

IN THE  
COURT OF APPEALS OF INDIANA

FILED  
OCT -1 2007  
CLERK OF THE  
INDIANA SUPREME COURT  
COURT OF APPEALS  
2007-10-01

CAUSE NO. 49A02-0706-CR-498

RICHARD P. WALLACE, ) An appeal from:  
 ) Marion Superior Court, Crim Division,  
 ) Rm. No. 15  
 )  
 Appellant (Defendant Below), )  
 )  
 )  
 v. ) Lower Court Cause No.:  
 ) 49F15-0401-FD-001458  
 )  
 )  
 )  
 STATE OF INDIANA, ) The Honorable  
 ) Lisa Borges, Judge  
 )  
 Appellee (Plaintiff Below). )

---

BRIEF OF APPELLANT

---

Kathleen M. Sweeney (2192-49)  
Attorney at Law  
155 E. Market Street, Suite 400  
Indianapolis, Indiana 46204  
TX: 317.632.9411

Attorney for Defendant-Appellant  
Richard P. Wallace

IN THE  
COURT OF APPEALS OF INDIANA

---

CAUSE NO. 49A02-0706-CR-498

---

<b>RICHARD P. WALLACE,</b>  Appellant (Defendant Below),  v.  <b>STATE OF INDIANA,</b>  Appellee (Plaintiff Below).	) An appeal from: ) Marion Superior Court, Crim Division, ) Rm. No. 15 ) ) ) Lower Court Cause No.: ) 49F15-0401-FD-001458 ) ) ) ) ) The Honorable ) Lisa Borges, Judge )
---	--

---

BRIEF OF APPELLANT

---

**Kathleen M. Sweeney (2192-49)**  
Attorney at Law  
155 E. Market Street, Suite 400  
Indianapolis, Indiana 46204  
TX: 317.632.9411

Attorney for Defendant-Appellant  
Richard P. Wallace

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
Statement of the Issues.....	1
Statement of the Case.....	2
Statement of the Facts.....	3
Summary of the Argument.....	7
Argument .....	8
1.    The State failed to prove that Wallace had not registered in calendar year 2004.	
2.    Current revisions and applications that have been made to the sex offender registry have become so expansive that the registry and its related criminal sanctions are punitive and in violation of <i>ex post facto</i> laws.	
3.    It is a reasonable inference that the State has forfeited its right to prosecute Wallace for failure to register because that issue was negotiated in his prior plea agreement.	
Conclusion .....	16
Certificate of Service .....	17
Abstract of Judgment	
Order denying Defendant’s Motion To Dismiss	

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Page</u></b>
<i>Burkes v. State</i> , 445 N.E.2d 983 (Ind. 1983), .....	8
<i>Commonwealth v. Williams</i> , 832 A. 2d 962, 985 (Pa. 2003).....	14
<i>Griffin v. State</i> , 756 N.E.2d 572 (Ind. Ct. App. 2001) ).....	15
<i>Justice v. State</i> , 530 N.E.2d 295 (Ind. 1988).....	8
<i>Manlove v. State</i> (1968), 250 Ind. 70, 232 N.E.2d 874.....	8
<i>McMahel v. State</i> , 609 N.E.2d 1175 (Ind. Ct.App. 1993).....	8
<i>State v. D.M.Z.</i> , 674 N.E.2d 585 (Ind. Ct.App. 1996).....	9
<i>State v. Eilers</i> , 697 N.E.2d 969 (Ind. Ct. App. 1998) .....	9
<i>Smith v. Doe</i> , 538 US 84 (2003) .....	14
<i>Smith v. State</i> , 717 N.E.2d 239 (Ind. Ct.App. 1999) .....	15
<i>Spencer v. O'Connor</i> , 707 N.E.2d 1039 (Ind.Ct.App.1999).....	7, 10, 11, 14
<i>In re Winship</i> , 397 U.S. 358 (1970).....	9
<b>Rules:</b>	
Ind. Appellate Rule 46(A)(10).....	3
<b>Statutes:</b>	
Ind. Code § 5-2-12-1. ....	11
Ind.Code § 5-2-12-6.....	11
Ind. Code § 5-2-12-9 .....	8
Ind.Code § 5-2-12-13.....	11

