IN THE
INDIANA COURT OF APPEALS
CASE NO. 18A-PL-2334

STATE OF INDIANA,	)	
	)	Appeal from the Howard Superior Court 4
Appellant/Defendant,	)	
	)	Trial Court Case No. 34D01-1805-PL-334
VS.	)	
	)	The Honorable George A. Hopkins, Judge
DOUGLAS KIRBY,	)	
	)	
Appellee/Plaintiff.	)	

APPELLEE'S BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the law of the case doctrine precludes re-litigation of the issue of whether the unlawful-entry statute is an unconstitutional ex post facto law as applied to Kirby?

2. Whether the unlawful-entry statute enacted five years after Kirby's conviction violates the ex post facto clauses of Article I, Section 24, of the Indiana Constitution and Article I, Section 10, of the United States Constitution as applied to Kirby?

APPELLEE'S BRIEF:

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Nature of Case

The State appeals the trial court's declaratory judgment that Indiana Code Section 35-42-4-14, the unlawful entry onto school property by a serious sex offender law, is an unconstitutional ex post facto law as applied to Kirby.

Proceedings Below

On January 11, 2010, an Information for Child Solicitation I. C. 35-42-4-6(c)(1), a Class C Felony, was filed against Douglas Kirby. *Appellant's App., p. 15.* On July 9, 2010, a Recommendation of Plea Agreement was filed by which Kirby agreed to plead guilty to the lesser included offence of child solicitation as a Class D Felony. *Appellant's App., pp. 16-17.* A sentencing hearing was held on November 8, 2010, at which Kirby pled guilty to child solicitation, a Class D Felony, a lesser included offense. *Appellant's App., pp. 18-19, 43.* The Court accepted the guilty plea and entered judgment of conviction. *Appellant's App., pp. 18-25, 43.* Kirby was required to register as a sex offender along with his suspended sentence and probation. *Appellant's App., pp. 18-19, 43.*

On November 5, 2013, Kirby petitioned to convert the Class D Felony to a Class A Misdemeanor after completion of his sentence and satisfaction of all other obligations imposed as part of the sentence. *Appellant's App., p. 81.* On February 10, 2015, the trial

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court granted the petition and reduced Kirby's conviction to a Class A Misdemeanor. *Appellant's App., pp. 43, 82.*

On April 15, 2016, Kirby filed a Petition for Post-Conviction Relief, asserting that his conviction and/or sentence violated his constitutional rights in that at the time of his guilty plea, it was not illegal for him to be at his children's school after having been convicted of child solicitation under I. C. 35-42-4-6. *Appellant's App., pp. 100-101.* However, after the guilty plea, I. C. 35-42-4-14(b) was changed and now prohibits a person convicted of child solicitation from being on school property. On June 20, 2016, Kirby filed his Amended Petition for Post-Conviction Relief. *Appellant's App., pp. 103-104.* The State filed its Response on July 5, 2016. *Appellant's App., pp. 106-107.* On August 15, 2016, the trial court found that entry on the school property by an individual convicted of child solicitation was not a criminal offense prior to the 2015 amendment of the statute. The trial court further found that Kirby's son, Xaine, was active in school athletics, including football and wrestling, and that by virtue of the new law, Kirby could not attend and support his son's athletic events, and that this would have a negative impact on the relationship between the father and the son. Ultimately, the trial court found that Kirby did not sustain his burden of proof and that the State of Indiana did not sustain its burden of proof. The trial court noted

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that the Court was not asked to determine the constitutionality of I. C. 35-42-4-14(b), and denied the Petition for Post-Conviction Relief. *Appellant's App., pp. 86-88.*

Kirby appealed and the Court of Appeals, on August 31, 2017, entered its opinion concluding that the unlawful-entry statute is unconstitutional as applied to Kirby because it amounts to retroactive punishment in violation of the Ex Post Facto Clause. *Appellant's App., pp. 22-36, 108-111.*

The State sought Transfer and the Indiana Supreme Court granted the same and issued its opinion on April 27, 2018. *Appellant's App., pp. 16-21.* The Indiana Supreme Court held that Indiana's post-conviction relief rules do not allow Kirby to bring his ex post facto claim in a post-conviction proceeding. The Supreme Court did not rule on the merits of the ex post facto claim. The Supreme Court held that a declaratory judgment action was an appropriate vehicle for Kirby's ex post facto claim. *Appellant's App., p. 21.*

Kirby then filed his Complaint for Declaratory Relief on May 15, 2018. *Appellant's App., pp. 5-7.* Kirby sought a declaration that I. C. 35-42-4-14 is an unconstitutional ex post facto law as applied to him. After a hearing, the trial court entered its Order declaring the statute unconstitutional as applied to Kirby. *Appellant's App., pp. 117-119.*

The State filed its Notice of Appeal on September 27, 2018. *Appellant's App., p. 3.*

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The clerk filed the Notice of Completion of Clerk's Record on October 1, 2018. *Appellant's App., p. 3.* The State filed its Appellant's Corrected Brief on November 1, 2018.

