2015 ME 3

SUPREME JUDICIAL COURT OF MAINE
sitting as
THE LAW COURT

DOCKET NO. KEN-14-5

JOHN DOE #46,

Plaintiff-Appellant,

vs.

STEPHANIE P. ANDERSON, et al.,

Defendants-Appellees.



ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT
DENYING APPELLANT'S MOTION FOR TEMPORARY RESTRAINING ORDER
AND OTHER INJUNCTIVE RELIEF

Sat below: Honorable Michela Murphy, J.S.C.
(Docket No. CV-12-124)

# BRIEF OF PETITIONER-APPELLANT JOHN DOE #46

BRUCE M. MERRILL, P.A.
225 Commercial St./Suite 501
Portland, ME 04101
207/775-3333
Attorney for Petitioner-Appellant

ON THE BRIEF:
Bruce M. Merrill, Esq.

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## STATEMENT OF THE CASE

John Doe #46 is a resident of Cumberland County, State of Maine. His true identity is known to the Attorney General.[1] John Doe #46 pleaded guilty on January 30, 2003, to a violation of Title 17 M.R.S.A. § 2924, Possession of Sexually Explicit Materials, a Class D misdemeanor. He was sentenced on that same date to 364 days' incarceration, with all but 72 hours suspended. At the time of his sentencing, the court "determined" that John Doe #46 was not an individual required to register with the Maine State Police following his release.(Appendix ("App.") 99). He was not advised by the authorities at the Knox County Jail, following his release on February 2, 2003, that he was required to register. *See*, Title 34-A M.R.S.A. § 11222(1) and (2)(2003).

The reason why neither the court made the statutory determination, nor the jail so advised John Doe #46, was because the statute in effect at that time did not include his offense in the definition of "sex offenses." *See*, Title 34-A M.R.S.A. § 11203 (2003). The definition at that time did not include 17 M.R.S.A. § 2924 as an offense requiring registration. In fact, the amendment to the statute to include that offense did not become effective until September 13, 2003. *See*, P.L. 2003, ch. 371, § 2.

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[1]John Doe #46 filed a Motion to Proceed Under Pseudonym contemporaneously with the filing of his Complaint, which motion was granted on May 4, 2012 (App. 2).

At the time that John Doe #46 pleaded guilty and was sentenced, the court was required, pursuant to 34-A M.R.S.A. § 11222 (1999), to "determine . . . if a defendant is a sex offender or a sexually violent predator. A person who the court determines is a sex offender or a sexually violent predator shall register according to this subchapter." *See, e.g.,* State v. Johnson, 894 A.2d 489 (Me. 2006)(SORNA required court to determine whether defendant was "sex offender" at time of sentencing). As noted above, the definition of "sex offender" at that time did not include 17 M.R.S.A. § 2924. *See,* 34-A M.R.S.A. § 11203(5) and (6) (2003).

It was not until later in 2003 that SORNA was amended to encompass the offense for which John Doe #46 was convicted, *viz.*, 17 M.R.S.A. § 2924. 34-A M.R.S.A. § 11203(6); P.L. 2003, ch. 371, § 2. As noted, by operation of law, that section was not effective until September 13, 2003.

As such, based upon the date of his conviction, January 30, 2003, and the offense to which he pleaded guilty, 17 M.R.S.A. § 2924, no "triggering event," required by 34-A M.R.S.A. § 11222, occurred ("The court shall determine at the time of sentencing if a defendant is a sex offender [now, " 10-year registrant"] . . . A person who the court [so] determines . . . shall register according to this subchapter.").

Pursuant to prior § 11222(1-A), the duty to register must be

exercised "[f]ollowing determination by the court . . ." that a person is required to register. As no court ever "determined" that John Doe #46 was required to register, no "duty" to register existed.

Notwithstanding the above, John Doe #46 originally received a Notice to Register letter on July 18, 2006. He challenged that Notice at that time on the grounds set forth above (App. 46).[2] AAG Laura Yustak Smith responded to that challenge in a letter to the State Bureau of Identification dated January 10, 2007, in which she acknowledged that there might be an issue with regard to John Doe #46's duty to register (App. 50). She advised, however, that "[i]f this gap in the duty to register does in fact exist, I will be advising the Dept. of Public Safety to submit legislation, to have retrospective effect, to correct this apparent oversight." *Id.*

On or about February 27, 2012, John Doe #46 received his second letter from the State Police, State Bureau of Identification, indicating that he was required to register as a

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[2]John Doe #46's position at that time was not based upon an *ex post facto* argument. *See*, State v. Haskell, 784 A.2d 4 (Me. 2001) (Legislative intent in enacting SORNA remedial, not criminal). Rather, it was premised upon the fact that there was never a "triggering event", *i.e.*, a determination made by the sentencing court that John Doe #46 was required to register, which is a condition precedent to registration. *See*, State v.Johnson, 894 A.2d 489, 490 (Me. 2006)(SORNA required court to determine whether defendant was "sex offender" at time of sentencing); *cf.* Haskell, 784 A.2d at 6 (Pursuant to SORNA, sentencing court notified and ordered defendant to comply with registration provisions of Act).

sex offender with the Sex Offender Registry for the next ten years, prompting the instant challenge. He subsequently filed a challenge to that Notice in the Superior Court on April 4, 2012, seeking declaratory and injunctive relief (App. 1, 14).[3]

The trial court denied that part of John Doe #46's Complaint which sought declaratory and injunctive relief based upon an *ex post facto* argument on May 3, 2012[4], but instructed counsel to file supplemental memoranda addressing the issues of Separation of Powers; Bill of Attainder; and procedural Due Process arguments (App. 2, 7). Following briefing (App. 25, 52), the matter was stayed, pending the decision from this Court in Doe v. Williams, 61 A.3d 718 (Me. 2013)(App. 4, 6).

Following the decision in Doe v. Williams, the trial court met with counsel to determine whether there were any issues remaining with respect to John Doe #46. Doe #46 thereafter filed a letter indicating that the issues of: 1) whether Title 34-A M.R.S.A. § 11222(1) violates the Separation of Powers clause of the Maine Constitution by giving an executive agency exclusively judicial powers; 2) whether "sex offender" determination, by operation of law, acts as a prohibited Bill of Attainder under the United States and Maine Constitutions; and 3) whether

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[3]Justice Michaela Murphy, J.S.C., had previously been designated as the single Justice to receive and handle all SORNA challenges.

[4]This denial was based upon the trial court's decision in a prior Doe case, which was then under appeal (App. 6).

requiring John Doe #46 to register under SORNA violates his procedural due process rights where he was never adjudicated a "sex offender" by the court[5], remained to be decided by the trial court (App. 4, 7, 83, 88).

On October 29, 2013, the trial court issued its *Order on Motion for Temporary Restraining Order and Other Injunctive Relief* denying and dismissing John Doe #46's Complaint for Injunctive relief (App. 6-12).

Joe Doe #46 thereafter filed a Motion for Reconsideration on November 8, 2013, that was also denied by the trial court on December 10, 2013 (App. 5, 13, 90, 101, 103).

This appeal follows.

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[5]This procedural due process issue is different than the procedural due process issue addressed in Doe v. Williams, 61 A.3d 718, 736-37 (Me. 2013).

## STATEMENT OF ISSUES PRESENTED AND STANDARD OF REVIEW

Whether the Superior Court erred in denying John Doe #46's Verified Complaint for Temporary Restraining Order and Other Injunctive Relief thereby denying him Due Process of Law?

Standard of Review: De Novo.