Ind.Code § 5-2-12-14.....11

Ind. Code §11-8-8-1. ....11

Ind. Code § 11-8-8-8. ....12

Ind. Code §11-8-8-17.....8, 11

Ind. Code § 35-38-2-2.2 .....14

**Constitutional:**

Indiana Constitution, Article 1, § 24.....10

United States Constitution, Article I, § 10.....10

IN THE  
COURT OF APPEALS OF INDIANA

\_\_\_\_\_  
CAUSE NO. 49A02-0706-CR-498  
\_\_\_\_\_

RICHARD P. WALLACE,  Appellant (Defendant Below),  v.  STATE OF INDIANA,  Appellee (Plaintiff Below).	) An appeal from: ) Marion Superior Court, Crim Division, ) Rm. No. 15 ) ) ) Lower Court Cause No.: ) 49F15-0401-FD-001458 ) ) ) ) ) The Honorable ) Lisa Borges, Judge )
---	--

**BRIEF OF APPELLANT**

**STATEMENT OF THE ISSUES**

**Whether the State failed to prove that Wallace had not registered in calendar year 2004?**

**Whether current revisions and applications that have been made to the sex offender registry have become so expansive that the registry and its related criminal sanctions are punitive and in violation of *Ex Post Facto* laws?**

**Whether it is a reasonable inference that the State has forfeited its right to prosecute Wallace for failure to register because that issue was negotiated in his prior plea agreement?**

## STATEMENT OF THE CASE

### **Nature of the Case**

This is a direct appeal in which Richard P. Wallace was convicted by a jury of one count of failure to register as a sex offender, class D felony.<sup>1</sup>

### **Course of the Proceedings**

On January 6, 2004, Richard Wallace was charged with one count of failure to register as a sex offender in violation of Ind. Code 5-2-12-9 (2004)<sup>2</sup>. [A 25]

On October 8, 2004, Wallace filed a motion to dismiss the charge. [A 42] On April 19, 2005, a hearing was held on Wallace's motion to dismiss [A 10-CCS; T Vol II 249] which the court denied by written order on May 18, 2005 [A 91].

On January 31, 2007, the jury trial began and on the same day, a guilty verdict was returned on the sole count as charged. [A 170; T Vol I 219]

### **Disposition in the Trial Court**

On April 1, 2007, Wallace was sentenced on Count I, failure to register as a sex offender, class D felony, to 545 days executed with 543 days suspended, 545 days probation including the payments of fees and costs, 80 hours of community service, mental health evaluation and treatment, and registration as a sex offender. [A 19-CCS; A 22; T Vol I 239-245]

---

<sup>1</sup> Transcript will be designated as "T"; Appendix as "A"; and the single volume of Exhibits as "Ex."

<sup>2</sup> In 2006, this statute was repealed and replaced by Ind. Code § 11-8-8-17.

The Court stated<sup>3</sup> : Ok. And, and I've kind... I've really gone back and forth, and umm certainly I don't think it's appropriate to give any further punishment with regard to the prior crime. That... that's over. Umm, that's something that's in your past. Umm, it's because you have a criminal history, I would find that your criminal history is aggravating circumstance. Umm, and that's something that it just is. I would find as a mitigating factor, however, that it would create a hardship on your family if you are incarcerated in the department of corrections, because you have a great job, where you're earning eighty-thousand plus a year. You're paying thirteen-hundred dollars a month in child support. And you have children who are at the age that they are going to be going to college. Umm, if you lose that job, umm I think that that would create a hardship, and I think that's not what this is intended to do, and so I've gone back and forth with what I ought to do and what I think is the right thing, umm and my initial thought was that I was going to give you a period of home detention, umm but because the state's not asking for incarceration, I'm not going to do that. I am going to find that I want probation for the period of time that I give you sentence, so the sentence will be for five hundred and forty-five days, and that will all be suspended and you'll be placed on probation for those five hundred and forty-five days. Umm, I have every reason to believe that you will perform well while you are on probation, umm you are to maintain your child support, at it's current level, or whatever is ordered by the court that has jurisdiction over that matter. Umm, you are to participate in a mental health evaluation and counseling, because umm, because I think it's something that from reading your psi, and reading the addendum even that was presented, umm I believe that it is something that can help you, and I want you to take advantage of it. There's a way to take advantage of it, because you don't have a choice by being ordered to do it, you know, you'll... I think you'll do it, and I think that I know you went through counseling before with Brian Ross, and in your information that I reviewed you said that you found it helpful. I realize that was targeted in a different direction. This probation is targeted in two directions, one for you to give back to the community, and also for you to do some work to help yourself, and so that' some of the things I want you to do is that mental health evaluation and counseling, the treatment that they ask you to do. I see no reason in your history, or in any allegations for random urinalysis or any drug testing. I don't see that there's any kind of problem with that. No substance abuse issues that I can identify. Umm, I would like you to do eighty hours of community service work while you're on probation, and I would like that to do be done in work with adult literacy, because I think that you have some things that you can give back to the community and that's a way you can do that, I think particularly if probation can... can place you where you can do that, that would be my preference. Ok, umm with regard to your motion regarding registration. I did some research, and the following is what my opinion is with regard to that and it'll be my finding as well. First, you are an offender as defined

