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The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

April 10, 1995

The Honorable Ronald N. Fleming
Member, House of Representatives
414A Blatt Building
Columbia, South Carolina 29211

Re: Informal Opinion

Dear Representative Fleming:

Attorney General Condon has referred your letter to me for reply. You note that you are the author of H.3300 which requires local Sheriffs and Police Departments to post a notification of all sex offenders living in the area. You seek an opinion of this Office regarding the bill's constitutionality. Despite some authorities to the contrary, it is my opinion that the Bill would pass constitutional muster.

H.3300 amends Section 112, Act No. 497 of 1994, codified at S.C. Code Ann. Section 23-3-410, et seq. The 1994 Act created a "sex offender registry", requiring state residents convicted of certain sex or other offenses to register with the sheriff of the county in which they reside. The preamble to the Act, codified at Section 23-3-400, states:

> [t]he sex offender registry will provide law enforcement with the tools needed in investigating criminal offenses. Statistics show that sex offenders often pose a high risk of re-offending. Additionally, law enforcement's efforts to protect communities, conduct investigations, and apprehend offenders who commit sex offenses, are impaired by the lack of information about these convicted offenders who live within the law enforcement agency's jurisdiction.

Section 23-3-410 places the registry's direction under the Chief of SLED, requiring SLED to promulgate implementing regulations. The pertinent offenses which are subject to the

registry are enumerated in Section 23-3-430. Section 23-3-440 requires that, prior to the release of a specified offender, the Department of Corrections or the Department of Probation, Parole and Pardon Services must notify the sheriff of the county where the offender will reside and SLED that the offender is being released..

Furthermore, the Department must notify the offender of the requirement to register with the sheriff within 24 hours of release. The Department is also required to obtain descriptive information of the offender, including a current photograph prior to release. Similar duties are imposed upon the Department of Probation, Parole and Pardon Services and the Department of Juvenile Justice, where relevant.

Pursuant to Section 23-3-460, the offender is mandated to register annually for life, registering at the sheriff's department in the county in which the offender resides. Failure to register is made a felony, pursuant to Section 23-3-470. If a person moves to a new county, he must register in that county within ten days of establishing the new residence. New residents in South Carolina not under the jurisdiction of one of the three Departments must register within 60 days. Section 23-3-460. Section 23-3-490 makes information collected for the registry "not open to inspection by the public, being made available only to law enforcement, investigative agencies and those authorized by the court."

H.3300 amends the 1994 Act in the following ways. Added to the preamble is the intent "to provide public notification when a sex offender is residing or intends to reside in a community." The sheriff, within 45 days, is thus required to "post the name of the sex offender in a publicly accessible location in his office." In addition, the Bill repeals Section 23-3-490, previously requiring that information collected for the offender registry shall not be open to the public. Thus, the public is given access to this information consistent with the requirement of public posting by the Sheriff in his office of the offender's name.

Law/Analysis

Our Supreme Court has consistently held that a legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear beyond a reasonable doubt. Robinson v. Richland County Council, 293 S.C. 27, 358 S.E.2d 392 (1987). Every presumption must be made in favor of the constitutional validity of a statute. Y.C. Ballenger Elec. Contractors, Inc. v. Reach-All Sales, Inc., 276 S.C. 394, 279 S.E.2d 127 (1981). The burden is placed on those claiming an act to be unconstitutional to prove and show it is unconstitutional beyond all reasonable doubt. McCollum v. Snipes, 213 S.C. 254, 49 S.E.2d 12 (1948).

