute impermissible ex post facto laws as applied to Henry.

Id. at 171 ¶24 (citation omitted). But for *Smith*, the court recognized it likely would have reached a different result than in *Noble* if it were interpreting Arizona's modern scheme, because under this scheme, "sex offenders are not only 'forced to display a scarlet letter to the world,' but state authorities are required to shine a spotlight on that letter." *Id*. at 171-72 ¶25. It also found "difficult to harmonize" that sex offender registration could be both nonpunitive under *Smith* while simultaneously severe enough of a criminal punishment to merit a jury trial under *Fushek*. *Id*. at 172 ¶26.

Because the court was so constrained by *Smith* and *Noble*, the best it could do was tee the case up for this Court—which denied review.

There is an additional reason to prohibit retroactive application of such laws against those who, like Henry, pled guilty in order to avoid the risk of an extremely harsh sentence if not acquitted at trial. Our justice system has become "a system of pleas, not a system of trials." *Missouri v. Frye*, 566 U.S. 134, 143 (2012); *Lafler v. Cooper*, 566 U.S. 156, 170 (2012). Part of the bargain offered by the State to induce such a guilty plea is the promise that all penalties to which the defendant will be subject is contained in the plea agreement. Particularly when the State reneges on its agreement so many years later, the remedy of withdrawal from the plea is no longer an option, leaving specific performance as the only remaining remedy. *Santobello v. New York*, 404 U.S. 257 (1971). At least one court has found this as an important consideration when finding an *ex post facto* violation. *Doe v. Anderson*, 108 A.3d 378, 387 (Me. 2015).

In this case, the court of appeals held Henry's *ex post facto* arguments were foreclosed by the opinion in Henry's prior case, without any analysis or discussion of *Noble* or *Smith*. *Decision* ¶8. The time has come for this Court to reconsider *Noble*. *Henry I* correctly noted the irreconcilability of *Noble* with *Fushek*. This Court should find that the registration scheme cannot be applied retroactively to Henry.

B. Other state courts have considered this question post-*Smith* and found their registration laws violate the federal *ex post facto* clause.

In *Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017), the Pennsylvania Supreme Court held that the Pennsylvania registration scheme violated both the federal and state prohibitions against *ex post facto* laws. It recognized that it held Pennsylvania's scheme was constitutional in *Commonwealth v. Williams*, 832 A.2d 962 (Pa. 2003), but subsequent statutory changes, most notably those associated with the federal Adam Walsh Act of 2006, undermined the findings in its earlier case. Thus, retroactive application of the current statutes violated both the federal constitution under the analysis in *Smith* as well as the state constitution. *Muniz*, 164 A.3d at 1218, 1223.

In *Doe v. State*, 111 A.3d 1077 (N.H. 2015), the New Hampshire Supreme Court noted two major differences between the Alaska scheme at issue in *Smith* and its own. "First, the Smith Court made a point to mention that the act did not have an in-person reporting requirement. . . . Under New Hampshire's act, however, the petitioner, a tier III offender, must register in person four times per year, and tier I and II offenders must register in person twice per year." *Id*. at 1094. "Second, the record in *Smith* contained 'no evidence that the Act has led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred.' Here, however, the petitioner alleges he was not able to move in with his son or obtain public housing because of his status as a registered sex

offender." *Id*. at 1094 (quoting *Smith*, 538 U.S. at 100). The court saved the statute's constitutionality by judicially ordering that affected registrants be provided a hearing with judicial review at which they could establish that they should not be subject to continued lifelong registration. *Id*. at 1101.

Other states, recognizing that their respective *ex post facto* prohibitions are identical to those of the federal constitution, have held that GPS monitoring is a kind of confinement and restriction that is punitive. *Commonwealth v. Cory*, 911 N.E.2d 187, 195-97 (Mass. 2009); *Riley v. New Jersey State Parole Bd.*, 98 A.3d 544, 560 (N.J. 2014). This Court may do the same without running afoul of *Smith*, because the issue is no longer a close call.

II. This Court should hold, similarly to other state courts, that this punitive scheme violates the Arizona Constitution's prohibition on *ex post facto* laws.