---

<sup>3</sup> Appellate Rule 46(A)(10) requires a copy of the sentencing order in the brief. However, as a practice, the Marion Superior Courts do not produce such orders, and therefore the statement in the transcript is the best record of the sentencing order and is reproduced herein. An Abstract of Judgment is attached to the end of the brief.



by Indiana Code 11-8-8-19c, you are required to register for life now, because you were at least eighteen years of age at the time of the offense and the victim in that 1988 conviction was less than twelve years of age at the time of the crime. Umm, I know that you claim that you did not have to register because it was not a negotiated term of your plea agreement, however in reviewing the Court of Appeals, and the United State's Supreme Court and Seventh Circuit cases, I find the following; an on-point case, which is in re: the matter of G.B. at 709 N.E. 2<sup>nd</sup>, 352 which is a 1999 court of appeals 2<sup>nd</sup> district case (sic). In that case, the court was dealing with a juvenile defendant who had umm, who was placed on the sex offender registry, after his release from the department of corrections, and I realize that that particular, the facts of that case are not exactly on-point, but what they say in that case is that under the sex offender registration act an individual must be placed on the registry if he or she meets the statutory definition of offender. State may not enter into, nor may the trial court accept a plea agreement that purports to alter or nullify the operation of the act, and here's the heart of it. The fact that GB's plea agreement did not specifically refer to the registry is irrelevant. The trial court must place GB on the registry if the evidence at the time of his release support a finding that he is likely to be a repeat sex offender, now that's as to a juvenile and his adjudication, under the law and because of that, I draw the guidance from the court of appeals opinions that your plea agreement umm, and whether that requirement to register was negotiated term is irrelevant, and I'll also point out Freije vs. State at 709 N.E. 2<sup>nd</sup> 323, where the Indiana Supreme Court said, regardless of the language of a plea agreement, certain conditions must also be imposed according to statute. All probationers must pay a probation fee, those convicted of operating a vehicle while intoxicated must pay and alcohol and drug countermeasures fee, and those convicted of sex offenses must register with local law enforcement. Umm, I realize that you're not challenging the requirement as ex-post-facto, other than by inference, umm and because there is in that inference, I would refer you to *Smith v. Doe* at 538 U.S. 84, a 2003 United State's Supreme Court case that held that a sex offender that sex offender registration statute do not violate the ex-post-facto clause if their aims are not punitive. So then we look to some more case law. On May the thirty-first of 2006, the Seventh Circuit United State's Court of Appeals in *Stewart vs. Foltz* at US @Lexus 13702 cites *Spencer v. O'Conner*, 707 N.E. 2<sup>nd</sup> 1039, which is a 1999 case, wherein the Indiana 2<sup>nd</sup> district court of appeals determined that the Indiana Sex Offender Registry's notification provision was intended to be non-punitive, and did not find reporting requirements rose to a constitutional violation, so in light of these facts, and these decisions, I find no compelling reason to forego your requirement to register until I'm guided by the court of appeals in some other fashion, so I find that you must fulfill your requirement to register as a sex offender according to Indiana law, and that will be one of the conditions of your probation. Umm, I have a referral form for you to take with you over to probation, and I want you to do that today, and make an appointment to begin working through the probation requirements. [T Vol I 239 L 24-25 to 244]

-Continued....

COURT: Fines and court costs. I'll assess a fine in the amount of a hundred dollars, and umm, umm, court costs in the amount of a hundred and fifty-nine dollars. [T Vol I 245 L 21-23]

A timely Notice of Appeal was filed on May 7, 2007. [A 1]

## **STATEMENT OF THE FACTS**

### **Trial**

In 1988, Richard P. Wallace ("Wallace") was charged in Marion County, Indiana with two counts of child molesting, as a class B felony and class C felony. [Ex 3] After months of negotiation on February 15, 1989, the State agreed to allow Wallace to plead guilty to child molesting as a class D felony.<sup>4</sup> [T Vol I 81, 170-171; Ex. 3] The trial court sentenced Wallace to a community corrections program for 180 days along with other conditions of probation which he successfully completed in 1992. [Ex 3]