Principally, the argument that the statute and amendatory Bill is unconstitutional is that it violates the ex post facto Clause of the federal and state Constitutions. See, U.S. Const. art. I, § 10; S.C. Const. Art. I, § 4. The seminal ex post facto case was decided two centuries ago in Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798) and remains the basis for ex post facto law today. See, Collins v. Youngblood, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). In Collins, the United States Supreme Court reiterated that Calder v. Bull long ago correctly held that a law violates the ex post facto clause if it (1) punishes as a crime an act previously committed which was innocent when done; (2) makes more burdensome the punishment for a crime, after its commission; or (3) deprives one charged with a crime of any defense available according to the law at the time the act was committed. 497 U.S. at 42-43, 52, 110 S.Ct. at 2719-2720, 2724. Our own Supreme Court has adopted the Calder test as well. State v. Huiett, 302 S.C. 169, 394 S.E.2d 486 (1990). See also, Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

In State v. Huiett, supra, our Supreme Court outlined the test for a law to fall within the ex post facto prohibition:

> ... two critical elements must be present:
>
> (1) the law must be retrospective so as to apply to events occurring before its enactment, and (2) the law must disadvantage the offender affected by it.

302 S.C. at 171.

Obviously, the statute and the proposed Bill, if enacted, would be retrospective, at least to those individuals who committed the designated offenses prior to the legislation's enactment. See, Washington v. Ward, 123 Wash.2d 488, 869 P.2d 1062 (1994); Re: Artway v. Atty. Gen. of New Jersey, 1995 W.L. 91540 (D. N. J. 1995). The real question, however, is whether application of this law and proposed Bill to those who committed these offenses prior thereto, unconstitutionally "disadvantages" these individuals. We conclude that it does not.

While there is authority to the contrary, see, Artway, supra, a number of other recent decisions have concluded that similar legislation does not violate the ex post facto clause or other provisions of the federal Constitution. We deem these decisions to be the more soundly-reasoned and thus adopt their reasoning.

In Washington v. Ward, supra, the Washington Supreme Court (En Banc) concluded that a sex offender registration statute, albeit "burdensome" upon offenders, did not constitute "punishment" and, thus, did not violate the constitutional prohibition against ex post facto legislation. The Court first examined the purpose of the statute and concluded that its primary objective was regulatory rather than punitive. 869 P.2d at 1068. Next, the Court examined the effect of the legislation to determine whether the statute "is so punitive as to negate its regulatory intent." Supra. For this analysis, reliance was placed upon Kennedy v. Mendoza-Martinez, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963), which had enunciated a number of factors to determine whether legislation is punitive. This is the test utilized in virtually every case of this kind. The United States Supreme Court in Kennedy listed the following factors as pivotal:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purposes assigned ...

372 U.S. at 168-69, 83 S.Ct. at 567-68.

The Washington Supreme Court applied the Kennedy test to the Washington registration statute and found that no punishment was involved. Registration alone was first determined to impose no additional burdens on offenders.

> The statute requires an offender to provide the local sheriff with eight pieces of information: name, address, date and place of birth, place of employment, crime for which convicted, date and place of conviction, aliases used, social security number. In addition, the local sheriff must obtain two items: the offender's photograph and fingerprints. We note that at least one criminal justice agency routinely has all of this information on file at the time of an offender's conviction and sentencing.

869 P.2d at 1069.

In addition, the Court determined that the physical act of registration imposed no affirmative disability or restraint. Provided that sex offenders complied with the registration requirements, they were free to move about as they chose, or as anyone else did.

The key issue was, therefore, dissemination of registrant information. The Court noted that criminal justice agencies could release criminal conviction records under Washington law. Therefore, noted the Court, "... the disclosure of conviction information cannot impose an additional burden." In addition, the Court found that the fact that public disclosure and dissemination was somewhat limited by the Washington registration statute, provided an important basis to conclude the statute was not punitive.

> We hold, however, that because the Legislature has limited the disclosure of registration information to the public, the statutory registration scheme does not impose additional punishment on registrants. The Legislature placed significant limits on (1) whether an agency may disclose registrant information, (2) what the agency may disclose, and (3) where it may disclose the information. The statute regulating disclosure ... provides that "[p]ublic agencies are authorized to release relevant and necessary information regarding sex offenders to the public when the release of the information is necessary for public protection."