Whether the Maine Legislature can take an exclusively Judicial power, assign it to the Executive branch, and then apply it, retroactively, without violating the Separation of Powers clause of Article III of the Maine Constitution?

Standard of Review: De Novo.

Whether SORNA, applied retroactively, violates the Bill of Attainder clause of the Maine Constitution?

Standard of Review: De Novo.

## SUMMARY OF LEGAL ARGUMENT

The trial court erred in denying John Doe #46's Verified Complaint for Temporary Restraining Order and other Injunctive Relief. John Doe #46 is in a distinctly different factual posture than "any of the Does" considered by this Court in the Doe case. As such, he satisfied the requirements of the "stigma-plus" test and was entitled to have the trial court undertake an "as applied" analysis to determine what process is "due" him.

It violates the Separation of Powers clause of Article III of the Maine Constitution for the Maine Legislature to take an exclusively Judicial power, transfer it to the Executive branch of government, and apply it, retroactively. Hence, SORNA is unconstitutional as it is applied to John Doe #46.

SORNA, applied retroactively, violates the Bill of Attainder clause found in art. 1, § 11, of the Maine Constitution.

For the reasons more specifically set forth below, John Doe #46's request for injunctive and declaratory relief should have been granted by the trial court.

## LEGAL ARGUMENT

## POINT I

### THE TRIAL COURT ERRED IN DENYING JOHN DOE #46'S VERIFIED COMPLAINT FOR TEMPORARY RESTRAINING ORDER AND OTHER INJUNCTIVE RELIEF

In Doe v. Williams, this Court, in discussing the "stigma-plus test," stated that [b]ecause the registry contains no information that cannot be obtained through a routine criminal background check, the registry does not affect any of the Does' liberty or property interests, and we therefore need not reach the question of what process is due." 61 A.3d at 737. The trial court opined that "[g]iven this broad language ('any of the Does') together with the definitive finding regarding the nature of the information publicized on the registry, it did not believe that it could undertake an 'as applied' analysis for the Plaintiff." (App. at 11). This was error.

In Doe, the Court noted that:

> The Supreme Court has articulated the 'stigma-plus test' to determine whether procedural due process rights are implicated when the state imposes a stigma on an individual that negatively affects his reputation. A state action is an infringement on due process rights pursuant to the stigma-plus test only if it both negatively affects an individual's reputation and alters the legal status of an individual in a manner that affects his or her liberty, such as revoking parole or taking away the right to operate a vehicle.

Doe, 61 A.3d at 737 (citing Paul v. Davis, 424 U.S. 693 (1976)).

The Doe majority found that the Does' legal status was unaffected by SORNA of 1999. *Id.*

In order for state action that injures one's reputation to implicate the Due Process clause, the action must also alter one's legal status or rights. Paul v. Davis, 424 U.S. 693 (1976). It is the alteration of legal status, in the sense of a deprivation of a right previously held under state law, that when "combined with the injury resulting from the defamation, justif[ies] the invocation of procedural safeguards." *Id.* at 708-09. The need to show alteration of legal status, along with some stigmatic or reputation injury, is commonly referred to as the "stigma-plus" test. Khan v. Bland, 630 F.3d 519, 534 (7th Cir. 2010).

At least one court has found that a state's failure to provide any procedure to correct errors in its registry implicated a liberty interest protected by the Due Process clause. Schepers v. Comm'r., Indiana D.O.C., 691 F.3d 909 (7th Cir. 2012). In Schepers, the Seventh Circuit Court of Appeals found that Indiana's registry violated Due Process because it provided no process whatsoever to an entire class of registrants (those who had not been incarcerated). *Id.* at 915.

Upon notice of a duty to register in Maine, a person has 24 hours in which to notify the local law enforcement agency of the requirement to register. That person also has five days to

register with the Maine State Police. That person must provide current primary residence, other domiciles, employment address, a current photograph, fingerprints, and a $25.00 fee. The fee must be paid annually throughout the duration of the registration period. Title 34-A M.R.S.A. §§ 11221-11227. If any of this information changes, the person has 24 hours to notify the local law enforcement agency and five days to notify the Maine State Police of those changes. *Id.* Failure to comply with any of these rules and requirements, throughout the registration period, is a strict liability crime. 34-A M.R.S.A. § 11227(1).

Information provided is posted to the Internet and remains on the Maine website, even if the person subsequently moves out of state.[6] Local law enforcement agencies are free to have their own independent web sites. Information is also distributed to national agencies. *Id.*

Upon registration, a person becomes liable to laws that would otherwise not be applicable. As noted, there is the Maine crime of Failure to Register. 34-A M.R.S.A. § 11227. Additionally, there is the Federal crime of Failure to Register. 18 U.S.C. § 2250. The State of Maine imposes residency

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[6]"Information regarding a Maine-convicted registrant who moved out of state will remain available on Maine's Sex Offender Registry until his/her obligation to register has expired." http://sor.informe.org/sor/.

restrictions on offenders. Title 30-A M.R.S.A. § 3014. It also has sex offender restricted zones. Title 17-A M.R.S.A. § 261.

A person wishing to travel among the states must be aware of every state law and local ordinance that may be applicable to registered sex offenders. A person wishing to travel internationally must give a 21-day advanced notice to the local police agency. *See,* http://ojp.gov/smart/pdfs/SORNAFinalSuppGuidelines01_11_11.pdf.

Enforcement of registration is done with compliance checks. These can be carried out by local law enforcement officers going door-to-door to verify addresses. The U.S. Marshals Service has also been given jurisdiction over sex offender compliance. 28 U.S.C. § 566(e)(1)(C).

Preliminarily, John Doe #46 is constrained to note that his unique factual situation was not considered when this Court considered "any of the Does" that it had before it in the previous Doe case. Secondly, because it found that the registry did not affect any of those Does, it did not "reach the question of what process is due." Doe, 61 A.3d at 737.

In the instant case, John Doe #46 set forth, in great detail, in his letter to the trial court dated August 8, 2013, precisely how his reputation and his legal status would be impacted by requiring him to register and reincorporates them by reference herein (App. 84-85). He clearly set forth how "John

Doe #46" will be impacted by the "collateral consequences" of registration (App. 11).

John Doe #46 submitted that both his reputation and his legal status would be affected by requiring him to register, thereby satisfying the requirements of the "stigma-plus test." His reputation will be affected because once he is required to register, the public's knowledge of his offense will negatively impact his standing in the community where he now lives and works. The registry makes significant personal information readily available to the public.[7] *Id.* at 744 (Silver, J., dissenting).

Moreover, to suggest that the information published about this Doe on the Registry website would not differ from that of any other Doe, including those before this Court in Doe v. Williams, focuses only on the internet publication of this information (*i.e.*, the "stigma"), while ignoring the multitude of other laws that attach once one is determined to be a "sex offender" requiring registration under SORNA (*i.e.*, the "plus" or

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[7]SORNA of 1999 provides the public access to each offender's name, date of birth, photograph, city or town of domicile and residence, address of employment, address of college or school, the statutory citation and name of the offense for which the registrant was convicted, and designation as a 10-year or lifetime registrant. 34-A M.R.S.A. § 11221(9)(A)(2012). Additional information, including the mailing address and physical location of a registrant's domicile and residence, is easily available to the public through a written request. 34-A M.R.S.A. § 11221(9)(B)(2012).

change in legal status).[8] In addition, there is ample evidence documented in Smith v. Doe, 538 U.S. 84, 109 (2003)(Souter, J. concurring in judgment) that SORNA does create stigma, and this stigma has only grown since 2003.