It was part of the negotiated deal that there would not be a commitment to the Indiana Department of Corrections. [T Vol I 176, 178] Wallace believed that at the time of his conviction there was a registry for offenders who had been sentenced to serve a term of imprisonment at the Department of Corrections. [T Vol I 177] Wallace believed this is the reason institutional incarceration was not included in the plea and why he believed why he was not required to register. [T Vol I 171, 177-178] In fact he had no notice of any duty to register until 2003. [T Vol I 172]

In 2003, Wallace's ex-wife called police to tell them that Wallace was living in Indianapolis, that he was a convicted sex offender, and that he had never registered. [T Vol I 91] Lisa Reidenbach, Sex Offender Registry Coordinator for the Indianapolis

Police Department, now known as Indianapolis Metropolitan Police Department (IMPD), was responsible for maintaining the lists of sex offender registrants living in Marion County including daily updating of the web site, and taking photos and fingerprints of registrants. [T Vol I 88]

Based on the information provided by Wallace's ex-wife, Reidenbach pulled the records, reviewed them, and determined that because Wallace's criminal conduct involved a minor less than 12 years of age, he was required to register. Having made that determination, Reidenbach sent Wallace a letter, dated November 20, 2003, directing him to register with the Indianapolis Police Department within seven (7) days. [Ex 1] Having received no response from Wallace, Reidenbach, on December 28, 2003, sent another letter to Wallace. [T Vol I 95; Ex 2]

With receipt of the second letter, Wallace made an appointment with Reidenbach. [T Vol I 97, 174] Wallace showed her his plea agreement and explained his position that he was not required to register. [T Vol I 98] He also told her that his "deal" was to exclude incarceration and that he had never been in the Department of Corrections. [T Vol I 177-178] Reidenbach directed Wallace to register which he refused to do. [T Vol I 99, 118] As a result of Wallace's refusal, the charge was filed. [T Vol I 138]

### **Motion To Dismiss Hearing**

On October 8, 2004, Wallace filed a motion to dismiss the charge arguing that because his probation had terminated in 1992, he was not subject to registration. [A 42] The State responded that Wallace did not qualify for the statutory limitation. [A 44]

---

<sup>4</sup> The stipulation states Wallace was convicted of a D felony which appears to be in conflict with Exhibit 3, the plea agreement, which states he was pleading to a class C felony. No abstract of judgment was introduced.

On April 19, 2005, the trial court heard argument [T Vol II 249] and on May 18, 2005, issued a written order denying, without reasons, the motion [A 91].

At the beginning of the trial, Wallace again renewed the motion to dismiss and made a continuing objection. [T Vol I 9] At both the motion to dismiss hearing and again at trial, Wallace raised constitutional violations of state and federal *ex post facto* laws and principles of contract law. [T Vol II 249-254; T Vol I 9-12]

### SUMMARY ARGUMENT

First, in order to prove Wallace failed to register, the State must either prove that he failed to register within seven (7) days of release from a penal institution or that he failed to register in a calendar year or annually. It was unrefuted that Wallace was never incarcerated in a penal institution. Therefore, he could be convicted only if he failed to register within a calendar year. The State charged the violation as occurring on January 5, 2004, which also was unrefuted. It is impossible that on January 5, 2004 for Wallace to have failed to register for the calendar year since it was a mere five (5) days old.

Second, Wallace's conviction violates the state and federal constitutional prohibitions against *ex post facto* laws. Wallace's conviction is based upon a duty to register. This court has previously held that the duty to register was not an *ex post facto* violation. *Spencer v. O'Connor*, 707 N.E.2d 1039 (Ind.Ct.App.1999). However, the very restrictions the court relied upon have been discarded so that this civil statute has taken on criminal law characteristics. Moreover, because of the expansiveness of the registry, the criminal charge has become linked to it creating an impermissible punishment aspect.

Third, there is a reasonable inference that Wallace believed that the notion of a registry was considered which is why his plea agreement specifically excluded incarceration at a penal facility. Contract principles preclude his subsequent prosecution.

## ARGUMENT

1. **The State failed to prove that Wallace had not registered in calendar year 2004.**

### Standard of Review

"When reviewing such a challenge [sufficiency of the evidence], we will neither weigh the evidence nor judge the credibility of the witnesses. *Burkes v. State* (1983), Ind., 445 N.E.2d 983, 986, and we will consider only the evidence favorable to the judgment, together with all reasonable inferences flowing there from. *Id.* at 986-987. If there is substantive evidence of probative value to support the judgment, it will not be disturbed. *Id.* But we hasten to add that, even though greatly limited in our scope of review, we must still determine whether a reasonable trier of fact could conclude that the defendant was guilty beyond a reasonable doubt. See, *Justice v. State* (1988), Ind., 530 N.E.2d 295, 296; *Manlove v. State* (1968), 250 Ind. 70, 232 N.E.2d 874, 881-82." *McMahel v. State*, 609 N.E.2d 1175, 1177 (Ind. Ct.App. 1993).

