

31-8-A

CASE NO. 06-6393

**FILED**

~~MAR 28 2007~~

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

LEONARD GREEN, Clerk

**JOHN DOE**

**Appellant**

**vs.**

**PHIL BREDESEN, Governor of the State of Tennessee,  
CHARLES M. TRAUGHBER, Chairman, Tennessee Board of  
Probation and Parole,  
MARK GWYN, Director of the Tennessee Bureau of Investigation,  
RANDALL NICHOLS, District Attorney General 6<sup>th</sup> Judicial District**

**Appellees**

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**APPELLANT'S FINAL BRIEF**

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
AT KNOXVILLE**

Attorney for Appellant:

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1410 N. Broadway  
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GA Bar No. 521979  
(865) 971-4330

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

<b>JOHN DOE, and JANE DOE,</b>	:	
	:	
<b>Appellees</b>	:	Case No. 06-00072
	:	
<b>vs.</b>	:	
	:	
<b>PHIL BREDESEN, Governor of the State of Tennessee, et al.</b>	:	
	:	
<b>Appellants</b>	:	

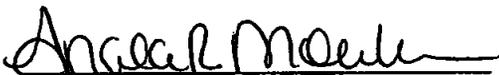
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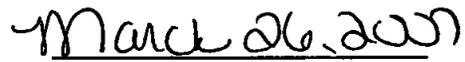
**DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST**

Pursuant to 6<sup>th</sup> Cir. R. 26.1, JOHN DOE, makes the following disclosures:

(1) Is said party a subsidiary of affiliate of a publicly owned corporation? No.

(2) Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO.

  
ANGELA R. MORELOCK  
Attorney for Appellees

  
DATE

## **TABLE OF AUTHORITIES**

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## **STATEMENT IN SUPPORT OF ORAL ARGUMENT**

Pursuant to Rule 34(g) of the Rules of the United States Court of Appeals for the Sixth Circuit, Appellants submits that oral argument is necessary in this case. They assert that the issues raised herein are of significant legal importance not only to Appellants but to provide appropriate guidance to the lower courts and that oral argument would better allow this court to make an appropriate ruling. They also contends that oral argument is necessary to protect their constitutional rights and liberty interests at stake in this case.

**STATEMENT OF SUBJECT MATTER**

**AND APPELLATE JURISDICTION**

Appellants, John Doe and Jane Doe, brought suit against the Appellees / Defendants alleging violation of their constitutional rights under the U.S. Const. Art. I, § 10, cl.1, U.S. Const. Amend. 5, U.S. Const. Amend. 14, §1, 42 U.S.C. §§ 1983 and 1988, Tenn. Const. art. I, § 11, and Tenn. Const. art. I, §§ 3,7,8,19 and 27. ( R.1 Complaint, page 1-5, JA page 5) The United States District Court for the Eastern District of Tennessee had subject matter jurisdiction over the offenses pursuant to 42 U.S.C. §1331 (2000).

This Court has jurisdiction over Appellant's appeal pursuant to 28 U.S.C. §1291, which provides that the "...court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States,...". The final Judgment was filed in the District Court on October 18, 2006. ( R.17, page 1, JA page 84) ( Appellants filed a timely Notice of Appeal with the District Court on November 1, 2006. ( R. 18, page 1, JA 85))

## **ISSUES PRESENTED FOR REVIEW**

- I. Whether or not the district court erred in not finding that Tenn. Code Ann. §§ 40-39-201, 40-39-202, 40-39-207, 40-39-301, 40-39-302 and 40-39-303 are unconstitutional as applied to him.
- II. Whether or not the district court erred in not finding that Tenn. Code Ann. §§ 40-39-301 and 40-39-303 are unconstitutional in their application to the Appellant because these provisions violate his protection against ex-post facto laws under Tenn. Const. art. 1, § 11, and his fundamental rights to individual privacy encompassed by Tenn. Const. art. I §§ 3,7,8,19 and 27.
- III. Whether or not the district court erred in not finding that Tenn. Code Ann. §§ 40-39-301 and 40-39-303 are unconstitutional as applied to him as these provisions aggravate his punishment after conviction in violation of the Ex Post Facto Clause of the United States Constitution.
- IV. Whether or not the district court erred in not granting Appellant's Temporary Injunction.

## **STATEMENT OF THE CASE**

Appellant filed is Complaint (R. 1 Complaint, pages 1-5, JA 5) and Motion for Temporary Restraining Order and a Preliminary Injunction (R. 4 Motion for Temporary Restraining Order, pages 1-3, JA 10 ) and Memorandum in Support of Motion for Temporary Restraining Order (R. 5, Memorandum in Support of Motion for Temporary Restraining Order, pages 1-8, JA 13) on March 1, 2006.