869 P.2d at 1069-1070. Thus, the Court found that "[w]hile registrant information may be released under limited circumstances to the general public, ... the appropriate dissemination of relevant and necessary information does not constitute punishment for purposes of ex post facto analysis." Supra at 1072.

Further, the Court in Ward found that a registration statute was not historically regarded as punishment. Instead, registration "is a traditional governmental method of making available relevant and necessary information to law enforcement agencies." Nor was registration promotive of the traditional aims of punishment.

> ... the Legislature's primary intent is to aid law enforcement agencies' efforts to protect their communities by providing a mechanism for increased access to relevant and necessary information. Even if a secondary effect of registration is to deter future crimes in our communities, we decline to hold that such positive effects are punitive in nature.

869 P.2d at 1073.

Finally, the Ward Court concluded that registration was not excessive in relation to its nonpunitive purpose.

> We are not persuaded by the argument that the registration statute would burden former offenders by making them the focus of every sex crime investigation ... Such attention is incident to the conviction and not a result of registration as a sex offender.

Accordingly, concluded the Court, the constitutional prohibition against ex post facto legislation was not violated by the sex offender registration statute. We agree with the Court's reasoning:

> The Legislature's purpose was regulatory, not punitive; registration does not affirmatively inhibit or restrain an offender's movement or activities; registration per se is not traditionally deemed punishment; nor does registration of sex offenders necessarily promote the traditional deterrent function of punishment. Although a registrant may be burdened by registration, such burdens are an incident of the underlying conviction and are not punitive for purposes of ex post facto analysis. We hold, therefore, that the Community Protection Act's requirement for registration of sex offenders, retroactively applied ... is not punishment.[1]

Other courts have reached a similar conclusion with respect to constitutionality of sex offender registration statutes. State v. Noble, 171 Ariz. 171, 829 P.2d 1217 (Ariz. 1992) also held that the Arizona statute requiring sex offenders to register, was not violative of the ex post facto clause. In that case, the Court relied principally upon the fact that "... outside of a few regulatory exceptions, the information provided by sex offenders pursuant to the registration statue is kept confidential." 829 P.2d 1224. Similarly, in People v. Adams, 144 Ill.2d 381, 163 Ill. Dec. 483, 581 N.E.2d 637 (1991), the Illinois Supreme Court held that the Illinois Habitual Child Sex Offender Registration Act did not impose unconstitutional punishment for purposes of the Eighth Amendment

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[1] The Court in Ward also concluded that the Act did not violate Due Process or Equal Protection rights of the offenders.

prohibition against cruel and unusual punishment. Again, the Illinois statute did not permit dissemination of registrant information to the general public, however. See also, State v. Costello, 643 A.2d 531 (N. H. 1994) [New Hampshire registration statute, which required confidentiality, did not violate ex post facto clause.]

The Court in Ward, while agreeing with the conclusion reached in Adams disagreed with any implication therein that dissemination of information to the general public is punitive in nature. We find the Ward court's reasoning once again to be highly persuasive:

> Although we concur in its holding, we do not find Adams dispositive on the issue advanced by appellants--that public stigma is a punitive effect of sex offender registration. Public stigma arises not as a result of registration nor as a result of release to the general public of information concerning a conviction. Any "badge of infamy" stigma that may exist arises from private reactions to the crime by members of the general public. [emphasis added].

Moreover, as the Washington Court of Appeals earlier stated in State v. Taylor, 67 Wash. App. 350, 835 P.2d 245 (1992), in upholding the registration and notification statute which placed "no restriction on the dissemination of the information by the sheriff or on the use the sheriff can make of it ...",

> [m]uch of the information required by the statute is public information generally available to interested persons who make a reasonable effort to obtain it. The fact of a registrant's conviction, the nature of the crime, and when and where the conviction took place are all matters of public record. Law enforcement agencies and prospective employers could in given cases obtain the information without the assistance of a registration statute. In employment situations, the information can be obtained from the applicant.