### Analysis

Wallace was charged with failure to register as a sex offender in violation of Ind. Code § 5-2-12-9 (2004).<sup>5</sup> The charging information stated, in pertinent part, that

---

<sup>5</sup> The current version is Ind. Code § 11-8-8-17 (P.L.140-2006, Sec.42).

... On or about Jan. 5, 2004, in Marion County, State of Indiana, RICHARD P. WALLACE, having a duty to register as a sexual offender, did knowingly or intentionally fail to register as a sexual offender, within seven (7) days of release from Penal Institution or maintain their annual registration requirement with Local Law Enforcement Authority; [A 25]

Testimony was clear that Wallace was never incarcerated in a penal institution.

The only provision that Wallace could be convicted under was the failure to register “annually.” The term “annually” is not defined in the statute. “Undefined words in a statute are given their plain, ordinary and usual meaning.” *State v. Eilers*, 697 N.E.2d 969, 970-971 (Ind. Ct. App. 1998)(internal citations omitted). Moreover in giving a statutory term its plain, ordinary and usual meaning, “courts may use English language dictionaries as well as consider the relationship with other words and phrases.” *Id. citing State v. D.M.Z.*, 674 N.E.2d 585, 588 (Ind. Ct.App. 1996).

The *Merriam-Webster On-Line Dictionary* defines “annually” in pertinent part as

- 1 : covering the period of a year <annual rainfall>
- 2 : occurring or happening every year or once a year : YEARLY <an annual reunion>
- 3 : completing the life cycle in one growing season or single year <annual plants>  
- an-nu-al-ly adverb. [www.m-w.com/dictionary/annually](http://www.m-w.com/dictionary/annually)

The State charged that Wallace violated the annual registration requirement on January 5, 2004. The plain reading can only be that Wallace had failed to maintain his annual registration for the calendar year 2004. It is impossible for the State to have submitted proof beyond on a reasonable doubt on this issue since calendar year 2004 was merely five (5) days old. *Cf. In re Winship*, 397 U.S. 358, 364 (1970) (“[T]he Due Process Clause protects the accused against conviction except upon proof beyond a

reasonable doubt of every fact necessary to constitute the crime with which he is charged.”).

Because the State failed to prove a violation occurred in full calendar year 2004, there is insufficient evidence to uphold his conviction.

2. **Current revisions and applications that have been made to the sex offender registry have become so expansive that the registry and its related criminal sanctions are punitive and in violation of *ex post facto* laws.**

### **Background**

In 1999, this court found that the duty to register and the sex offender registry itself did not violate state and federal *ex post facto* laws. *Spencer v. O'Connor*, 707 N.E.2d 1039, (Ind.Ct.App.1999), trans. denied 726 N.E.2d 305 (Ind.1999). Since that holding, the statute has been expanded and there is a greater interconnection between the civil provision requiring registration and the criminal sanction for failing to do so. Based upon this expansion, Wallace seeks this Court to overrule its holding in *Spencer* and find that his prosecution for failure to register as a sex offender is an *ex post facto* violation pursuant to Article I, § 10, United States Constitution and Article I, § 24, Indiana Constitution.<sup>6</sup>

### **Standard of Review**

Wallace raised this issue both at the motion to dismiss hearing and again at trial. The analysis for whether a statute violates the *ex post facto* provisions is the same under

---

<sup>6</sup> In pertinent part: United States Constitution provides that “[n]o state shall ... pass any ... ex post facto law.” Art. I, § 10. The Indiana Constitution provides that “[n]o ex post facto law ... shall ever be passed.” Art. I, § 24.

the federal and state constitutions. See *Spencer*, 707 N.E.2d at 1042. The *Spencer* court used a two-step process to examine the *ex post facto* claims, in pertinent part:

First, we must determine whether the legislature intended the proceedings to be civil or criminal. In making this determination, we may examine the declared purpose of the legislature as well as the structure and design of the statute. If the intent was civil, we must next ask whether the “statutory scheme [is] so punitive either in purpose or effect as to negate [the State’s] intention to deem it civil.”