As noted by Justice Souter, "[w]hen a legislature uses prior convictions to impose burdens that outpace the law's civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones." *Id.* While the Smith v. Doe majority accepted the State's explanation that the Act simply makes public information available in a new way, 538 U.S. at 97-100, "the scheme does much more. Its point, after all, is to send a message that probably would not be otherwise heard, by selecting some conviction information out of its corpus of penal records and broadcasting it with a warning." *Id.* at 109

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[8]Sex Offenders are regulated through registration, fees, data collection, compliance checks, restrictions on residency, travel restrictions, and zones of exclusion. *See, e.g.*, 34-A M.R.S.A. § 11221-11227(registration, data collection, fees, criminal penalty); 17-A M.R.S.A. § 261(sex offender restricted zone); 30-A M.R.S.A. § 3014 (residency restrictions); 18 U.S.C. § 2250 (federal failure to register); 42 U.S.C. § 16914(1)(a)(catch-all category: "Any other information required by the Attorney General", most recently expanded to require 21 day advance notification for international travel, *see* http://www.ojp.usdoj.gov/smart/pdfs/SORNAFinalSuppGuidelines01_11_11.pdf).

(Souter, J, concurring).[9] Moreover importantly, considerably more information is collected and published to the Internet than just conviction data, *e.g.*, the offender's workplace, residence, car registration, DNA, and fees, etc.[10]

In addition to the information published on the Internet, there is also public notification by the local police department

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[9]"I seriously doubt that the Act's requirements are 'less harsh than the sanctions of occupational debarment' that we upheld in Hudson v. U.S.,522 U.S. 93 (1997), DeVeau v. Braisted, 363 U.S. 144 (1960), and Hawker v. New York, 170 U.S. 189 (1898). It is true that the Act imposes no formal proscription against any particular employment, but there is significant evidence of onerous practical effects of being listed on a sex offender registry. *See, e.g.*, Doe v. Pataki, 120 F.3d 1263, 1279 (2d Cir. 1997)(noting "numerous instances of in which sex offenders have suffered harm in the aftermath of notification -- ranging from public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson"); E.B. v. Verniero, 119 F.3d 1077, 1102 (3d Cir. 1997)("The record documents that registrants and their families have experienced profound humiliation and isolation as a result of the reaction of those notified. Employment and employment opportunities have been jeopardized or lost. Housing and housing opportunities have suffered a similar fate. Family and other personal relationships have been destroyed or severely stained. Retribution has been visited by private, unlawful violence and threats and, while such incidents of 'vigilante justice' are not common, they happen with sufficient frequency and publicity that registrants justifiably live in fear of them"); *Brief for the Office of the Public Defender for the State of New Jersey, et al.*, as Amici Curiae (describing specific incidents)." Smith v. Doe, 538 U.S. 84, 109, n.*(2003)(Souter, J. concurring in judgment).

[10]*See, e.g.*, the answer to Question #9 of the Frequently Asked Questions on the Maine Sex Offender website: Generally, the following *information about the registrant will be provided in response to the* initial search: 1) name, 2) known alias names of the registrant, 3) registrant's physical description, including gender, race, height, weight, and eye color, 4) date of birth, 5) photograph (if one is available), 6) mailing and home address or domicile of registrant, and 7) place of employment (city or town, if available), 8) place of school attendance (city or town, if available/applicable), and 9) a legal description of the crime for which the registrant was convicted, the date of the conviction, the court of conviction, and the sentence imposed. http://sor.informe.org/sor/.

through public meetings or "papering" of the offender's neighborhood. Also, sometimes, very public compliance checks are carried out by the local police; sometimes, as noted, with the assistance of the U.S. Marshal's Service.[11]

Most importantly, Doe #46 is distinguishable from the other Does in Doe v. Williams because many of them were given a pathway off of the registry after they were retroactively added by the new legislation. Most of the Does filed suit because of legislative changes in 2005 that made sex offender registration retroactive to 1982 (P.L. 2005, Ch. 423). Because of subsequent litigation and this Court's decision in State v. Letalien, 985 A.2d 4, 20 (Me. 2009), the Legislature enacted a waiver process in 2009 (P.L. 2009, Ch. 365, An Act to Improve the Use of Information Regarding Sex Offenders).

This waiver process meant that most Does, and other non-litigant sex offenders, registered for less than five years. This waiver process is not available to John Doe #46, who must register and then have that information remain on the registry for 10 years. Without any procedural Due Process, Doe #46 faces 10 years of substantial restraint on his liberty, along with

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[11] *See, e.g.*: http://www.keepmecurrent.com/sex-offender-operation-nets-westbrook-residents/article_ 09cbd102-06a8-11e3-b55f-001a4bcf887a, and http://www.pressherald.com/news/operation-guardian-sweeps-state-to-check-sex-offender-compliance_2010-09-11.html.

multiple laws that can impose additional criminal penalties for non-compliance.

Registration will also severely impact John Doe #46's ability to continue to work as a licensed professional caregiver. Moreover, John Doe #46 employs several individuals in his practice who are, each, the sole "bread winners" in their families and who are, therefore, dependent on the ability of John Doe #46 to continue that practice.

Requiring John Doe #46 to register will also impact his reputation in the community as the father of a five-year old daughter and have significant negative consequences on his ability to raise her as a single parent.

John Doe #46's legal status will also be impacted by his duty to register, as evidenced by the fact that on the day that he registers, he automatically becomes subject to several additional laws that he was not subject to before he registered. These are laws that apply to registrants, only. For example, as set forth above, as a registered "sex offender," John Doe #46 will be subject to laws of registration, laws of residency restriction, laws of prohibition, Federal and state criminal laws for failure to register, and certain travel restrictions when traveling outside of the state.

Moreover, John Doe #46 may be effectively driven out of the practice that he has built up over the past 10 years, once he is

required to register and his offense is made public. Losing his ability to practice his chosen profession, which is a property right, is certainly more onerous than "taking away the right to operate a vehicle." Doe v. Williams, 61 A.3d at 737.

> Registered sex offenders face ostracism, job loss, eviction or expulsion from their homes, and the dissolution of personal relationships. They confront harassment, threats, and property damage. *Some have endured vigilantism and violence. A few* have been killed. Many experience despair and hopelessness; some have committed suicide. These consequences extend beyond the individual offenders to their families as well.

*Human Rights Watch, No Easy Answers: Sex Offender Laws in the US*, pp. 78-79 (2007), *available at* http://www.hrw.org/reports/2007/us0907/us0907web.pdf, referenced in Doe, 61 A.3d at 743 (Silver, J., Dissenting).

It is respectfully submitted that John Doe #46 has satisfied the requirements of the "stigma-plus" test and was entitled to have the trial court undertake an "as applied" analysis to determine what process is "due" him. As noted, he is in a different position than "any of the Does" previously considered by this Court.

Justice Silver recognized that the "stigma associated with publication on the Internet is demonstrative of SORNA of 1999's role as punishment and its punitive effects." Doe, 61 A.3d at 743 (Silver, J., dissenting). He noted that sex offenders who are required to register "are subjected to stigma in part due to

the underlying offense[12], but also in part due to the dissemination of information. The registry makes significant personal information readily available to the public." *Id.* at 744. "The public does not have access to the pictures, home addresses, and work places of those convicted of robbery, arson, embezzlement, or any other crime." *Id.* at 743.

