No. _____

In The Supreme Court of the United States

DAVID PAUL HALL,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the retroactive application of a sex offender registration program violate the *Ex Post Facto* Clause of the United States Constitution where the program imposes numerous onerous obligations and restrictions upon a registrant for life, with no opportunity to terminate registration even upon a showing that the registrant does not pose a threat to public safety?

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Petitioner David Hall respectfully requests that this Court issue a writ of *certiorari* to review the opinion entered in this case by the Court of Appeals of North Carolina and the order entered by the Supreme Court of North Carolina dismissing Petitioner's appeal and refusing to grant discretionary review.

OPINIONS AND ORDERS BELOW

The Supreme Court of North Carolina's dismissal of the appeal and denial of the petition for discretionary review (App. 1) is published at 771 S.E.2d 285 (N.C. 2014) (mem.). The opinion of the Court of Appeals of North Carolina affirming the Superior Court's denial of the petition for termination of sex offender registration (App. 3) is published at 768 S.E.2d 39 (N.C. Ct. App. 2014). The Superior Court's order denying the petition (App. 21) appears in the Appendix.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) to review the opinion of the Court of Appeals of North Carolina and order of the Supreme Court of North Carolina dismissing the appeal and denying the petition for discretionary review. The order dismissing the appeal and denying discretionary review was entered on April 9, 2015. This petition for writ of *certiorari* is timely filed within 90 days from that date. Sup. Ct. R. 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, sec. 10

No state shall . . . pass any . . . ex post fact Law . . . .

N.C. Gen. Stat. § 14-208.7

(a) A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides. . . . If the person is a current resident of North Carolina, the person shall register:

> (1) Within three business days of release from a penal institution or arrival in a county to live outside a penal institution; or
> (2) Immediately upon conviction for a reportable offense where an active term of imprisonment was not imposed.

Registration shall be maintained for a period of at least 30 years following the date of initial county registration unless the person, after 10 years of registration, successfully petitions the superior court to shorten his or her registration time period under G.S. 14-208.12A.[1]

. . .

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[1] The 30-year registration period does not apply to Petitioner. Instead, he must maintain registration for at least 10 years, with no upper limit. *See* N.C. Sess. Laws 2006-247, 2008-117.

N.C. Gen. Stat. § 14-208.12A

(a) Ten years from the date of initial county registration, a person required to register under this Part may petition the superior court to terminate the 30-year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article.

. . .

(a1) The court may grant the relief if:

(1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,

(2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and

(3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

(a2) The district attorney in the district in which the petition is filed shall be given notice of the petition at least three weeks before the hearing on

the matter. The petitioner may present evidence in support of the petition and the district attorney may present evidence in opposition to the requested relief or may otherwise demonstrate the reasons why the petition should be denied.

(a3) If the court denies the petition, the person may again petition the court for relief in accordance with this section one year from the date of the denial of the original petition to terminate the registration requirement. If the court grants the petition to terminate the registration requirement, the clerk of court shall forward a certified copy of the order to the Department of Public Safety to have the person's name removed from the registry.[2]

. . .

STATEMENT OF THE CASE

Petitioner pleaded guilty in Mecklenburg County Superior Court, North Carolina, to the second degree kidnapping and first degree rape of an adult. In 1982, he was sentenced to imprisonment for life. At the time of Petitioner's offense and sentencing, North Carolina had no sex offender registry.

Petitioner remained incarcerated for the following 21 years. During that time, Petitioner

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[2] The numerous obligations and restrictions encompassed by North Carolina's Sex Offender and Public Protection Registration Program are set out in N.G. Gen. Stat. §§ 14-208.7 through 14-208.19A.

completed an intensive, voluntary treatment program designed to reduce recidivism among sex offenders. He also took advantage of many educational opportunities while incarcerated, earning a bachelor's degree and several other diplomas and certificates. In short, he worked diligently to better himself and to prepare for his reentry into society.

While Petitioner was incarcerated, North Carolina enacted its original sex offender registration law. The registration requirements took effect January 1, 1996, and applied to persons who were incarcerated on that date. The 1996 statute generally required persons convicted of certain enumerated crimes to register upon release from prison and to maintain registration for 10 years. Exemption from the registration requirement was available to some persons upon individualized review. N.C. Sess. Laws 1995-545.

North Carolina amended the sex offender registration law effective April 1, 1998, eliminating the potential for exemption from registration and specifying that the registration period for most registrants, including Petitioner, terminated automatically at the expiration of 10 years. N.C. Sess. Laws 1997-516.

Petitioner earned parole and was released from prison on April 26, 2003; he began serving a 5-year parole term. Two days after his release from prison, Petitioner registered as a sex offender. Under the law at the time he registered, he was required to register for a maximum of 10 years, with

few obligations and restrictions. He has maintained his registration continually to the present.

While Petitioner was on parole, North Carolina amended the sex offender registration program effective December 1, 2006, changing the registration period for Petitioner from a maximum of 10 years with automatic termination to a minimum of 10 years with no stated maximum. The amendments created a mechanism for petitioning in the Superior Court for terminating registration 10 years after initial registration. To be eligible for termination, a registrant must establish both that he is not a current or potential threat to public safety and that removal from the registry complies with "federal standards applicable to the termination of a registration requirement." N.C. Gen. Stat. § 14-208.12A(a1); N.C. Sess. Laws 2006-247. Applying the federal standards, the North Carolina Court of Appeals determined petitioner is not eligible to seek termination of registration during his lifetime, based solely on the fact of his 1982 conviction for first degree rape. (App. 8 (citing 42 U.S.C. §§ 16911, 16915))

Thus, although the 2006 amendments created a mechanism for registrants to petition for removal from the registry, the amendment also retroactively imposed the federal standards upon Petitioner, conclusively foreclosing any opportunity for termination. He can never be removed from the registry, despite the fact he has now been judicially determined not to pose a threat to public safety. (App. 8, 22)

In addition to altering duration requirements, the 2006 amendments also greatly expanded registrants' daily obligations and restrictions, creating a comprehensive statutory registration program. The newly-crafted program imposed broad restrictions affecting every facet of Petitioner's life. The requirements governing Petitioner are set out in the Sex Offender and Public Protection Registration Program (SOPPRP), North Carolina General Statutes sections 14-208.7 through 14-208.19A.[3] Petitioner must now comply with numerous SOPPRP requirements for the rest of his life. For example:

- By statute, a wide range of information (including photographs) is made publically available in a searchable, online directory. N.C. Gen. Stat. §§ 14-208.10, 14-208.15.

- Registrants must appear in person at the sheriff's office every six months within three business days of receiving a mailed form to verify their registration information. N.C. Gen. Stat. § 14-208.9A(a)(1)-(3).

- Changes to several categories of registration information must be reported to the sheriff's office in person within three business days. N.C. Gen. Stat. § 14-208.9.

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[3] North Carolina has separate sex offender registration programs for sexually violent predators (N.C. Gen. Stat. §§ 14-208.20 through 14-208.25) and juveniles (N.C. Gen. Stat. §§ 14-208.26 through 14-208.32). Those programs are not material to this Petition.

- The sheriff is authorized to verify the registrant's home address by an on-site visit. The sheriff also may summon the registrant to the sheriff's office for the taking of a new photograph at any time, and the registrant must comply within three business days. N.C. Gen. Stat. § 14-208.9A(b), (c).

