No. 15-15531

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

David Bernard Clark, Petitioner/Appellant,

v.

Charles L. Ryan, Director of Arizona Department of Corrections, and the Attorney General of the State of Arizona, Appellees

Appeal from the United States District Court
for the District of Arizona

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

I. JURISDICTIONAL STATEMENT

The district court had jurisdiction over Petitioner/Appellant, David Bernard Clark's (hereafter "Mr. Clark"), petition for writ of habeas corpus under 28 U.S.C. § 2254. On February 20, 2015, the district court denied Mr. Clark's petition and a Certificate of Appealability. Appellant's Excerpt of Record (hereafter "ER") at 7. Pursuant to 28 U.S.C. § 2253(a), this Court has jurisdiction over Mr. Clark's appeal from the order and final judgment of the district court. Id. Mr. Clark timely filed with this Court a notice of appeal, pursuant to Rule 4(a)(1)(A), Federal Rules of Appellate Procedure, on March 19, 2015. ER at 195. Thereafter, Mr. Clark filed a Motion for Certificate of Appealability, pursuant to the provisions of 28 U.S.C. § 2253, and Rule 22(b) of the Federal Rules of Appellate Procedure. ER at 195. On July 13, 2015, this Court granted the Certificate of Appealability. ER at 195. The issue certified for appeal is: Whether appellant's conviction under Arizona's Sex Offender Registration Act violates the *ex post facto* clause of the United States Constitution. ER at 1.

II. ISSUE PRESENTED

WHETHER MR. CLARK'S CONVICTION UNDER ARIZONA'S SEX OFFENDER REGISTRATION ACT VIOLATES THE *EX POST FACTO* CLAUSE OF THE UNITED STATES CONSTITUTION?

III. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND

Between 1978 and 1983, Arizona was without a sex offender registration statute. See State v. Henry, 224 Ariz. 164, 168, 228 P.3d 900, 904 (Ct. App. 2010). In 1982, Mr. Clark pled guilty to sexual misconduct, a class 2 felony. ER at 53, 72. The charge arose out of an episode of consensual sex with a minor under fifteen years old when Mr. Clark was eighteen years old. ER at 53. In 1982, Mr. Clark received a four-year term of probation as punishment, *which he successfully completed*. ER at 53. On July 27, 1983, A.R.S. § 13-3821, Arizona's modern sex offender registration statute, became effective. State v. Noble, 171 Ariz. 171, 172-73, 829 P.2d 1217, 1221, 1218-19 (1992). Pursuant to this law, Mr. Clark was required to register as a sex offender. See A.R.S. § 13-3821. Mr. Clark has been classified as a Level Three Offender, meaning that the sex offender registration statutes apply to Mr. Clark to the greatest extent possible. ER at 14.

On December 21, 2009, Mr. Clark was arrested in Cochise County for failing to register. ER at 54. On January 13, 2010, Mr. Clark pled guilty to a charge of failure to register as a sex offender, *a class 4 felony*. ER at 54. Mr. Clark was sentenced on February 12, 2010 to a stipulated term of three and one-half years imprisonment. ER at 71. On December 13, 2010, the Cochise County Superior Court denied Mr. Clark's Petition for Post-Conviction Relief. ER at 71-

75. On April 20, 2010, the Arizona Court of Appeals, Division Two, granted Mr. Clark's petition for review, but denied relief. ER at 187. Mr. Clark then petitioned the Arizona Supreme Court for review. ER at 181. On March 20, 2012, the high court granted review, and oral argument was held. ER at 181. However, on May 8, 2012, the Arizona Supreme Court later determined that review was improvidently granted and vacated its original order. ER at 183.

On March 05, 2013, having exhausted his state court remedies, Mr. Clark brought his original Petition for *Habeas Corpus*. ER at 193. As stated above, on February 20, 2015, the district court denied Mr. Clark all relief. ER at 195. This appeal follows.

B. FACTUAL BACKGROUND

Mr. Clark pled guilty to sexual misconduct in 1982. ER at 73. The terms of the plea agreement stipulated that Mr. Clark would serve four years of probation, which he successfully completed. ER at 54. The crime he was convicted of involved consensual sex when he was eighteen years old with a fourteen year old. ER at 54.

Nearly twenty-seven years passed between the day on which Mr. Clark pled guilty to sexual misconduct, in 1982, to the day he was arrested in 2009 for failing to register as a sex offender. Even though Mr. Clark was arrested and sentenced in 1982 when there was no sex offender registration statute, he was arrested in 2009

for a violation of a the Arizona sex offender statute that was not enacted until 1983. ER at 54. Under this new statute Mr. Clark is considered a Level Three offender and forced to register for the rest of his life. See A.R.S. §§ 13-3821 *et seq*. Since its enactment in 1983, the Arizona statute has undergone a number of changes making the obligations of registrants more burdensome. Noble, 171 Ariz. at 172-173, 829 P.2d at 1218-19. Under these new obligations, Mr. Clark is required to, *inter alia*, notify law enforcement of any change in name or address within ten days. ER at 55. Failure to do so is now a class 4 felony. A.R.S. § 13-3824.

