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IN THE

COURT OF APPEALS OF INDIANA

No. 18A-CR-373

DICKIE D. BRIDGES, *Appellant-Defendant*, *v.* STATE OF INDIANA, *Appellee-Plaintiff*.	Interlocutory Appeal from the Allen Superior Court, No. 02D05-1708-F5-214, The Honorable Frances C. Gull, Judge.

BRIEF OF APPELLEE

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STATEMENT OF THE ISSUE

Whether the trial court erred when it denied Defendant's motion to dismiss and be removed from the sex offender registry.

STATEMENT OF THE CASE

Nature of the Appeal

Defendant Dickie D. Bridges appeals the trial court's denial of his motion to dismiss and to remove Defendant from the Sex Offender Registry.

Course of Proceedings

In Part I of Count I of its information, the State charged Defendant on August 2, 2017, with Level 5 Felony failure to register as a sex or violent offender, as defined in Indiana Code section 11-8-8-5, as required under Indiana section Code 11-8-8-11 (App. Vol. II, 10). Count I, Part II of the charging information alleged that on or about August 2, 2013, Defendant was convicted in cause number 02D06-1305-FC-132, for failing to register as a sex offender (App. Vol. II, 12). Count II, Part I, of the information alleged Level 5 Felony failure to register as an offender for Defendant's failure to complete his weekly registration requirement with law enforcement between June 29, 2017, and July 17, 2017 (App. Vol. II, 14). Part II of Count II alleged Defendant had a previous conviction for failing to register, specifically his conviction of August 2, 2013, from cause 02D06-1305-FC-132 (App. Vol. II, 16).

On October 23, 2017, Defendant filed a motion to dismiss and to remove Defendant from the sex offender registry (App. Vol. II, 20-22). The trial court

held an evidentiary hearing on Defendant's motion on October 27, 2017 (Tr. Vol. II, 1-63). On December 13, 2017, Defendant filed a memorandum in support of his motion to dismiss (App. Vol. II, 23-35). On December 22, 2017, the State filed its memorandum in opposition to Defendant's motion to dismiss and remove Defendant from the sex offender registry (App. Vol. II, 36-44). On January 25, 2018, the trial court issued its Order or Judgment of the Court, finding that the law is with the State of Indiana and against the Defendant, and denying the Defendant's motion to dismiss and remove Defendant from the sex offender registry (App. Vol. II, 45).

On January 31, 2018, Defendant filed his Petition for Certification of Interlocutory Order for Appeal thereof and for a Stay of Proceedings Pending Appeal (App. Vol. II, 46). On February 6, 2018, the trial court issued its Order Certifying Interlocutory Appeal and staying further proceedings pending this appeal. This interlocutory appeal ensued.

STATEMENT OF THE FACTS

Defendant was convicted on October 7, 2002, of two counts of child molesting, each a Class C Felony, in cause number 02D04-0108-CF-349 (App. Vol. II, 23). Those offenses subjected Defendant to a ten-year registration requirement under the Sex Offender Registration Act (App. Vol. II, 23, 36). As of May 16, 2006, Defendant's registration requirement was amended from a ten-

year requirement to a lifetime requirement (Ex. 11).[1] Defendant's life-time registration requirement was later amended again and his registration requirement was for ten-years.[2] Defendant was released from prison on May 16, 2006, and this began his ten-year registration requirement (App. Vol. II, 23, 36). His registration requirement as of that date, May 16, 2006, was scheduled to conclude on May 16, 2016 (App. Vol. II, 36).[3]

Effective July 1, 2008, the legislature amended Indiana Code 11-8-8-19, to toll the registration requirements for offenders who commit additional offenses that result in incarceration (App. Vol. II, 25). More specifically, the amendments provided that an offender is required to register under that chapter until the expiration of ten (10) years after he is released from a penal facility for the offense that required the registration (App. Vol. II, 25). Under the 2008 amendment, the entire ten-year requirement does not restart if the

[1] In 2006, the legislature amended the Act to require certain sex offenders, based on the details of their crimes, to register with local law enforcement for life. *See, e.g.,* the then-operative version of Indiana Code § 11–8–8–19(c).