- Registrants must give notice of all online identifiers they use, and the State can provide online identifiers to entities so they can prescreen users of their web sites. N.C. Gen. Stat. §§ 14-208.7(b)(7), 14-208.15A.

- Registrants must report temporary, out-of-county employment and living arrangements, as well as any plan to move to a different state. N.C. Gen. Stat. §§ 14-208.8A, 14-208.9(b).

- Registrants are forbidden to live, work, or be present in or near schools, day care centers, and other premises intended primarily for the use, care, or supervision of minors. N.C. Gen. Stat. §§ 14-208.16, 14-208.17, 14-208.18.

- Registrants are banned from some professions. They cannot be granted EMS credentials or be licensed in the funeral industry, and cannot obtain certain commercial driver's license endorsements. N.C. Gen. Stat. §§ 14-208.19A, 90-210.25B, 131E-159(h).[4]

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[4] Some of these restrictions were added or refined in amendments that took effect in 2008 or 2009. N.C. Sess. Laws 2008-117, 2008-220.

- Registrants are forbidden from using commercial social networking websites, such as Facebook. N.C. Gen. Stat. § 14-202.5.

Failure to comply with registry obligations, and violations of residential, premises, employment, and internet restrictions are punishable as felonies. N.C. Gen. Stat. §§ 14-202.5, 208.11, 208.16, 208.17, 208.18.

Petitioner successfully completed his 5-year parole term without incident and was discharged from parole in April 2008. In the 12 years since his release from prison, Petitioner has continued his work toward rehabilitation, self improvement, and becoming a contributing member of society, including completing a course of mental health treatment. A mental health evaluation conducted in 2013, shortly before the trial court's decision in this case, showed Petitioner suffers no form of mental illness. Petitioner has sustained long-term membership and participation in his church, and numerous church members actively support his removal from the sex offender registry. Petitioner also has maintained close, regular contact with a mentor for over 30 years, including the 12 years since his release from prison.

On May 3, 2013, Petitioner filed a petition for termination of sex offender registration. During a September 23, 2013, hearing on the petition, Petitioner presented evidence showing he did not pose a current or potential threat to public safety. Petitioner also objected to lifetime registration

obligations and restrictions as a violation of the *ex post facto* protections of the North Carolina and United States constitutions.

After considering the evidence, arguments, and Petitioner's written memorandum, the trial court issued a written order on September 27, 2013. (App. 21-23) It found Petitioner "is not a current or potential threat to public safety." (*Id.* at 22) The court declined to hold that terminating Petitioner's registration would comply with "federal standards applicable to the termination of a registration requirement...." (*Id.*) Due to the absence of that finding, the court concluded Petitioner was not eligible for removal from the sex offender registry. (*Id.* at 23)

In a published opinion, the North Carolina Court of Appeals held the retroactive application of federal registration termination standards, which resulted in Petitioner being a lifetime registrant subject to a lifetime of obligations and restrictions, does not violate federal or state constitutional prohibitions on *ex post facto* laws. (App. 3-4, 12-19)

The Supreme Court of North Carolina dismissed Petitioner's appeal upon concluding it did not present a substantial constitutional question, and it declined discretionary review. (App. 1) The dismissal for lack of a substantial constitutional question is a decision on the merits. *Grady v. North Carolina*, ___ U.S. ___, 135 S. Ct. 1368, 1370 n.* (2015).

REASONS FOR GRANTING THE WRIT

I. The North Carolina Supreme Court Decided an Important Question of Federal Constitutional Law in a Way That Conflicts With Decisions of Other State Courts of Last Resort When it Employed This Court's Framework For Analyzing *Ex Post Facto* Claims and Rejected Petitioner's Challenge to the Retroactive Application of North Carolina's Sex Offender and Public Protection Registration Program (SOPPRP).

North Carolina's Supreme Court and Court of Appeals rejected Petitioner's *ex post facto* challenge to SOPPRP, which retroactively subjects Petitioner to an extensive web of obligations and restrictions for the rest of his life. Applying a framework developed by this Court for analyzing *ex post facto* challenges, the Court of Appeals concluded SOPPRP is not so punitive in effect as to negate the state legislature's intent to enact a regulatory sex offender registration program. Courts of last resort for several states have reached the opposite conclusion after applying the same federal analysis to similar or less burdensome sex offender registration programs. This conflict warrants review of Petitioner's case.

The United States Constitution provides, "No state shall . . . pass any . . . ex post facto Law." U.S. Const. art. I, § 10. The *Ex Post Facto* Clause forbids retroactive punishment. *Smith v. Doe*, 538 U.S. 84, 89 (2003).

Federal Ex Post Facto Analysis

This Court applies a two-part analysis to determine whether a statute is punitive for purposes of the *Ex Post Facto* Clause. *Smith*, 538 U.S. at 92. First, the Court determines whether the legislature intended to establish civil, regulatory procedures or whether it intended to impose punishment. *Id.* If the legislature intended to impose punishment, the inquiry ends. *Id.* If the legislature intended to enact a civil, regulatory scheme, the Court examines whether there is "the clearest proof" that the statutory scheme is "so punitive either in purpose or effect as to negate the State's intention to deem it civil." *Id.* (internal quotation marks and brackets omitted).

In *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963), this Court identified seven factors relevant to assessing whether a statute has a punitive effect: (1) "[w]hether the sanction involves an affirmative disability or restraint," (2) "whether it has historically been regarded as a 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 an alternative purpose to which it may rationally be connected is assignable for it," and (7) "whether it appears excessive in relation to the alternative purpose assigned." In *Smith*, 538 U.S. at 97-105, the Court applied the *Mendoza-Martinez* factors in the context of reviewing whether the retroactive

application of a sex offender registration statute violated the federal *Ex Post Facto* Clause. In the wake of *Smith*, many state courts have applied the *Mendoza-Martinez* factors when reviewing whether sex offender registration statutes were punitive such that their retroactive application violated *ex post facto* protections.

State Courts' Application of the Federal Analysis

The North Carolina Court of Appeals (which binds all North Carolina trial courts and whose decision the North Carolina Supreme Court left undisturbed) applied the *Mendoza-Martinez* factors when it rejected Petitioner's federal and state *ex post facto* challenge to SOPPRP. (App. 16) At least six other state courts of last resort that applied the *Mendoza-Martinez* factors when evaluating similar or less burdensome registration programs have concluded retroactive application of those programs violated state constitution prohibitions against *ex post facto* laws. *See, e.g., Doe v. State*, 111 A.3d 1077, 1093-1100 (N.H. 2015); *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004, 1021-30 (Okla. 2013); *Gonzalez v. State*, 980 N.E.2d 312, 317-21 (Ind. 2013); *State v. Letalien*, 985 A.2d 4, 16-26 (Me. 2009); *Doe v. State*, 189 P.3d 999, 1008-19 (Alaska 2008); *Commonwealth v. Baker*, 295 S.W.3d 437, 443-47 (Ky. 2009). The Maine and Kentucky courts concluded the programs also violated the federal *ex post facto* prohibition. *Letalien*, 985 A.2d at 26; *Baker*, 295 S.E.3d at 447.

Because state sex offender registration programs have developed independently of one

another and vary substantially from one another, SOPPRP is not directly comparable to another state's registration scheme. However, a recent decision by the New Hampshire Supreme Court, *Doe v. State*, 111 A.3d 1077 (N.H. 2015), serves as a illustrative example of the conflict between the North Carolina decision in Petitioner's case and opinions reached in other states. Although the New Hampshire Act is less burdensome than SOPPRP in several respects, it provides a useful starting point for comparison.