*In making this determination of what process is "due," this* Court must balance three factors: "[f]irst, the private interest *that will be affected by the official action; second, the risk of* an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

Lastly, one must ask what possible benefit is to be gained by requiring John Doe #46 to register in 2014 for a ten (10)-year period of time for an offense he committed over ten (10) years ago. John Doe #46 was convicted and sentenced for his misdemeanor offense on January 30, 2003. He did not register at that time because the offense to which he pleaded guilty did not require that he register. Since that time, John Doe #46, a

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[12]John Doe #46 is again constrained to note that the sentencing court did not determine him to be a "sex offender" when he sentenced him on January 30, 2003 (App. 99).

licensed professional, has operated under a conditional license necessitating that he modify his practice to meet those conditions. He has succeeded in rebuilding his practice over these past 10 years. He now works and lives in a different community than he did at the time of his offense.

Studies now show that recidivism decreases as offenders age. One recent study stated that:

> after the age of 45, the risk for reoffending drops precipitously. In addition, our data indicates that after 20 years in the community, offense free, the risk of reoffending is extremely low.

Rebecca E. Swinburne, *et al.*, *Predicting Reoffense for Community-Based Sexual Offenders: An Analysis of 30 Years of Data*, Sexual Abuse: A.J. of Research and Treatment 11-12 (2012).

John Doe #46 is presently 48 years of age (App. 117).

Moreover, registration may actually increase the risk of recidivism by promoting criminally-deviant behavior by socially isolating offenders. *See* J.J. Prescott, *Do Sex Offender Registries Make Us Less Safe?*, *Regulation*, Summer 2012, at 50 (discussing the "negative collateral consequences" for registrants, including loss of social ties, that may cause an increase in criminal behavior)(cited in Doe v. Williams, 61 A.3d at 745) (Silver, J., dissenting).

Due to a purely fortuitous event[13], John Doe #46 has been charged with a criminal offense for failing to register. Although it is a misdemeanor offense, and although the plea offer is a $500.00 fine, pleading guilty will subject John Doe #46 to the possibility of losing his conditional license due to this "new criminal conduct."

John Doe #46 has also become a father in the past 10 years. He is a father who has sole custody of his five-year old daughter and they live in the same community in which he works and she attends school. Requiring him to register means, in all likelihood, that he will be prohibited from attending any of his daughter's activities at school or being anywhere near where her classmates are. As the sole custodial parent, this will be problematic, to say the least. Moreover, given that his daughter is currently in Kindergarten, these problems will persist for 10 of the 12 years of her primary and secondary education.

If the primary purpose behind a 10-year registration for John Doe #46's offense is to ensure that the public is protected

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[13]John Doe #46 originally asked the trial court to enjoin the Cumberland County District Attorney's Office (a named defendant in his Complaint) from prosecuting him for failing to register pending the outcome of his application for a Temporary Restraining Order. Although the court declined to do so because of Separation of Powers, it did request that the Attorney General's Office speak to the Cumberland County District Attorney's Office. DAG Paul Stern indicated that AAG Yustak Smith would handle that request when she returned to work the following Monday. Unfortunately, by the time that AAG Yustak Smith was able to speak with that Office, a complaint had already been filed. Resolution of that matter has been continued since that time, pending the outcome of this action.

from the possibility of John Doe #46 re-offending[14], does not the fact that he has not re-offended during the past ten years prove that point? What possible societal purpose is served by requiring John Doe #46 to register today that has not already been satisfied over the past 10-year period of time, other than allowing the Department of Public Safety to validate itself for "submitting] legislation, to have retrospective effect, to correct this apparent oversight" of John Doe #46 not having to register in 2003? (App. 50). It is respectfully submitted that there is none. *Cf.*, Smith v. Doe, 538 U.S. at 115-16 (Ginsberg, J. dissenting)(the public notification regimen of the registry "calls to mind shaming punishments once used to mark an offender as someone to be shunned").

Although it is impossible to determine how many individuals were affected by LD. 1157 (SORNA of 1999), John Doe #46 has to represent an ever-dwindling minority. Granting relief to him will not have an appreciable negative impact, if any, on the State's efforts to require other offenders to register.

The dissenting opinion in Doe stated that "[although the changes to SORNA of 1999 have reduced the physical burdens on the offender, *the State's supervision and control over the offender*

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[14]*See* 34 M.R.S.A. § 11201 (2012)("The purpose of this chapter is to protect the public from potentially dangerous registrants and offenders by enhancing access to information concerning those registrants and offenders.").

*have not been reduced. This supervision and control, as we recognized in Letalien, signifies the punitive effect of SORNA of 1999."* 61 A.3d at 742-43 (Silver, J., dissenting)(emphasis added).

John Doe #46 is unique from the other John Does and the trial court erred in failing to undertake an "as applied" analysis as it applied to him (App. 11).

## POINT II

## SORNA VIOLATES THE SEPARATION OF POWERS CLAUSE UNDER THE MAINE CONSTITUTION

It violates the Separation of Powers clause of the Maine Constitution for the Maine Legislature to take an exclusively Judicial power, assign it to the Executive branch of government, and apply that change retroactively.

Art. III, § 2 of the Maine Constitution provides for the strict separation of powers between the three branches of government.[15] Gilbert v. State, 505 A.2d 1326, 1328 (Me. 1986). In a case of first impression, the Law Court made the following pronouncement:

> The pertinent provisions of the Maine Constitution are explicit and restrictive. Article III, entitled 'Distribution of Powers,' commands separation of the powers of government among the three great branches with a double emphasis: section 1 declares that the governmental powers 'shall be divided into three *distinct* departments, the legislative, executive and judicial'; and then section 2 expressly prohibits any person 'belonging to one of these departments [from exercising] any of the powers properly belonging to either of the others, except in the cases herein *expressly* directed or permitted.'

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[15]The Maine Constitution provides that "[t]he powers of this government shall be divided into three distinct departments, the legislative, the executive and the judicial." Maine Const., art. III, § 1. That Article further provides that "[n]o person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted." Maine Const., art. III, § 2; Curtis v. Cornish, 84 A. 799 (Me. 1912).

State v. Hunter, 447 A.2d 797, 799 (Me. 1982)(emphasis in original). Articles IV, V, and VI of the Maine Constitution specify the powers of the three distinct departments--legislative, executive and judicial, respectively. *Id.*

The Separation of Powers provision ordained by the Maine Constitution is more strictly interpreted than that contained in the U.S. Constitution.[16] *Id.* Under the Maine Constitution, the inquiry is a narrow one: Has the power at issue been explicitly granted to one branch of state government, and to no other branch? If so, art. III, § 2 "forbids another branch to exercise that power." *Id.* at 800. "Separation of the powers of government among the legislative, executive and judicial branches both prevents the concentration of power in . . . any single governmental entity and provides the framework of three distinct power centers, thus permitting the implementing of the 'checks and balances' theory." State v. St. Regis Paper Co., 432 A.2d 383, 384 (Me. 1981).

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[16]While the separation of powers principle in the U.S. Constitution is more implicit than explicit, the doctrine is still fundamental to the American concept of government. As the Supreme Court has stated:

> The Constitution, in distributing the powers of government, creates three distinct and separate departments. . . . This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital [citations omitted], namely, to preclude a commingling of those essentially different powers of government in the same hands.

O'Donoghue v. United States, 289 U.S. 516, 530 (1933).

For example, a law passed increasing "good-time" reductions available to prisoners, which was expressly applicable to persons committed to custody before its effective date, as to portions of their sentences remaining to be served after the effective date, had the effect of commuting the lengths of existing sentences and did not merely change the computation of sentences to be imposed. Such a statutory change was held to be an exercise by the Legislature of power granted to the governor to commute sentences, in violation of the Separation of Powers provision in the Maine Constitution. Bessie v. State, 488 A.2d 477 (Me. 1985); *see, also,* Gilbert, 505 A.2d at 1328 (legislative enactment that works sentence reduction equivalent to a commutation viewed as unconstitutional separation of powers).