[2] In *Gonzalez v. State*, 980 N.E.2d 312 (Ind. 2013), the Indiana Supreme Court held that the 2006 amendments to the registration requirements that shifted the requirements from ten-years to life could not be applied retroactively.

[3] The State acknowledged to the trial court in proceedings below that as of Defendant's release from prison, his original registration requirement would have been scheduled to conclude on May 16, 2016 (App. Vol. II, 36).

offender is convicted of a subsequent offense, but the registration period is to be tolled during any period that the offender is incarcerated (App. Vol. II, 25).[4]

On August 2, 2010, in cause number 02C01-1004-FD-183, Defendant was convicted of, and sentenced for, operating while intoxicated (App. Vol. II, 24). He was sentenced to a suspended sentence, and that sentence was revoked (App. Vol. II, 24). His offense, for which he was charged on April 28, 2010, was alleged to have occurred in March of 2010 (App. Vol. II, 24, 36). On March 7, 2011, Defendant was convicted of failure to register as a sex offender, a Class D Felony, in cause number 02D06-1101-FD-39; he was sentenced to two years executed (App. Vol. II, 24; Tr. 27). On August 2, 2013, Defendant was convicted of failure to register as a sex offender, a Class C Felony, in cause number 02D06-1305-FC-132 (App. Vol. II, 24). He was sentenced to two years executed (App. Vol. II, 24; Tr. 27).

The State advised Defendant on January 29, 2017, that he was required to register as a sex offender (App. Vol. II, 25). The State applied the 2008 amendments' tolling provision to Defendant's 2010, 2011, and 2013 offenses, and in so doing the State required Defendant to register as an offender until

[4] Counsel for the State is loath to include such legal matters in any "Statement of the Facts." However, this appeal is a challenge to a registration requirement; any factual timeline that defines the context or background against which such an issue is raised will inevitably include legislative history as well as the offender's particular criminal history, and little else; and it is a fact that the legislature passed the amendments at issue in this instant cause in 2008; and it is a fact that these are the amendments being applied to Defendant, and whose application is now being challenged.

January 4, 2020 (Ex. 10; Ex. Vol. p. 160: "Date Registration Expires: 1/4/2020 with tolling").

Defendant challenged the State's application of the 2008 amendments to the tolling of his registration requirement and the State defended the new expiration date as follows. Defendant filed a motion to dismiss and to remove Defendant from the sex offender registry, on October 23, 2017 (App. Vol. II, 20-22). The trial court held an evidentiary hearing on Defendant's motion on October 27, 2017 (Tr. Vol. II, 1-63). On December 13, 2017, Defendant filed a memorandum in support of his motion to dismiss (App. Vol. II, 23-35). On December 22, 2017, the State filed its memorandum in opposition to Defendant's motion to dismiss and remove Defendant from the sex offender registry (App. Vol. II, 36-44). On January 25, 2018, the trial court issued its Order denying the Defendant's motion to dismiss and remove Defendant from the sex offender registry (App. Vol. II, 45). This interlocutory appeal ensued.

SUMMARY OF THE ARGUMENT

The trial court correctly denied Defendant's motion to dismiss his charges for failing to register, and correctly determined that the law on this issue is with the State and against Defendant. The law that was applied to Defendant in 2017, on account of offenses committed by Defendant in 2010, 2011, and 2013, was in effect in 2008. Indiana's prohibition against ex post facto laws is designed to ensure that when individuals complete acts that subject them to Indiana's laws they have a realistic expectation of how the law affects them. At

the time that he offended in 2010, 2011, and 2013, Defendant should have reasonably expected that any offense, for which he was incarcerated, and which he committed after 2008, would subject him to different tolling provisions than those which attached before 2008.

