IN THE

INDIANA COURT OF APPEALS

No. 49A02-0706-CR-498

RICHARD P. WALLACE,	)	Appeal from the
	)	Marion Superior Court, Crim. Div 15
Appellant (Defendant Below),	)	
	)	
vs.	)	No. 49F15-0401-FD-1458
	)	
STATE OF INDIANA,	)	
	)	The Honorable
Appellee (Plaintiff Below),	)	Lisa Borges, Judge

BRIEF OF APPELLEE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

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BRIEF OF THE APPELLEE

STATEMENT OF THE ISSUES

I. Was the evidence sufficient to allow a reasonable fact finder to conclude that Defendant is guilty of failing to register as a sex offender, a Class D felony?

II Does Indiana Code §§ 5-2-12-9,[1] as applied to Defendant in this case, violate the Ex Post Facto Clause of the United States and Indiana Constitutions?

III. Does the plea agreement that led to the predicate conviction control the duty of Defendant to register as a sex offender?

STATEMENT OF THE CASE

Nature of Case

Defendant is appealing his conviction for failing to register as a sex offender, a Class D felony.

[1] This chapter has been repealed and recodified at Indiana Code §§ 11-8-8, *et seq.*

Course of Proceedings

On January 6, 2004, the State charged Defendant with failing to register as a sex offender, a Class D felony (App. p. 25). On October 8, 2004, Defendant filed a motion to dismiss the charge (App. pp. 42-43). The trial court denied the motion to dismiss on May 18, 2005 (App. p. 91). A jury found Defendant guilty on January 31, 2007, and, on April 10, 2007, the trial court sentenced Defendant to a 545 day of incarceration but ordered the sentence suspended and served on probation (App. pp. 22, 170).

Defendant filed a notice of appeal on May 7, 2007 (App. pp. 1-2). The trial court clerk issued the Notice of Completion of Clerk's Record on June 25, 2007, indicating that the transcript was not yet complete (App. p. 180). On July 23, 2007, the Notice of Completion of Transcript was filed (App. p. 181). The Appellant's Brief and Appendix were filed on October 1, 2007 (Clerk's Online Docket).

STATEMENT OF THE FACTS

Sometime before 1989, Defendant molested a child less than twelve-years old while he was himself over the age of eighteen (Tr. pp. 169-171, 177). In 1989 Defendant pleaded guilty to child molesting, a Class C felony, pursuant to a written agreement (Tr. pp. 169-171; Ex. 3). The trial court sentenced Defendant in accordance with the terms of the agreement, imposing a suspended sentence of five years and various conditions of probation (Tr. p. 171; Ex. 3).

In 1994, the Indiana General Assembly enacted Zachary's Law, which required probationers and parolees who had been convicted of child molesting to register as a sex "offender." P.l. 11-1994 § 7. Over the next several years, the registration scheme was modified to apply to persons convicted of child molesting after June 30, 1994. P.l. 33-1996 § 2. Then, in

2001, the law was amended such that a "sex and violent offender"[2] required to register with local law enforcement was defined as a person convicted of child molesting irrespective of the age or date of the conviction. P.l. 238-2001 §§ 4-5. Moreover, this Act made registration a lifetime requirement whenever the offender over the age of eighteen molested a victim under the age of twelve. Id. at § 13. These amendments were effective July 1, 2001. Id. at §§ 4-5, 13.

In 2003, the ex-wife of Defendant notified authorities that Defendant had been convicted of a sex offense but had never registered (Tr. p. 91). Lisa Reidenbach, the Sex Offender Registration Coordinator for the Indianapolis Police Department, investigated the claim and sent Defendant a letter advising him of the need to register (Tr. pp. 88, 92-95). This letter was dated November 20, 2003, and as of December 28, 2003, Reidenbach had not received a response (Tr. pp. 92-97; Ex. 1 & Ex. 2). Reidenbach then sent another letter on December 28, and this time Defendant responded by appearing in her office only a few days later on December 31 (Tr. pp. 95-98; Ex. 2). During the ensuing meeting, Defendant declared that he would not register as a sex offender because his 1989 plea agreement did not require it (Tr. pp. 99, 173-175). As of January 6, 2004, the date he was charged in this case, Defendant had yet to register as a sex offender (App. p. 25; Tr. pp. 114-115; Ex. 4).

