Circuit Court for Prince George's County
Case No.: CAL 15-37300

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1289

September Term, 2016

FELA ALI-FULLER

v.

STEVEN MOYER

Woodward, C.J.,
Kehoe,
Shaw Geter,

JJ.

Opinion by Shaw Geter, J.

Filed: December 13, 2017

*This is an unreported opinion, and may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case arises from a petition for declaratory relief, injunctive relief, and for writs of mandamus and prohibition filed in the Circuit Court for Prince George's County. Appellant, Fela Ali-Fuller, challenged whether his conviction for a sexually violent offense required him to enroll in the Maryland Sex Offender Registry under the Maryland Sex Offender registration statute. He argued that, because he was convicted before the statute was enacted, requiring him to register violates the Maryland Declaration of Rights' prohibition on *ex post facto* laws. Appellee, Stephen T. Moyer, the Department of Public Safety and Correctional Services' Secretary, moved for summary judgment, asking the court to declare appellant be obligated to register as a sex offender under Maryland law. The circuit court granted appellee's motion.

We have reworded appellant's questions for our review as follows[1]:

1. Did the trial court err in granting the motion for summary judgment?
2. Does requiring appellant to enroll in the Maryland Sex Offender Registry violate Maryland's prohibition against *ex post facto* laws?

For the reasons set forth below, we shall answer the questions in the negative and affirm the judgment of the circuit court.

---

[1] Appellant presented the following questions for our review:

1. Did the lower court err in granting the motion for summary judgment?
2. In ex post facto analysis, is the operative date the date of conviction, as opposed to the date the convicted person moved to Maryland?
3. Is the Maryland Constitution supreme, even in the fact of contrary legislative intent of the General Assembly?

BACKGROUND

On December 1, 1987, a U.S. Army General Court-Martial convicted appellant Fela Ali-Fuller[2] of rape and attempt to commit sodomy while he served on active duty in Germany. He was incarcerated at the U.S. Disciplinary Barracks in Fort Leavenworth, Kansas, until his release on parole on October 19, 2000.[3]

In 1995, the Maryland General Assembly enacted the Maryland Sex Offender Registration statute. *State v. Duran*, 407 Md. 532, 546-47 n.7 (2009). The sex offender registration statute was amended in 2001 to apply retrospectively to different groups of sex offenders, including those "convicted of an offense committed before July 1, 1997, and who [was] under the custody or supervision of a supervising authority on October 1, 2001." Md. Code Ann. Crim. Proc. § 11-702.1(a) (2001).[4]

From 2000 to 2004, appellant resided in the District of Columbia, where his criminal conviction mandated that he register as a sex offender under the laws of that jurisdiction. Appellant never contested his requirement to register in the District of Columbia.

In 2001, the registration requirements for sex offenders were defined in Section 11-707 of the Criminal Procedure Article. Registration was mandated for anyone meeting the definition of a "sexually violent offender" and "who, before moving into this State, was required to register in another state, or by a federal, military, or Native American tribal

[2] At the time of his conviction, appellant's name was Anthony C. Fuller.

[3] Appellant's parole is effective until August 8, 2025.

[4] The retroactive application of the statute was also amended in 2009, but that amended is not relevant to the current appeal.

court for an offense occurring before July 1, 1997."[5] Md. Code Ann., Crim. Proc. § 11-704(a)(6) (Supp. 2001). The length of registration was detailed in § 11-707, which stated that the term of registration would be 10 years unless the registrant met certain criteria. Under Section 11-707(a)(4)(ii)(2), offenders convicted of violating Article 27, § 462, rape in the first degree,[6] would be required to register for life.[7]

In 2004, appellant moved to Maryland. He enrolled in the Maryland Sex Offender Registry (the "MSOR"), maintained by the Department of Public Safety and Correctional

[5] The reference to a 'state' in a Maryland statute also includes the District of Columbia. Md. Code Ann., Gen. Prov. § 1-115(a)(2).

[6] A person was guilty of rape in the first degree, under § 462, "if the person engages in vaginal intercourse with another person by force or threat of force against the will and without the consent of the other person and" "[e]mploys or displays a dangerous or deadly weapon" or if "[t]he person commits the offense aided and abetted by one or more other persons." Md. Code Ann., Art. 27, § 462(a) (2001). Appellant was convicted in 1987 for rape. He forcibly penetrated the victim, brandishing a knife during the altercation. Appellant was also abetted by another individual, who also raped the victim.

[7] In 2001, Md. Code Ann. Crim. Proc. § 11-707(a)(4) stated: "**The term of registration is**:

(i) 10 years; or

(ii) **Life, if**:

1. The registrant has been determined to be a sexually violent predator in accordance with the procedures described in § 11-703 of this subtitle;
2. **The registrant has been convicted of any violation of Article 27, §§ 462 through 464B of the Code;** or
3. The registrant has been previously required to register and has been convicted of a subsequent crime as a child sexual offender or an offender or has been convicted of a subsequent sexually violent offense.