It was not reasonable for Defendant to think, any time after July 1, 2008, that future offenses that led to incarceration would have no effect on the tolling provisions of his registration requirement. The relevant provisions of INSORA are not a violation of the Ex Post Facto Clause as applied to Defendant because Indiana has not imposed any additional burdens upon Defendant than those to which he was already subjected. The amendments applied to Defendant in the instant cause do not increase his registration requirement; they merely alter the tolling provisions applied to that requirement. They do not apply retroactively to the original offense which required any kind of registration in the first place. They apply proactively to offenses committed after 2008.

Defendant was already subject to a ten-year registration requirement, and this was the case before 2008, and after 2008. No additional punishment or burden is imposed upon Defendant by applying, in 2017, the tolling provisions contained in INSORA that were in effect in 2008. This is because the triggering activity or action for which the 2008 amendments are herein being applied occurred in 2010, 2011, and 2013. The law predates its application here, and therefore there is no retroactivity. There being no retroactivity, there is no ex post facto violation. The factors that are traditionally applied need not even be

reached, as they should only be considered when there is some punitive application of the law whose triggering conduct predates that law's passage.

That said, even applying the seven *Mendoza-Martinez* factors used when conduct being legislated predates the applied legislation, the law is still with the State and against Defendant, and the trial court's decision is still justified on those grounds as well. Defendant himself conceded before the trial court that no punitive intent on the part of the legislature can be shown by changes to the tolling provision. And three of the factors without dispute favor reading a non-punitive effect: (1) that the changes of the tolling provisions do not operate to promote traditional aims of punishment, (regarding factor four); (2) that the question of whether the behavior to which the statute applies is already a crime favors treating the statute as non-punitive (regarding factor five); and (3) that whether an alternative purpose may be assigned to or connected to the amended version of the law favors treating the amended statute as non-punitive (regarding factor six). Nothing establishes an affirmative disability or restraint results from tolling provisions. Defendant cannot show that tolling provisions are historically regarded as punitive. Tolling provisions apply automatically, and therefore have nothing to do with a finding of scienter. This Court should affirm the decision of the trial court.

ARGUMENT

The trial court properly denied Defendant's motion to dismiss.

The trial court correctly denied Defendant's motion to dismiss. The State charged Defendant with failing to register as a sex offender and Defendant moved to dismiss the charges on grounds that the application of the 2008 amendments to SORA as applied to Defendant in 2017, for conduct he committed in 2010, 2011, and 2013, constituted ex post facto punishment. The State's application of the amendments made law in 2008, to Defendant, on account of offenses he committed in 2010, 2011, and 2013, does not constitute an example of ex post facto punishment and this Court should affirm the trial court below.

As an initial matter, the seven *Mendoza-Martinez* factors need not even be considered in this case. They should be applied when the timeline clearly indicates that the following relationship in time attaches: (1) the commission of some act or conduct, to which the law is applied, has occurred; and, then, after the actions to which the law is being applied, (2) the law is passed, and applied retroactively. In this case, the law in question was amended in 2008. The conduct triggering its application occurred in 2010, 2011, and 2013. There is no "retroactivity" in play in this case, and therefore, there is no retroactive punishment to consider; there is no retroactive application of anything, be it punitive or administrative, to consider. The time line reveals that the law was amended, and its amendments were applied to conduct that occurred later.

Indiana's Constitution prohibits ex post facto laws. Ind. Const. Art. 1, § 24. "No ex post facto law…shall ever be passed." Ind. Const. Art. 1, § 24. The fundamental principle behind the Ex Post Facto Clause is that a person has a right to fair warning of the result of their conduct. *Seales v. State*, 4 N.E.3d 821, 823 (Ind. Ct. App. 2014), *trans. denied*. The issue before this Court is whether, as applied to Defendant, INSORA's 2008 tolling provision is unconstitutional. This issue is a question of law. This Court reviews questions of law *de novo* and is not required to show deference to the trial court's determinations. *Bowling v. State*, 960 N.E.2d 837, 841 (Ind. Ct. App. 2012), *trans. denied*.