In *Doe*, the New Hampshire Supreme Court considered whether the retroactive application of New Hampshire's sex offender registration Act, which imposed lifetime registration obligations with no opportunity to seek termination based on an individual's rehabilitation, violated a state constitutional prohibition against retrospective laws. *Doe*, 111 A.3d at 1100. The Court held that the *ex post facto* protection provided by the United States Constitution and New Hampshire's constitution are "the same." *Id.* at 1089. Therefore, the Court relied on federal law–this Court's decisions in *Smith* and *Mendoza-Martinez* –to guide its analysis of the state statute. *Id.* at 1090, 1093.

The New Hampshire Supreme Court found the state legislature intended its sex offender registration Act to be regulatory and non-punitive. *Doe*, 111 A.3d at 1093. The North Carolina Court of Appeals also found the state legislature intended SOPPRP to be regulatory and non-punitive, a finding Petitioner does not challenge. (App. 15)

Unlike the North Carolina Court of Appeals, when the New Hampshire Court applied the *Mendoza-Martinez* factors, it found the punitive effects of the New Hampshire Act clearly outweighed its regulatory intent. In making its assessment, the Court considered the cumulative effects of all components of the New Hampshire registration scheme, including those that appeared in the original 1991 statute and those that were adopted later through a series of 10 amendments. *See Doe*, 111 A.3d at 1083-89, 1094.

Applying the first *Mendoza-Martinez* factor, the *Doe* Court found that three features of the New Hampshire Act created affirmative disabilities or restraints: (1) a requirement to register in person with authorities on a regularly scheduled basis, (2) housing disadvantages attributable to registration, and (3) a requirement to furnish detailed personal information, which is published online. *Doe*, 111 A.3d at 1094-96. The housing disadvantage for lifetime registrants like Petitioner includes a federal ban on admission to public housing. 42 U.S.C. § 13663. The *Doe* Court found the first *Mendoza-Martinez* factor weighed in favor of finding a punitive effect. *Doe*, 111 A.3d at 1096. Other state courts have agreed. *See Starkey,* 305 P.3d at 1022-23 (in-person reporting, housing restrictions); *Gonzalez*, 980 N.E.2d at 317 (in-person reporting); *Letalien,* 985 A.2d at 18 (in-person reporting); *State v. Pollard,* 908 N.E.2d 1145, 1150 (Ind. 2009) (housing restrictions); *Doe*, 189 P.3d at 1009-12 (online publication of personal information); *Baker*, 295 S.W.3d at 445 (housing restrictions).

SOPPRP shares each of the three features discussed by the New Hampshire Supreme Court. First, Petitioner must appear in person at the sheriff's office every six months; changes in address, academic or employment status, or name must be reported in person within three business days; and changes to online identifiers must be reported in person within 10 days. N.C. Gen. Stat. §§ 14-208.9, 14-208.9A.

Second, in addition to the general stigma-based housing disadvantages suffered by registrants under the New Hampshire scheme, SOPPRP specifically places restrictions on where registrants can reside. Registrants are barred from living near schools, day care centers, and other places intended primarily for the use, care, or supervision of minors, even if the offense triggering the registration did not involve a child victim.[2] N.C. Gen. Stat. §§ 14-208.16, 14-208.18.

Third, SOPPRP mandates the online posting of a registrant's photograph and a wide range of

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[2] Registered sex offenders commonly face housing restrictions. The U.S. Department of Justice reports, "As of 2007, some 27 states and hundreds of municipalities had enacted laws that bar sex offenders from residing near schools, parks, playgrounds and day care centers." U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, "In Short, Toward Criminal Justice Solutions," July 2008, available at https://www.ncjrs.gov/pdffiles1/nij/222759.pdf (last viewed July 6, 2015). The Department of Justice recognizes that statutory exclusion zones can severely limit where registrants can live. *Id.*

personal information that must be reported by the registrant. N.C. Gen. Stat. §§ 14-208.10, 14-208.15.

Moreover, SOPPRP imposes additional restrictions beyond those addressed in *Doe*. By its express terms, SOPPRP restricts where registrants can work or simply be present, and it bars them from receiving specific commercial drivers' license endorsements. N.C. Gen. Stat. §§ 14-208.17, 14-208.18, 14-208.19A. Related statutes bar registrants from working in the EMS and funeral services fields. N.C. Gen Stat. §§ 90-210.25B, 131E-159(h).

Because the North Carolina courts failed to recognize the punitive nature of SOPPRP's affirmative restrictions and restraints, their decisions conflict with those of the other state courts that have deemed similar or lesser burdens punitive.

Applying the second *Mendoza-Martinez* factor, the *Doe* Court found the New Hampshire requirement for online publication of registration information was analogous to the historical punishment of shaming. 111 A.3d at 1096-97. The Court reasoned that the Act singles out sex offenders and implicitly brands them as dangerous. *Id.* at 1097. The Court also recognized the Internet now serves, in many ways, as a community's town square. *Id.* The Court found that posting photographs and registration information online "holds [registrants] out to others to shame or shun." *Id.* Consequently, the Court found the second *Mendoza-Martinez* factor weighed in favor of finding a punitive effect. *Id.* Other state courts also have found that online posting of registration information

resembles shaming, contributing to the punitive effect of registration statutes. *Doe*, 189 P.3d at 1012; *Wallace v. State*, 905 N.E.2d 372, 380 (Ind. 2009).

SOPPRP also subjects registrants to shaming by singling them out and mandating that their photographs and registration information be posted online. N.C. Gen. Stat. §§ 14-208.10, 14-208.15. SOPPRP also imposes restrictions on where registrants can live, work, and simply be present, and these restrictions resemble the historical punishment of banishment. *See* N.C. Gen. Stat. §§ 14-208.16, 14-208.17, 14-208.18; *see also Starkey*, 305 P. 3d at 1025-26; *Baker*, 295 S.W.3d at 444. Because the North Carolina courts failed to recognize the resemblance between SOPPRP's requirements and historical punishment, their decisions conflict with those of the other state courts that have made that connection.

The New Hampshire Court found the third *Mendoza-Martinez* factor (whether compliance with the registration program was required only upon a finding of scienter) weighed only marginally in favor of finding the registration program was punitive. *Doe*, 111 A.3d at 1097-98.

Applying the fourth *Mendoza-Martinez* factor, whether the statute promotes the traditional aims of punishment, the *Doe* Court found restrictions mandated by the New Hampshire Act to be retributive. *Doe,* 111 A.3d at 1098. The Court observed that the obligation to register was triggered exclusively by past actions, and not by "any individualized assessment of current risk or level of

dangerousness." *Id.* at 1098. The Court stated that when registration requirements "are imposed equally upon all offenders, with no consideration given to how dangerous any particular registrant may be to public safety, that restriction begins to look far more like retribution for past offenses than a regulation intended to prevent future ones." *Id.* at 1098 (internal quotation marks omitted). The Court found this factor therefore weighed in favor of finding a punitive effect. *Id.* Other state courts have reached the same conclusion. *Baker*, 295 S.W.3d at 444; *Starkey*, 305 P.3d at 1027-28, *Wallace*, 905 N.E.2d at 381-82.