SUMMARY OF THE ARGUMENT

I. The evidence is sufficient to sustain the jury verdict. Defendant never registered as a sex offender despite being told that he was required to register. The failure to register is a continuing offense and was committed from the time he was aware of the requirement to register.

II. Defendant's conviction does not violate the Ex Post Facto Clause of the federal or state constitutions. Indiana Code §§ 5-2-12-9 is not an ex post facto law in a constitutional

[2] By January 2004, when Defendant was charged in this case, the term "sex and violent offender" was changed to "offender." P.l. 116-2002 § 8.

sense. Any penal consequences suffered by Defendant under the statute complained of are a proper regulatory consequence of a previous conviction and not additional punishment for the prior conviction.

III. The previous plea agreement can have no effect on the requirement that Defendant register as a sex offender. The sex offender registry did not exist at the time the plea agreement was entered and therefore could not have been contemplated by either party as having any part in the plea negotiations.

ARGUMENT

I. The Evidence Is Sufficient To Sustain The Jury Verdict

A. Standard Of Review

When asked to review the sufficiency of evidence supporting a conviction, the appellate court must affirm a conviction "unless, considering only the evidence and reasonable inferences favorable to the judgment, and neither reweighing the evidence nor judging the credibility of the witnesses, [the court] can conclude that no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Carroll v. State*, 744 N.E.2d 432, 433 (Ind. 2001). Put most simply, "[t]he evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007).

B. Discussion

The evidence allowed the jury to conclude that Defendant failed to register as a sex offender. At the time Defendant was charged with this offense, Indiana Code Section 5-2-12-5(f) stated, "An offender shall complete a registration form." Subparagraph g further states, "The offender shall register not more than seven days after the offender ... is placed on probation. It was a class D felony for "an offender" to knowingly or intentionally fail to register

in this manner. Ind. Code § 5-2-12-9 (2004). In this case, as of the date Defendant was charged with failure to register, he had never submitted a registration form or complied with the requirements of Indiana Code Chapter 5-2-12. The jury was informed of this from both a representative of the Indianapolis Police Department and Defendant himself (Tr. pp. 114-115; 173-175; Ex. 4). It is therefore difficult to understand what additional evidence would be necessary to sustain the conviction.

Defendant incorrectly implies that the State did not prove this offense because the evidence did not precisely match the language of the charging information. Specifically, Defendant claims that he could not have committed the charged offense because he was never released from a penal institution and there was not enough time for him to have violated a requirement to register annually, as the information alleged (Br. of Appellant pp. 9-10). However, any variance between the offense as charged and the facts adduced at trial is not fatal to the conviction. "Not all variances between allegations in the charge and the evidence at trial are fatal." *Tucker v. State*, 725 N.E.2d 894, 896 (Ind. Ct. App. 2000). In fact, a variance will be considered fatal only if it misled the defendant in the preparation and maintenance of his defense with resulting harm or leaves the defendant vulnerable to double jeopardy in a subsequent criminal proceeding covering the same events, facts, and evidence. *Winn v. State*, 748 N.E.2d 352, 356 (Ind. 2001). Thus, the Court will allow variances between the proof at trial and the pleading of descriptive averments when the descriptive averments are not material or essential to the offense charged. *Tucker*, 725 N.E.2d at 896.