Defendant moved to dismiss his charges for failure to register on grounds that INSORA as applied to Defendant was an *ex post facto* violation, and thus unconstitutional (App. Vol. II, 20-22). He filed a memorandum in support of the same following a hearing on the motion (Tr. Vol. II, 1-63; App. Vol. II, 23-25). In it, his argument focused upon the Indiana Constitution as interpreted through the opinions of *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009), among others (App. Vol. II, 23-25). When a statute is challenged as an alleged violation of the Indiana Constitution, the party challenging the statute bears the burden of proof. *Jensen v. State*, 905 N.E.2d 384, 390 (Ind. 2009). All doubts are resolved against that party. *Id.* "If two reasonable interpretations of a statute are available, one of which is constitutional and the other not, we will choose that path which permits upholding the statute because we will not presume that the

legislature violated the constitution unless the unambiguous language of the statute requires that conclusion." *State Bd. of Tax Comm'rs v. Town of St. John*, 702 N.E.2d 1034, 1037 (Ind.1998). Additionally, this Court reviews challenges to the denial of a motion to dismiss criminal charges under an abuse of discretion standard. *State v. Dixon*, 924 N.E.2d 1270, 1271 (Ind. Ct. App. 2010), *trans. denied*.

The new tolling provisions, as applied to Defendant in the instant cause, are not unconstitutional. Even though neither party cited to it below, the most informative or instructive case for this issue is *Tyson v. State*, 51 N.E.2d 88 (Ind. 2016). It is true that *Tyson* involved moving across state lines and this case involves the tolling provisions. But that superficial distinction does not undermine the relevance of the reasoning behind *Tyson*. There are two more significant similarities that render *Tyson* the more instructive case among the many to choose from in the history of this evolving law.

First, what mattered most in the *Tyson* case was that the law being challenged was not being applied to the original sex offense; it was being applied to subsequent conduct, and, in turn, that subsequent conduct followed, rather than pre-dated, the law that was applied in *Tyson*. When Tyson chose to move to Indiana, he subjected himself to then-current Indiana laws, which required him to register as a sex offender. The amendments in question in *Tyson* occurred in 2006; the conduct that triggered the application of the 2006 law occurred in 2009. *Tyson*, 51 N.E.3d at 90.

Second, and equally important, and, in fact, central to our Supreme Court's reasoning in *Tyson*, the amendments in question more closely compare to challenged amendments like those raised in *Jensen v. State*, 905 N.E.2d 384 (Ind. 2009), than they do with a case like *Wallace v. State*, 905 N.E.2d 371 (Ind. 2009). Defendant's case is a *Jensen* case; it is not a *Wallace* case. Our Supreme Court put it this way:

> [U]nlike *Wallace,* where the offender had no obligation to register anywhere before the Act was passed, Tyson was required to register in Texas *years* before our statutory definition was amended to include him. His circumstances are much more similar to those in *Jensen* and *Harris,* where both offenders already had to register; the challenged amendments merely lengthened that requirement. We simply cannot say that transferring the obligation upon moving is any more punitive than lengthening it to potentially last a lifetime.

Tyson, 51 N.E.3d at 96. The above two points require further discussion, those points being: (1) there is no retroactive relationship here between law and conduct (to which the law applies, or which triggers its application; and (2) there is no change in punitive effect on account of the amendments.

With regard to retroactivity, Defendant chose to re-offend after Indiana's registration qualifications included tolling provisions based on additional offenses and additional or new sentences. The plain language of the statute relates to persons who commit offenses that lead to new incarceration, not additional time for sex offenses already committed. One fundamental rule of statutory construction is to give words and phrases in the statute their plain,

ordinary and usual meaning, unless the statute itself shows a contrary purpose. *Saurer v. Board of Zoning Appeals*, 629 N.E.2d 893, 897 (Ind. Ct. App. 1994).