The same reasoning applies to SOPPRP, which mandates a lifetime registration period for Petitioner, with no opportunity for an individualized consideration of his rehabilitation or risk of dangerousness. Mandating lifetime registration for Petitioner, despite a judicial finding that he does not pose a risk to the public, is clearly retributive. By failing to recognize the retributive nature of SOPPRP, the North Carolina courts are in conflict with the other state courts.

Applying the fifth *Mendoza-Martinez* factor, whether the statute applies to behavior that already is a crime, the *Doe* Court emphasized that the New Hampshire Act specifically targets sex offenders and omits persons convicted of all other crimes. *Doe*, 111 A.3d at 1098-99. The New Hampshire Court found that where registration requirements were triggered by conviction of a sex offense, this circumstance indicated a punitive effect. *Id.* at 1099. Other state courts have reached the same conclusion. *Starkey*,

305 P.3d at 1028; *Letalien*, 985 A.2d at 21-22; *Wallace*, 905 N.E.2d at 382; *Doe*, 189 P.3d at 1014-15; *see also Smith v. Doe*, 538 U.S. at 113, Stevens, J., dissenting in part and concurring in part ("In my opinion, a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty is punishment."); *Smith*, 538 U.S. at 109, Souter, J., concurring ("The fact that the Act uses past crime as the touchstone, probably sweeping in a significant number of people who pose no real threat to the community, serves to feed suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law's stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.").

As in the statutes addressed in the above-cited cases, the registration requirements imposed by SOPPRP apply uniformly to all persons convicted of a broad universe of crimes. Non-criminal conduct occurring before or after the commission of a crime has no effect either on the length of the registration period or on the number or degree of restrictions imposed. Because the North Carolina courts failed to recognize the punitive effect of this factor, their decisions conflict with those of the other state courts that have deemed similar or lesser burdens punitive.

The New Hampshire Court found the sixth *Mendoza-Martinez* factor (whether the act was rationally connected to a legitimate regulatory

purpose) weighed against finding a punitive effect. *Doe*, 111 A.3 at 1099-1100.

Applying the seventh *Mendoza-Martinez* factor, the New Hampshire Court found requiring persons to be registered for life, without regard to whether they pose a current threat to public safety, was excessive in relation to the non-punitive public safety purposes of the registration program. *Doe*, 111 A.3d at 1100. In reaching this conclusion, the Court considered the impact of the numerous burdens of registration that a lifetime registrant must endure in New Hampshire. *Id.* The Court noted those burdens included in-person appearances at a police department, mandated reporting of detailed and personal information, and the online posting of that information along with a photograph. *Id.* Emphasizing the lifetime duration of these requirements, the Court stated, "Notably, there is no way for the petitioner to be relieved of the requirements, even though he has not reoffended in 30 years, has completed counseling, was discharged from probation early, and is currently permanently disabled." *Id.* Other state courts also have held that registration statutes that impose burdensome requirements for life with no opportunity for individualized assessment of dangerousness are excessive in relation to their legitimate, non-punitive purposes. *Starkey*, 305 P.3d at 1028-30; *Gonzalez*, 980 N.E. at 319-21.

Under SOPPRP, Petitioner also is subject to lifetime registration with no opportunity for termination, despite a judicial finding that he does not pose a threat to public safety. (App. 8, 22)

Additionally, he is subject to a broader range of lifetime obligations and restrictions than those imposed under New Hampshire law. Those factors render SOPPRP's requirements excessive in relation to its regulatory goals.

SOPPRP's excessive reach also is established by its uniform application of onerous restrictions that are intended to protect children, regardless of whether the registrant committed an offense against a child. Registrants are prohibited from living, working, or being physically present in large portions of their communities as a means of protecting children from child predators. *See* N.C. Gen. Stat. §§ 14-208.16, 14-208.17, 14-208.18. The Indiana Supreme Court has found similar residence restrictions are excessive as to registrants with no history of committing offenses against children. *See Pollard*, 908 N.E.2d at 1153 (by "[r]estricting the residence of offenders based on conduct that may have nothing to do with crimes against children, . . . the statute exceeds its non-punitive purposes"). Petitioner's victim was an adult.

Because the North Carolina courts failed to recognize the excessiveness of SOPPRP in relation to its regulatory intent, their decisions conflict with the decisions discussed above.

In the end, the *Doe* Court found the aggregate punitive effects of the New Hampshire Act clearly outweighed the legislature's regulatory intent. *Doe*, 111 A.3d at 1100. Because the New Hampshire Act, like SOPPRP, had been amended several times since its inception, incrementally increasing the

intrusiveness and burdens of registration with each amendment, the Court did not attempt to pinpoint which new provision caused the Act to cross the *ex post facto* threshold. *Id.* at 1101. Instead, it concluded imposing the Act's various obligations and restrictions, and subjecting a registrant to those burdens for life, with no opportunity for individualized review for dangerousness, rendered the Act punitive.

The decisions reached in *Doe* and in the other state court opinions cited above conflict with the decision reached by North Carolina's Supreme Court and Court of Appeals. As a consequence of the North Carolina courts' erroneous decisions, Petitioner is subject to the severely punitive web of requirements imposed by SOPPRP for the rest of his life, despite a judicial finding that he does not pose a threat to public safety. Petitioner's case warrants review.[5]

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[5] Upon finding that retroactive application of the New Hampshire Act violated the state's constitutional prohibition against retroactive laws, the *Doe* Court concluded the Act still could be enforced, consistent with constitutional protections, if the petitioner were "promptly given an opportunity . . . to demonstrate that he no longer poses a risk sufficient to justify continued registration." *Doe,* 111 A.3d at 1101. The Court held he would be entitled to relief from the requirements of registration if a hearing resulted in a finding that he did not pose a danger to the public. Petitioner seeks the same remedy.

II. In Light of the Trend Toward Expanding Obligations and Restrictions Imposed by Sex Offender Registration Statutes, This Court Should Revisit the Question of Whether Sex Offender Registration Laws Can Violate the Constitutional Prohibition Against *Ex Post Facto* Laws.

Twelve years ago, in *Smith v. Doe*, 538 U.S. 84 (2003), this Court analyzed whether the retroactive application of an Alaskan sex offender registration statute violated the federal *ex post facto* prohibition. The statute reviewed in *Smith* had just two components: (1) a requirement for registration, and periodic verification, and (2) a public notification system. *Id.* at 90. The Court concluded the Alaska statute was not so punitive in effect as to violate the *Ex Post Facto* Clause. *Id.* at 105-06.