On December 21, 2009, Mr. Clark was arrested in Cochise County, Arizona for violation of the sex registration statute. ER at 55. On January 13, 2010, Mr. Clark pled guilty and accepted a term of three and one-half years in prison, which he served. ER at 55. This term of imprisonment was almost as long as the *probation* Mr. Clark received for the original incident in 1982. ER at 55.

IV. SUMMARY OF THE ARGUMENT

This case presents a classic example of a violation of the *ex post facto* clause of the United States Constitution. In 1982, Mr. Clark was convicted of sexual misconduct with a minor. He successfully served his sentence of four years of probation. Not until 1983, after Mr. Clark's conviction and sentencing, Arizona enacted its Sex Offender Registration statute. This statutory scheme did not exist

at the time of Mr. Clark's conviction. A full twenty-seven years passed until 2009, when Mr. Clark was arrested for failure to properly register under this statute. He again pled guilty to a felony as a result of his failure to register and this time was sent to prison for three and one-half years as a result. Mr. Clark was punished retroactively by a statute that did not even exist at the time of his original conviction in 1982. This case, as will be discussed below in detail, is distinguishable from the Supreme Court case of Smith v. Doe, 538 U.S. 84 (2003), and from this Court's more recent decision of Am. Civil Liberties Union of Nevada v. Masto, 670 F.3d 1046 (9th Cir. 2012). Specifically, in neither Smith nor Masto was there an actual punishment of imprisonment as exists in Mr. Clark's case for violation of a statute that did not exist at the time of his original conviction. Moreover, the Arizona sex offender registration scheme is actually part of Arizona's criminal code, has most of the indicia under the seven "Mendoza-Martinez" factors, and resulted in literal punishment by imprisonment for Mr. Clark. Under these circumstances, without question, Mr. Clark's conviction in 2010 violates the federal *ex post facto* clause, and must be reversed.

V. ARGUMENT

A. STANDARD OF REVIEW

Habeas Corpus

The Court of Appeals reviews *de novo* a district court's denial of a habeas corpus petition. See Juan H. v. Allen, 408 F.3d 1262, 1269 n. 7 (9th Cir.2005).

State Court Decision

A writ of habeas corpus is available under 28 U.S.C. § 2254, "only on the basis of some transgression of federal law binding on the state courts." Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)). Title 28 U.S.C. § 2254, as amended in 1996, sets forth the following standard of review applicable to federal courts reviewing state court decisions:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254 (d); See Williams v. Taylor, 529 U.S. 362 (2000); Lockhart v. Terhune, 250 F.3d 1223, 1229 (9th Cir. 2001).

"Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme Court of the United States] on a question of law. . . ." Williams, 529 U.S. at 413. A federal habeas court "may not issue the writ simply because that court concludes

in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams, 529 U.S. at 412.

"In determining whether a state court decision is contrary to federal law, [this Court] look[s] to the state's last reasoned decision—in this case, the referee's report—as the basis for its judgment." Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002). The last reasoned decision in Mr. Clark's case was the appellate court's granting review but denial of relief adopting the trial court's dismissal of his Rule 32 petition based on the decision in Henry. ER at 187-88.

B. UNDER BOTH THE SUPREME COURT'S DECISION OF SMITH V. DOE, AND THIS COURT'S DECISION IN AMERICAN CIVIL LIBERTIES UNION OF NEV. V. MASTO, MR. CLARK'S CONVICTION UNDER ARIZONA'S SEX OFFENDER REGISTRATION ACT VIOLATES THE *EX POST FACTO* CLAUSE OF THE UNITED STATES CONSTITUTION:

1. **An Analysis of the "Mendoza-Martinez" Factors Utilized In Smith v. Doe, Illustrate that Mr. Clark's Conviction Must Be Deemed *Ex Post Facto*:**

The United States Supreme Court in Smith analyzed the effects of Alaska's Sex Offender Registration Act using the factors noted in Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)[1], to determine whether the statutes violated the

[1] As further discussed *infra*, to determine whether a statute is impermissibly punitive under the Mendoza-Martinez test, courts consider: "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter,

federal *ex post facto* clause. Smith, 538 U.S. at 97. The provisions of the Alaska statute examined in Smith did not impose the severe burdens and restrictions of the Arizona statutes challenged by Mr. Clark, both facially and as applied.

The Mendoza-Martinez test, used in Smith, requires that a court "examine whether [a] statutory scheme is so punitive [in effect] as to negate [the State's] intention to deem it civil." Smith, 538 U.S. at 92 (quoting United States v. Ward, 448 U.S. 242, 248–249, (1980)). An expression of a non-punitive legislative intent is insufficient to establish that a statute is in fact regulatory. Smith, 538 U.S. at 92.

