

COMMONWEALTH OF KENTUCKY  
KENTUCKY SUPREME COURT  
FILE NO. 2008-SC-896

**FILED**

AUG 11 2009

SUPREME COURT CLERK

WILLIAM BUCK

APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT  
HON. FRED A. STINE, JUDGE  
CIR. NO. 07-CR-00102

COMMONWEALTH OF KENTUCKY

APPELLEE

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**REPLY BRIEF FOR APPELLANT**


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**CERTIFICATE REQUIRED BY CR 76.12(b)**

The undersigned does hereby certify that copies of this Reply Brief for Appellant were served upon the following named individuals by United States Mail, postage prepaid, on this 11<sup>th</sup> day of August, 2009: Hon. Fred A. Stine, Judge, Campbell Circuit Court, Div. II, 330 York Street, 2nd Floor, Newport, Kentucky 41071; Hon. Sheryl Egli Heeter, Assistant Commonwealth's Attorney, Campbell County Courthouse, Room 12, Newport, Kentucky 41071; Hon. Aaron Currin, Assistant Public Advocate, 333 Scott Street, Suite 400, Covington, Kentucky 41011; and by messenger mail to the Hon. James Coleman Shackelford, Asst. Attorney General, 1024 Capital Center Drive, Frankfort, Kentucky 40601. I hereby further certify that the record on appeal was not checked out for the purpose of this Reply Brief.

  
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SAMUEL N. POTTER

## **Purpose of the Reply Brief**

The purpose of this Reply Brief is to address only those matters presented in the Brief for Appellee that deserve further comment, argument, and/or citation of additional authority.

## Arguments

### I. The General Assembly and the Campbell Circuit Court Violated the *Ex Post Facto* Clauses of the United States and Kentucky Constitutions by Retroactively Applying the Sex Offender Registration Law to Mr. Buck that Disadvantaged Him by Subjecting Him to Punishment.

In his Brief for Appellant, William Anthony Buck argued that applying the sex offender registration (SOR) law to him violated the *Ex Post Facto* doctrine. As part of this argument, Mr. Buck distinguished his situation from the case of *Hyatt v. Commonwealth*, 72 S.W.3d 566 (Ky. 2002).

Much has changed in the seven years since *Hyatt*. This Court should account for these changes by reexamining the constitutionality of the SOR law. Maine has undertaken this kind of renewed analysis. Maine had declared that its version of the SOR law did not violate the *Ex Post Facto* clause in *State v. Haskell*, 784 A.2d 4 (Me. 2001). Faced with a subsequent constitutional challenge based on changes in the law, Maine allowed the case to proceed: "We conclude that *Haskell* does not declare for all time that SORNA is immune from an ex post facto challenge. It is conceivable that a challenger can demonstrate that, through amendments, the Legislature changed the character and effects of SORNA from civil to criminal." *Doe v. District Attorney*, 932 A.2d 552, 560 (Me. 2007). *Doe v. District Attorney* went on to hold that sufficient questions of fact existed to survive a 12(b)(6) motion to dismiss. *Id.* at

563. The Brief for Appellant contained the type of analysis envisioned by *Doe v. District Attorney*.

While the Appellee cited *Hyatt*, the Appellee failed to rebut the distinction articulated in the Brief for Appellant.<sup>1</sup> *Hyatt* ruled that being classified as a high-risk offender constituted punishment and violated the *Ex Post Facto* clause. *Id.* at 570. Mr. Buck is arguing that being sent to prison for failing to register as a sex offender constitutes punishment and violates the *Ex Post Facto* clause. Risk-assessment and classification are regulative and remedial. Conviction and incarceration are punishment.

Mr. Buck argued in his Brief for Appellant that the SOR system no longer resembled its remedial nature in *Hyatt*. *Id.* at 572. The SOR system had progressed to a punitive nature by the time of Mr. Buck's case. This was evidenced by Mr. Buck's indictment as a subsequent offender, which became a Class C felony after the July 12, 2006 enactment of the SOR amendments contained in House Bill 3. TR, 1. Indeed, Mr. Buck was indicted for conduct that occurred about two years prior to the amendments taking effect. TR, 4.

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<sup>1</sup>The Appellee also cited *Smith v. Doe*, 538 U.S. 84 (2003), in support of the constitutionality of the SOR law. Brief for Appellee, 5. Just as *Hyatt* must be distinguished due to the changes in the SOR law and its application, Mr. Buck asserts that the same recalculation required by *Doe v. District Attorney* applies equally to *Smith*. Thus, *Smith* is not dispositive of the issue.

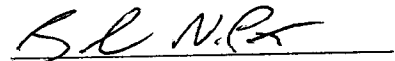
In further support of the punitive nature of the SOR law, Mr. Buck took at face value the plain language of the title of the bill that contained the 2006 amendments, which was "An Act relating to sex offenses and the punishment thereof." TR, 28(*citing*, 2006 Ky. Acts, Ch. 182). The Appellee essentially conceded the bill dealt with the punishment of sex offenders, characterizing it as "a general description of the contents of the bill." Brief for Appellee, 7. Thus, the registration is now designed to punish sex offenders through the registration process, not just regulate them.

The specifics of the bill are consistent with its general description. While the provision that prohibited sex offenders from living within 1,000 feet of a school existed before the 2006 amendment, the amendment criminalized that behavior. KRS 17.545(3) and KRS 17.495(repealed by the 2006 amendments). Indiana found that a similar statute violated the *Ex Post Facto* clause. *State v. Pollard*, 908 N.E.2d 1145 (In. 2009). The doubled registration period of 20 years from 10 years also reflects the punitive nature of the current SOR system. KRS 17.520(3). As such, the SOR law as applied to Mr. Buck violates the *Ex Post Facto* clauses of the Kentucky and United States Constitutions.

## **Conclusion**

Therefore, William Anthony Buck respectfully requests this Court to remedy the deprivation of his rights under the *Ex Post Facto* Clauses of the Constitutions of the United States and Kentucky by reversing his conviction and sentence. Alternatively, he requests this Court to reverse and remand his case to the Campbell Circuit Court with instructions to proceed consistent with the legal reasoning set forth above and in the Brief for Appellant, and/or any and all other relief this Court determines is appropriate.

Respectfully submitted,



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