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Doug Kirby is a 52 year old father and grandfather. *Appellant's App., p. 45.* Kirby has two adult daughters, and has a son, Xaine, who is sixteen years old and attends Eastbrook High School. *Appellant's App., p. 45.* Kirby has a second son, who is just over one (1) year old. Kirby is employed at the V. A. Hospital in Marion, Indiana, as a Legal Clerk. *Appellant's App., p. 45.*

On January 11, 2010, Kirby was charged with child solicitation as defined by I. C. 35-42-4-6(c)(1), a Class C Felony. *Appellant's App., p. 45.* Kirby ultimately was convicted on November 5, 2010, of child solicitation, as a Class D Felony, and was sentenced to the Indiana Department of Corrections for a period of eighteen (18) months, all suspended except for time served awaiting disposition in the amount of one day. *Appellant's App., p. 45.* The remainder of Kirby's sentence was suspended and ordered served on supervised probation. He was ordered to pay court costs, probation costs, and a probation administration fee. On February 10, 2015, Kirby's Class D Felony conviction was reduced to a misdemeanor. *Appellant's App., p. 45.*

Before Kirby's arrest for child solicitation, Kirby's wife and Xaine's mother left him because Kirby suffered from an Internet addiction. *Appellant's App., p. 45.* Kirby then put himself through counseling for his addiction beginning in August of 2009. *Appellant's App.,*

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p. 45.

Kirby became a single parent and retained custody of Xaine. *Appellant's App., p. 45.* Kirby and Xaine, who was nine (9) years old at the time of Kirby's conviction and sixteen (16) now, are very close and have a great relationship. Xaine is involved in many extra curricular activities, including football, wrestling, track and baseball. *Appellant's App., pp. 45-46.*

As part of Kirby's sentence, he had to register as a sex offender and could not reside within one thousand feet of a school property. *Appellant's App., pp. 46,* 94. He was also required to participate in sex offender treatment. *Appellant's App., pp. 46, 95.* At the sentencing hearing, Kirby requested the trial court to be allowed to go on to school property to attend his son's school functions and sporting events. *Appellant's App., p. 46.* The trial court took into consideration that Kirby had no criminal history and was seeking treatment for his addiction, and found that prohibiting Kirby from going to his son's school functions would be impractical. *Appellant's App., p. 46.* Thus, the trial court specifically allowed Kirby to go on to school property and to continue to be a part of his son's school life.

The trial court, on February 10, 2015, granted Kirby's Petition to Modify Sentence

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from a Class D Felony to a Class A Misdemeanor. *Appellant's App., p. 46.* At the hearing on the petition, the trial court acknowledge Kirby's efforts, stating as follows:

> "Mr. Kirby, I unfortunately, I rarely hear of very good, positive stories in cases like this, and I mean cases like this in the sense of criminal cases, not just this specific case. You've obviously done what needs to be done, the system has worked for you, it's worked because of you, because you made it work."

Appellant's App., p. 46.

From the time of his sentencing in 2010 through the time that his sentence was reduced in early 2015, Kirby was allowed to go on to school property to participate in his son's educational and extra curricular activities. *Appellant's App., p. 46.* However, after the unlawful-entry law was passed in July of 2015, Kirby received a telephone call from his son's school and was told he would not be permitted back on to school property. *Appellant's App., p. 46.*

At the time of Kirby's guilty plea, it was not illegal for him to be at his child's school after having been convicted of child solicitation under I. C. 35-42-4-6. However, subsequent to Kirby's guilty plea, the unlawful-entry law was enacted under I. C. 35-42-4-14, which

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makes it a Level 6 Felony for a "serious sex offender" to enter onto school property. At the time Kirby committed the act of child solicitation, his conviction would not have prohibited him from being present on school property.

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The Court of Appeals' Opinion of August 31, 2017, holding the unlawful-entry statute to be an unconstitutional ex post facto law as applied to Kirby is the law of the case, and this court should refuse to reopen what has previously been decided.