The Arizona statutory scheme enacted, and enforced, against Mr. Clark was, in fact, punitive rather than civil. The scheme is enacted within the criminal code and non-compliance with the requirements results in actual punishment, such as the imprisonment and parole to which Mr. Clark has been subjected. Mr. Clark submits that had the legislature intended to ensure compliance with a regulatory, civil statutory scheme, the draconian punishment provisions would not have been included in the statute. Even assuming, *arguendo*, the statutory scheme was intended to serve only a regulatory purpose, the Henry court unreasonably applied

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whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69, 83 S. Ct. 554, 567-68 (1963).

the Mendoza-Martinez factors, which show that the statute's punitive effects clearly outweigh the regulatory purpose.

a. The Arizona Statute Creates an Affirmative Disability or Restraint Through Mandatory Lifelong In Person Registration Requirements With No Possibility of Termination.

The first factor under the Mendoza-Martinez analysis is whether the statute imposes an affirmative disability or restraint. The Arizona statute is distinguishable from the Alaska statute with respect to this Mendoza-Martinez factor. In determining that the Alaska statute did not impose an affirmative disability or restraint, the Smith court considered the fact that the Alaska statute "does not require [registration] updates to be made in person." Smith, 538 U.S. at 101.

However, both Maine and New Hampshire's supreme courts have distinguished Smith based on statutes similar to the Arizona statute Mr. Clark is challenging. The Supreme Court of Maine, in State v. Letalien, 2009 ME 130, 985 A.2d 4, determined that mandatory in-person registration imposes an affirmative disability or restraint in violation of the federal *ex post facto* clause. 2009 ME at ¶ 37 n. 9, 985 A.2d at 18 n. 9. Similarly, the Supreme Court of New Hampshire, in Doe v. State, 167 N.H. 382, 111 A.3d 1077 (2015), determined that lifelong requirement is an affirmative disability or restraint. 167 N.H. at 403-06, 111 A.3d

at 1095-97.[2] Both of these cases, Letalien and Doe, determined that the restraint was amplified by the harsh criminal penalties for failure to comply with the requirements. See Letalien, 2009 ME at ¶37, 985 A.2d at 18; Doe, 167 N.H. at 403-404, 111 A.3d at 1095-97. The Letalien court opined this "is undoubtedly a form of significant supervision by the state [which] imposes a disability or restraint that is neither minor nor indirect." 2009 ME at ¶37, 985 A.2d at 18.

Unlike Smith, where the Supreme Court found that the Alaska statute was not "parallel to probation," 538 U.S. at 101, Arizona courts have ***specifically held*** that Arizona's statute is not ***merely similar*** to probation, but imposes more restraints. Fushek v. State, 218 Ariz. 285, 183 P.3d 536 (2008). Arizona's statutory scheme makes "registration a life long obligation," and provides no mechanism, whatsoever, for the termination of the requirement. Id. at 291, 183 P.3d at 542. In Fushek the court emphasized, "The duration of the registration makes this statutory consequence ***much more severe*** than a comparatively short probation period." (emphasis added) Id. at 291, 183 P.3d at 542.

Indeed the New Hampshire Supreme Court adopted Maine's reasoning in stating: "[I]t belies common sense to suggest that a newly imposed lifetime obligation to report to a police station every ninety days to verify one's

[2] See also Doe v. Dep't of Pub. Safety & Corr. Servs., 430 Md. 535, 62 A.3d 123, 124 (2013) (holding the lifelong registration requirements where a violation of the *ex post facto* clause of Maryland under the same analysis).

identification, residence, and school, and to submit to fingerprinting and provide a current photograph, is not a substantial disability or restraint." Doe, 167 N.H. at 405, 111 A.3d at 1096 (quoting Letalien, 925 A.2d at 24-25). As noted by the Arizona appellate court:

> [Smith] acknowledged that the registration system's similarities to probation or supervised release presented a forceful argument that [Alaska's] Act was punitive. The court noted, however, that the Act specified no procedures for implementing the statute's requirements. Arizona's statute, by contrast, ***contains implementation procedures for law enforcement agencies*** *and provides for enforcing registration laws* ***not through administrative means***, ***but through criminal prosecution***. In this way, Arizona's scheme ***is even more analogous to probation or supervised release than the Alaska scheme*** addressed in Smith.

(emphasis added) Henry, 224 Ariz. at 170-71, 228 P.3d at 906-07. Further, Mr. Clark himself was imprisoned and paroled as a direct result of the Arizona statute that did not exist when he was first convicted in 1982.