Originally, under Maine law, the determination as to whether a defendant had to register as a sex offender was determined by a court as part of the sentence, and that person was so advised by a court of the duty to register following that determination. *See,* 34-A M.R.S.A. § 11222(1) and (2) (1999); *see, also,* State v. Johnson, 894 A.2d 489, 490 (Me. 2006)(SORNA required court to determine whether defendant "sex offender" at time of sentencing.); *cf.*, Doe v. District Attorney, 932 A.2d 552, 565 (Me. 2007)(Alexander, J., concurring)(Since 2004, registration requirements are no longer imposed as a criminal penalty "as part of a sentence", citing 17-A M.R.S.A. § 1152(2-C)(2006)).

The Legislature has since modified the statute on several occasions, and the most recent version provides that a duty to register exists after notification "by a court of jurisdiction, the department [of corrections], the [State] bureau [of identification] or a law enforcement agency." 34-A M.R.S.A. § 11222(1) (2008). Notification of the duty to register "shall" be given by the court at the time of sentencing and "also may be given . . . at any time after the imposition of sentence." *Id.* The State Department of Corrections, the State Bureau of Identification, and any law enforcement agency are all part of the executive branch of government. *See, generally,* http://www.maine.gov/portal/government/branches.

Under Maine law, the executive department does not have the authority to modify the judgment of a sentencing judge. Rogers v. State, 528 A.2d 462 (Me. 1987). In Rogers, the Attorney General and Maine State Prison officials modified a sentence imposed by the court, maintaining that the judge incorrectly sentenced a defendant to concurrent sentences. When the defendant challenged that modification, it was deemed to be an impermissible encroachment on the judicial power of sentencing:

> Regardless of the propriety of the sentence imposed, neither the Department of the Attorney General, nor the Maine State Prison Classification Office had the authority to modify or countermand the judgment of the sentencing justice that the term of the sentence for the kidnaping conviction run concurrently with that for the armed robbery

> and armed assault and battery. Any such power resides in the judicial department.

528 A.2d at 465.

Statutes that attempt to transfer judicial sentencing functions to another branch of government violate the Separation of Powers doctrine. State v. Wade, 757 N.W.2d 618, 627 (Iowa 2008). Any encroachment is deemed a violation. *Id.* State sex offenders in Ohio, initially classified by the court under Megan's Law[17], were later re-classified by the Attorney General under the Adam Walsh Act.[18] This re-classification scheme violated the Separation of Powers doctrine by impermissibly instructing the Executive branch to review past decisions of the Judicial branch. Ohio v. Baddeck, 933 N.E.2d 753 (Ohio 2010).

In the instant case, John Doe #46 was sentenced in Maine at a time when sex offender determination was the exclusive province of the sentencing court, and that determination was made at the time of sentencing. Johnson, 894 A.2d at 490. John Doe #46 was

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[17]Megan's Law was a 1994 New Jersey statute named after Megan Kafka, a young girl who was abducted, raped and killed by a convicted sex offender. Federal legislation followed later that year when Congress enacted the Jacob Weltering Crimes Against Children and Sexually Violent Offender Registration Act (42 U.S.C. § 14071, *et seq.*). That Act, which became known as the "federal Megan's Law", required states to implement a registry of sex offenders and those who commit crimes against children. Ohio v. Baddeck, 933 N.E.2d 753, 757 (Ohio 2010).

[18]In 2006, Congress passed the Adam Walsh Child Protection and Safety Act, 42 U.S.C. § 16901, *et seq.*). The Act created national standards for sex-offender registration, community notification, and classification. Baddeck, 933 N.E.2d at 759.

determined not to be a sex offender because the crime for which he was convicted was not deemed to be a sex offense. *See*, 34-A M.R.S.A. § 11203 (2003). The Legislature has now broadened the power to make that determination to include the State Bureau of Identification, the Department of Corrections, and any law enforcement agency. 34-A M.R.S.A. § 11222(1).

The duty to determine who was a sex offender needing to register as such was a judicial function, carried out as part of sentencing, since the first registration act was enacted in 1991. *See*, 34-A M.R.S.A. §§ 11001-11004 (Supp. 1992); *see, also,* Let alien, 985 A.2d at 20 ("[The fact remains that sex offender registration was required to be an integral part of the original sentencing process . . ."). When § 11222(1) was amended in 2009, it, *inter alia*, broadened the power to determine who was a sex offender, theretofore solely a Judicial function, to include several executive agencies. In so doing, the Legislature took powers explicitly delegated to the Judicial branch and improperly gave them to the Executive branch, in violation of art. III, § 2 of the Maine Constitution.

Precisely because art. III, § 2 explicitly requires that no one person exercise the powers of more than one of the three branches of government, separation of powers issues must be dealt with in a "formal" rather than a "functional" manner. Hunter, 447 A.2d at 799. The resulting test under the Maine Constitution

is a narrow one: "Has the power in issue been explicitly granted to one branch of state government, and to no other branch? If so, article III, § 2 forbids another branch to exercise that power." *Id.* at 800.

Sentencing is a solely Judicial function, and the determination of sex offender status and the duty to register was part of that function. *See, id.* at 803 (power to reduce sentence was not part of traditional judicial power). By giving that power to the Executive branch, the instant legislation violates the constitutional prohibition enunciated by the Separation of Powers provision of art. III, §§ 1 and 2, of the Maine Constitution. Bessie, 488 A.2d at 480.

The Sex Offender registration and notification requirements, until 2004, were "explicitly criminal punishments, defined by statute as 'part of a sentence' and a condition of probation imposed pursuant to the criminal sentencing provisions of the Criminal Code." Doe v. District Attorney, 932 A.2d at 563 (Alexander, J. concurring). Those registration and notification requirements were triggered only if ordered by the sentencing court, at the time of sentencing (PL. 1995, Ch. 680, which enacted 17-A M.R.S.A. § 1152(2-C)("As part of a sentence, the court shall order every natural person who is a convicted sex offender . . . to satisfy all requirements set forth in the Sex Offender Registration and Notification Act.")

As part of John Doe's sentencing hearing in 2003, a judge "determined" that he was not a "sex offender" subject to the registration requirement (App. 99). While, arguably, the judge was constrained by law, that determination was made and that determination was strictly a Judicial function. The Legislature has since abrogated that "determination" being made by a judicial officer and replaced it with "a legislatively enacted collateral consequence" (App. 11), *i.e.*, registration is now required upon notice, "*irrespective of which actor from which branch of* government supplies that notice." (App. 10). However, before that notice can be issued, someone must still "determine" whether that individual is required to register under SORNA.

Stated somewhat differently, the State agency did more than merely *advise* John Doe #46 of a duty to register -- the *notification*, itself, according to the statutory changes enacted by the Legislature, *triggered* the duty to register. *See,* 34-A M.R.S.A. § 11222 (An offender has a duty to register after notification has been given to the offender by a court of jurisdiction, the department, the bureau or a law enforcement agency).

The trial court adopted the formulation of the State that "[The absence of a judicial action (indeed the impossibility of that action) coupled with a subsequently legislatively enacted collateral consequence, does not implicate the separation of

powers issue." (App. 11, citing State's Memorandum in Opposition to Plaintiff's Supplemental Memorandum at p. 18). Respectfully, the State's formulation is flawed and the trial court erred in adopting it.