This Court correctly decided that the unlawful-entry statute at 35-42-4-14(b) is an unconstitutional ex post facto law as applied to Kirby. Kirby was convicted of child solicitation in 2010, and the unlawful-entry statute was enacted on July 1, 2015. Kirby has a child in school, and even after his conviction for child solicitation, Kirby was permitted to go on to school property to attend the educational and extra curricular events of his son and grandchildren. The trial judge considered Kirby's rehabilitation efforts and the changes Kirby had made in his life, and found it would be beneficial to allow Kirby to continue to take part in his son's activities at the school. Only when the unlawful-entry was passed in 2015, was Kirby prohibited from going on to school property. Applying the seven factors from Kennedy v. Mendoza-Martinez, 372 U. S. 144 (1963), the effects of the unlawful-entry statute amount to unconstitutional punishment as applied to Kirby.

This Court's decision in McVey v. State, 56 N.E.3d 674 (Ind. Ct. App. 2016) is distinguishable. McVey did not have a child in school and wanted to go onto school property to take a class. This educational process started for McVey after the unlawful-entry statute

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went into effect.

By contrast, Kirby was already a single parent when the statute went into effect, and was already going onto school property without incident, and with the permission of the trial court judge, to participate in his son's educational activities. Thus, the unlawful-entry statute as specifically applied to Kirby was punitive in nature and thus a violation of the ex post facto clauses.

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A. THIS COURT'S PREVIOUS DECISION FINDING THE UNLAWFUL-ENTRY STATUTE UNCONSTITUTIONAL AS APPLIED TO KIRBY IS THE LAW OF THE CASE AND SHOULD PRECLUDE THIS COURT FROM RECONSIDERING THE ISSUE.

The "law of the case doctrine" 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. Wells Fargo Bank, N.A. v. Summers, 974 N.E.2d 488, 502 (Ind. Ct. App. 2012). Under that doctrine, the decision of an appellate court becomes the law of the case and governs the case throughout all of it subsequent stages, as to all questions which were presented and decided, both directly and indirectly. Terex-Telelect, Inc. v. Wade, 59 N.E.3d 298, 303 (Ind. Ct. App. 2016). Facts that are established at one stage of a proceeding, which are part of an issue on which judgment was entered and appeal taken, are unalterably and finally established as part of the law of the case, and may not be re-litigated at a subsequent stage. American Family Mutual Insurance Company v. Federated Mutual Insurance Company, 800 N.E.2d 1015, 1019 (Ind. Ct. App. 2004). Indiana applies the law of the case doctrine "in its strictest sense and has resisted creating exceptions to the strict application of the doctrine". Ind.-Ky. Elec. Corp. v. Save the Valley, Inc., 953 N.E.2d 511, 518 (Ind. Ct. App. 2011). Even if the earlier decision is deemed to be incorrect, it nevertheless becomes

the law of the case and must be followed. Ind.-Ky. Elec. Corp., id.

This Court has previously decided that the unlawful-entry statute is an unconstitutional ex post facto law as applied to Kirby. The State now seeks to re-litigate this same issue. The State's attempt to re-litigate the constitutionality issue should be precluded. That issue has been decided by this Court. There are no new facts and the law of the case doctrine should be invoked to preclude the State's appeal in the interests of judicial economy and prompt dispensation of justice and to preclude the promotion of potentially endless litigation and appeals. American Family, 800 N.E.2d at 1019-1020. [1]

It would create a hardship and work a manifest injustice to Kirby if a law of the case doctrine were not applied in that he would be subject to additional collateral consequences of his sentence. His privilege to enter onto school property to participate in his son's extra curricular activities was given to him, taken away, restored by this Court, and the State now seeks to have that privilege taken away again. The law of the case doctrine applies to terminate this hardship and injustice to Kirby.

[1]The State seems to complain in its Brief that the trial court granted declaratory relief summarily upon the pleadings and without discovery, evidence, or motions for summary judgment. However, the State offers no evidence that it ever requested discovery, offered additional evidence, or requested an opportunity to move for summary judgment. Nor does the State offer any evidence that it objected to the trial court's holding a hearing on the issues raised by the request for declaratory relief. The State makes no argument that the trial court erred procedurally.

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B. THE COURT CORRECTLY DECIDED THAT THE UNLAWFUL-ENTRY STATUTE AS APPLIED TO KIRBY IS AN EX POST FACTO LAW IN VIOLATION OF KIRBY'S CONSTITUTIONAL RIGHTS.