Thereafter Defendants filed, on April 5, 2006, a Motion to Dismiss and Response in Opposition to Motion (R. 12, Motion to Dismiss and Response in Opposition to Motion, pages 1-2, JA 21) and a Memorandum in Support of Motion (R. 13, Memorandum in Support of Motion to Dismiss, pages 1-35, JA 23). Plaintiff filed his Response to Defendants Motion to Dismiss on May 2, 2006 (R. 14 Plaintiff's Response to Defendants' Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6), pages 1-5, JA 58). On May 8, 2006 Defendants filed a Reply to Plaintiff's Response to Motion to Dismiss. (R. 15, Defendants Reply to Plaintiff's Response to Motion to Dismiss, pages 1-3, JA 63).

After reviewing Plaintiff's and Defendants briefs, the U.S. District Court ruled on the briefs (R. 16, memorandum Opinion, pages 1-18, JA 66) then dismissed the action with prejudice (R. 17, Judgment on Decision by the Court, page 1, JA 84).

Plaintiff hereby appeals the Memorandum Opinion and Judgment of the United

States District Court.

### **STATEMENT OF FACTS**

After January 1, 1995 and prior to July 1, 2003, Appellant pled guilty in the Criminal Court of Knox County to violations of T.C.A. §§39-12-101 and 31-13-304, namely Attempted Aggravated Kidnaping, a lesser included offense to Aggravated Kidnaping, and to two counts of violating T.C.A. §39-13-527, Sexual Battery by Authority Figure. Appellant received a total sentence of eighteen years and was placed on probation. At the time Appellant was convicted, the latter two of his criminal offenses was classified under Tennessee law as a “sexual offense,” and Appellant was classified as a “sexual offender.” Pursuant to then existing Tennessee law, as a “sexual offender,” Appellant could, after ten years following termination of probation, petition the circuit court to relieve him of continued filing of registration / monitoring forms and for expungement of all data captured by the centralized record system relating to him. Since being placed on probation, Appellant has met the statutory sexual offender registration / monitoring requirements found in T.C.A. §40-39-103 (repealed) and has successfully completed all probation requirements.

On August 1, 2004 the “Tennessee Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act of 2004” became effective. Tenn. Code Ann. §40-39-201 et seq. replaced Tenn. Code Ann. § 40-39-101 et seq.

Under Tenn. Code Ann. § 40-39-102(5), Appellant's criminal offense remained classified as a "sexual offense". Additionally, the law provided an offender the opportunity, after ten years of termination of his or her probation, to file a petition in the circuit court where the offender resided, relieving the offender of filing registration / monitoring forms and expunging all related data pertaining to that offender. Tenn. Code Ann. § 40-39-107.

Under Tenn. Code Ann. §§ 40-39-202(23) and (24), Plaintiff John Doe's criminal offense was redefined as a "violent sexual offense" and he in turn is now considered a "violent sexual offender". Under Tenn. Code Ann. §40-39-207(g)(1)(B), an offender convicted of a violent sexual offense must comply with the requirements of the Tennessee Bureau of Investigation Sexual Offender Registry for the remainder of his or her life.

Prior to July 1, 2004 the classification system for sexual offenders was codified at Tenn. Code Ann. § 40-39-301 (1) and (3).

Tenn. Code Ann. §40-39-302 gave the Board of Probation and Parole the authority to establish a monitoring system for serious sexual offenders and violent sexual offenders. This code section took effect on July 1, 2004.

On July 1, 2004 Tenn. Code Ann. §40-39-303 took effect. This code section known as the "Satellite-Based Monitoring Program" provides that any person

convicted of a sexual offense must be enrolled in a satellite based monitoring program for the extent of his or her term of probation or parole.

Tenn Code Ann. § 40- 39-303 grants the board of probation and parole the authority to make satellite based monitoring a mandatory condition of release, and the discretion to determine which parolees or probationers for whom it will be mandatory.

On or about August 15, 2005 Appellant was notified by his probation officer, Mr. Dan Davis, that beginning the first week of September 2005, Appellant would be required to pay for and wear at all times a Global Positioning System (GPS) for the purpose of satellite based monitoring.