Accordingly, the registration obligations imposed by Arizona's statutory scheme are, without question, tantamount to a criminal sentence imposed by a judicial officer for the conviction of a sex offense. However, for an offender such as Mr. Clark, this obligation arises after he has already been punished and continues for the duration of his life. Unlike a term of supervised release, the obligation for Mr. Clark is life long with no mechanism for termination. Mr. Clark does not have the privilege of having an independent, neutral determination by a judicial officer regarding the necessity of the conditions imposed. Instead, law

enforcement performs these actions for the rest of Mr. Clark's life. Thus, this Mendoza-Martinez factor weighs heavily in favor of Mr. Clark's contention the Arizona statutory scheme is punitive.

b. The Arizona Statute is Analogous to Historical Forms of Punishment.

The second Mendoza-Martinez factor analyzes whether a law imposes requirements that resemble historical punishments. Courts have recognized that sex offender registration statutes "are of fairly recent origin." Smith, 538 U.S. at 97. However, this inquiry is only whether the punishments resemble historical punishment, not that they are an exact replica. Id. Mr. Clark submits the registration and notification requirements of the Arizona statute are similar to the traditional punishments of shaming and supervised probation or parole.

i. The Arizona statute is analogous to shaming.

In Smith, the Supreme Court determined the dissemination of factual information already part of the public record based on conviction was not the same as shaming. Smith, 538 U.S. at 98. However, Mr. Clark submits the registration and notification statutes go beyond the mere dissemination of factual information.

In 1992, The Arizona supreme court concluded the modern statutory scheme, as it then existed, was not punitive. See Noble, 171 Ariz. at 175, 829 P.2d at 1221. Limited access to registrant information was at the crux of the court's balance of the Mendoza-Martinez factors:

> The most significant factor in this case is our determination that . . . the overriding purpose of § 13-3281 is . . . a purpose unrelated to punishing . . . for past offenses. *In addition, potentially punitive aspects of the statute have been mitigated. Registrants are not forced to display a scarlet letter to the world; outside a few regulatory exceptions, the information provided by sex offenders pursuant to the registration statute is kept confidential.*

(emphasis added) Noble, 171 Ariz. at 178, 829 P.2d at 1224. However, the "[Arizona] legislature has since removed those features of the [statute] protecting the confidentiality of an offender's registration status and *now specifically requires broad community disclosure of that status for most classes of offenders . . . .*" (emphasis added) Henry, 224 Ariz. at 172, 228 P.3d at 908. Thus, "sex offenders are ***not only forced to display a scarlet letter to the world***, but ***state authorities are required to shine a spotlight on that letter***." (emphasis added) Id. at 172, 228 P.3d at 908. (internal quotations omitted).

In Doe, the New Hampshire supreme court distinguished Smith and concluded that the internet disclosure was like colonial shaming in the town square. Doe, 167 N.H. at 405-06, 111 A.3d at 1097. The New Hampshire supreme court reasoned: "Placing offenders' pictures and information online serves to notify the community, but also holds them out for others to shame or shun." Id. at 406, 111 A.3d at 1097.

The internet has become, in our modern world, like a virtual town square making the required scarlet letter floodlit by Arizona authorities more analogous to

shaming punishment than ever before. At the time the Supreme Court decided Smith, in 2003, internet access in households was around fifty percent.[3] Currently, for the last reported year, 2010, internet access in households is over twenty percent higher. This demonstrates the availability of sex offender information, mandatorily imposed by the registration statute, is not just analogous to a Hawthorne's Scarlet Letter, but far more severe. Arizona has forced Mr. Clark to post his name, address, a picture, description and other information for all to see who have access to the internet (which in the 21st Century is almost everybody). The stigma of being placed on the registry holds the registrant out as someone deserving of the stigma. As Justice Souter said in his concurrence in Smith, "[s]election makes a statement." Smith, 538 U.S. at 109. Our world has changed and it is time to recognize that lifelong registration requirements, under the threat of criminal prosecution, create a stigma that is akin to historical punishment.

In deciding Smith, the Supreme Court acknowledged the "attendant humiliation" in publishing the information via the internet. However, the Court found the internet publishing did not equate to a traditional form of punishment sufficiently to render the statute punitive under the Mendoza-Martinez test. 538

[3] See National Telecommunications and Information Administration, Internet and Computer Use Studies and Data Files, Figure 1, available at http://www.ntia.doc.gov/data (last visited November 19, 2015) and attached to Mr. Clark's Supplemental Brief to the Arizona Supreme Court as Exhibit A. ER at 160.

U.S. at 99. It is notable however, Alaska's statute, unlike Arizona's, did not require registrants to provide online identifiers.[4]

While the website warns that use of the information to "intimidate, harass, or create a criminal act" will result in prosecution, the (legitimate) risk of having a criminal act committed against him is not the sole harm to which Mr. Clark is subjected by having his information published online. As discussed above, registrants such as Mr. Clark are subject to a humiliating display of their information and status as a sex offender, accessible now by more individuals than ever before.