The Statute as amended in 2008 states that the offender's registration requirement applies until the expiration of ten (10) years after the date the offender is either (1) released from a penal facility; (2) placed in a community transition program; (3) is placed in a community corrections program; (4) is placed on parole; or (5) is placed on probation; "for the sex or violent offense requiring registration, whichever occurs last. The registration period is tolled during any period that the sex or violent offender is incarcerated. The registration period does not restart if the offender is convicted of a subsequent offense." Ind. Code § 11-8-8-19.

Here, given the plain language of the statute, this particular language makes clear that this triggering clause applies to tolling only, and that the "trigger" is simply incarceration. The legislature has shown no intent other than to change the way the registration period is tolled. Under the statutes that have existed since 2002, the registration requirement was triggered by Defendant's commission of and conviction for a sex crime in Indiana; but the tolling provisions to be applied to anyone after 2008 are based upon subsequent incarceration, not prior incarceration nor prior offenses. Therefore, a reading of the plain language of the statute shows that Defendant's 2010, 2011, and 2013, offenses, are what trigger the tolling provisions in the statute, and not his underlying child molestation offenses from 2001.

Defendant moved to dismiss charges against him, for failure to register, on grounds that the enforcement of INSORA is unconstitutional as applied to him because it equals *ex post facto* punishment (App. Vol. II, 25: the "2008 amendment to the law should not *apply to Bridges* since his convictions occurred long before the July 1, 2008 effective date of the amendment.") But Defendant looks to the wrong convictions. The amendments did not, under the plain language of the statute, apply to the 2002 convictions. The convictions, or rather resulting incarcerations, which trigger an application of the 2008 amended statute, are those from 2010, 2011, and 2013.

When analyzing an as-applied challenge to the constitutionality of a statute, the court considers the specific statutory language being applied to the individual and decides whether under the specific facts of the situation the statute is unconstitutional. *Martin v. Richey*, 711 N.E.2d 1273, 1279 (Ind. 1999). INSORA classified Defendant as a sex offender in 2002, at the time he committed child molestation; but the tolling provisions of 2008 only applied to Defendant because he reoffended in 2010, 2011, and 2013, and was incarcerated for those offenses, after 2008. Application of this very narrow provision of INSORA to Defendant does not and cannot amount to an *ex post facto* violation, and thus is constitutional as applied to Defendant.

Article 1, Section 24 "forbids laws imposing punishment for an act that was not otherwise punishable at the time it was committed or imposing additional punishment for an act then proscribed." *Lemon v. Harris*, 949

N.E.2d. 803, 809 (Ind. 2011). "The critical question in evaluating an *ex post facto* claim 'is whether the law changes the legal consequences of acts completed *before its effective date*.'" *Sewell v. State*, 973 N.E.2d 96, 102 (Ind. Ct. App. 2012) (quoting *Weaver v. Graham*, 450 U.S. 24, 31, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981)) (emphasis added by the State).

The acts that subjected Defendant, in 2017, to the tolling provisions contained in the 2008 Indiana law, were completed after passage of that 2008 law, and before its application to Defendant. Defendant therefore had fair notice and warning that any incarceration after 2008 would subject him to changes in the tolling provisions for his registration under INSORA. It did not increase the ten-years. But going to prison again does and did, and should, change the manner by which the time is calculated. I.C. § 11-8-8-19. The fundamental principle behind the *Ex Post Facto* Clause is that a person has a right to fair warning of the result of their conduct. *Armstrong v. State,* 848 N.E.2d 1088, 1093 (Ind.2006). Here, Defendant had fair warning of how the tolling provisions would apply if he committed acts that led to further incarceration.

Defendant bore the burden of proof to show that his requirement to register was an *ex post facto* violation. I.C. §§ 11-8-8-22(h), -22(j). He failed to meet this burden, and the trial court properly denied his motion to dismiss the charges against him. In *Sewell*, this Court recognized the importance of the

date of an offender's residency decision as it related to the date that *specific portions* of INSORA were enacted. This Court stated:

> Here, the law punishes the decision by Sewell, an offender against children, to take up residence within 1,000 feet of an existing youth program center. We conclude that because Sewell's residency decision occurred after the enactment of the statute, Sewell's prosecution does not violate state or federal ex post facto provisions.