In contrast to the simplicity of the Alaska statute reviewed in *Smith*, contemporary sex offender registration programs are likely to be much more complex. SOPPRP serves as a vivid example. SOPPRP is a comprehensive statutory scheme that imposes myriad obligations and restrictions that touch on every facet of a registrant's life. In all, SOPPRP, N.C. Gen. Stat. §§ 14-208.7, *et seq.*, comprises 18 statutory sections, each of which contributes to its punitive effect:

- § 14-208.7 - Registration
- § 14-208.8 - Prerelease Notification

- § 14-208.8A - Notification Requirement of Out-of-Country Employment if Temporary Residence Established

- § 14-208.9 - Change of Address; Change of Academic Status or Educational Employment Status; Change of Online Identifier; Change of Name

- § 14-208.9A - Verification of Registration Information

- § 14-208.10 - Registration Information is Public Record; Access to Registration Information

- § 14-208.11 - Failure to Register; Falsification of Verification Notice; Failure to Return Verification Form; Order for Arrest

- § 14-208.11A - Duty to Report Noncompliance of a Sex Offender; Penalty for Failure to Report in Certain Circumstances

- § 14-208.12A - Request for Termination of Registration Requirement

- § 14-208.13 - File with Criminal Information Network

- § 14-208.14 - Statewide Registry; Department of Public Safety Designated Custodian of Statewide Registry

- § 14-208.15 - Certain Statewide Registry Information is Public Record; Access to Statewide Registry

- § 14-208.15A – Release of Online Identifiers to Entity; Fee
- § 14-208.16 - Residential Restrictions
- § 14-208.17 - Sexual Predator Prohibited from Working or Volunteering for Child-Involved Activities; Limitation on Residential Use
- § 14-208.18 - Sex Offender Unlawfully on Premises
- § 14-208.19 - Community and Public Notification
- § 14-208.19A - Commercial Drivers License Restrictions'

On its face, SOPPRP's broad, pervasive range of obligations and restrictions sets it apart from the far less demanding statute reviewed in *Smith.* The breadth of SOPPRP's statutory requirements illustrates the trend toward more burdensome registry schemes.

The narrowness of the Alaska program was essential to this Court's analysis in *Smith.* For example, in assessing whether the Alaska statute subjected registrants to an affirmative disability or restraint, the Court emphasized it did not require registrants to appear in person to update their information. *Smith*, 538 U.S. at 101. In contrast, SOPPRP requires every registrant to report in person at a sheriff's office twice annually to verify registration information, and changes to several categories of information must be reported in person within three business days. N.C. Gen. Stat. §§ 14-

208.9, 14-208.9A(1)-(3). As discussed above, other states also have in-person reporting requirements, and courts have held those requirements constitute a substantial restraint.

Additionally, the statute reviewed in *Smith* imposed no direct restrictions on housing or employment, and the Court noted there was no evidence that registrants suffered any housing or occupational disadvantages that would not have occurred simply by virtue of their convictions. *Smith*, 538 U.S. at 100. In contrast, SOPPRP expressly places limits on where registrants can reside and work. N.C. Gen. Stat. §§ 14-208.16, 14-208.17, 14-208.18, 14-208.19A. As discussed above, courts in other states have addressed similar restrictions on housing and found them to be punitive.

Many of the other requirements encompassed by SOPPRP were not even within the contemplation of the *Smith* Court due to their absence from the statute under review. The possible restrictions and obligations a state may choose to add to its registration scheme are limitless.

As established above, North Carolina is not alone in enacting an extensive registration program. Each of the state cases discussed in this Petition involve a program much more complex than the program addressed in Smith. *See Doe v. State*, 111 A.3d 1077 (N.H. 2015); *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004 (Okla. 2013); *Gonzalez v. State*, 980 N.E.2d 312 (Ind. 2013); *State v. Letalien*, 985 A.2d 4 (Me. 2009); *Doe v. State*, 189 P.3d 999

(Alaska 2008); and *Commonwealth v. Baker*, 295 S.W.3d 437 (Ky. 2009). The broad range of obligations and restrictions currently imposed by many contemporary sex offender registration programs sets those programs apart from the modest program addressed in *Smith*. Yet, as this case illustrates, there is a genuine risk that state courts will continue to rely on *Smith* and its progeny to reject *ex post facto* challenges to complex registration programs that impose onerous burdens.[6]

---

[6] An additional factor discussed in *Smith* merits mention. In *Smith*, the Court cited publications of the U.S. Department of Justice, Bureau of Justice Statistics (BJS), to support the conclusion that sex offenders, as a class, pose a high rate of recidivism and dangerousness. *Smith*, 538 U.S. at 103. BJS statistics show, however, that sex offenders are less likely than other offenders to be re-arrested for any offense (43 percent compared to 68 percent within three years). U.S. Department of Justice, BJS, Recidivism of Sex Offenders Released from Prison in 1994 at 14 (2003). Further, the rates at which persons convicted of sex offenses later are arrested for additional sex offenses during that three-year period is 5.3 percent, far lower than the rate of their recidivism in general. *Id.* at 24. While the percentage of new sex offenses is larger for persons previously convicted of sex offenses than for persons convicted of other crimes (5.3 percent compared to 1.3 percent within three years), *id.*, the rate of sexual re-offending is lower than might be presumed from the Court's statement in *Smith* that "[t]he risk of recidivism posed by sex offenders is 'frightening and high.' " *Smith*, 538 U.S. at 103 (quoting *McKune v. Lile*, 56 U.S. 24, 34 (2002)).

The *Smith* Court also cited to research showing re-offenses "may occur 'as late as 20 years following release.'" *Smith*, 538 U.S. at 104 (citing National Institute of Justice, R. Prentky, R. Knight, & A. Lee, U.S. Dept. of Justice, Child

(continued on next page)

An enormous number of United States residents are required to register as sex offenders. A June 1, 2015, map disseminated by the National Center for Missing and Exploited Children reported that 843,260 persons were registered as sex offenders in this country.[7] This number includes 16,066 persons in North Carolina. Data is not available to establish the number of persons affected by the retroactive application of SOPPRP. Nevertheless, the sheer number of registrants in the United States demonstrates the potential for widespread, serious *ex post facto* violations occasioned by the retroactive application of increasingly onerous obligations and restraints. This potential is particularly troubling where individuals must continue to adhere to registration obligations for ever-increasing durations, sometimes with no opportunity to terminate registration even upon a showing of rehabilitation.

Sexual Molestation: Research Issues 14 (1997)). The study subjects for the research underlying the paper cited by the Court were 115 "repetitive sex offenders . . . released over a 25-year period from the Massachusetts Treatment Center (MTC) for Sexually Dangerous Persons." *Id.* at 11. Further, the finding that re-offenses could occur up to 20 years following release was specifically limited to "child molesters in this sample." *Id.* at 14. Any reliance on this research in the broader context of adult offenders, and particularly adult offenders who have not been found to be repetitive offenders, is unjustified.

[7] http://www.missingkids.com/en_US/documents/Sex_Offenders_Map.pdf (last viewed July 6, 2015).

This Court can correct the course of *ex post facto* jurisprudence in the context of sex offender registration programs by granting *certiorari* in this case and addressing the burdensome requirements of SOPPRP.

CONCLUSION

The Court should grant the petition for a writ of *certiorari* and reverse the decision of the Supreme Court of North Carolina.

Respectfully submitted,

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No. _____

In The Supreme Court of the United States

DAVID PAUL HALL,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of North Carolina

APPENDIX

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771 S.E.2d 285 (Mem)
Supreme Court of North Carolina.

In the matter of David P. HALL.

No. 60P15.
April 9, 2015.

Attorneys and Law Firms

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Glenn Gerding, for Hall, David P.
William P. Hart, Jr., Assistant Attorney General, for State of North Carolina.
R. Andrew Murray, District Attorney, for State of North Carolina.

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Petitioner on the 4th of February 2015 in this matter pursuant to G.S. 7A–30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the State of NC, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is "Allowed by order of the Court in conference, this the 9th of April 2015."

Upon consideration of the petition filed on the 4th of February 2015 by Petitioner in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A–31,

the following order was entered and is hereby certified to the North Carolina Court of Appeals: "Denied by order of the Court in conference, this the 9th of April 2015."

ERVIN, J. recused.

768 S.E.2d 39

Court of Appeals of North Carolina.

In the Matter of David Paul HALL.