835 P.2d at 249. The Court further added:

> [t]here is a stigma attached to one who has committed a sexual offense. It stems from the fact of conviction and is not something that can be easily concealed once the offender has been released from custody. To the extent that registration

> makes it likely more persons will learn of the conviction, it is unlikely that the additional dissemination of the information brought about by registration will significantly increase the stigmatic effect over what it would be absent any registration requirement.

Supra [emphasis added]. See also, 1991 Op. Atty. Gen. , 113 (July 10, 1991) [publication by DSS of "Ten Most Wanted" Non-Supporting Parents poster is permissible where information in poster is available in public records].

We recognize there is case law to the contrary, however. In Re: Artway, supra, while the United States District Court for New Jersey upheld the so-called "Megan's Law" requiring registration of sex offenders on virtually the same grounds as did the Arizona Supreme Court in State v Nobel, supra, the Court struck down the requirement of notification in the law. Just as the other decisions previously discussed, the Court in Artway analyzed the issue of notification in terms of the factors set forth in Kennedy v. Mendoza-Martinez, supra. Nevertheless, the Court found that the notification, particularly dissemination of information to the general public, was punitive in nature.

The New Jersey law required various degrees of notification, depending upon whether the prosecutor determined that the offender was likely to be a repeat sex offender. A low risk of recidivism required notification of law enforcement agencies likely to encounter the offender. An offender who posed a moderate risk (Tier 2), required notification of schools, licensed day care centers and summer camps as well as certain designated agencies and community organizations. One who was deemed a high risk (Tier 3) also required law enforcement to notify members of the public likely to encounter the offender. If an offender were classified as a moderate or high risk, his name, a recent photograph, physical description, the offense, address, place of employment or schooling, as well as a description and the license plate number of the registrant's vehicle were included in the notification.

The Court found that this notification procedure went "well beyond all previous provisions for public access to an individual's criminal history."

> This information, under Megan's law, is available not just to those who take the time and effort to search out courthouse records, telephone books or other sources of information, but to each and every member of a registrant's community whether they are interested or not.

Analyzing the specific New Jersey, statutory scheme, pursuant to the criteria of Kennedy v. Mendoza-Martinez, the Court held that

> Based on the foregoing analysis of Megan's Law under the factors set forth by the Supreme Court in Kennedy, and the fact that most, if not all, factors weigh in favor of finding the law punitive, the Court must conclude that the Legislature's stated intent for Megan's Law is outweighed by those factors. This Court is satisfied that the public notification provisions of Megan's Law constitute more a form of punishment that a regulatory scheme and is an unconstitutional violation of the United States Constitution in its retroactive application.

Slip Op. at 28. The Court went on to hold that the registration requirement of Megan's Law was constitutional, but that the Tier 2 (moderate risk) and Tier 3 (high risk) notification procedures were unconstitutional in their retroactive application.

We find however, that the New Jersey statute and the Artway decision are distinguishable from our statute and the proposed Bill. Moreover, we believe the Ward and Taylor decisions, discussed extensively above, provide the better analysis and reasoning with respect to the pertinent constitutional issues.

The proposed Bill, while it removes the confidentiality requirement imposed upon information collected for the registry, still, only requires the Sheriff to post the name of the sex offender in a publicly accessible location in his office. This requirement, as well as that of giving members of the public access to the registry information, if they desire it, is far different from the New Jersey statutory scheme which, in the words of the United States District Court, provides information "to each and every member of a registrant's community whether they are interested or not." The New Jersey statute goes to considerable lengths to classify each offender depending upon his level of risk and then mandates notification commensurate with that risk. By comparison, the South Carolina proposed Bill simply places the name of every offender in a prominent place and authorizes the public to have access to information that is already public.