## **SUMMARY OF THE ARGUMENT**

The issues for review in this appeal is 1) whether or not the district court erred in not finding that Tenn. Code Ann. §§ 40-39-201, 40-39-202, 40-39-207, 40-39-301, 40-39-302 and 40-39-303 are unconstitutional as applied to him; 2) whether or not the district court erred in not finding that Tenn. Code Ann. §§ 40-39-301 and 40-39-303 are unconstitutional in their application to the Plaintiff because these provisions violate his protection against ex-post facto laws under Tenn. Const. art. 1, § 11, and his fundamental rights to individual privacy encompassed by Tenn. Const. art. I §§ 3,7,8,19 and 27; 3) whether or not the district court erred in not finding that Tenn. Code Ann. §§ 40-39-301 and 40-39-303 are unconstitutional as applied to him as these provisions aggravate his punishment after conviction in violation of the Ex Post Facto Clause of the United States Constitution and 4) whether or not the district court erred in not granting Appellant's Temporary Injunction.

Appellant believes that the district court erred in not find that the above Tenn. Code Ann. sections were unconstitutional as applied to him, were not in violation of the Ex Post Facto Clause of the United States Constitution and that the district court erred in its failure to grant him a temporary and permanent injunction.

## **STANDARD OF REVIEW**

The standard of review of issuance of preliminary injunction is found in Bonnell v. Lorenzo, 241 F. 3d 800(6th Cir. 2001). “We review the district court’s decision to grant a preliminary injunction for an abuse of discretion...” Id. at 808 citing Mascio v. Pub. Employees Ret. Sys., 160 F.3d 310, 312-313 (6<sup>th</sup> Cir. 1998).

In reviewing whether or not the statutes cited above are a violation of the Ex Post Facto Clause of the United States Constitution, Article I, Section 3 Clause 3, the court must determine (1) whether the legislature intended to impose a punishment of enact a regulatory scheme that was civil and non punitive; and (2) whether the effect of the law is so punitive that it negates the state’s attempt to craft civil restrictions. Doe v. Miller, 298 F. Supp. 844 (S.D. Iowa 2004), citing Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140 (2003).

## ARGUMENT

On August 1, 2004 Tennessee's entire Sexual Offender Registration and Monitoring Act, T.C.A. §§40-39-101 et seq. was superseded by T.C.A. §§40-39-201 et seq. Among the changes imposed by this statute, the 2004 Act redefined the sexual offenses of which Appellant had pleaded guilty as "violent sexual offenses" and reclassified Appellant as a "violent sexual offender." *See* T.C.A. §40-39-202(23) and (24). At the time of the offenses (April 21, 1999), Sexual Battery by an Authority Figure was in Tennessee considered a "sexual offense" as were most sexual crimes. "Sexually violent crimes" were restricted to those offenses that involved some form of serious physical sexual violence: Aggravated Rape, Rape, Aggravated Sexual Battery, Child Rape and criminal attempt of any of the aforementioned. Appellant's offense being reclassified as "violent sexual offense" has not only changed the level of the crime he committed, but has also labeled him as a "violent sexual offender." The changes have produced the following results: Pursuant to T.C.A. §40-39-207(f)(1)(B), Appellant, now being considered as having been convicted of a violent sexual offense, must comply with the requirements of the Tennessee Bureau of Investigation Sexual Offender Registry for the remainder of his natural life. For persons convicted of a "violent sexual offense," the 2004 statute does not permit any relief whatever from registration / monitoring report filing, nor does it provide any

mechanism for expungement of captured data short of the offender's death. Finally, the 2004 Act grants to the state Board of Probation and Parole authority to make satellite based monitoring a mandatory condition of parole or probation, and it gives it the discretion to determine which statutorily qualified parolees or probationers for whom it will be mandatory. *See* T.C.A. §40-39-303(a). Included within the class of persons for whom the Board may require satellite monitoring are "violent sexual offenders" to include "any person who has been released on probation or parole following a conviction for any sexual offense, as defined in subdivision (2), to the extent that such person continues to be subject to active supervision of the board..." T.C.A §40-39-301(3). The above statutory language thus seeks to seek in all persons convicted of any sexual offense as defined, regardless of the date of conviction, provided, of course that the persons are still subject to the active supervision. Appellant appears to fall into this latter category and is now considered by the Board as being subject to satellite monitoring; the Board has implemented the program, and Appellant is currently being monitored in that fashion.