No. COA14–435. | Dec. 31, 2014.

Appeal by petitioner from order entered 30 September 2013 by Judge W. Robert Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 24 September 2014.

Attorneys and Law Firms

Attorney General Roy Cooper, by Assistant Attorney General William P. Hart, Jr., for the State.

Glenn Gerding and Anne M. Hayes, Raleigh, for petitioner.

Opinion

BRYANT, Judge.

Where the language of N.C. Gen. Stat. § 14–208.12A shows a clear intent by our legislature to incorporate the requirements of the federal sex offender registration statutes, SORNA, into our State's statutory provisions governing the sex offender registration process, and to retroactively apply those provisions to sex offenders currently on the registry, we affirm the trial court's order doing so. It is well-established by our Courts that the application of N.C. Gen. Stat. § 14–208.5 *et seq.* which governs the sex offender registration process

does not violate our prohibition against *ex post facto* laws. Where petitioner fails to raise a constitutional argument before the trial court, that argument is deemed waived on appeal.

On 18 January 1982, petitioner David Paul Hall pled guilty to first-degree rape and second-degree kidnapping and was sentenced to life in prison. After serving over twenty years, petitioner was released on parole in April 2003 and properly registered himself as a sex offender in Mecklenburg County.

On 3 May 2013, petitioner filed a petition in Mecklenburg County Superior Court seeking termination of his sex offender registration. After a hearing on 23 September 2013, the trial court entered an order on 30 September denying the petition. Petitioner appeals.

Petitioner raises three issues on appeal: (I) whether the trial court erred in relying on the federal SORNA statute to deny his petition to terminate his sex offender registration; (II) whether the trial court's application of SORNA to support denying the petition constituted an *ex post facto* violation; and (III) whether the denial of the petition violated petitioner's substantive due process rights.

I.

Petitioner contends the trial court erred in relying on the federal SORNA statute to justify the

denial of his petition for termination of his sex offender registration. Specifically, petitioner contends such reliance on SORNA was erroneous because N.C. Gen.Stat. § 14–208.12A was not meant to be applied retroactively. We disagree.

> Resolution of issues involving statutory construction is ultimately a question of law for the courts. Where an appeal presents a question of statutory interpretation, full review is appropriate, and we review a trial court's conclusions of law *de novo*....
>
> When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment. Moreover, when confronted with a clear and unambiguous statute, courts are without power to interpolate, or superimpose, provisions and limitations not contained therein.
>
> The best indicia of the legislature's intent are the language of the statute or ordinance, the spirit of the act and what the act seeks to accomplish. Moreover, in discerning the intent of the General Assembly, statutes *in pari materia* should be construed together and harmonized whenever possible. *In pari materia* is defined as upon the same matter or subject.

In re Borden, 216 N.C.App. 579, 581, 718 S.E.2d 683, 685 (2011) (citations and quotations omitted).

North Carolina General Statutes, section 14–208.12A, provides that

> (a) Ten years from the date of initial county registration, a person required to register under this Part may petition the superior court to terminate the 30–year registration requirement if the person has not been convicted of a subsequent offense requiring registration under this Article....
>
> (a1) The court may grant the relief if:
>
> (1) The petitioner demonstrates to the court that he or she has not been arrested for any crime that would require registration under this Article since completing the sentence,
>
> (2) *The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State,* and
>
> (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

N.C. Gen.Stat. § 14–208.12A(a), (a1) (2013) (emphasis added).

SORNA,[1] 42 U.S.C.S. § 16911 *et seq.,* the Sex Offender Registration and Notification Act, establishes federal standards for sex offender registration and sets up guidelines for state sex offender registration programs. The federal standards are implemented and applied pursuant to the provisions of N.C. Gen.Stat. § 14–208.5 *et seq.,* which set forth North Carolina's sex offender registration program. *See* N.C. Gen.Stat. § 14–208.7(a) (2013) ("A person who is a State resident and who has a reportable conviction shall be required to maintain registration with the sheriff of the county where the person resides.... Registration shall be maintained for a period of at least 30 years following the date of initial county registration unless the person, after 10 years of registration, successfully petitions the superior court to shorten his or her registration time period under G.S. 14–208.12A.").

---

[1] SORNA was initially known as the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program ("the Jacob Wetterling Act"). 42 U.S.C. § 14071 (1997). Upon its repeal in 2006, the Jacob Wetterling Act was replaced by the Adam Walsh Child Protection and Safety Act ("the Adam Walsh Act"). 42 U.S.C. § 16901 (2006). The Adam Walsh Act covers substantially the same material as previously covered by the Jacob Wetterling Act; it further details and updates the registration requirements for sex offenders. *See id.; see also In re McClain,* ——N.C. App. ——, ——, 741 S.E.2d 893, 895, *discretionary review denied,* 366 N.C. 600, 743 S.E.2d 188 (2013) (discussing the evolution of the federal SORNA statute).

SORNA utilizes three tiers. Under SORNA, a tier I sex offender must register for fifteen years, a tier II sex offender must register for twenty-five years, and a tier III sex offender must register for life. However, a tier I sex offender may reduce his or her registration period to ten years by keeping a clean record; likewise, a tier II sex offender may reduce his or her registration period to twenty years. Only a tier III sex offender who is "adjudicated delinquent [as a juvenile] for the offense" may reduce his or her registration period to twenty-five years; otherwise, a tier III sex offender is subject to lifetime registration. *See* 42 U.S.C.S. § 16915(a), (b) (2013).

Here, petitioner pled guilty to first-degree rape in which a knife was used to threaten the victim; petitioner was not adjudicated delinquent for this offense. Therefore, based on the application of SORNA standards, petitioner is a tier III sex offender subject to lifetime registration. *Compare id.* § 16911(4) ("The term 'tier III sex offender' means a sex offender whose offense is punishable by imprisonment for more than 1 year and [ ] is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense: aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18, United States Code [18 U.S.C.S. §§ 2241 and 2242])[.]"), *and* 18 U.S.C.S. § 2241(a) (2013) (defining "aggravated sexual abuse" as "[w]hoever ... knowingly causes another person to engage in a sexual act—(1) by using force against that other person; or (2) by threatening or placing that other person in fear that any person will be subjected to

death, serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both."), *with* first-degree rape as defined by N.C. Gen. Stat. § 14–27.2(a)(2) (2013) ("A person is guilty of rape in the first degree if the person engages in vaginal intercourse [ ] [w]ith another person by force and against the will of the other person, and [ ] [e]mploys or displays a dangerous or deadly weapon[.]").

Petitioner argues that because N.C.G.S. § 14–208.12A, as amended in 2001, did not apply retroactively to petitioner's sex offender registration requirements, the 2006 amendment of this statute cannot be applied retroactively either. N.C.G.S. § 14–208.12A(a) (2001) stated that: "The requirement that a person register under this Part automatically terminates 10 years from the date of initial county registration if the person has not been convicted of a subsequent offense requiring registration under this Article." In 2006, N.C.G.S. § 14–208.12A(a) was amended, and subsection (a1) added, to provide that:

> *(a) A person required to register under this Part may petition the superior court in the district where the person resides to terminate the registration requirement 10 years from the date of initial county registration if the person has not been convicted of a subsequent offense requiring registration under this Article.*
>
> (a1) The court may grant the relief if:
>
> (1) The petitioner demonstrates to the court that he or she has not been arrested

> for any crime that would require registration under this Article since completing the sentence,
>
> (2) The requested relief complies with the provisions of the federal Jacob Wetterling Act, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State, and
>
> (3) The court is otherwise satisfied that the petitioner is not a current or potential threat to public safety.