Further, Mr. Clark submits that the website's warning is unlikely to prevent those who desire to perpetrate unlawful acts against a registrant from doing so. Such individuals are likely to recognize the illegality of performing such acts. The website merely facilitates such recognition. Any individual could simply search for any sex offenders living within a nearby radius of any address. Indeed, the potential to use technology to facilitate harassment is evidenced by the rapid

[4] See A.R.S. § 13-3827(J): For the purpose of this section, "required online identifier" means any electronic e-mail address information or instant message, chat, social networking or other similar internet communication name, but does not include a social security number, date of birth or pin number.

adoption in recent years of "cyber-stalking" and "cyber-harassment" laws,[5] as well as "cyber-bullying" and electronic harassment laws in the education setting.[6]

The legislative intent underlying laws that prevent electronic harassment stems from the increased use of electronic devices, which provide access to the internet, which has facilitated the ability to harass, intimidate, and threaten others. See, e.g., 2007 Ark. Sess. Laws Ch. 115. This is further troublesome given that electronic communications not only permit widespread public distribution, but also provide anonymity to perpetrators. See H.R. 1966, 111th Cong. § 2 (1st Sess. 2009). These problems are presented in the context of publishing sex offender information as well. Cf. Doe v. State, 189 P.3d 999, 1010 n. 81 (Alaska 2008) (describing occurrences of harassment and vigilantism against registrants). Significantly, the ability provided through Arizona's website to discern whether an

[5] The majority of states have, since Smith and Noble, enacted criminal statutes prohibiting either cyber-harassment or cyber-stalking. See Cyber-Stalking and Cyber-Harassment Laws table, attached to Mr. Clark's Supplemental Brief to the Arizona Supreme Court as Exhibit C. ER at 163-172. Notably, the Arizona legislature recently proposed amendments to criminal stalking and harassment laws to expand prohibited conduct to include the use of electronic and digital means. See 2012 AZ H.B. 2549 (revising A.R.S. § 13-2916 to include using digital or electronic devices and communications to, among other things, intentionally threaten or harass, and revising A.R.S. § 13-2923 to define stalking as encompassing use of GPS and digital or electronic devices to conduct surveillance of another).

[6] The majority of states have, since Smith and Noble, enacted education laws and policies against cyber-bullying and cyber-harassment in the school setting. See State Cyber-bullying and Cyber-Harassment Laws table, attached to Mr. Clark's Supplemental Brief to the Arizona Supreme Court as Exhibit D. ER at 174-180.

online identifier belongs to a registrant may give others the ability to electronically harass that particular registrant under the veil of internet anonymity. Obtaining recourse against online harassment may be difficult due to various complications, such as the difficulty of subpoenaing online service providers for an anonymous user's information.[7]

Arizona registry's increased access to information with the ability to use technology to harm, lends new found support to the concerns voiced in the concurring and dissenting opinions in Smith nearly twelve years ago. See Smith, 538 U.S. at 109 (Souter, J., concurring in the judgment) (noting that "there is significant evidence of onerous practical effects of being listed on a sex offender registry" such as harassment and physical harm); Id. at 111-12 (Stevens, J., dissenting) ("[W]idespread public access to [information] has a severe stigmatizing effect [such as] threats [and] assaults . . . ."); Smith, 538 U.S. at 115 (Ginsburg, J., dissenting) (noting that Alaska's act "exposes registrants, through aggressive public notification of their crimes, to profound humiliation and community-wide ostracism."). Thus, now more than ever, Arizona's internet registry has become more analogous to the traditional punishment of shaming.

[7] See Ben Quarmby, Protection from Online Libel: A Discussion and Comparison of the Legal and Extrajudicial Recourses Available to Individual and Corporate Plaintiffs, 42 New Eng. L. Rev. 275, 288-92 (Winter 2008).

ii. The Arizona statute is analogous to probation or parole.

The second drastic aspect of Arizona's sex offender registration scheme, evolving since its original enactment, is that "the registration requirements have become *decidedly* more burdensome . . . ." (emphasis added) Henry, 224 Ariz. at 171, 228 P.3d at 907. The Arizona statute is not merely similar to the traditional punishments of parole and probation, but is far more burdensome. Cf. Wallace v. State, 905 N.E. 2d 371, 380 (Ind. 2009) (sex offender registration statutes "resemble historical forms of punishment in that . . . registration and reporting provisions are comparable to conditions of supervised probation or parole."). The penalties associated with noncompliance of the Arizona statutes include ***criminal punishment***, as evidenced by Mr. Clark's own imprisonment and parole. See Henry, 224 Ariz. at 169, 228 P.3d at 905. Failure to register has increased from a class 2 misdemeanor to a class 4 felony. Id. at 169, 228 P.3d at 905. A registrant's failure to possess and update an identification card is a class 6 felony and subjects an offender to a mandatory $250 assessment. Id. at 169, 228 P.3d at 905. The Arizona statute does "not provide for the termination of the registration requirement, except for individuals who committed offenses as juveniles. Thus, once imposed, sex offender registration is a lifelong obligation." Fushek, 218 Ariz. at 291, 183 P.3d at 542. Furthermore, Arizona recently amended the statutes to require offenders who have more than one residence to register with law

enforcement not, annually, but under the same conditions as transients. Namely, the registrant must "provide a description and physical location of any temporary residence [and register] not less than every ninety days . . . ." See A.R.S. §§ 13-3281(I), 13-3282(A) (as amended by 2012 Ariz. Legis. Serv. Ch. 23 (H.B. 2019)).