The United States Constitution provides that "[n]o State shall...pass any...ex post facto Law". U. S. Const. Art. I, Section 10. The Indiana Constitution provides that "[n]o ex post facto Law...shall ever be passed". Ind. Const. Art. I, Section 24. Among other things "[t]he ex post facto prohibition forbids the Congress and the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed". Wallace v. State, 905 N.E.2d 371, 377 (Ind. 2009). The Court in Wallace went on to state, "The underlying purpose of the Ex Post Facto Clause is to give effect to the fundamental principle that persons have a right to fair warning of that conduct which will give rise to criminal penalties". Wallace, at 377; Armstrong v. State, 848 N.E.2d 1088, 1093 (Ind. 2006).

1. Kirby has a realistic, non-hypothetical danger of sustaining a direct injury as a result of the operation or enforcement of the unlawful-entry statute.

Kirby's conviction for child solicitation came on November 5, 2010. *App. 18.* The unlawful-entry statute was enacted on July 1, 2015, nearly five years later. The unlawful-entry statute prohibits persons identified as "serious sex offenders" from knowingly or intentionally entering "school property". Because of Kirby's conviction for child solicitation,

and because Kirby falls within the definition of a "serious sex offender" under I. C. 35-42-4-14(a)(2)(F). Therefore, Kirby knowingly or intentionally enters school property, he commits an unlawful entry by a serious sex offender, a Level 6 Felony. I. C. 35-42-4-14(b)

Kirby asserts that the unlawful-entry law imposes retroactive punishment because he committed a qualifying offense prior to July 1, 2015.

When contesting the constitutionality of a criminal statute, it is not necessary that Kirby first expose himself to actual arrest or prosecution to be entitled to challenge the law that he claims deters the exercise of his contitutional rights. Babbitt v. United Farm Workers National Union, 442 U. S. 289, 298, 99 S.Ct. 2301, 60 L.E.2d 895 (1979). When a plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief. Babbitt, 442 U. S. At 298.

2. The effects of the law on Kirby are excessively punitive.

To be forbidden ex post facto law, the challenged statute amounts to punishment. Wallace, at 379. In determining whether the law constitutes retroactive punishment forbidden by the ex post fact clauses, the United States Supreme Bourt has set forth a two-

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part test. First, a determination must be made as to whether the legislature intended to establish a civil, non-punitive, regulatory scheme, or whether the state legislature intended to impose punishment. Smith v. Doe, 538 U. S. 84, 92, 123 S.Ct. 1140, 155 L.E.2d 164, (2003). If the legislature intended to impose punishment, that ends the inquiry, and the law violates the ex post facto prohibition. Wallace v. State, 965 N.E.2d 371, 378 (Ind. 2009). But if the legislature intended to enact a civil, non-punitive, regulatory scheme, then a determination must be made as to whether the statutory scheme is so punitive, either in purpose or effect, as to negate the state's intention to deem it civil. Wallace, at 378; Smith v. Doe, at 92. This is also known as the "intent-effects" test. Wallace, at 378.

Because Indiana has no available legislative history, the Indiana Supreme Court guides us to assume without deciding that the legislature's intent in passing the law was to create a civil, regulatory, non-punitive scheme, and then move on to the second part of the test. Wallace, at 378.

For the second part of the test, the question is whether the effects of the law, as applied to Kirby, are so punitive in nature as to constitute a criminal penalty. Wallace, at 379; McVey v. State, 56 N.E.3d 674 (Ind. Ct. App. 2016).

In evaluating the law's effects, seven factors set forth in Kennedy v. Mondoza-

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Martinez, 372 U.S. 144, 168-69, 83 S.Ct. 554, 9 L.E.2d 644 (1963) are to be applied:

(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 its operation will promote the traditional aims of punishment - 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 appears excessive in relation to the alternative purpose.

Wallace, at 379; McVey, at 680; Jensen v. State, 905 N.E.2d 384, 391 (Ind. 2009).

C. ANALYSIS OF SIX OF THE SEVEN *KENNEDY* FACTORS SHOWS AN EXCESSIVELY PUNITIVE EFFECT ON KIRBY.

1. Affirmative disability or restraint.

In making the determination of whether the law subjects those within its purview to an affirmative disability or restraint, the inquiry is how the effects of the law are felt by those subject to it. If a disability or restraint is minor or indirect, its effects are unlikely to be punitive. State v. Pollard, 908 N.E.2d 1145 at 1150; Smith, at 99-100.

