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IN THE
COURT OF APPEALS OF INDIANA

No. 18A-PL-2334

STATE OF INDIANA, *Appellant-Defendant*, v. DOUGLAS KIRBY, *Appellee-Plaintiff*.	Appeal from the Howard Superior Court 4, No. 34D04-1805-PL-334, The Honorable George A. Hopkins, Judge.

STATE'S REPLY BRIEF

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I.
The law of the case doctrine does not bind this Court here.

The law of the case doctrine is inapplicable here because the earlier decision that Kirby asks this Court to revive was in another case that was improperly brought in the first place, and then later vacated on transfer by our Supreme Court. The law of the case doctrine neither requires resurrection of such cases in subsequent litigation nor prohibits this Court from considering anew Kirby's claim on the merits.

"The doctrine of the law of the case is a discretionary tool by which appellate courts decline to revisit legal issues already determined on appeal in the same case and on substantially the same facts." *Cutter v. State,* 725 N.E.2d 401, 405 (Ind. 2000). "Questions not conclusively decided in a prior appeal do not become the law of the case." *Riggs v. Burell*, 619 N.E.2d 562, 564 (Ind. 1993). Kirby appears to believe that there is no difference between his improperly brought post-conviction relief petition and the declaratory judgment action that he filed in this case. But the entire point of the Supreme Court's decision was to invalidate Kirby's post-conviction attack on the constitutionality of the unlawful entry statute. *Kirby v. State*, 95 N.E.3d 518 (Ind. 2018). So not only was that PCR appeal improper from the beginning, this Court's decision was vacated when the Supreme Court granted transfer. Ind. Appellate Rule 58(A). After transfer is granted, only the Supreme Court can reinstate any part of a Court of Appeals decision, *id.*, yet that Court explicitly left the entire opinion vacated. *Kirby*, 95 N.E.3d at 520. Law of the case has no application here.

If Kirby's view of law of the case were correct, then there was no point to the Supreme Court granting transfer at all. But as this Court understands, Supreme Court decisions are not pointless, but rather have meaning and consequences. The law of the case doctrine does not bind any court in considering the merits of Kirby's declaratory judgment action, and this Court should reverse the trial court because the unlawful entry statute is not an unconstitutional ex post facto law as to Kirby or anyone else similarly situated.

II.
The unlawful entry onto school property statute is not an unconstitutional ex post facto law.

This Court should reverse the trial court's declaration that Indiana Code 35-42-4-14 is an ex post facto law because whatever the punitive effects of the statute are, they are not so severe as to negate the statute's plainly nonpunitive, civil purpose. Kirby does not significantly engage the State's arguments as to most of the intent-effects test's factors, except for the last, most significant factor: whether the statute has a "rational connection to a nonpunitive purpose." Kirby now concedes that the statute's nonpunitive purpose is wholly legitimate: to keep children safe from serious sex offenders while at a school. *See* Brief of Appellee at 25. He merely insists that his personal situation is more important than the public interest in keeping schoolchildren safe from predators like him. But an ex post facto claim is not subject to a strict scrutiny analysis that is unique to every individual offender. Kirby cannot show that this narrowly-drawn statute is excessively punitive to

serious sex offenders who are parents with children in school when compared with the legitimate, powerful, and facially nonpunitive civil regulatory purpose.

Nevertheless, Kirby's argument begins and ends with these factual assertions:

- he is a parent of a high school student;
- he wishes to attend school activities such as sporting events, graduation, and similar occasions; and
- the sentencing court removed its otherwise standard probation term that Kirby refrain from going into a school during his term of probation.[1]

These are not insignificant effects on him. But even more significant are the facts that show why restricting Kirby from schools is nonetheless wholly appropriate:

- Kirby is a sex addict who continues to struggle with his condition;
- Kirby sought out teenage schoolgirls on the Internet for sexual intercourse in order to satisfy his addiction;
- the children who would be at Kirby's son's school are the same age as the girls who would be at his son's school events; and
- Kirby continues to minimize his crimes even today. *See, e.g.,* Brief of Appellee at 27 (describing his crime as "victimless" even though unknown intended victims were simply lucky that an undercover police officer caught Kirby).

Even if the Court were to subject this statute to Kirby's highly individualized approach, his particular circumstances lose their force when properly considered in their broader and more complete context.

[1] Kirby was on probation for 18 months, and his son was only nine years old at that time.

