

No. _____

IN THE
Supreme Court of the United States

COMMONWEALTH OF KENTUCKY, *Petitioner*

v.

MICHAEL BAKER, *Respondent*

On Application to Associate Justice John Paul Stevens from the
Kentucky Supreme Court

**APPLICATION TO STAY ENFORCEMENT AND EXECUTION
OF KENTUCY SUPREME COURT OPINION PENDING
CERTIORARI**

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To the Honorable John Paul Stevens, Associate Justice of the Supreme Court
of the United States and Circuit Justice for the Sixth Circuit:

Pursuant to Rule 23 of the Rules of this Court and 28 U.S.C. § 2101(f),
petitioner Commonwealth of Kentucky respectfully moves for an order
staying the enforcement and execution of the opinion of the Kentucky
Supreme Court certifying the law, in the above-entitled proceeding, pending
the filing of and final action by this Court on a petition for certiorari seeking
review of the Kentucky Supreme Court's opinion in this case.

The petition for certiorari will seek plenary review of the Kentucky
Supreme Court's decision in *Commonwealth v. Baker*, — S.W.3d —, 2009 WL

3161371 (Ky. 2009), which certified that the retroactive application of Kentucky Revised Statute (KRS) 17.545 constituted an ex post facto violation.

Petitioner has exhausted all possibilities of securing a stay of the enforcement and execution of the opinion certifying the law from the Kentucky Supreme Court; and the Kentucky Supreme Court has ordered that its opinion be made final immediately.

(a) Procedural history of this case

The relevant procedural events in this case may be summarized as follows:

1. October 1, 2009 - The Kentucky Supreme Court rendered its opinion certifying that the retroactive application of KRS 17.545 violates the ex post facto clause of the United States and Kentucky Constitutions, a copy of which is attached hereto. The court having divided five to two, the dissenting opinion is also attached.

2. October 21, 2009 - Petitioner Commonwealth of Kentucky filed a motion to stay the execution and enforcement of the Kentucky Supreme Court's opinion pending certiorari proceedings pursuant to Kentucky Rule of Civil Procedure (CR) 76.44(b).

3. November 2, 2009 - The Kentucky Supreme Court denied petitioner's motion to stay execution and enforcement of the opinion. A copy of that order is attached.

4. November 5, 2009 - Date of filing the instant application with the Clerk of this Court.

5. December 30, 2009 - Present due date for filing petition for writ of certiorari, being ninety (90) days from the date of entry of the opinion of the Kentucky Supreme Court.

(b) Standards for granting a stay

This Court will grant a stay when there is “(1) ‘a ‘reasonable probability’ that four justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction’; (2) ‘a fair prospect that a majority of the Court will conclude that the decision below was erroneous’; and (3) a likelihood that ‘irreparable harm [will] result from the denial of the stay.’”

Conkright v. Frommert, 129 S.Ct. 1861, 1862 (2009) (Ginsburg, J., in chambers) (quoting *Rostker v. Goldberg*, 448 U.S. 1306 (1980) (Brennan, J., in chambers)). Each of these factors is satisfied here.

(c) Application of the stay standards to this case

I. The reasonable probability that the Court will grant certiorari

This case presents an important question of federal constitutional law that should be resolved by this Court, and there is a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari. The majority of the Kentucky Supreme Court determined that the retroactive application of KRS 17.545, which prohibits registered sex offenders from residing within 1,000 feet of a high school, middle school,

elementary school, preschool, publicly owned playground, or licensed day care facility, violates the ex post facto clauses of the United States and Kentucky Constitutions. In determining the statute constituted retroactive punishment, the Kentucky Supreme Court applied the two-part test set forth by this Court in *Smith v. Doe*, 538 U.S. 84 (2003). Applying that test, the majority of the Kentucky Supreme Court concluded that, although the Kentucky General Assembly had intended KRS 17.545 to be a civil, non-punitive, regulatory scheme (slip opinion, p. 9), the statute was so punitive in effect as to negate the legislature's intent (slip opinion, p.16).

As the dissenting opinion notes, the majority opinion of the Kentucky Supreme Court invalidating the retroactive application of a sex offender residency restriction statute stands “[v]irtually alone among appellate courts to consider the issue.” (slip opinion, p. 17). Sex offender residency restriction statutes similar to KRS 17.545 have previously been considered by numerous state appellate courts and a United States court of appeals and those courts consistently have found the retroactive application of the statutes not to be an ex post facto violation. *See People v. Morgan*, 881 N.E.2d 507 (Ill. App. 2007); *Weems v. Little Rock Police Dept.*, 453 F.3d 1010 (8th Cir. 2006) (applying Arkansas law); *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2005) (applying Iowa law); *People v. Leroy*, 828 N.E.2d 769 (Ill. App. 2005); *State v. Seering*, 701 N.W.2d 655 (Iowa 2005); *Lee v. State*, 895 So.2d (Ala.Crim.App.