(emphasis added).

Petitioner's argument that the 2006 amendment is not applicable to his petition to terminate his sex offender registration lacks merit, since N.C.G.S. § 14–208.12A (2006) is clearly retroactively applicable to petitioner. Petitioner was released from prison in April 2003, at which time petitioner registered with the Mecklenburg County Sheriff's Office as a sex offender. As such, petitioner was not eligible to petition the Mecklenburg County Superior Court for termination of his sex offender registration until ten years later, in April 2013.

This Court has addressed a similar retroactivity argument in *In re Hamilton.* In *In re Hamilton,* the petitioner argued that the requirements governing the termination of sex offender registration pursuant to N.C.G.S. § 14–208.12A were not intended to be retroactively

applied. We disagreed, finding that:

> The implementing language of [N.C.G.S. § 14–208.12A] states that it became effective 1 December 2006, and further specifies that it "is applicable to persons for whom the period of registration would terminate on or after [the effective] date." Petitioner's period of registration was not scheduled to terminate until 2011, and thus, section 14–208.12A plainly and explicitly applies to Petitioner. Further, while Petitioner contends the 2006 amendment to section 14–208.7, deleting the automatic termination language and adding language that the registration requirement last for "at least ten years" is ambiguous, we are not persuaded. The General Assembly did not explicitly state that this amendment was to apply retroactively to persons already on the registry. However, reading section 14–208.7 *in pari materia* with section 14–208.12A, *we must construe the abolition of the automatic termination provision as applying to persons for whom the period of registration would terminate on or after 1 December 2006.* To do otherwise would render the implementing language of section 14–208.12A superfluous and frustrate the General Assembly's intent in enacting and amending the registration scheme.

In re Hamilton, 220 N.C. App. 350, 355–56, 725 S.E.2d 393, 397 (2012) (emphasis added). Therefore, since petitioner could not become eligible to petition for termination of his sex offender registration until

2013 at the earliest, N.C.G.S. § 14–208.12A is retroactively applicable to petitioner. See *id.*; see also *In re McClain,* —— N.C. App. at ——, 741 S.E.2d at 896 (affirming the trial court's incorporation of SORNA in N.C.G.S. § 14–208.12A), *discretionary review denied,* 366 N.C. 600, 743 S.E.2d 188 (2013); *In re Civil Penalty,* 324 N.C. 373, 384, 379 S.E.2d 30, 36–37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." (citations omitted)). Accordingly, petitioner's argument is overruled.

II.

Petitioner next contends the retroactive application of SORNA to N.C.G.S. § 14–208.12A constitutes an *ex post facto* violation. We disagree.

"An appellate court reviews conclusions of law pertaining to a constitutional matter de novo." *State v. Bowditch,* 364 N.C. 335, 340, 700 S.E.2d 1, 5 (2010) (citations omitted).

Petitioner argues that the trial court's retroactive application of SORNA to N.C.G.S. § 14–208.12A constitutes an *ex post facto* violation. The State, in contrast, contends petitioner has not properly preserved this argument for appellate review. Specifically, the State argues that petitioner's *ex post facto* argument was not properly preserved for review because this argument was not ruled upon by the trial court.

Constitutional issues which are not raised and passed upon at trial cannot be reviewed for the first time on appeal. *See State v. Garcia,* 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) (citations omitted).

Here, the record indicates that petitioner raised an argument during the petition hearing concerning whether the trial court's retroactive application of SORNA constituted an *ex post facto* violation. In addition, petitioner sent a memorandum addressing his *ex post facto* argument to the trial court after the hearing but before the trial court entered its order denying the petition. Although the trial court did not make any findings of fact or conclusions of law regarding petitioner's *ex post facto* argument in its order denying the petition, we disagree with the State's contention that this issue has not been properly preserved for review. Rather, based on the record, which clearly indicates that petitioner presented his *ex post facto* argument to the trial court and the trial court's own statement that it would "take the time to read through the materials" provided to it by both petitioner and the State, it would appear that by entering an order denying the petition, the trial court implicitly rejected petitioner's *ex post facto* argument.[2] As such, we address petitioner's *ex post facto* argument.

---

[2] We note that the better practice would have been for the trial court to have ruled explicitly upon petitioner's *ex post facto* argument, either in a separate order or by including additional findings of fact and conclusions of law in the order. However, since the record supports a determination that the trial court reviewed and denied petitioner's *ex post facto* argument, we will review petitioner's contentions on appeal.

The enactment of *ex post facto* laws is prohibited by both the United States and the North Carolina Constitutions. *See* U.S. CONST. art. I, § 10 ("No state shall ... pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts...."); N.C. CONST. art. I, § 16 ("Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted."). This prohibition against *ex post facto* laws applies to:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime,* or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment,* and inflicts a *greater punishment,* than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence,* and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender.*

State v. Wiley, 355 N.C. 592, 625, 565 S.E.2d 22, 45 (2002) (citations and quotation omitted). "Because both the federal and state constitutional *ex post facto* provisions are evaluated under the same definition, we analyze defendant's state and federal constitutional contentions jointly." *Id.* (citation

omitted).

Petitioner argues that the trial court's retroactive application of SORNA to N.C.G.S. § 14–208.12A constitutes an *ex post facto* violation because this application has a "clearly punitive effect".

> An ex post facto analysis begins with determining whether the express or implicit intention of the legislature was to impose punishment, and if so, that ends the inquiry. If the intention was to enact a civil, regulatory scheme, then by referring to the factors enunciated in *Kennedy v. Mendoza–Martinez* for guidance, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate the legislature's civil intent.

Bowditch, 364 N.C. at 341–42, 700 S.E.2d at 6 (citations and quotations omitted).

In examining the legislative intent behind our sex offender registry statutes, it is well established that N.C.G.S. § 14–208.12A creates a "non-punitive civil regulatory scheme." *See State v. Pell,* 211 N.C. App. 376, 377, 712 S.E.2d 189, 190 (2011) (noting that "the sex offender registration requirement provided in Article 27A was a non-punitive civil regulatory scheme." (citing *State v. White,* 162 N.C. App. 183, 193, 590 S.E.2d 448, 455 (2004))). Nevertheless, as we are urged to do so by defendant's vigorous argument, we will "further

examine whether the statutory scheme is so punitive ... as to negate the legislature's civil intent." *Bowditch,* 364 N.C. at 342, 700 S.E.2d at 6 (citations and quotations omitted).

In determining whether the effects of a civil statute are truly punitive, this Court applies the factors as set forth in *Kennedy v. Mendoza–Martinez,* 372 U.S. 144, 168–69, 83 S. Ct. 554, 9 L.Ed.2d 644 (1963). *White,* 162 N.C. App. at 194, 590 S.E.2d at 455 (citation omitted).

> [T]he most relevant factors for registration laws [have been found] to be whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a non[-]punitive purpose; or is excessive with respect to this purpose.

Id. (citation and quotation omitted).