The second part of the test requires the party challenging the statute to provide “the clearest proof” of the punitive purpose or effect of the statute. Thus, in determining whether a sanction is civil or criminal, we cannot look solely to the label given to it by the legislature, but must also examine whether it is so punitive in effect as to no longer be properly called a civil sanction. *Id.* at 1042-1043 (internal citations omitted).

### Analysis

Central to the *Spencer* court’s finding that the duty to register was civil and not punitive was the narrowness of the statute. Specifically, the Court found:

1. The offender need only provide limited personal information, including his or her name, date of birth, physical description, Social Security number, driver’s license number, and address. Ind.Code § 5-2-12-6.<sup>7</sup> *Id.*
2. The offender’s duty to register terminates ten years after he is released from prison, placed on parole, or placed on probation, whichever occurs last. Ind.Code § 5-2-12-13. *Id.*
3. These limitations in content and duration establish a regulatory intent in which registration apprises law enforcement officials of basic information about an offender living in the area. *Id.*
4. These limitations show a regulatory intent to monitor the whereabouts of the offender, not to punish the offender. *Id.*

---

<sup>7</sup> Ind. Code § 5-2-12-1 to § 5-2-12-14 was repealed and replaced by Ind. Code §11-8-8-1 to §11-8-8-17 in 2006. (*Repealed by P.L.140-2006, SEC.41, and P.L.173-2006, SEC.55.*)



Since the *Spencer* holding, the legislature has enacted a new statute that mandates inclusion of all of the limitations that the court inferred would transform the registry from a civil provision to a criminal penalty. Specifically Ind. Code § 11-8-8-8 requires that, in pertinent part, the registration include:

- (1) The sex or violent offender's full name, alias, any name by which the sex or violent offender was previously known, date of birth, sex, race, height, weight, hair color, eye color, any scars, marks, or tattoos, Social Security number, driver's license number or state identification card number, vehicle description and vehicle plate number for any vehicle the sex or violent offender owns or operates on a regular basis, principal residence address, other address where the sex or violent offender spends more than seven (7) nights in a fourteen (14) day period, and mailing address, if different from the sex or violent offender's principal residence address.
- (2) A description of the offense for which the sex or violent offender was convicted, the date of conviction, the county of the conviction, the cause number of the conviction, and the sentence imposed, if applicable.
- (3) If the person is required to register under section 7(a)(2) or 7(a)(3) of this chapter, the name and address of each of the sex or violent offender's employers in Indiana, the name and address of each campus or location where the sex or violent offender is enrolled in school in Indiana, and the address where the sex or violent offender stays or intends to stay while in Indiana.
- (4) A recent photograph of the sex or violent offender.
- (5) If the sex or violent offender is a sexually violent predator, that the sex or violent offender is a sexually violent predator.
- (6) If the sex or violent offender is required to register for life, that the sex or violent offender is required to register for life.
- (7) Any other information required by the department. (*As added by P.L.140-2006, SEC.13 and P.L.173-2006, SEC.13. Amended by P.L.216-2007, SEC.16.*)

With Wallace's conviction, he has, in fact, disclosed this information. Below see his information as taken from the Marion County Sheriff's web site:

---

### Offender Detail

---



**RICHARD PATRICK WALLACE**

---

**Address(es):**

**Employer -** STATE WIDE CREDIT [MAP](#)  
6640 INTECH BLVD  
INDIANAPOLIS, INDIANA 46278  
**County:** MARION

**Home -** RICHARD PATRICK WALLACE [MAP](#)  
1679 STACY LYNN DR  
INDIANAPOLIS, INDIANA 46231  
**County:** MARION

---

<b>Age:</b>	51	<b>Sex:</b>	Male
<b>Race:</b>	White	<b>Complexion:</b>	Fair
<b>Height:</b>	6' 00"	<b>Weight:</b>	185 lb
<b>Eye Color:</b>	Brown	<b>Hair:</b>	Brown
<b>Build:</b>	Medium		

---

**Aliases:** No aliases found.

---

**Charges:**

[35-42-4-3] CHILD MOLESTING  
**Cause:** 8804017  
**Sentence:** PROBATION  
**Conviction County:** MARION  
**Conviction State:** INDIANA  
**Conviction Date:** 02/15/1989

---

**Status:** ACTIVE  
**Registration Type:** Sex Offender  
**Offender Type:** LIFETIME NOTIFICATION  
**Released:** 02/15/1989  
**End Reg. Date:**  
**Next Reg. Date:** 04/17/2008

**NOTICE:** Searches based on names, dates of birth and other identifiers are not always accurate, nor is the information contained on this website guaranteed to be correct. The only way to positively link someone to a criminal record is through fingerprint verification.