2004); *Thompson v. State*, 603 S.E.2d 233 (Ga. 2004); *Denson v. State*, 600 S.E.2d 645 (Ga. App. 2004). Prior to 2009, no state or federal appellate court that had considered the issue had found the retroactive application of a sex offender residency restriction to be an ex post facto violation.

In *State v. Pollard*, 908 N.E.2d 1145 (Ind. 2009), however, the Indiana Supreme Court departed from the cases cited above and found that state's sex offender residency restriction statute to be a violation of the ex post facto clause when applied retroactively. The majority opinion of the Kentucky Supreme Court relied heavily upon the *Pollard* decision in rejecting the analysis of the courts that had found there was no ex post facto violation in applying a sex offender residency restriction retroactively (slip opinion, p. 6, 13, and 15). A conflict is thus occurring in the consideration of the issue presented in this matter, and this Court should exercise its authority to resolve this conflict among the state and federal courts as this issue will only become more prevalent. For instance, the California Supreme Court heard arguments on November 3, 2009, addressing this precise issue. *In re J. (E.) On Habeas Corpus*, S156933; *In re P. (S.) On Habeas Corpus*, S157631; *In re S. (J.) On Habeas Corpus*, S157633; and *In re T. (K.) On Habeas Corpus*, S157634.

The majority opinion of the Kentucky Supreme Court in this matter is now the second state court of last resort which "has decided an important

federal question in a way that conflicts with the decision of another state court of last resort [and] of a United States court of appeals.” Sup. Ct. R. 10(b). From this circumstance emerges the “certworthy” question whether the retroactive application of a sex offender residency restriction statute constitutes a violation of the ex post facto clause. Further, although the majority opinion determined that KRS 17.545 violated both the ex post facto clauses of the United States and Kentucky Constitutions, the Kentucky Supreme Court has never indicated that the ex post facto clause of the Kentucky Constitution provides any greater protection than the same clause in the United States Constitution. In fact, the majority’s analysis of the question in this matter relied exclusively on the precedents of this Court applying the ex post facto clause of the United States Constitution. Thus, it is proper for this Court to review the issue presented herein as there is no independent and adequate state grounds for supporting the Kentucky Supreme Court’s decision. *Michigan v. Long*, 463 U.S. 1032, 1039 (1983).

As this Court stated in *Smith v. Doe*, 538 U.S. at 103, “[t]he risk of recidivism posed by sex offenders is ‘frightening and high.’” In an attempt to protect the public and limit the temptation for such recidivism on the part of sex offenders, residency restriction statutes such as KRS 17.545 are becoming more prevalent. Because of this prevalence, there is a reasonable probability that this Court is likely to agree that it should grant a writ of certiorari to consider the important constitutional question of whether the retroactive

application of such statutes constitutes an ex post facto violation and resolve the conflict that now exists between state courts of last resort and a United States court of appeals.

II. The 'fair prospect' that the decision below will be found erroneous

As the dissenting opinion herein points out, "the majority has, with respect to a most difficult social problem, arrogated to itself the role of legislator and has substituted its public policy judgment for that of the General Assembly" (slip opinion, p. 17). For that reason, and the fact that all but one other state appellate court as well as a United States court of appeals considering the issue have found "that retroactive sex offender residency restrictions do not exceed legislative authority to address vital public safety concerns," there is a fair prospect a majority of this Court will conclude the Kentucky Supreme Court erroneously found such practice constitutes an ex post facto violation.

As noted, the majority opinion concluded that the Kentucky General Assembly intended the residency restrictions to serve a regulatory, non-punitive, public safety function (slip opinion, p. 7-9). The statute, therefore, passed constitutional muster under the first part of this Court's two-part test for considering whether a statute violates the ex post facto clause set forth in *Smith, supra*. The majority then analyzed whether the statute was so punitive in purpose or effect to negate its civil intent under the second part of the *Smith* test. In doing so, the majority considered the five factors from this

Court's decision in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), which this Court found relevant in *Smith*, 538 U.S. at 97. Those five factors are "whether, in its necessary operation, the regulatory scheme" (1) has been regarded in our history and traditions as punishment, (2) promotes the traditional aims of punishment, (3) imposes an affirmative disability or restraint, (4) has a rational connection to a non-punitive purpose, or (5) is excessive with respect to the non-punitive purpose. *Id.* The majority opinion, departing from the decisions of all but one state appellate court and a United States court of appeals, concluded that all five of the factors weighed in favor of finding KRS 17.545 was punitive in effect (slip opinion, p. 16). However, the majority ignored this Court's admonishment that "*only the clearest proof will suffice* to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Smith*, 538 U.S. at 92.

The dissenting opinion correctly asserts, however, that "the majority's application of the [United States] Supreme Court's factors fails at several points to defer, as we are obliged to do, to permissible legislative judgments, and amounts thus to judicial legislating under the guise of constitutional analysis" (slip opinion, p. 21). For instance, because the residency restrictions contained in KRS 17.545 leave registrants free to visit, work, and participate in the community they are not a traditional form of punishment such as banishment which this Court has defined as "punishment inflicted upon criminals by compelling them to quit a city, place, or country, for a