Sewell, 973 N.E.2d at 103. Similarly, in *Tyson*, Tyson's voluntary decision to relocate to Indiana occurred well after the enactment of *specific portions* of INSORA were enacted that required him to register as a result of his pre-existing registration requirement from Texas. *Tyson*, 51 N.E.3d at 90. As in *Sewell*, the date of Tyson's relocation decision *was after* the statute was enacted. And in the final analysis, Tyson's requirement to register was not an *ex post facto* violation. As with both *Sewell*, and *Tyson*, Defendant's decision to re-offend occurred after, and not before, the law in question – the relevant *specific portion* – was amended. The incarceration resulting from such new offenses, and the change in tolling that results from it, happened after the law being applied was enacted.

There is a second reason why *Tyson* is the most instructive case. *Tyson* accurately points out the salient difference between a "Jensen" case and a "Wallace" case. Here, *Tyson* shows how and why Defendant's reliance on *Wallace* in this case is misplaced. In *Wallace*, the offense was committed in Indiana *before* INSORA was enacted. *Wallace*, 905 N.E.2d at 373-74. Wallace was subject to Indiana's laws from the time he committed the crime through the

time that Indiana attempted to impose a registration requirement on him. It was the commission of his crime *alone* that required Wallace to register as a sex offender. "The critical question in evaluating an *ex post facto* claim 'is whether the law *changes* the legal consequences of acts completed before its effective date.'" *Sewell*, 973 N.E.2d at 102 (quoting *Weaver*, 450 U.S. at 31)(emphasis added). For Wallace, the acts which subjected him to his registration requirement were completed before 1988, when he was charged with two counts of child molestation. *Wallace*, 905 N.E.2d at 373. The law *changed* the consequences of Wallace's actions.

But the law at issue in *Tyson* changed nothing in relation to *Tyson*, the same was true in *Sewell*, and the law in this case has changed nothing in relation to Defendant. He had to register – before his new offenses – for ten years. He has to register, after his new offense, for ten years. The consequences of his sex offenses are unchanged. There being no change, there can be no *ex post facto* violation.

Instead, Defendant in this case more closely resembles *Jensen* than *Wallace*. Defendant in this case was, like Jensen, already required to register. On the same day that application of an act, not in existence at the time Wallace committed his offenses, constituted an ex post facto violation against Wallace, our Supreme Court simultaneously determined that an amendment to the Act, which actually increased a pre-existing registration requirement for Jensen

from ten-years to a lifetime, did not constitute an ex post facto violation. *Tyson*, 51 N.E.3d at 93. As the *Tyson* court put it:

> [A]n amendment to that Act, which lengthened the mandatory registration period for sexually violent predators from ten years to life, presented no ex post facto violation as applied to an offender who was already under a requirement to register. *Jensen,* 905 N.E.2d at 394. Two years later, we upheld a similar amendment enhancing an offender's present registration requirement. *Lemmon v. Harris,* 949 N.E.2d 803, 813 (Ind.2011) ("Harris's claim fails for the same reasons Jensen's claim failed.").

Tyson, 51 N.E.3d at 93. Here, it is important to stress that reasoning. Jensen was already required to register. Defendant in this cause was already required to register. Harris was already required to register. In both *Jensen*, and in *Lemon v. Harris*, the amendments to the Act applied to the original triggering sex offenses, and, it should be stressed, increased the length of the registration requirement. Here, Defendant, like Harris and Jensen before him, also had a pre-existing registration requirement. Only here, it remains ten years. I.C. § 11-8-8-19. If it is not ex post facto punishment to turn Harris's and Jensen's pre-existing registration requirements from ten years to a lifetime, it cannot be additional punishment to change the tolling provisions that attach to Defendant's unaffected ten year registration requirement in this cause. *Id.*