In reviewing whether the requirements of sex offender registration are so punitive as to negate the civil intent behind such registration, our Courts have consistently held that the sex offender registration provisions as set forth in N.C. Gen. Stat. § 14–208.5 *et seq.* (Article 27A) do not amount to *ex post facto* violations. *See* N.C.G.S. § 14–208.5 (2013) (setting forth the purposes behind the sex offender registration requirements); *see also State v. Sakobie,*

165 N.C. App. 447, 452, 598 S.E.2d 615, 618 (2004) ("[T]he legislature did not intend that the provisions of Article 27A be punitive [and] ... the effects of North Carolina's registration law do not negate the General Assembly's expressed civil intent and that retroactive application of Article 27A does not violate the prohibitions against *ex post facto* laws." (citing *White,* 162 N.C. App. at 194–98, 590 S.E.2d at 455–58)).

Petitioner argues that despite our Court's well-established line of decisions holding that sex offender registration does not constitute an *ex post facto* violation, such a view is inapplicable to the instant case since it involves lifetime registration. Petitioner contends lifetime registration, such as that based on SORNA, is so overly punitive as to constitute an *ex post facto* violation. We reject petitioner's contention, since the reasoning in *Bowditch,* upholding lifetime satellite-based monitoring of sex offenders, informs us that the imposition of lifetime sex offender registration programs does not constitute an *ex post facto* violation. *See Bowditch,* 364 N.C. at 342–43, 700 S.E.2d at 6–7 (holding that satellite-based monitoring ("SBM") of sex offenders does not create an *ex post facto* violation, for "the placement of the SBM program within Article 27A of Chapter 14 of our General Statutes is significant. The SBM program follows immediately after the Article 27A sections comp[ri]sing the Sex Offender Registration Programs [pursuant to] N.C.G.S. §§ 14–208.5 to –208.32 (2009). *Before enactment of the SBM program, the Supreme Court of the United States had determined sex offender registration statutes to*

be civil regulations, Smith [v. Doe], 538 U.S. [84,] 105–06, 123 S.Ct. 1140 [155 L.Ed.2d 164 [2003]], and North Carolina appellate courts had reached the same conclusion, see State v. Sakobie, 165 N.C.App. 447, 451–52, 598 S.E.2d 615, 617–18 (2004). Moreover, the legislature's statement of purpose for Article 27A, found at section 14–208.5, explains that 'the purpose of this Article [is] to assist law enforcement agencies' efforts to protect communities.' Understandably, section 14–208.5 explicitly refers to registration, but the SBM program [set forth in §§ 14–208.40–208.45, Part 5 of Article 27A] is consistent with that section's express goals of compiling and fostering the 'exchange of relevant information' concerning sex offenders. The decision to codify the SBM statutory scheme in the same Article and immediately following the registration programs implies a legislative objective to make the SBM program one part of a broader regulatory means of confronting the unique 'threat to public safety posed by the recidivist tendencies of convicted sex offenders.' [*State v.*] *Abshire,* 363 N.C. [322,] 323, 677 S.E.2d [444,] 446 [2009]." (emphasis added)).

This broader, regulatory means of addressing the need for law enforcement officers and the public to have information regarding certain convicted sex offenders may seem burdensome, but it is not penal or punitive. We note that defendant has argued vigorously for a different result regarding the burden imposed on him by the registration requirements as they currently exist. Without addressing each individual point raised by defendant, we acknowledge these arguments and note that they

have been previously addressed and rejected by our Courts. *See State v. Williams,* 207 N.C. App. 499, 505, 700 S.E.2d 774, 777–78 (2010). Moreover, this Court has held that Article 27A of Chapter 14 of our North Carolina General Statutes sets forth civil, rather than punitive, remedies and, therefore, does not constitute a violation of *ex post facto* laws. *See id.* Therefore, in light of this Court's prior decisions rejecting the argument that our sex offender registration statutes constitute an *ex post facto* law, we are bound to say that petitioner's argument lacks merit. *See In re Civil Penalty,* 324 N.C. at 384, 379 S.E.2d at 37 ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." (citations omitted)). Accordingly, petitioner's argument is overruled.

III.

Finally, petitioner argues that the trial court's denial of the petition violated petitioner's substantive due process rights. However, since petitioner did not raise this argument before the trial court, this argument has not been properly preserved for appeal. *See* N.C. R. App. P. 10(a)(1) (2014) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context."); *see also Garcia,* 358 N.C. at 410, 597 S.E.2d at 745. Moreover, we note

that even if petitioner's argument had been properly preserved for appeal, it has already been determined that the registration requirements of N.C.G.S. § 14–208.5 *et seq.* do not amount to a violation of due process. *See State v. Williams,* —— N.C. App. ——, ——, 761 S.E.2d 662, 665–68 (2014) (holding that the imposition of lifetime SBM did not violate the defendant's due process); *White,* 162 N.C. App. at 189–90, 590 S.E.2d at 453 ("[T]he notice provisions of the registration act (N.C. Gen. Stat. §§ 14–208.8 [*et seq.*]) remove the statute from due process attacks[.]" (citation omitted)). Accordingly, petitioner's argument is deemed waived. The order of the trial court is, therefore, affirmed.

Affirmed.

Judges ELMORE and ERVIN concur.

STATE OF NORTH CAROLINA

Mecklenburg County

File No. 81 CRS 065575

In the Superior Court Division

In the Matter of David Paul Hall

ORDER FOR TERMINATION OF
SEX OFFENDER REGISTRATION

File No: 81 CRS 065575, Rape 1st Degree, Date of Conviction 01/18/1982, Mecklenburg County, North Carolina, Date of Initial Registration 4/28/2003

FINDINGS OF FACT

After a hearing on this petition, the Court finds the following:

[X] 1. The petitioner was required to register as a sex offender under Part 2 of Article 27A of Chapter 14 of the General Statutes for the offense(s) set out above.

[X] 2. The petitioner has been subject to the North Carolina registration requirements of Part 2 of Article 27A for at least ten (10) years beginning with the Date Of Initial NC Registration above.

[X] 3. Since the Date Of Conviction above, the petitioner has not been convicted of any

subsequent offense requiring registration under Article 27A of Chapter 14.

[X] 4. Since the completion of his/her sentence for the offense(s) set out above, the petitioner has not been arrested for any offense that would require registration under Article 27A of Chapter 14.

[X] 5. The petitioner served this petition on the Office of the District Attorney at least three (3) weeks prior to the hearing held on this matter.

[X] 6. The petitioner is not a current or potential threat to public safety.

NO 7. The relief requested by the petitioner complies with the provisions of the federal Jacob Wetterling Act, 42 U.S.C. § 14071, as amended, and any other federal standards applicable to the termination of a registration requirement or required to be met as a condition for the receipt of federal funds by the State.

[X] 8. If the petitioner filed a previous petition for termination under G.S. 14-208.12A that was denied, one year or more has passed since, the date of the denial.

[X] 9. If the conviction requiring the petitioner's registration occurred in another state, the petitioner (i) provided written notice to the sheriff of the county where the

petitioner was convicted that the petitioner is petitioning the court to terminate the registration requirement and (ii) included with the petition an affidavit, signed by the petitioner, that verifies that the petitioner notified the sheriff of the county where the petitioner was convicted of the petition and that provides the mailing address and contact information for that sheriff.

"The Court did not find #7."

CONCLUSIONS OF LAW

After a hearing on this petition, and based on the foregoing findings, the Court concludes as follows: (check one)

☐ 1. The petitioner is entitled to the relief requested. (All of the findings of fact above must be found.)

☒ 2. The petitioner is NOT entitled to the relief requested.

Date: 9/27/13

Signed: Judge W. Robert Bell