These facts, when understood in the broader context, are particularly relevant to the most important factor of the intent-effects test, whether there is a "rational connection to a nonpunitive purpose." *See State v. Pollard,* 908 N.E.2d 1145, 1152–53 (Ind. 2009) (this is a '[m]ost significant' factor in [a] determination that the statute's effects are not punitive"); *Lemmon v. Harris*, 949 N.E.2d 803, 812 (Ind. 2011) (same). As this Court recognized in *McVey v. State*, 56 N.E.3d 674, 681 (Ind. Ct. App. 2016), this seventh factor can be determinative as to whether the unlawful entry statute is an ex post facto law.

The statute's nonpunitive purpose is reinforced as much by its structure as its subject. Kirby is a sex offender against children, and the unlawful entry statute is a narrowly tailored law that aims to keep children safe from sexual abuse while they are at school. *Id.* This law is narrowly tailored to apply a) only to sex offenders who committed those crimes that posed the greatest threat to children, b) during the period that they must register as a sex offender, and c) only to school property where those children often are (and should be at their safest). The legislature's careful tailoring reinforces its civil regulatory purpose and greatly reduces the number and severity of any punitive impact that it might have on pre-existing sex offenders like Kirby.

To prevail on his claim, Kirby must prove that the statute has no "rational connection to a nonpunitive purpose" such that the school property restriction is clearly excessive. *Pollard*, 908 N.E.2d at 1152–53. Even when considering only Kirby's personal situation, Kirby wholly fails to explain how his personal interest in

seeing his son's high school activities is so important that it constitutionally negates the powerful public interest in keeping high school girls safe from their predators while they are at school. While Kirby may find the statute to be personally difficult to live with, that effect pales in comparison to the damage that sex offenses have on child victims—particularly when those offenses are related to school. *See generally* National Center for Victims of Crime, "Effects of Child Sexual Abuse on Victims," accessible at http://victimsofcrime.org/media/reporting-on-child-sexual-abuse/effects-of-csa-on-the-victim. Understandably, Kirby tells us that he will not reoffend, but the public is not constitutionally bound to take Kirby at his word.

The other more important factors of the intent-effects test are whether restricting serious sex offenders from school property is traditionally considered a form of punishment, imposes an affirmative disability or restraint, and promotes the traditional aims or punishment. *See, e.g., Smith v. Doe*, 538 U.S. 84, 97 (2003) (discussing significance of those factors of the *Mendoza-Martinez* test). To begin, the statute does not impose any physical restraint other than what is incidental to effectuate its legitimate civil purpose. While Kirby sees his not being able to witness his son's games in person as some form of restraint, it is nothing like imprisonment, forceful eviction, or even occupational debarment. Brief of Appellant at 11. Not being able to see a sporting event is simply not a physical restraint of the kind our courts have understood the intent-effect test to include.

As to the historical understanding, Kirby is incorrect that school property is open to the public. Limiting access to school property itself is qualitatively different

from banishing certain people from their longtime residences near a school, such as the case in *Pollard*. 908 N.E.2d at 1150–51. There is simply no historical understanding that policies of keeping some people out of schools is a punishment as opposed to a proper exercise of regulatory authority.

Finally, the unlawful entry statute does not further the traditional aims of punishment, such as deterrence and retribution. The statute is aimed at protecting students from a narrow classification of sexual offenders, and is not directly aimed at punishment, deterrence, or retribution. Kirby points to the incidental effect of deterring some crimes by making them harder to physically commit, but this does not convert the statute into a de facto punishment. If any child safety policy is to be effective, it will have the incidental effect of making it more difficult for criminals to prey on those children. Kirby misunderstands this factor: "[t]o hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' … would severely undermine the Government's ability to engage in effective regulation." *Smith*, 538 U.S. at 102. Restricting serious sex offenders from schools is a legitimate regulatory policy, not a criminal punishment.

Kirby attacks the unlawful entry statute from entirely his own viewpoint and based solely on what effects it has on him uniquely. It is as if the broader public safety concerns are of no moment merely because he is a father who wants to be able to see his son's sporting games. But the Ex Post Facto Clause does not require the public interest to give way to a single person's desires. The fact remains that Kirby may pose a danger to children at schools because he has a proclivity for

seducing teenage girls for sex. It is not unconstitutional to require him to refrain from entering school property for his sex offender registration period, which expires in 2022. The trial court erred in summarily holding otherwise.

CONCLUSION

This Court should reverse the trial court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 3, 2018, I electronically filed the foregoing document using the Indiana E-filing System ("IEFS"). I also certify that the foregoing document was served December 3, 2018, upon opposing counsel via IEFS.

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