In this case, because the State was required to prove only a failure to register, not necessarily in what particular and at what precise moment the failure took place, the variance at issue is not fatal to Defendant 's conviction. The statute required Defendant to complete a

registration form, and it required that such registration be done after his release from probation. Of course, Defendant had completed his term of probation long before the registration requirement was made applicable to him in 2001, but the failure to register as a sex offender is a continuing offense. *See, e.g. State v. Flatt*, 227 S.W.3d 615, 621(Tenn. Crim. App. 2006) and *Arizona v. Helmer*, 53 P.3d 1153, 1155 (Ariz. Ct. App. 2002). In other words, Defendant was in violation of his duty, including the requirement that he "complete a registration form," from the date the duty was imposed, *i.e.*, July 1, 2001, until the date he was charged with the instant offense. The State presented evidence that this duty was never discharge; therefore, the evidence was sufficient to sustain the conviction.

II. Defendant's Conviction Does Not Violate The Ex Post Facto Clause Of The Federal Or State Constitutions.[3]

A. Standard Of Review

"Legislation under constitutional attack is clothed in a presumption of constitutionality." *Phelps v. Sybinsky*, 736 N.E.2d 809, 815 (Ind. Ct. App. 2000), *trans. denied.* It is Defendant's burden to rebut this presumption, "and all reasonable doubts must be resolved in favor of an act's constitutionality." *Id.* "When a statute can be construed to support its constitutionality, such construction must be adopted." *Id.* In the end, the Defendant must "show that the alleged constitutional defects are clearly apparent." *Id.* Moreover, when a party brings an "as applied constitutional challenge to a statute," this Court is required to apply the "material burden" standard enunciated in *Price v. State*, 622 N.E.2d 954 (Ind. 1993). *Clinic for Women, Inc. v. Brizzi*, 837 N.E.2d 973, 983 (Ind. 2005). Under that standard, "a legislative enactment or government regulation would be unconstitutional if it imposed a 'material burden' on a

[3] Nearly this exact issue is currently under consideration by a panel of this Court. *See Douglas v. State*, Cause Number 48A02-0701-CR-33.

'fundamental right' that constituted a 'core constitutional value.'" *Id.* "'[This] analysis does not involve weighing nor is it influenced by the social utility of the state action at issue. [The issue is] the magnitude of the impairment. If the right, as impaired, would no longer serve the purpose for which it was designed, it has been materially impaired." *Id.*

B. There Is No Ex Post Facto Violation At Work In This Case.

Indiana Code Indiana Code §§ 5-2-12 *et seq.*, as applied to Defendant, is not an ex post facto law.[4] The federal constitution states, "No State shall ... pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts..." U.S. Const., Art. I, § 10. The Indiana Constitution similarly commands that "[n]o *ex post facto* law ... shall ever be passed." IND. CONST. art 1, § 24. The purpose of these prohibitions "is the assurance that legislative acts will give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Iseton v. State*, 472 N.E.2d 643, 650 (Ind. Ct. App. 1984).

Justice Samuel Chase observed long ago that there are four types of ex post facto laws. He "cataloged" those general types in the following language:

> I will state *what laws* I consider *ex post facto laws,* within the *words* and the *intent* of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime,* or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment,* and inflicts a *greater punishment,* than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence,* and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender.*

Carmell v. Texas, 529 U.S. 513, 522 (2000) (quoting *Calder v. Bull*, 3 Dal. 386, 390, 1 L.Ed. 648 (1798) (Chase, J.)). Here, when Defendant became aware of a duty to register as a sex offender and then refused to so register, Indiana Code Section 5-2-12-9 had already defined such action as

[4] Indiana courts use the same analysis for *ex post facto* claims, regardless of whether they arising under the federal or state constitution. *Teer v. State*, 738 N.E.2d 283, 287 (Ind. Ct. App. 2000).

a Class D felony. That felony classification has not changed. Consequently, this case does not involve the first or second categories set forth by Justice Chase. Moreover, this case has nothing to do with the rules of evidence, so the fourth category is irrelevant. Consequently, only the third category of ex post facto laws – those that inflict greater punishment than was available when the crime was committed – is here implicated.

This category is implicated but is not, in the end, applicable, because the law in question is simply not retroactive in a constitutional sense. "[T]wo critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver v. Graham*, 450 U.S. 24, 29 (1981). Again, Justice Chase discussed exactly what constituted a "retrospective" law for purposes of the Ex Post Facto Clause.