A statute "violates the *ex post facto* clause [] if it is a 'law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed." Noble, 171 Ariz. at 174, 829 P.2d at 1220 (quoting Calder v. Bull, 3 U.S. (3 Dall.), 386, 390 (1798)). Mr. Clark was convicted in 1982 when there was no requirement to register as a sex offender in Arizona. Nearly twenty-seven years later, Mr. Clark was sent to prison for failing to register under a statute that did not exist when he was convicted and sentenced in 1982.

The Arizona appellate court has recently stated that imposition of the requirement of registration imposed after sentencing is not valid. See State v. Serrano, 234 Ariz. 491, 323 P.3d 774, 779 (Ct. App. 2014). The court opined: "By requiring such orders to be made at that time, the legislature has ensured that defendants receive important procedural protections, such as representation by counsel, as well as actual notice of any registration obligation." Serrano, 234 Ariz. at 495, 323 P. 3d at 778. As in Serrano, Mr. Clark was required to register after his original conviction and sentencing only by the enactment of Arizona's statutory scheme, which did not exist at the time. He was afforded none of the protections

described in Serrano. Moreover, he has been imprisoned and paroled for failing to comply with the registration requirement. This shows punitive effects under the Mendoza-Martinez factors.

c. The Arizona Statute Comes into Play on A Finding of Scienter.

Although Smith does not contain any discussion with respect to whether the application of the Alaska statute becomes applicable due to a conviction requiring scienter, this Mendoza-Martinez factor, has traditionally been significant in distinguishing a civil statute from a criminal one. Cf. Wallace, 905 N.E.2d at 381 (quoting Kansas v. Hendericks, 521 U.S. 346, 362 (1997)). Importantly, Arizona's statute overwhelmingly applies to crimes requiring a finding of scienter for conviction. See A.R.S. § 13-3821(A). Therefore, this factor favors Mr. Clark.

d. The Arizona Statute Promotes Traditional Aims of Punishment.

Retribution, which is one of the traditional aims of punishment considered under the Mendoza-Martinez analysis, supports a finding that Arizona's statutory scheme is punitive. In Smith, the Court found that the former Alaska statute was not retributive, because it distinguished between offenders convicted of a non-aggravated offense (who must register for 15 years) and those convicted of an aggravated offense or multiple offenses (who must register for life). 538 U.S. at 120. These categories, "*and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism*, and thus [are]

consistent with the regulatory objective." (emphasis added) Smith, 538 U.S. at 120.

By contrast, Arizona's statute indiscriminately requires ***all*** offenders to register ***for life***, displaying a retributive purpose. Given that Arizona's statute requires *all* offenders, regardless of the nature or number of the offense they have committed, to register literally for their entire lifetimes ***without the possibility of relief***. While the legislature may not have "passed the act for purposes of retribution – vengeance for its own sake – [it] strains credulity to suppose . . . that the Act does not promote community condemnation of the offender." See Doe, 111 A.3d at 1098.

In Belleau v. Wall, No. 12-CV-1198, 2015 WL 5560278 (E.D. Wis. Sept. 21, 2015), the district court held the placing of a GPS monitor on a sex offender for life was retribution and deterrence. The court reasoned that: "To the extent it resembles parole or other forms of court-ordered supervision, GPS monitoring "necessarily embodies aims commonly associated with punishment, including deterrence." Belleau, 2015 WL 5560278, at *15. Arizona considers registration under its statutory scheme to have more restraints than probation. Fushek, 218 Ariz. at 291, 183 P.3d at 542. Accordingly, this Mendoza-Martinez factor demonstrates that Arizona's statute, unlike the one addressed in Smith, is punitive.

e. The Arizona Statute Applies to Behavior that is Already Criminal.

While underlying behavior that is itself criminal triggers Arizona's sex offender registration statute, the Smith court determined that this Kennedy factor, in the context of sex offender registration, is to be given little weight. However, Justice Stevens found it significant that "a criminal conviction under these statutes provides both a sufficient and a necessary condition for the sanction." Smith, 538 U.S. at 112 (Stevens, J., dissenting). He also stated:

> No matter how often the Court may repeat and manipulate multifactor tests that have been applied in wholly dissimilar cases involving only one or two of these three aspects of these statutory sanctions, it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders and on no one else as a result of their convictions are not part of their punishment. In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment.

Smith, 538 U.S. at 112 (Stevens, J., dissenting). Here, Arizona's statute is enforced using threats of actual punishment. As stated throughout, Mr. Clark was actually imprisoned and paroled as a result of his failure to register.