For the above reasons, the following is true. *Tyson* should guide the analysis in this case. There is no *ex post facto* violation because there is no retroactivity. The relationship between the law in question and the conduct that triggers it is the appropriate one, in this timeline. The party in question,

Defendant, had fair notice of the law before it applied to him. And Defendant here more closely resembles *Jensen* than *Wallace*. As *Tyson* made eminently clear, if changes to the law that increase the length of a pre-existing requirement, even if those changes occurred after the triggering conduct, are not in violation of the *ex post facto* clause, then changes that do nothing to increase the duration of the requirement, and which predate the conduct for which the law is being applied, can certainly not constitute an *ex post facto* violation either. There should not even be a need for an analysis under the *Mendoza-Martinez* test, because there is no retroactive relationship between law and conduct. That said, however, even if the test is to be applied, it favors the State and the trial court.

The test this Court uses involves seven factors. *Wallace v. State*, 905 N.E.2d 371, 378-379 (Ind. 2009) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)). *Jensen* and *Harris* established the test to be employed here. Defendant conceded before the trial court that no punitive intent on the part of the legislature can be shown by changes to the tolling provision (App. Vol. II, 29). Despite the legislature's intent for the changes to be regulatory in nature, changes to the Act may nevertheless be ex post facto laws under a balancing of seven factors: (1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as punishment; (3) whether it comes into play only on a finding of scienter; (4) whether it promotes the traditional aims of punishment, such as retribution and

deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether it has a rational alternative purpose; and (7) whether it is excessive in relation to the alternative purpose. *Jensen*, 905 N.E.2d at 391 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

Here, even applying the seven factors, it is clear that there is no ex post facto violation. With respect to the first factor, there is no additional sanction, disability or restraint, under the new 2008 amendments. They affect tolling only. I.C. § 11-8-8-19. Defendant has not been called upon to do anything more than register for ten years. Which actual days count towards the completion of that requirement depended, since 2008, on his ability to stay out of prison, but he has not been further disabled or restrained by this change. This places factor one in the State's favor.

Second, Defendant himself conceded before the trial court below that factors four, five, and six, all indicate a non-punitive effect (App. Vol. II, 31-32).[5] Defendant was correct. Factor four asks if the provision promotes the traditional aims of punishment, and tolling provisions do not promote such aims. Factor five asks whether the behavior to which the law is applied is already a crime; tolling applies to calculations of time. Factor six favors the State because the rational purpose behind this provision is preventative and not

[5] Defendant appears to have changed his mind; but his analysis of factors four, five and six was more correct before the trial court than on appeal.

responsive, in encouraging those who register to refrain from committing new offenses, among other purposes served.

Looking to factors two, three, and seven, the law is still with the State and against Defendant here. Tolling provisions, under any analysis, have nothing historically to do with actual punishment. They are also automatic, regardless, and so they cannot be said to have anything to do with a finding of scienter. And the amendment only changes the tolling provisions for sex offenders if they commit new offenses that result in incarceration; the legislature even specifically stated that the term does not begin anew; and the ten years' duration is not impacted. This is anything but excessive in relation to its purpose, which appears, under any reading, to discourage sex offenders, already required to register, from re-offending, as well as to facilitate the regulation of the scheme as it applies to offenders who are in and out of prison. Not one of the seven factors here leads to the conclusion that this amendment, now being challenged, is punitive in its effects. Defendant admits it is not punitive in intent (App. Vol. II, 29). But the effects are not punitive either, looking to all seven factors. This Court should affirm the trial court's decision.

CONCLUSION

For the foregoing reasons, the State respectfully urges that the trial court's judgment be affirmed.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I certify that on July 3, 2018, I electronically filed the foregoing document using the Indiana E-filing System ("IEFS"). I also certify that the foregoing document was served July 3, 2018, upon opposing counsel via IEFS, addressed as follows:

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