Although not required to do so, Arizona courts often read our state constitution in lockstep with the United States Supreme Court's reading of the federal constitution and eschew any independent reading of the state constitution. *See Pool v. Superior Court*, 139 Ariz. 98, 108 (1984) (while giving great weight to United States Supreme Court decisions, "we cannot and should not follow federal precedent blindly"). More recent scholars— including two justices of this Court— have called for looking to the Arizona Constitution as an independent source of individual rights. *See* Ruth V. McGregor, *Recent Developments in Arizona State*

Constitutional Law, 35 Ariz. St. L.J. 265, 274-80 (2003); Clint Bolick, *Vindicating the Arizona Constitution's Promise of Freedom*, 44 Ariz. St. L.J. 505, 509 (2012) ("Far better is the 'primacy' approach—that is, interpreting state constitutional provisions separately from their federal constitutional counterparts, focusing on their language, intent, and history. Such an approach contributes to consistency in the law, it honors the intent of the framers to provide an independent and primary organic law, and it ensures that the rights of Arizonans will not erode even when federal constitutional rights do.").

Noble represents a classic lockstep approach. 171 Ariz. at 173 ("We ordinarily interpret the scope of a clause in the Arizona Constitution similarly to the United States Supreme Court's interpretation of an identical clause in the federal constitution."). Where the United States Supreme Court has spoken on a subject, this Court may recognize that the correct result is contrary and reach that result by means of the state constitution. *Pool*; *see also State v. Jean*, 243 Ariz. 331, 353 ¶ 92 (Bolick, J., concurring in part and dissenting in part) ("Our federalist system allows us to interpret our state constitution differently than the U.S. Supreme Court interprets the national Constitution, so long as we do not diminish federal constitutional protections…").

After *Doe* was decided in 2003, one of the litigants initiated new proceedings under the *ex post facto* clause of the Alaska Constitution. *Doe v. State*, 189 P.3d 999,

1000 (Alaska 2008).[3] Alaska's sex offender website posted names, addresses, and employer addresses on the Internet. *Id.* at 1009. Applying the *Smith* analysis, the Supreme Court of Alaska held that the harmful effects of the Alaska Sex Offender Registration Act also stemmed from the registration, disclosure, and dissemination provisions and found that this was an affirmative disability or restraint. *Id.* at 1011. The Court held that the Alaska Sex Registration Act violated the *ex post facto* clause of the Alaska Constitution. *Id.* at 1019.

The Supreme Court of Indiana held that its state's scheme excessively penalized offenders who had already been punished because they had no available channel to petition the trial court for review of future dangerousness or complete rehabilitation whereas the State could establish the defendant's status as a sexually violent person. *Gonzalez v. State*, 980 N.E.2d 312, 319-21 (Ind. 2013). Although its analysis was largely identical to the federal *ex post facto* analysis, minor differences led the court to base its reasoning on article I, section 24 of the Indiana Constitution. *Id*. at 316 n.3. More recently, in *Kirby v. State*, 83 N.E.3d 1237, 1245-1246 (Ind. App. 2017), *affirmed on other grounds*, (Ind. 2018), the court held that the state *ex post facto* prohibition prevented application of an amendment to Indiana's scheme to Kirby, who had completed all forms of punishment imposed by the trial court and

[3] Many petitioners in these cases are "John Does," but in both Alaska cases the plaintiff pled no contest to sexual abuse of a minor and was released from prison in 1990. *See Smith*, 538 U.S. at 91.

had never since behaved inappropriately. The court noted that a finding of scienter for the registration statute and the underlying qualifying offense favors treating the effects of the statute as punitive, and that its application only to criminal behavior favors treating the effect of the statute as punitive. *Id*. at 1244-45.

Other courts have reached similar conclusions. *See Doe v. Dept. of Public Safety and Correc. Svcs.*, 62 A.3d 123, 130 (Md. 2013) (in holding retroactive application violates state constitutional *ex post facto* prohibition, "we need not, and do not, address whether requiring Petitioner to register violates the prohibition against *ex post facto* laws under Article 1 of the federal Constitution.") (citing *Michigan v. Long*, 463 U.S. 1032, 1041 (1983)); *State v. Williams*, 952 N.E.2d 1108, 1112-13 (Ohio 2011) (denial of a hearing to contest offender's classification, which was available when defendant committed offense, violated state *ex post facto* prohibition). This Court should give primacy to the state constitutional declaration of rights and hold that article 2, section 25 affords greater protection than the federal *ex post facto* clause.

CONCLUSION

AACJ asks this court to grant review of Henry's petition to address these important issues of federal and state constitutional law.

RESPECTFULLY SUBMITTED this 25th day of June, 2018.

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