Moreover, unlike the statute that was analyzed in *Spencer* (10 year limitation); Wallace has been placed upon an unconstitutional life term of probation.

In *Smith v. Doe*, 538 US 84 (2003), the Supreme Court found that the sex offender statute in Alaska requiring registration and notification was not punitive, therefore, not a violation of *federal ex post facto*. Alaska's statute is similar to Indiana's, however, Hoosiers have long contended more protections under the Indiana Constitution.

Additionally, Indiana in Ind. Code § 35-38-2-2.2 mandates that as a condition of probation for a sex offender, the court shall, among other things, "prohibit the sex offender from residing within 1000 feet of school property for the period of probation." From a narrow and limited registry enacted in 1994 is borne the registry of 2007 which requires name, photos, work and home addresses posted on the internet certainly criminal characteristics and the limitation of an offender's place of residence.

More importantly, *Smith* does not address whether a criminal conviction and incarceration resulting from failure to register is so intrinsically related to the sex offender registry that is not a new charge. And if it is not a new charge, does this make establish the registry as punitive and or does any resulting conviction implicate a double jeopardy concern?<sup>8</sup> In sum, the expansiveness of the current duty to register has grown to include punitive measures such that the registry has become imbued with criminal characteristics and the criminal violations based upon the failure to register are so closely linked, they do not even constitute a new charge. As such, both state and federal *ex post facto* laws have been violated in prosecuting Wallace for this alleged crime. His

---

<sup>8</sup> See *Commonwealth v. Williams*, Pennsylvania Supreme Court holding a new charge of failure to register was intrinsically related to the sex offender registry. 832 A. 2d 962, 985 (Pa. 2003). Because of the interconnectedness, the registry used punitive measures (incarceration and probation).

conviction should be reversed and his name and personal information stricken from the sex offender registry.

3. **It is a reasonable inference that the State has forfeited its right to prosecute Wallace for failure to register because that issue was negotiated in his prior plea agreement.**

#### **Standard of Review**

“A plea agreement is a contract, ‘an explicit agreement between the State and defendant which is binding upon both parties when accepted by the trial court.’ ” *Griffin v. State*, 756 N.E.2d 572, 573 (Ind. Ct. App. 2001) *citing to Smith v. State*, 717 N.E.2d 239, 241 (Ind. Ct.App. 1999). In reviewing plea agreements, principles of contract law can be used. *Id.*

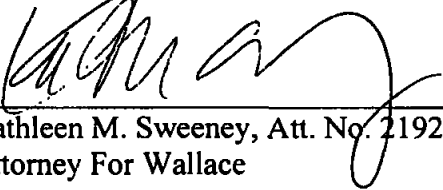
#### **Analysis**

Wallace testified that his plea agreement was negotiated over several months. It is clear that he pled to a lesser charge than the lead B felony count. He also specifically stated that “the deal” [T Vol I 178] was that he wouldn’t be incarcerated at the Department of Corrections because then he would have to register [T Vol I 177-178]. Wallace believed, with reasonable inference and the terms of the agreement that he would not be required to register in the future. As such, his conviction should be vacated.

**CONCLUSION**

For the reasons stated, Mr. Wallace respectfully requests that this Court vacate his conviction for failure to register as a sex offender, direct that his name and personal information stricken from the sex offender registry and grant any and all other just relief.

Respectfully submitted,



---

Kathleen M. Sweeney, Att. No. 2192-49  
Attorney For Wallace

155 E. Market Street, Suite 400  
Indianapolis, IN 46204  
Telephone 317.632.9411

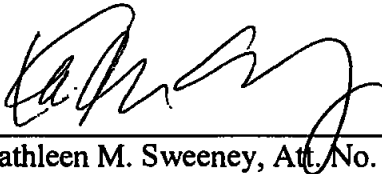
**IN THE  
COURT OF APPEALS OF INDIANA**

\_\_\_\_\_  
**CAUSE NO. 49A02-0706-CR-498**  
\_\_\_\_\_

<b>RICHARD WALLACE,</b>	)	<b>An appeal from:</b>
	)	<b>Marion Superior Court, Crim Division,</b>
<b>Appellant (Defendant Below),</b>	)	<b>Rm. No. 15</b>
	)	
<b>v.</b>	)	<b>Lower Court Cause No.:</b>
	)	<b>49F15-0401-FD-001458</b>
	)	
	)	
<b>STATE OF INDIANA,</b>	)	<b>The Honorable</b>
	)	<b>Lisa Borges, Judge</b>
<b>Appellee (Plaintiff Below).</b>	)	

**PROOF OF SERVICE**

I hereby affirm under the penalties for perjury that I have provided two (2) copies of the Brief of Appellant in the above-captioned cause to Steve Carter, Indiana Attorney General, 219 State House, Indianapolis, Indiana 46204 by U.S. Mail on October 1, 2007.