The State's formulation starts with the proposition that the presiding justice could not "choose" that Plaintiff was a "sex offender" or a "sexually violent predator" because the Legislature had chosen those categories (App. 69). On the contrary, that is precisely what the judicial officer did: "determine" whether Plaintiff was required to register as either a "sex offender" or a "sexually violent predator," based upon whether his crime was a "sex offense" or a "sexually violent offense." *See*, 34-A M.R.S.A. § 11222(1) and (2)(1999).

That "determination" has been taken from the judiciary and is now be made by "any actor" from any "branch of government" (App. 10); *see also*, 34-A M.R.S.A. § 11222(1)(2009). This is so because before a "notice" to register can go out, someone must "determine" <u>whether</u> that individual is required to register. At the time of John Doe #46's sentencing, that "determination" was a Judicial one; today it is an Executive one, which violates the Separation of Powers provision of the Maine Constitution. *See*, Art. III, § 2, Maine Const.

More importantly, prior challenges to the retroactive placement of persons on the registry were not made under a Separation of Powers analysis. *See, e.g.*, Doe v. District Attorney, 932 A.2d at 567 (Suggesting that because State v. Haskell, 784 A.2d 4(Me. 2001), addressed a *different* issue, this Court had not fully considered its prior jurisprudence addressing the validity of re-labeling as "civil" certain proceedings that retain criminal characteristics and penalties).

John Doe #46 raises a novel issue regarding his Separation of Powers argument, so it is a false assumption to suggest that simply because this procedure previously passed muster that somehow makes it constitutional vis-a-vis Maine's Separation of Powers clause. *Cf.*, State v. Freeman, 487 A.2d 1175 (Me. 1985)(holding that civil OUI process was, in reality, a criminal proceeding requiring constitutional protections).

John Doe #46 was forced to rebuild both his professional and personal life following his conviction in 2003. This, he has successfully managed to do. The State's suggestion that "the consequences of being on the registry flow from his decision to engage in criminal conduct and the publicly available criminal conviction based upon that conduct" bespeaks a fundamental misunderstanding of the limits that State power should have to disrupt John Doe's personal and professional life ten years after a judicial determination was made. A determination that he did

not have to register as a "sex offender" because he was not, in fact, a "sex offender," according to the Legislature, at the time that he committed his misdemeanor offense.

The trial court also suggested that John Doe #46's "obligation to register was triggered only when the Legislature, in 2009, enacted PL. 2009, Chapter 365 (effective September 12, 2009) and essentially established his obligation to be a collateral consequence of his 2003 conviction." (App. 10). Respectfully, this is also incorrect.

The statute at issue, 34-A M.R.S.A. § 11222, provides, in pertinent part, that "[an offender has a duty to register under this chapter after notification has been given to the offender by a court of jurisdiction, the department, the bureau or a law enforcement agency. . .". (emphasis added). Such notice was not given to John Doe #46 until February 27, 2012; that is when his obligation to register was triggered, not in 2009 when the legislation was enacted (App. 7, fn. 2).

The violation of Maine's Separation of Powers clause makes SORNA unconstitutional.

## POINT III

## SORNA, APPLIED RETROACTIVELY, VIOLATES THE BILL OF ATTAINDER CLAUSE OF THE MAINE CONSTITUTION

In the dissent to Doe v. Williams, Justice Silver stated:

> What is at issue here is whether, after a person's sentence has been imposed, and after that sentence has been served, the State may add to the sentence new and onerous burdens and restrictions that were not authorized when the offender was sentenced.

61 A.3d at 742 (Silver, J., dissenting).

The Maine Constitution provides protection from this type of action under the Due Process clause, the Separation of Powers clause, and the Bill of Attainder clause. *Maine Const.*, art. I, §§ 6-A, 11; art. III, § 2.

Art. I, § 11, of the Maine Constitution[19] provides:

> The Legislature shall pass no bill of attainder, ex post facto law, nor law impairing the obligation of contracts, and no attainder shall work corruption of blood nor forfeiture of estate.

Bills of Attainder are "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment upon them without a judicial trial." U.S. v. Govett, 328 U.S. 303, 315-16 (1946). A Bill of Attainder must possess four properties: 1) it must be an act of legislation; 2) it must be applied to an easily ascertained group or individual; 3) it

[19]The U.S. Constitution contains similar language prohibiting the enactments of "bills of attainder". *See* U.S. Const. art. I, § 9, cl. 3 (prohibiting Congress); *id.* § 10 (prohibiting states).

must inflict punishment; and 4) there must not be a judicial trial. Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1 (1961).

The prohibition against bills of attainder not only protects individuals from legislative punishment, but also serves an important function in preserving the separation of powers. The Bill of Attainder clause acts as "a general safeguard against legislative exercise of the judicial function, or more simply -- trial by legislature." United States v. Brown, 381 U.S. 437, 442 (1965).

As the Brown Court made clear, the scope of the Bill of Attainder clause must be viewed with regard to the evils it was designed to prevent – namely, the submission of the supposedly impartial judicial function to the whims of a popularly-elected legislature. *Id.* at 442, 447. The reasons are twofold: first, the judiciary is better suited than the legislature to find facts and allot blame in particular cases, *Id.* at 445; and, second, the Founders wanted to protect unpopular individuals from politically- motivated legislators. Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 480 (1977). The most recent incantation of SORNA of 1999 undermines the very purpose of the Bill of

Attainder clause: protecting unpopular individuals from legislative excess through a strict separation of powers.[20]

In its contemporary usage, the Bill of Attainder clause prohibits any "law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." Selective Serv. Sys. v. Minn. Pub. Interest Research Grp., 468 U.S. 841, 846-47 (1984).

Historically, under Maine law, sex offender status determination and the duty to register was determined by a judicial officer as part of the sentencing process. Maine's Sex Offender Registration and Notification Act (SORNA of 1995), PL. 1995, ch. 680, §4 (effective July 6, 1996)(codified at 34-A M.R.S.A. §§ 11101-11144 (Supp. 1996)), provided that: "*As part of a sentence, the court shall order every natural person who is a* convicted sex offender . . . to satisfy all requirements set

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[20]As noted above, AAG Yustak Smith told the Bureau of Identification in 2007 that "[i]f this gap in the duty [of John Doe #46] to register does in fact exist, I will be advising the Dept. of Public Safety to submit legislation, to have retrospective effect, to correct this apparent oversight." (App. 50)(emphasis added). This species of legislative action is exactly the evil that the Bill of Attainder Clause aims to prevent: congressional pandering to popular whims and the subversion of separation of powers for the sake of political expediency. The Supreme Court has emphasized that the Bill of Attainder Clause is not merely a technical prohibition but, rather, an explicit expression of separation of powers. *See,* United States v. Brown, 381 U.S. 437, 443-44 (1965). The Brown Court made clear that Congress "cannot specify the people upon whom the sanction it prescribes is to be levied," *Id.* at 461, even if there are good policy reasons for the legislation in question.

forth in the Sex Offender Registration and Notification Act." (codified at 17-A M.R.S.A. § 1152(2-C)(Supp. 1996)(emphasis added).[21] *See, also,* 34-A M.R.S.A. § 11222 (1999)(At the time of sentencing the court is to "determine . . . if a defendant is a sex offender or a sexually violent predator. A person *who the court determines* is a sex offender or a sexually violent predator shall register according to this subchapter." (Emphasis added). In 2003, a change in the law called for the registration requirement to be imposed "at the time" of sentencing, rather than "[a]s part of" the sentence. Doe v. District Attorney, 932 A.2d at 556.

As noted above, the Legislature has amended this law on several occasions over the years, expanding the number of offenses that are labeled as sex offenses; making the application of sex offender status retroactive; and removing the need that determination of sex offender status be made by a judicial officer. *See* 34-A M.R.S.A. § 11222 (2008); *see, also,* Letalien, 985 A.2d at 10-11.