South Carolina's statute and the proposed Bill are, in my judgment, regulatory in purpose. The Act's stated purpose "is to promote the State's fundamental right to provide for public health, welfare and safety of its citizens." Moreover, the Act and Bill are in keeping with the Washington scheme which recognizes that the registry information "is public information generally available to interested persons who make a reasonable effort to obtain it." Washington v. Taylor, supra.

The primary thrust of the Act, together with the amendatory Bill, is that a central registry is created by SLED, notice is given to the appropriate Sheriff prior to a sex offender's release, the offender is required to register with the Sheriff, the Sheriff is required, within 45 days, to post the name of the offender in his office, and members of the public are given access to the information with respect to the offender. This Office has previously recognized the constitutional validity of legislation requiring the registration of convicted criminals. Op. Atty.Gen., July 2, 1968, citing, Lambert v. California, 335 U.S. 225 (1957). Moreover, as concluded in State v. Ward and Washington v. Taylor supra, rather than constituting a "badge of infamy" which punishes the offender, the requirement of notice to the Sheriff, posting and public access simply provide further public recognition of the designated sex offender crime for which there has been a conviction in a court of law. Rather than punitive, this law has the purpose of assisting law enforcement authorities and the public in the future.

While the proposed Bill seeks to amend the statute so as to remove the requirement of confidentiality so that a member of the public has access to the information contained in the registry, this is not "punishment" of the offender in the constitutional sense. Presumably, all the information involving the previous offense would be public information, available through the records of the Court, to anyone possessing the fortitude or perseverance to seek it. We agree with the reasoning of the Ward court that any public stigma arises not "as a result of release of information to the general public of information concerning a conviction," but from "private reactions to the crime by members of the general public." While admittedly the proposed amendment, by providing complete public access to registry information, may go further than the limited public access in Ward, the Court in Taylor does not appear to deem such limited public access controlling; indeed, Taylor notes that the registration statute there placed no restriction upon the sheriff in disseminating the information or making use of it. Supra at 246. We do not believe that limited public access, as in Ward, is so much the key to constitutionality as is the fact that the stigma stems from conviction rather than registration and dissemination of public information.

Likewise, the proposed amendment's requirement that the Sheriff post the offender's name in a publicly accessible part of his Office poses no constitutional threat of punishment. As even the Court in Artway recognized, "[i]t has long been a facet of United States law that criminal records should be available to the public for scrutiny and investigation ...", including the offenders name, address, the nature of his crime and conviction and the period for which he was imprisoned. Likewise, it has long been the law in South Carolina that the conviction of a person in a court of law is public information. See., e.g., State v. Allen, 276 .C. 412, 279 S.E.2d 365 (1981) [criminal

conviction a matter of public record]; Op. Atty. Gen., May 27, 1980, Op. Atty. Gen., January 24, 1990; S.C. Code Ann. Section 30-4-50(3).

In summary, we conclude, as did the Court in Ward, that the statute and proposed amendments requiring registration and notification concerning convicted sex offenders are regulatory, not punitive; that registration does not affirmatively inhibit or restrain an offender's movement or activities; that registration per se is not traditionally deemed punishment; and that registration does not necessarily promote the traditional deterrent function of punishment. We further conclude, as did the Ward Court, that while a registrant may be burdened by registration, such burdens are an incident of the underlying conviction and are not punitive. Finally, we conclude that the posting of the name of the offender in a prominent place in the Sheriff's office and the public's access to the conviction information regarding the offender, as maintained in the registry are not punishment, but again, an incident of the prior conviction which is already public information. While there is contrary authority, it is our opinion that such authority is distinguishable and, moreover, is not the better-reasoned analysis. Thus, it is our opinion that the "sex offender" registration statute and its proposed amendments are constitutional.

This letter is an informal opinion only. It has been written by a designated Assistant Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I remain

Very truly yours,

Robert D. Cook
Assistant Attorney General

RDC/an