> That Charles 1st. king of England, was beheaded; that Oliver Cromwell was Protector of England, that Louis 16th, late king of France, was guillotined; are all facts, that have happened; but it would be nonsense to suppose, that the states were prohibited from making any law after either of these events, and with reference thereto. The prohibition, in the letter, is not to pass any law concerning and after the fact; but the plain and obvious meaning and intention of the prohibition is this; that the legislatures of the several states shall not pass laws, after a fact done by a subject or citizen, which shall have relation to such fact, and shall punish him for having done it.

Calder, 1 L.Ed. at 650. In other words, the legal consequences that befall a person because of the historical fact of past conduct do not necessarily have a "relation to such fact" or conduct recognized by the Ex Post Fact Clause. Thus, with respect to the retroactivity of sex offender registries in particular, the Supreme Court has specifically stated, "The *Ex Post Facto* Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Smith v. Doe*, 538 U.S. 84, 103-104 (2003).

The current punishment complained of by Defendant is a consequence of his failure to comply with a regulatory scheme that, while applicable to him only because of a prior conviction, is not unconstitutionally retrospective in application. That the sex offender registration system is regulatory in nature cannot be seriously disputed. This Court has already determined that the registration requirement is itself not an ex post facto law. *Spencer v. O'Connor*, 707 N.E.2d 1039, 1046 (Ind. Ct. App. 1999), *trans. denied.* The Court is in good company. After *Spencer* was decided, the United States Supreme Court, using much of the same rationale, later rejected an ex post facto challenge to the registration and notification of the sex offender registration law in Alaska, finding that the registration scheme was civil in nature. *Smith*, 538 U.S. at 105-106. Many – if not most – state courts have done the same. *Garrison v. State*, 950 So.2d 990, 993 (Miss. 2006); *State v. Gragg*, 137 P.3d 461, 465 (Idaho Ct. App. 2005) (failure to register charge); *State v. Mount*, 78 P.3d 829, 841 (Mont. 2003); *Hyatt v. Commonwealth*, 72 S.W.3d 566, 572 (Ky. 2002); *State ex rel. Olivieri v. State*, 779 So.2d 735, 749-750 (La. 2001); *State v. Haskell*, 784 A.2d 4, 15-16 (Me. 2001); *People v. Malchow*, 739 N.E.2d 433, 440 (Ill. 2000); *People v. Pennington*, 610 N.W.2d 608, 613 (Mich. Ct. App. 2000); *Meinders v. Weber*, 604 N.W.2d 248, 261-262 (S.D. 2000); *Saldana v. State*, 33 S.W.3d 70, 72 (Tex. Ct. App. 2000); *State v. Pickens*, 558 N.W.2d 396, 400 (Iowa 1997); *Kitze v. Commonwealth*, 475 S.E.2d 830, 832 (Va. Ct. App. 1996); *Doe v. Poritz*, 662 A.2d 367, 404-405 (N.J. 1995); *State v. Costello*, 643 A.2d 531, 534 (N.H. 1994); and *State v. Ward*, 869 P.2d 1062, 1074 (Wash. 1994).

The amendments to the registry system since this Court decided *Spencer* have not transformed an established regulatory and administrative measure into a criminal punishment. In *Smith*, the Supreme Court of the United States applied an "intent-effects" test to the registration

law at issue to determine whether the law was criminal or civil in nature. *Smith*, 538 U.S. at 92. Using this approach, the Court found the legislative intent of the Alaskan sex-offender registration system was non-punitive. *Id.* at 96. The Court then applied the so-called *Mendoza-Martinez* factors to determine whether the effect was so punitive that it effectively overrides the non-punitive intent. *Id.* at 97-106. The factors that the Court found most relevant were: 1) whether the regulatory scheme has historically been regarded as punishment; 2) whether the law imposes an affirmative restraint or disability; 3) whether the law promotes the traditional goals of punishment; 4) whether the law is rationally related to a non-punitive purpose; and 5) the excessiveness of the law in application. *Id.* at 97. The Court also stated, "[O]nly the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* at 92 (internal quotations omitted). Of course, it is the burden of the challenger to present this clear proof. *Id.* at 105.