In our case, the disability or restraint imposed by the unlawful-entry act is neither

minor nor indirect. Kirby was given permission by the trial court to enter school property to attend and observe his son's school activities. Kirby did this for five years before the unlawful-entry law went into effect. This he did without incident or misbehavior. Kirby is not allowed to go to the school where his son is involved in academics and sports activities, and cannot even attend his son's graduation ceremonies held on school property. The effect of the law on one such as Kirby who has a child attending school and who wants to enter school property to observe and participate in the child's education and extracurricular activities, is much greater than it would be on one who wanted to enter school property to take a class, to vote, or to do other things which would not necessarily require entering school property. As such, the act does not have merely a minor or indirect disability or restraint on Kirby and is clearly punitive when applied to Kirby.

2. Sanctions that have historically been considered punishment.

Being prohibited from visiting a place one would otherwise be allowed to visit if not for the prior conviction is tantamount to conditions and prohibitions imposed as part of probation or parole connected to the underlying offense. Pollard, 908 N.D.2d at 1151. Schools and school sporting events are open to the public. The trial court specifically allowed Kirby to go on to school property after his conviction, and this changed only when

the unlawful-entry law was passed five years later. Again, this factor weighs in favor of finding that the law was applied to Kirby is punitive rather than regulatory in nature.

3. Finding of scienter.

This factor is a distinguishing element in criminal versus civil statutes. Wallace, 905 N.E.2d 371, 381. If the law is not linked to a showing of mens rea, it is likely to be intended as punishment. Wallace, 381; Pollard, at 1151.

The unlawful-entry statute applies to serious sex offenders which generally include a finding of scienter at the time of the underlying conviction. The crime for which Kirby was originally convicted, child solicitation, requires a finding that the offense was committed "knowingly or intentionally". Pollard, 908 N.E.2d at 1151; I. C. 35-42-4-6. The scienter element is present and this factor weighs in favor of finding that the unlawful-entry statute as applied to Kirby is punitive in nature.

4. Promotion of the traditional aims of punishment; retribution and deterrence.

This factor is applied with the assumption that if the statute promotes the traditional aims of punishment, the statute is more likely punitive than regulatory. Pollard, 908 N.E.2d at 1152. The unlawful-entry statute promotes one of the traditional aims of punishment, which is to deter future crimes and to protect future victims. The goal is one of deterrence,

to deter sex offenders from entering school property and to reduce the likelihood of future offenses with children.

5. Criminality of the behavior at issue.

This factor involves an analysis of whether the behavior to which the law applies is already a crime. Wallace, 905 N.E.2d at 382. The obligations under this law are triggered by a criminal conviction of one of the crimes listed in the statute. Had Kirby not been convicted of one of the listed crimes, child solicitation, it would not be a criminal violation for him to enter onto school property. It is the determination of guilty for a qualifying offense that exposed Kirby to further criminal liability under the statute. Therefore, this factor also demonstrates that the effect of the unlawful-entry statute is punitive as applied to Kirby.

6. Advancing non-punitive purpose.

The analysis under this factor is whether an alternative purpose to which the statute may rationally be connected is assignable for it. Pollard, 908 N.E.2d at 1151. Kirby acknowledges that a non-punitive purpose of protecting school children is a non-punitive effect of the unlawful-entry statute.

7. Excessiveness in relation to asserted, alternative non-punitive purpose.

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The analysis under this factor is whether the statute appears excessive in relation to the non-punitive purpose assigned. Wallace, 905 N.E.2d at 383. This factor has been given the greatest weight among the seven factors by the courts. Wallace, at 383.

In discussing this factor in relation to the Sex Offender Registration Act, the Court in Wallace considered the fact that the law provided no mechanism by which a registered sex offender could petition the Court for relief from the obligation of continued registration and disclosure, i.e., offenders cannot shorten their registration or notification period, even with clear proof of rehabilitation. Wallace, at 384.

The Court in Pollard, also analyzed whether the effect of the statute reached beyond its non-punitive purpose by considering the seriousness of the crime, the relationship between the victim and the offender, and the initial determination of the risk of re-offending. Pollard, 908 N.E.2d at 1153.

Although the trial court erred in denying the Petition for Post-Conviction Relief, the trial court took the correct approach in allowing Kirby to go to his son's school to participate in his son's educational and athletic events. In so doing, the trial court recognized that it would be impractical for Kirby as a single parent, to no longer serve as an emergency contact for his own son in case of an emergency, and to prohibit Kirby from participating in the

educational and extra curricular activities in which his son is involved.