The effects of this monitoring system on Appellant's life are many: As part of the program, Appellant is required to carry with him at all times when not at his residence a relatively large box which contains the electronics necessary for the monitoring to take place. This box must be worn on one's person outside any coat

or other outer garment and therefore is obvious to any onlooker. Upon going into a building, Appellant must wait several minutes before entering, presumably to allow the device to reset. When inside a building, Appellant must go outside at least once every hour so that the monitoring can take place. The device is not waterproof, and Appellant is not allowed to swim or participate in any other water activity. Baths at home are impossible. Furthermore, the device has caused the Appellant added stress and many inconveniences as it does not always work properly. While on vacation, for which Appellant obtained prior permission from his probation officer and a judge, the Appellant received at least six telephone messages from someone at the probation office threatening him with immediate arrest if he did not return a telephone call to the probation office at once. This entire event was because the Global Positioning System monitoring system could not locate him. At other times the Global Positioning System either does not receive or transmit information correctly. When this happens Appellant has spent up to an hour on the telephone with someone in the probation office to correct the problem. On one occasion Appellant had to stand in the rain, for over thirty minutes, in his yard, for all his neighbors to see, while the probation office attempted to fix the problem. Appellant is required to purchase the device at a cost of \$50.00.

Appellant pleaded guilty in 2000, some four years prior to the enactment of the

2004 Act. He is successfully paying his debt to society as required by the judgment of conviction and sentence imposed. However, the provisions challenged, as applied, impose significant and severe new punishment not contemplated at the time of his conviction. These punishments are based not on any new offense, but on prior criminal conviction. While the legislature is free to increase or decrease punishment for criminal conduct, the United States Constitution, Article I, Section 3, Clause 3 (Ex Post Facto Clause) prohibits increased punishment beyond that which was prescribed when the crime was committed. See Cutshall v. Sundquist, 193 F.3d 466 (6<sup>th</sup> Cir. 1999), citing Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891 (1997). In analyzing whether a statute imposes a new punishment for a crime, federal courts have applied a two prong test: (1) whether the legislature intended to impose a punishment or enact a regulatory scheme that was civil and nonpunitive; and (2) whether the effect of the law is so punitive that it negates the state's attempt to craft civil restrictions. Doe v. Miller, 298 F. Supp. 844 (S.D. Iowa 2004), citing Smith v. Doe, 538 U.S. 84, 123 S.Ct. 1140 (2003). Thus, in determining whether a new statute imposes retroactive punishment in violation of the Ex Post Facto Clause, the Court must first ascertain whether the legislature meant the statute to establish some type of civil regulation or to punish the defendant. Smith, 123 S.Ct. At 1146-47. If the intention was to impose punishment, that ends the inquiry. If, however, the intent was to create a regulatory

scheme that is civil and non-punitive, in order for the Court to find an Ex Post Facto violation, it must go further and examine whether the scheme is so punitive either in purpose or effect as to negate a stated intention to deem it civil.

In this case, the Tennessee General Assembly declared in the preamble to the statute that “in making information about certain offenders available to the public” it did “not intend that the information be used to inflict retribution or additional punishment on any sexual offenders.” T.C.A. §40-39-201(b)(8). This stated purpose, of course, may not directly bear on the matters complained of herein, but Appellant maintains that the effect of the statute is so punitive as to negate any such stated intention. He also points out that this statute is codified within the criminal procedures area of the Tennessee Code.

The United States Supreme Court has established the following factors to consider in determining whether a statute imposes punishment: (1) whether in its necessary operation the statute has been regarded historically and traditionally as a punishment; (2) whether the statute imposes an affirmative disability or restraint; (3) whether the statute promotes the traditional aims of punishment; (4) whether the statute has a rational connection to a non-punitive purpose; and (5) whether the statute is excessive with respect to that purpose. Smith, 123 S.Ct. At 1149 (citing Kennedy v. Mendoza-Martinez, 83 S. Ct. 554 (1963)). Appellant avers that as applied

to him, the statute in question clearly imposes an affirmative disability or restraint; that it does not promote in any way the traditional aims of punishment; and that it has no rational connection to a non-punitive purpose, but that if it does, it is punitive as applied to him and excessive with respect to any such purpose.

Appellant was originally convicted of a “sexual offense” as that offense was defined at the time of commission and conviction. It was not until the enactment of the Act of 2004 that Appellant’s criminal offense was redefined and aggravated to a “violent sexual offense.” This redefinition of Appellant’s criminal offense was made with no assessment of whether Appellant really was “violent” or was likely to re-offend. The State of Tennessee violated Appellant’s due process rights by denying him the opportunity to be heard on his change in status.