Accordingly, three out the possible four properties that make a law a Bill of Attainder are present in the instant Sex

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[21]Maine's original sex offender registration law, the Sex Offender Registration Act (SORA of 1991) did not specifically state that compliance with its requirements was to made part of an offender's criminal sentence, but it did provide that a sentencing court could, for good cause shown, waive the registration requirement. *See,* 34-A M.R.S.A. § 11003(4)(D)(1992)("Registration may be waived only if . . . [t]he sentencing court, for good cause shown, waives the registration requirement.").

Offender Registration and Notification Act (SORNA of 1999, as amended[22]): An act of legislation creates sex offender status (1); it imposes upon a group readily ascertained by crimes the Legislature has deemed to merit sex offender status[23] (2); and, it is without benefit of a judicial trial (4). Thus, the remaining issue is whether the law inflicts punishment (3), thereby making it a prohibited Bill of Attainder.

With respect to the existence *vel non* of punishment, three factors guide the consideration: 1) the historical meaning of legislative punishment; 2) a "functional test . . . analyzing whether the law under challenge, viewed in terms of the type of and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and 3) a "motivational" test, examining "whether the legislative record evinces a congressional intent to punish". Nixon, 433 U.S. at 475-76, 478. Each of these criteria is an independent, though not necessarily a decisive, indicator of punitiveness. Fortetich

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[22]This does not include the most recent amendments to SORNA enacted by the 125th Legislature, which adjourned May 31, 2012.

[23]Consider, also, with regard to the specificity requirement, that a "sex offender" cannot escape his classification. Escapability, though not determinative, is a probative factor in the Court's analysis in Selective Serv. Sys. v. Minn. Pub. Interest Research Group, 468 U.S. 841, 850-51 (1984); *cf.*, Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 88 (1961)(referring to fact that members of class affected by statute could extricate themselves from class at will as one factor that tended to show Act was not directed at specific group but rather set forth a generally applicable definition).

v. U.S., 351 F.3d 1198 (D.C. Cir. 2003). Nor does a statute need to evidence all three of these factors to constitute a Bill of Attainder. SeaRiver Maritime Fin. Holdings v. Mineta, 309 F.3d 662, 673 (9th Cir. 2002); *see, also,* Nixon, 433 U.S. at 475 (finding that "new burdens and deprivations" -- those not within the historical meaning of punishment -- also "might be legislatively fashioned that are inconsistent with the bill of attainder guarantee").

The Supreme Court has recognized that certain types of punishment are "so disproportionately severe and so inappropriate to non-punitive ends that they unquestionably have been held to fall within the proscription of the [Bill of Attainder Clause]." Nixon, 433 U.S. at 473. "The classic example is death, but others include imprisonment, banishment, the punitive confiscation of property, and prohibition of designated individuals or groups from participation in specified employments or vocations." Con Edison Co. of N.Y., Inc. v. Pataki, 292 F.3d 338, 351 (2d Cir. 2002)(internal quotation marks, alteration and ellipsis omitted).

The Supreme Court has invalidated laws under the Bill of Attainder clause on five occasions. All of those cases involved laws that singled out suspected political subversives for unfavorable treatment. Following the Civil War, the Court invalidated a series of laws that denied rights to supporters of

the Confederacy. *See*, Cummings v. Missouri, 71 U.S. 277, 323 (1866). In that case, the Court struck down a state law that denied business and occupational licenses to anyone who did not take an oath that they had never supported the Confederacy. The companion case of Ex parte Garland, 71 U.S. 333 (1866), invalidated a Federal law that similarly barred former avowed members of the Confederacy from Federal employment. In 1872, the Court, relying on Cummings and Garland, struck down a law that prevented former Confederates from collecting debts in West Virginia state courts. Pierce v. Carskadon, 83 U.S. 234 (1872).

More recently, the Court struck down a statute aimed at three Federal employees who had been denounced as Communists before the House Committee on Un-American Activities. U.S. v. Govett, 328 U.S. 303 (1946). The statute at issue forbade the use of any Federal funds "to pay any part of the salary . . . of Goodwin B. Watson, William E. Dodd Junior, and Robert Morse Govett." 328 U.S. at 305, n.1. Finally, in 1965, a Federal law was invalidated making it a crime for any member of the Communist Party to serve as an officer or employee of a labor union. U.S. v. Brown, 381 U.S. at 441-42.

Three things are notable about these five Supreme Court cases. First, in all five cases, the Court found that the disabilities imposed fell within the scope of the "punishment" that the Bill of Attainder clause prohibits. Second, all five

cases involved the deprivation of life, liberty, or property rights.[24] Third, in all five cases the Court emphasized the punitive nature of the enactments while downplaying the supporting policy rationales offered by the government.

In State v. Myrick, 436 A.2d 379 (Me. 1981), this Court contemplated the punitive nature of a law barring convicted felons from possessing firearms. It found the law "does not impose any additional penalty; rather, it embodies a legitimate governmental purpose to protect the public from those the Legislature has justifiably deemed to have shown their unfitness to possess dangerous weapons by creating a distinct offense." 436 A.2d at 384. The challenge to the constitutionality of the law was made using the Ex Post Facto and Bill of Attainder clauses of the U.S. and Maine Constitutions. *Id.* at 382, 384.

This Court also reviewed a Bill of Attainder argument in an automobile Lemon Law case. In Daimler Chrysler Corp. v. Exec. Dir., Maine Rev. Services, 922 A.2d 465 (Me 2007), the Court used a functional test to determine if the punishment at issue violated the Bill of Attainder clause, and "[The functional test analyzes whether or not a law advances a non-punitive purpose".

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[24]As noted by Justice Alexander in Doe v. District Attorney: "article I, section 1, of the Maine Constitution recognizes the 'inherent and unalienable rights' of all people, including the rights of 'enjoying and defending life and liberty, acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness.' Article I, section 1 has no counterpart in the United States Constitution." 932 A.2d 552, 562 (Me. 2007)(Alexander, J., concurring).

922 A.2d at 474. The Court found that the Lemon Law had a "clear non-punitive purpose": Protection of the consumer. *Id.*

When considering the functional test of punishment, any legislation can be deemed to be passed for a non-punitive purpose and courts will be reluctant to find that an infringed right is not balanced by safety and security. This will be especially true for sex offenders. However, there is ample evidence that the statutory scheme that attaches to sex offender status is excessive in relation to its purported benefit on public safety. *See, e.g., No Easy Answers: Sex Offender Laws in the U.S.*, p. 17, above. As Justice Silver stated in Doe v. Williams, "Labeling a law's burden as civil instead of criminal does not reduce the level of punishment attached to the burden, not should it reduce the constitutional protection connected to the burden." 61 A. 3d at 743 (Silver, J. dissenting).

Determination of the motivational test is difficult because no matter what law makers have said prior to the passage of the act, a different motivation can later be ascribed.[25] This is especially true in Maine, where enacted legislation contains a dearth of legislative history explaining the rationale behind

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[25]One of the major concerns that prompted the prohibition against bills of attainder was "the fear that the legislature, in seeking to pander to an inflamed popular constituency, will find it expedient openly to assume the mantle of the judge -- or worse still, lynch mob." Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 480 (1977)(citing Brown Court's citation of Alexander Hamilton's concern "that legislatures might cater to the 'momentary passions' of a 'free people, in times of heat and violence . . .'").

most laws. Several isolated statements are not sufficient to show punitive intent on the part of the legislature. BellSouth Corp. v. FCC, 12 F.3d 678 (D.C. Cir 1998).