Here, Defendant has not presented clear proof that subsequent changes to the sex offender registry system have overridden the non-punitive intentions of the Indiana General Assembly. In fact, the only *Mendoza-Martinez* factor that could be implicated by his argument is the excessiveness of the law in application. Certainly, there has been no argument that these new measures, such as the prohibition of living within a certain distance from a school and the requirement that the offender register for life, have come unhinged from the established non-punitive purpose of the registry. As the *Smith* Court pointed out, this rational connection between the measure at issue and the non-punitive purpose is the "most significant factor in [the] determination that the statute's effects are not punitive." *Id.* at 102. Moreover, the limitation on an offenders residence and the fact that certain offenders must register for life do not present such significant restraints that they constitute punishment. With respect to the restriction of

residences, the Supreme Court has upheld arguably more harsh measures, including laws forbidding felons from working as union officials, *De Veau v. Braisted*, 363 U.S. 144 (1960), and prosecuting doctors for practicing medicine after having been convicted of a felony, *Hawker v. New York*, 170 U.S. 189 (1898). At the same time, in regards to the length of the registration requirement, the *Smith* Court stated, "Empirical research on child molesters, for instance, has shown that, contrary to conventional wisdom, most reoffenses do not occur within the first several years after release, but may occur as late as 20 years following release." *Smith*, 538 U.S. at 104 (internal quotation omitted). Thus, the two new regulatory measures advanced by Defendant as being so harsh as to constitute punishment, cannot constitute the clear evidence necessary to overturn the well-established non-punitive intent of the legislature.

If the entire registration system is regulatory in nature, it follows that the penalty provisions in the Act punish only the contemporary violations of the regulations and not the predicate offenses that make the regulatory system applicable to Defendant in the first place. As the Court of Appeals of Virginia has said, "Any potential punishment arising from the sex offender's failure to register is prospective and does not punish him or her for past criminal activity." *Kitze*, 475 S.E.2d at 833. Indeed, Indiana Code Section 5-2-12-9 creates an entirely new offense, based upon a defendant's status as a person previously convicted of certain sex crimes. *Compare Watson v. State*, 642 S.E.2d 328, 330 (Ga. Ct. App. 2007) (where the court concluded that a defendant would be guilty of a felony entirely distinct from those which required him to register with the sexual offender registry). That is, the crime at issue takes Defendant's status and makes it a crime for him not to undertake certain obligations required by that status.

In a case in which a "serious violent felon" whose predicate offense was committed before enactment of the serous violent felon statute lodged an ex post facto challenge, this Court adopted this very position. In *Teer*, the defendant was charged with possession of a firearm by a serious violent felon. *Teer*, 738 N.E.2d at 286. The defendant's status as a serious violent felon was based upon a 1996 conviction. *Id.* at 286 n. 1. However, the statute that criminalized the defendant's possession of a firearm was not enacted until roughly three years after that conviction. *Id.* at 287. The defendant claimed that this was an ex post facto violation, but this Court rejected that argument. *Id.* at 287-88. The Court stated, "The statute essentially prohibits the possession of a firearm by a serious violent felon; it neither re-punishes [the defendant] for the [previous] crime he committed nor enhances the penalty for the [previous] crime." *Id.* In so holding, the Court was following *Funk v. State*, 427 N.E.2d 1081 (Ind. 1981). In *Funk*, the Supreme Court upheld the habitual offender statute against an ex post facto challenge on the grounds that the habitual offender penalty punished the last committed offense and not the prior crimes upon which the enhancement was based. *Id.* at 1087. *See also Hall v. State*, 405 N.E.2d 530 (Ind. 1980).