As a direct result of the 2004 Act, Appellant is not required to fulfill the registration / monitoring report requirements for life without possibility for removal as was the case prior to the Act, an opportunity of which he looked forward at some time in the future. Each quarter he must personally present himself to the designated law enforcement agency and report that he is a “violent sexual offender” and update his information. As has already been discussed, he is now subject to satellite monitoring, the effects of which are to stigmatize him socially to a far greater extent than was the case under previous law. As stated by the Supreme Court in Collins v.

Youngblood, 497 U.S. 37, 52, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990), ex post facto prohibits laws that “punish as a crime an act previously committed, which was innocent when done;...make more burdensome the punishment of a crime; and deprive one charged with crime of any defense available according to law at the time when the act was committed.” (Emphasis supplied). Taken together, the requirements of the 2004 Act as applied to Appellant clearly constitute increased punishment for criminal acts committed prior to enactment. Such punishment is prohibited by the Ex Post Facto clause of the United States Constitution.

When Appellant pled guilty in 2000 he entered into a contract with the State of Tennessee via the Office of the Attorney General. The State of Tennessee by virtue of applying the 2004 Act to Appellant has violated the terms of the contract. In Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495 (1971), the Supreme Court held that a plea bargain is a contract, the terms of which must be enforced unless due process considerations militate against it. Appellant maintains that the plea bargain he entered into, in which he relied on the law then in effect in Tennessee regarding probation rules for convicted sexual offenders, cannot be changed to his detriment without breaching the agreement. Appellant has lived up to the requirements of probation in effect when he entered into the plea bargain, and the state should be required to do the same and not now be allowed to vary or change those requirements

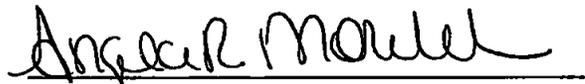
by legislative or any other fiat.

The District Court denied Appellants request for a Temporary Injunction by finding that the 2004 Act was merely administrative and was no intended to further punish Appellant. In this case the District Court abused its discretion in deny Appellant his temporary injunction. The District Court should have considered not only the legislative intent of the 2004 Act for the application of the 2004 Act as applied to Appellant. Had they done so the Court would have found that the increased length of time that Appellant must remain on the sex offender register (life as opposed to the opportunity have his name removed after 10 years following his release from probation), along with the added stigma and the denial of the opportunity to be heard on his change in status from a “sexual offender” to a “violent sexual offender” coupled with the new punishment of the Global Positioning System would have amounted to new punishment for a prior act and thus a violation of the ex post facto clause.

## CONCLUSION

Appellant's request for a Temporary Injunction should have been granted by the District Court. The District Court should have found that the 2004 Act as applied to Appellant was unconstitutional under the ex post fact clause and that it violated his right to due process and is fundamental rights to individual privacy as set forth in the Tennessee Constitution.

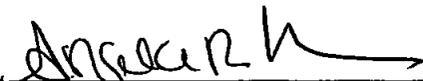
Respectfully submitted this 26<sup>th</sup> day of March, 2007

  
\_\_\_\_\_  
Angela R. Morelock

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**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that this brief complies with the requirements of the type-volume limitation of Rule 32(a)(7)(B), Fed. R. App. P., as it contains 3471 words, excluding the table of contents, table of citations, statement in support of oral argument, any addendum, and the certificates of counsel. Certification is based on the word count of the word-processing system used in preparing the petitioner's brief, WordPerfect 12.0 for Windows.

  
\_\_\_\_\_

Angela R. Morelock

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Proof Brief on Behalf of Appellant John Doe was mailed to the

Robert E. Cooper, Jr.  
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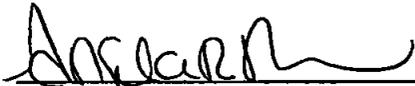
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\_\_\_\_\_  
Angela R. Morelock

CASE NO. 06-00072

JOHN DOE

Appellants

vs.

PHIL BREDESEN, Governor of the State of Tennessee,  
CHARLES M. TRAUGHBER, Chairman, Tennessee Board of  
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MARK GWYN, Director of the Tennessee Bureau of Investigation;  
RANDALL NICHOLS, District Attorney General 6<sup>th</sup> Judicial District

Appellees

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**APPELLANT'S DESIGNATION OF APPENDIX CONTENTS**

Appellant, pursuant to Sixth Circuit Court Rule 28(d), hereby designates the following filing in the district court's record as items to be included in the joint appendix.

<b><u>Description of Entry</u></b>	<b><u>Date</u></b>	<b><u>Record Entry No.</u></b>	<b><u>Joint Appendix</u></b>
Docket Sheet			1
Complaint	3/01/2006	1	5
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