  
\_\_\_\_\_  
Kathleen M. Sweeney, Att. No. 2192-49

155 E. Market Street, Suite 400  
Indianapolis, IN 46204  
Telephone 317.632.9411

ABSTRACT OF JUDGMENT THE STATE OF INDIANA VS. RICHARD P. WALLACE  
INDIANA DEPARTMENT OF CORRECTION  
INSTRUCTIONS: This form must accompany the judgment pre-sentence report, and all other documents required by law, upon the commitment of the adult offender to the Indiana Department of Correction. A separate Abstract must be used for each Cause Number.  
CAUSE NO 49-F15-0401-FD-001458  
DATE OF SENTENCING 04/10/07  
PROSECUTOR ANGELO AGUSTIN  
COURT SUPERIOR CRIMINAL 15  
MODIFICATION DATE  
PRESIDING JUDGE LISA F. BORGES  
DEFENSE ATTORNEY ANGELA AGUSTIN

PART 1 The defendant was found guilty of the following crimes under the above-referenced cause:  
COUNT CRIME CLASS FEL MISD STATUTORY CITATION  
001 FAIL REGISTER AS SEX OFFENDER/FD FD X 0005-0002-0012-0009

PART 2 As a result of the above convictions, the Court has sentenced the defendant to the DOC as follows:  
COUNT SENTENCE YEARS/DAYS EXECUTED YEARS/DAYS SUSPENDED YEARS/DAYS CON CUR CON SEC WITH (COUNT OR CAUSE#)  
001 00545 D 00000 D 00545 D X

PART 3 JUDGE'S RECOMMENDATIONS  
Is the defendant to be returned to the Court for probation at the completion of sentence? No Chief Probation Officer ROBERT L. BINGHAM  
No. of days confined prior to sentencing 2 Recommended degree of security MAX MED MIN X No Rec  
Additional comments and recommendations: 545 days;

PART 4 JUDICIAL SIGNATURE  
Signature of committing Judge *[Signature]* Date signed 4.10.07

PART 5 AFFIDAVIT OF CLERK  
State of Indiana }  
County of Marion } SS: Clerk of Marion County State of Indiana said Court in the above-entitled  
do hereby certify that the foregoing is a true and complete abstract of the judgment of said Court in the above-entitled  
cause of the date first shown on record in my office of the City of Indianapolis  
of the Superior Criminal Court of Marion County, at my office in the City of Indianapolis

THIS: DAY OF April, 2007. Signature of Clerk *[Signature]*

STATE OF INDIANA )  
COUNTY OF MARION ) SS:

IN THE MARION SUPERIOR COURT  
CRIMINAL DIVISION, ROOM 15  
Case Number 49F150401FD001458

STATE OF INDIANA )  
 )  
 vs. )  
 )  
 RICHARD WALLACE, )  
 Defendant )

**FILED**  
MAY 18 2005  
CLERK OF THE  
MARION CIRCUIT COURT

**ORDER ON DEFENDANT'S MOTION TO DISMISS**

1. The Defendant, Mr. Richard Wallace, filed a Motion to Dismiss the charges in this case on October 8, 2004.
2. The Court set the Motion for a hearing on April 19, 2005.
3. The undersigned was appointed the Judge Pro Tempore on April 19, 2005. At the hearing, the Defendant was present in person and by counsel, Ms. Jackie Butler. The State of Indiana was represented by Deputy Prosecuting Attorney Ms. L. Erin Kellam.
4. After hearing the arguments of counsel, the Court took the matter under advisement until May 27, 2005, and asked the parties to file short memoranda containing citations to any relevant case law no later than May 3, 2005.
5. Attorneys for both parties submitted pleadings on May 3, 2005.
6. The Court has had an opportunity to review each party's pleading and to consider the case law cited by each party.

Comes now the Court, and hereby DENIES the Defendant's Motion to Dismiss.

ALL SO ORDERED on this the 18<sup>th</sup> day of May, 2005.



Ruth D. Reichard, Judge *Pro Tempore*  
Marion Superior Court  
Criminal Division, Room 15

Copies to:

Ms. Jackie Butler, Attorney for the Defendant, Mr. Richard Wallace  
Ms. L. Erin Kellam, Deputy Prosecuting Attorney