Like the serious violent offender status in *Teer* and the habitual offender status in *Funk*, the sex offender status of Defendant existed well before Defendant engaged in the criminal conduct that flowed from his status, *i.e.*, failed to register as a sex offender. The duty to register was imposed on Defendant in 2001. He became aware of that requirement no later than 2003. Therefore, even though his predicate offense, like the serious violent felon in Teer, was committed before imposition of the new duty, he cannot characterize the relevant statutes as ex post facto laws. *See Smith*, 538 U.S. at 101-102 ("A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any

prosecution is a proceeding separate from the individual's original offense."). Again, this is not a new issue, and several states have come to the same conclusion in similar cases. *See Watson v. State*, 642 S.E.2d 328, 330 (Ga. Ct. App. 2007); *Garrison*, 950 So.2d at 992-93 (finding no ex post facto violation and therefore determining that the trial court properly denied a motion for J.N.O.V. filed by a defendant charged with and convicted of failing to register as a sex offender); and *Meinders*, 604 N.W.2d at 259 ("Any punishment flowing from the sex offender registration statutes comes from a failure to register, not from the past sex offense."). *See also Schreiber v. State*, 666 N.W.2d 127, 130 (Iowa 2003) (penal consequences for failing to submit DNA sample do not punish prior crime triggering duty to provide sample). This Court would continue to be in good company if it rejected the argument of Defendant in this case.[5]

III. The Plea Agreement In The Predicate Offense Does Not Control The Requirement That Defendant Register As A Sex Offender.

The plea agreement entered in 1989 does not dictate whether Defendant must register as a sex offender. There is nothing "remarkable" in stating that "plea agreements are in the nature of contracts entered into between the defendant and the State." *Lee v. State*, 816 N.E.2d 35, 38 (Ind. 2004). "The prosecutor and the defendant are the contracting parties, and the trial court's role with respect to their agreement is described by statute: 'If the court accepts a plea agreement, it shall be bound by its terms.'" *Pannarale v. State*, 638 N.E.2d 1247, 1248 (Ind. 1994) (quoting Indiana Code § 35-35-3-3(e)). It does not follow, however, that the plea agreement controls the application of the criminal law to the defendant for all time to come. The Court has put the relevant point most succinctly:

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[5] In a footnote, Defendant cites *Commonwealth v. Williams*, 832 A.2d 962, 985 (Pa. 2003), in support of his claim on this point. However, *Williams* was concerned with a challenge to registration requirement brought pursuant to the Due Process Clause, and the Court was specifically not facing an ex post facto challenge. *Id.* at 970 n. 13.

> We hold that the Sex Offender Registration Act is mandatory and that a trial court must comply with the Act regardless of the terms of the defendant's plea agreement. Because placement on the Registry does not amount to an additional penalty, it need not be included with the agreement's sentencing terms. In other words, a plea agreement has no effect on operation of the Act.

In re G.B., 709 N.E.2d 352, 355-56 (Ind. Ct. App. 1999). Given this very clear statement by this Court, Defendant cannot maintain the contention that his 1989 plea agreement controls his duty to register as a sex offender.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court affirm the judgment of the trial court in all aspects.

Respectfully submitted,

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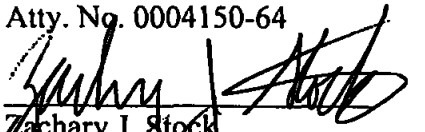
By: 

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CERTIFICATE OF SERVICE

I do solemnly affirm under the penalties for perjury that on November 5, 2007, I served upon the opposing counsel in the above-entitled cause two copies of the Brief of Appellee by depositing the same in the United States mail first-class postage prepaid, addressed as follows:

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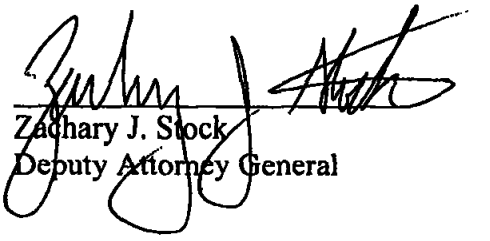

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