Retroactively labeling a person with sex offender status is an historical form of punishment contemplated by the Bill of Attainder clause. In Maine, sex offender status was originally part of the criminal sentence. Doe, 932 A.2d at 564 (Alexander, J., concurring). This Court has already determined that extending a person's time on the sex offender registry "makes more burdensome the punishment for a crime after its commission" and is, therefore, punitive. Letalien, 985 A.2d at 7, 20-21. This determination of punishment was done by analyzing the seven factors set forth in Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) to determine "whether, notwithstanding the Legislature's civil intent, it has been established by 'clearest proof' that the effects of SORNA of 1999 are so punitive as to overcome the civil characterization." Letalien, 985 A.2d at 16. It is respectfully submitted that these factors, alone, should be enough to establish that sex offender status is punitive.

The deprivation of liberty that attends sex offender registration seems to equal and exceed the historic cases where a prohibited Bill of Attainder was found[26]. Historically, people

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[26]US Department of Justice, National Institute of Justice (NIJ), "Sex Offender Community Notification: Assessing the Impact in Wisconsin," December 2000,available at

were barred from professions. In Ex Parte Garland, it was the practice of law; in Cummings, it was the priesthood; and, in Govett, it was a governmental job. Sex offenders do not merely face the loss of a job, or the exclusion from a single profession, they face living restrictions, travel restrictions, job restrictions, loss of privacy, and additional criminal penalties that apply only to the sex offender designation. *See,* Doe, 932 A.2d at 568-69 (Alexander, J., concurring).

John Doe #46 committed a crime at a time when sex offender registration was part of the criminal sentencing process. He was determined not to be a sex offender at the time, but the Legislature has since acted to add the crime he committed to a list of offenses that now require registration, and made it retroactive. Because time on the sex offender registry has been determined to be punitive by the Law Court, and because this punishment is now applicable to John Doe #46 by legislative fiat when it was previously only applicable through the judicial

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http://www.ncjrs.gov/pdffiles1/nij/179992.pdf (accessed August 24, 2007), p. 10. The study surveyed 30 sex offenders subject to community notification in Wisconsin. The results: 83 percent reported that notification resulted in "exclusion from residence," 77 percent reported "threats/harassment," 67 percent reported "emotional harm to family members," and being "ostracized by neighbors/acquaintances," and 50 percent reported "loss of employment." *See, also,* Levenson and Cotter, "The Effects of Megan's Law on Sex Offender Reintegration," Journal of Contemporary Criminal Justice, vol. 21, no. 3 (2005), pp. 298-300. Richard Tewksbury, "Collateral Consequences of Sex Offender Registration," Journal of Contemporary Criminal Justice, vol. 21, no.1 (2005), pp. 67-81.

process of sentencing, it is an impermissible Bill of Attainder, in violation of both the United States and Maine Constitutions.[27]

John Doe #46 is distinguished from the Doe(s) in Doe v. Williams in that 1) determination of sex offender status was a judicial power at the time of his sentence; and 2) he does not qualify for relief from the duty to register. In effect, this is adding a criminal penalty -- sex offender registration -- that a judge determined did not apply to John Doe #46, by a subsequent legislative act.

Sex offender status creates affirmative reporting obligations that must be done on threat of criminal prosecution; deprivation of property, in the form of annual fees; restrictions on housing; restrictions on travel; stigma; and increased police scrutiny, and all without the provisions and protections of a

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[27]Upon explaining why no prison time was needed for a police officer committing child sexual abuse, Kentucky Judge Mitch Perry said registration is a punishment. "That is a punishment effectively everyday for the rest of your life". "Retired officer sentenced for sexual abuse of a 4-year-old", Jaimie Weiss, WAVE NEWS, May 1, 2012, available at http://www.wave3.com/story/18004443/retired-officer-sentenced-for-sexual-abuse-of-a-4-year-old. Illinois Judge T. Jordan Gallagher stated to a man on the sex offender registry for one count of possession of child pornography "You are a sex offender and there are rules, and whether you like them or not, you've got to follow them. You're a second-class citizen and will be for the rest of your life. "Sex offender gets home monitoring after coaching", available at http://www.chicagotribune.com/news/local/breaking/chibrknews-sex-offender-gets-home-monitoring-after-coaching-kids-20110412,0,7896068.story.

judicial trial (App. 7., citing Nixon, 433 U.S. 425). This is precisely what the Bill of Attainder clause was meant to prevent.

The trial court found that retroactive application of SORNA to John Doe #46 was not a Bill of Attainder by using the standard of "clearest proof." (App. 7).

The trial court noted that this Court had not conducted the "functional test" required under a Bill of Attainder analysis, but had addressed whether the "effects" of SORNA were so punitive that those effects overcame what it had previously found to be the Legislature's civil (not criminal) "intent," thereby concluding that the SORNA registry did not constitute an *ex post facto* law under Maine or Federal law (App. 8, citing Doe v. Williams, 61 A.3d at 735). The trial court concluded that it could not "discern a principled or even analytical distinction between the 'intents' or 'effects' of a law under *ex post facto* analysis from whether the law 'functions' in a punitive way under a bill of attainder analysis." (App. 8). It concluded that this Court's finding that Maine's SORNA registry was not punitive in either its intent or effects "binds what this Court must find as to how the registry functions." *Id.*

As noted by the dissent in Doe v Williams, in the Maine Constitution, the *Ex Post Facto* clause is located in article I, § 11, which declares the personal rights of Maine's citizens, while the Federal *Ex Post Facto* clause is located in article I, § 9 of

the U.S. Constitution, which describes the powers and limitations of the legislative branch of the Federal government. 61 A.3d at 746 (Silver, J., dissenting). The dissent found that "the Maine Constitution provides an independent basis for decision, while the United States Constitution merely prescribes the minimum constitutional protections that states must afford their citizens." *Id.* It concluded that SORNA of 1999 violates the Maine Constitution. *Id.* It is respectfully submitted that it is for this Court to determine if this heightened standard of "clearest proof" is appropriate in evaluating the rights of Maine citizens under the Maine Constitution and whether John Doe #46 must establish by "clearest proof" that the SORNA registry inflicts punishment and is, therefore, an unconstitutional Bill of Attainder. John Doe #46 submits that he has established by the "clearest proof" that SORNA inflicts punishment on him and is, therefore, an unconstitutional Bill of Attainder.

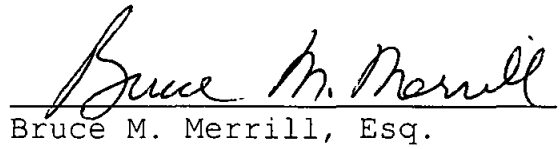
## CONCLUSION

Based upon the foregoing, it is respectfully submitted that the trial court below erred in denying John Doe #46's *Verified Complaint for Temporary Restraining Order and Other Injunctive Relief*. John Doe #46 was entitled to have his Due Process claim evaluated "as applied" to determine what process he was due. Moreover, it is further submitted that SORNA violates the Separation of Powers clause of the Maine Constitution because it allows for the Maine Legislature to take a purely judicial power, transfer it to the Executive branch of government, and apply that change retroactively. Lastly, SORNA, applied retroactively, violates the Bill of Attainder clause of the Maine Constitution.

Respectfully submitted,

BRUCE M. MERRILL, P.A.
Attorney for Plaintiff/Appellant
John Doe #46

Dated: March 7, 2014

By: 

Bruce M. Merrill, Esq.
225 Commercial St./Suite 501
Portland, ME 04101
207/775-3333 (Tel.)
207/775-2166 (FAX)