Significantly, in finding Maine's statute unconstitutional under the *federal ex post facto* clause, the Letalien court agreed with Justice Souter's concurrence in Smith, which stated:

> The fact that the [a]ct uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than

> regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.

Letalien, 2009 ME 130 at ¶ 47, 985 A.2d at 21-22 (quoting Smith, 538 U.S. at 109).

Similar to Maine's statute, the duty to register under Arizona's statute "only applies to offenders who were convicted of specified crimes, does not arise based on individualized assessment of an offender's risk of recidivism, and cannot be waived based on proof that an offender poses little or no risk." Id. at ¶ 48, 985 A.2d at 22. Therefore, Arizona's statutory scheme is punitive in effect under this Mendoza-Martinez factor.

f. An Alternative Purpose to Which it May Rationally be Connected is Assignable for it.

While this factor could conceivably weigh in favor of finding that Arizona's statute is regulatory rather than punitive, it is significant that the purposes of the criminal code include ensuring public safety through deterrence and imposing punishment on those whose conduct jeopardizes the public peace. See A.R.S. § 13-101(5)-(6). All forms of punishment may be rationally connected to ensuring public safety, and, therefore, this factor cannot be given undue weight in determining whether the statute is punitive.

g. The Arizona Statute is Excessive in Relation to its Non-Punitive Purpose.

As discussed, Arizona's statutory scheme is saturated with provisions that are far more burdensome and restrictive than the former Alaska statutory scheme addressed in Smith. These provisions clearly render Arizona's statute excessive and punitive under the federal *ex post facto* clause in a way that Alaska's statutory scheme was not. While both states publish information online, the former Alaska statute addressed in Smith apparently did not contain, as Arizona's statute does, additional community notification provisions, nor require that law enforcement provide the media with registrant information, as does Arizona's statute.[8] Further, Arizona requires *all* offenders to register for life. By contrast, Smith *specifically determined* that the *differing* lengths of time for which various offenders must register under Alaska law (15 years when convicted for a single, non-aggravated offense versus lifetime registration for aggravated offenses or more than one offense) were *not* excessive. 538 U.S. at 104. This demonstrates that Arizona's statute, unlike the former Alaska statute analyzed in Smith, is markedly excessive in relation to its non-punitive purpose.

Moreover, it is significant that the Doe court, in concluding that New Hampshire's statute is excessive under this Mendoza-Martinez factor, focused

[8] The Alaska statute "does not specify the means by which the registry information must be made public. Alaska has chosen to make most of the non-confidential information available on the Internet." Smith, 538 U.S. at 91.

upon the statute's lack of any mechanism to relieve registrants from the statute's obligations:

> We find the lifetime duration of the registry in particular to be excessive, when considered with all of the act's other impositions. *If in fact there is no meaningful risk to the public, then the imposition of such requirements becomes wholly punitive*.

(emphasis added) 167 N.H. at 410, 111 A.3d at 1100. Likewise, in Fushek, the Arizona Supreme Court observed that A.R.S. § 13-3826(2) initially required the community notification guidelines committee established by the statute to recommend a judicial process through which registrants could be relieved from the statute's requirements. 218 Ariz. at 291 n. 7, 193 P.3d at 542 n. 7. However, the "committee simply recommended that the legislature continue to study and analyze whether such a provision is the appropriate public policy for this state." Id. (internal quotations omitted). Therefore, registration and notification requirements remain in effect for the remainder of a registrant's life *without the possibility of relief*. This means that a registrant in Mr. Clark's position will be perpetually subject to the statute's broad disclosure requirements, threat of fines and prosecution, and branding of a "scarlet letter" for literally the rest of his life.

Even assuming, *arguendo*, Arizona's sex offender registration statute may serve any valid societal goals, it is unquestionably excessive in relation to those goals. See Doe, 189 P.3d at 1017-18 ("We are not balancing the rights of sex offenders against [those] of their victims [but] determining for *ex post facto*

purposes whether the means chosen to protect the public have consequences to sex offenders that [exceed the] valid interest in public safety, and exclude individuals who may pose equivalent threats . . . ."). As such, this Mendoza-Martinez factor also demonstrates that Arizona's statute is punitive and, therefore, violates the federal *ex post facto* clause.

On balance, the Mendoza-Martinez factors illustrate that, unlike the statute addressed in Smith, Arizona's statutory scheme is punitive in nature, thereby violating the *ex post facto* of the United States Constitution as applied to Mr. Clark's case. Therefore, Mr. Clark, who was incarcerated and on parole as a result of this statutory scheme, will continue to endure *ex post facto* punishment upon his release, with no prospect of relief unless this Court intervenes.