By contrast, there are no exceptions in the unlawful-entry statute to give relief to Kirby who has a child enrolled in school. The trial court clearly analyzed 1) the seriousness of Kirby's crime, 2) the fact that Kirby's crime was a victimless crime in that the "child" he solicited was in fact a police officer, and 3) Kirby's rehabilitative efforts. The trial court permitted Kirby to attend his son's school functions on school property even after his conviction, and later reduced Kirby's sentence to a misdemeanor. Kirby was permitted by both the trial court and the school to be on the school property on a regular basis to be a part of his son's educational and extra curricular activities. Kirby entered school property for five years without incident or misbehavior before the statute took effect. The imposition of the unlawful-entry statute is clearly excessive as applied to Kirby and goes beyond the scope of any public safety intention of the statute. The trial court, after having heard evidence, allowed Kirby to go on the school property where his son attends school. There is no such relief available under the unlawful-entry statue. As such, the statute is punitive as applied to Kirby rather than regulatory or civil in nature.

D. McVEY IS DISTINGUISHABLE.

In McVey v. State, 56 N.E.3d 674 (Ind. Ct. App. 2016), this Court addressed whether

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retroactive application of the unlawful-entry statute violates Indiana's ex post facto clause. The McVey Court found that the statute, as applied to McVey, did not violate Indiana's ex post facto provision. McVey, at 681.

However, McVey wanted to enter school property in order to take a CDL class. McVey, at 681. The class was available to be taken elsewhere. McVey started the CDL process after the unlawful-entry statute went into effect on July 1, 2015. McVey, at 681. McVey did not have a child who attended the school.

By contrast, Kirby's son, Xaine, attends Eastbrook High School. Xaine is active in school sports, including wrestling, football and track. *Tr. 93.* Xaine is very close with his father, and his father had been involved in all of Xaine's school activities, even after his conviction, including going to practices and games, until the passage of the unlawful-entry statute. *Tr. 93.* As stated by Xaine, having his father unable to attend his high school events has, "brought our relationship down. We can't bond like that anymore. We can't have football talks after games. I have to tell him about the game now. I have to let him know what happened. He can't see what happened. He can't see me score a touchdown". *Tr. 93-94.* Xaine testified that this has had a big impact on Xaine's life, and that his father is not going to be able to be present for even his high school graduation. *Tr. 93-94.*

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Thus, the prohibition on Kirby from entering onto the school property where his child attends is a very real punishment, and is not hypothetical. As stated by this Court in McVey, "an offender who is prohibited from entering school property to take a class after the unlawful-entry statute became effective is very different from an offender who is prohibited from living in a house that the offender owned and lived in for twenty years before the residency-restriction statute became effective." McVey, at 681.

Kirby and Xaine were father the son before the unlawful-entry statute went into effect. Kirby regularly entered school property to participate in Xaine's activities even after his conviction. The law is excessive and punitive in nature for Kirby in particular because he has a child enrolled in the school. Kirby cannot participate in Xaine's educational and extracurricular activities at the school, cannot attend his graduation, and cannot see to any other issues or emergencies that might be part and parcel of Xaine's attendance at the school. The effects of the law on Kirby are not minor or indirect. The effects of the unlawful-entry statute on Kirby are so punitive in nature as applied to Kirby that they constitute a criminal penalty and violate the ex post facto law. Wallace v. State, 905 N.E.2d 371, at 378.

CONCLUSION

WHEREFORE, for the foregoing reasons, Appellee Douglas Kirby respectfully requests that this Court preclude the litigation of the constitutionality issue under the law of the case doctrine, and affirm the trial court's declaration that the unlawful-entry statute is unconstitutional as applied to Kirby for the reasons set forth in this Court's opinion of August 31, 2017.

Respectfully submitted,

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APPELLEE'S BRIEF:

WORD COUNT CERTIFICATE

I verify that this brief contains no more than fourteen thousand (14,000.00) words.

/s/ Alan D. Wilson

BRIEF OF APPELLEE:

IN THE
INDIANA COURT OF APPEALS
CASE NO. 18A-PL-2334

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VS.	)	
	)	The Honorable George A. Hopkins, Judge
DOUGLAS KIRBY,	)	
	)	
Appellee/Plaintiff.	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Appellee's Brief was electronically filed with the Court's Indiana E-Filing System ("IEFS") on November 16, 2018. Appellee's Brief was forwarded by United States mail, postage prepaid to:

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