2. **The Facts of This Court's Decision of American Civil Liberties Union of Nev. v. Masto, Are Distinguishable from the Facts of Mr. Clark's Case.**

In 2012 this Court, adopted the reasoning and rationale used in Smith in determining that the Nevada statutory scheme challenged in American Civil Liberties Union of Nevada,[9] did not violate the *ex post facto* clause of the United States Constitution. 670 F.3d at 1058. In American Civil Liberties Union of

[9] This Court's most recent decision in Litmon v. Harris, 768 F.3d 1237 (9th Cir. 2014), is based on similar reasoning in American Civil Liberties Union of Nevada, 670 F.3d 1046 and distinguishable because the challenger only challenged the lifetime registration requirement not any retroactive punishment for failure to comply.

Nevada, the challengers attempted to block the newly expanded scope of the Nevada registration act prior to any conviction or punishment for failure to comply by enjoining the statute's enforcement. Id. at 1051-52. The expansion of the Nevada statute required lifetime registration, expanded disclosure, and notification. Id. at 1050-51. This challenge did not question the punishment for failure to comply with the retroactive expanded requirements, but merely dealt with whether the expanded requirements and notification were punishment in violation of the federal *ex post facto* clause.

In contrast, Mr. Clark is challenging his actual imprisonment for failing to comply with the retroactive Arizona statutory scheme. Unlike the challengers in Masto, Mr. Clark was convicted in 1982 when there was no statutory scheme requiring him to register as a sex offender. In Masto, this Court rejected the "analogy of [the Nevada] statutes to returning a burglar to prison for five years after the service of his sentence." 670 F.3d at 1055. However, Mr. Clark's case is distinguishable. Indeed, Mr. Clark was sent to prison after his initial sentence of conviction and sentence in 1982. Mr. Clark was arrested twenty-seven years later, in 2009, for failing to register under the Arizona statutory scheme that was not enacted until a year after his conviction and sentencing for his 1982 original offense. Thus, Mr. Clark has been sentenced for a second time under a law that did not exist at the time of his conviction in 1982.

In Masto this Court used the Supreme Court's Smith holding to determine the outcome. However, the Supreme Court only decided the narrow issue of whether Alaska's notification and registration requirement, by itself, violated the *ex post facto* clause in Smith. See United States v. Gillette, 553 F. Supp. 2d 524, 527 (D.V.I. 2008) ("the only issue before the court was whether the registration and notification scheme, by itself, violated *ex post facto*."); See also, United States v. Smith, 481 F. Supp. 2d 846, 853 (E.D. Mich. 2007) ("Whereas the Supreme Court held that Alaska's civil regulatory scheme was nonpunitive and its retroactive application did not violate the *ex post facto* clause, this Court concludes that the instant legislation, with its increased felony punishment placed in Title 18, does violate the *ex post facto* clause, insofar as the Government seeks to apply it to a defendant who *traveled* in interstate commerce prior to July 27, 2006, did not register during the 10-day window for registration."); United States v. Stinson, 507 F. Supp. 2d 560, 565 (S.D.W. Va. 2007) ("However, the issue currently before the Court is substantively different than whether the registry and notification requirements violate the *ex post facto* Clause. Rather, the issue here is whether the criminal penalties associated with SORNA violate the *ex post facto* clause when the Government seeks to enforce those penalties against a defendant who is covered by the Interim Rule but who traveled in interstate commerce before that Rule was issued.").

In Gillette, the district court looked at the issue presently before this Court: Whether or not imprisonment for failure to register under an act created subsequent to the conviction requiring registration is an *ex post facto* violation. 553 F. Supp. 2d at 527. The challenger in Gillette was convicted of his offense in 1983, Congress passed the federal Sex Offender Registration and Notification act in 1994. Gillette, 553 F. Supp. 2d at 526. Based on the fundamental difference of punishment for failure to comply with a law not in existence at the time of the original conviction the district court distinguished the Supreme Court's holding in Smith. Id. at 526-530. In Gillette the court reasoned: "Unlike ASORA [the Alaska Statute], 18 U.S.C. § 2250 is neither civil in nature nor nonpunitive; it imposes a possible ten year sentence." Id. at 528.

Mr. Clark's challenge to Arizona's statutory scheme differs in the same fundamental way. Mr. Clark was imprisoned for failure to register under Arizona's statute, which did not exist at the time of his conviction requiring registration, for three and one-half years. Therefore, Mr. Clark's case is distinguishable from this Court's decision of Masto.

VI. CONCLUSION

For the foregoing reasons this Court should reverse the district court's decision dismissing Mr. Clark's Petition for *habeas corpus* and remand with instructions to grant him relief.

RESPECTFULLY SUBMITTED this 24th day of November, 2015.

HORNE SLATON PLLC

By:/s/ Sandra Slaton_____
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VII. STATEMENT OF RELATED CASES

Pursuant to the Ninth Circuit Rule 28-2.6, Appellant certifies that neither he nor his counsel are aware of any related cases pending before this Court.

RESPECTFULLY SUBMITTED this 24th day of November, 2015.

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Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Certificate of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on November 24, 2015.

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