Though the statutes changed, this required registration period has been true since 1999. *See* Md. Code Ann. Art. 27, § 792(d)(4)(ii)(i) (West 1999 Supp.).

Services (the "Department"), on June 10, 2004. By definition, he was considered a "sexually violent offender" and required to register for life.[8]

In 2010, the Maryland General Assembly amended the sex offender registration statute, changing the categorizations into 'tiers.' Terms of registration are now based on the 'tier' of the offender – either Tier I, Tier II, or Tier III – and the definitions for the tiers are found in § 11-701. Appellant, who was previously categorized as a sexually violent offender, is now titled a Tier III sex offender.[9] Section 11-707 requires anyone classified as a Tier III sex offender, who committed a sexually violent offense, to register for life. The 2010 amendment also required retroactive registration of all persons who were already required to register on September 30, 2010. Md. Code Ann. Crim. Proc. § 11-702.1(a)(2).

---

[8] At the time of appellant's move to Maryland, "sexually violent offender" was defined as "a person who" "has been convicted of a sexually violent offense" or "has been convicted of an attempt to commit a sexually violent offense." Md. Code Ann. Crim. Proc. § 11-701(f) (West 2004 Supp.). "Sexually violent offense" was defined in § 11-701(g) as:

> (1) **A violation of §§ 3-303 [rape in the first degree] through 3-307** or §§ 3-309 through 3-312 of the Criminal Law Article;
> (2) Assault with intent to commit rape in the first or second degree or a sexual offense in the first or second degree as prohibited on or before September 30, 1996, under former Article 27, § 12 of the Code; or
> (3) A crime committed in another state or in a federal, military, or Native American tribal jurisdiction that, if committed in this State, would constitute one of the crimes listed in (1) or (2) of this subsection.

Md. Code Ann. Crim. Proc. § 11-701(f) (West 2004 Supp.).

[9] Md. Code Ann. Crim. Proc. § 11-701(q)(1)(ii) defines a "Tier III sex offender" as "a person who has been convicted of:

> (1) Conspiring to commit, attempting to commit, or committing in violation of:
> ...
> (ii) § **3-303** [rape in the first degree]".

On December 11, 2015, eleven years after his initial enrollment in the MSOR, appellant filed a Petition for Writ of Mandamus, Writ of Prohibition Injunctive Relief, and for Declaratory Judgment in the circuit court against the Department's Secretary, Stephen T. Moyer, asserting that the requirement he register on the MSOR violated the *ex post facto* clause of Article 17 of Maryland's Declaration of Rights. Secretary Moyer moved for summary judgment, asking the court to declare that appellant remain obligated to register as a sex offender under Maryland law. On August 1, 2016, the court granted Secretary Moyer's motion.

This appeal followed.

DISCUSSION

I. The circuit court did not err in resolving the matter in summary judgment.

A motion for summary judgment shall be granted "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." Maryland Rule 2-501. We, therefore, determine whether the trial court was legally correct. *Windesheim v. Larocca*, 443 Md. 312, 326 (2015) (citing *Goodwich v. Sinai Hosp. of Balt., Inc.*, 343 Md. 185, 204 (1996)). "However, "[b]efore determining whether the Circuit Court was legally correct in entering judgment as a matter of law," "we independently review the record to determine whether there were any genuine disputes of material fact." *Windesheim*, 443 Md. at 326 (citing *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 294 (2007)). "Whether summary judgment was granted properly is a question of law" and "[t]he standard of

review is *de novo*, and whether the trial court was legally correct." *Livesay v. Baltimore County*, 384 Md. 1, 9 (2004).

Appellant argues the circuit court erred in granting appellee's motion for summary judgment. However, appellant points to no dispute of any fact, material or not, that he and appellee disagree on. Appellant takes issue with the court's application of the law, which we will review *de novo* below. Nevertheless, because there was no dispute of material fact, the court did not err in resolving the matter in summary judgment.

II. The requirements imposed on appellant by the Maryland Sex Offender Registration Statue do not violate the prohibition against *ex post facto* laws.

The Circuit Court for Prince George's County found that pursuant to the 1999 and 2010 amendments to the Maryland Sex Offender Registration Act, appellant was required to register as a tier III sex offender for life, as "the Maryland Legislature did not intend for the state of Maryland to act as a safe haven of non-registry for convicted sex offenders in other states."[10] Appellant argues that requiring him to register on the MSOR violates the prohibition against *ex post facto* laws in Article 17 of the Maryland Declaration of Rights. He contends that because the MSOR came into existence after he committed the offense, the court erred in requiring him to register. Appellee, conversely, argues the Act was not applied retrospectively to appellant because it was the District of Columbia's requirement to register, not his actual conviction, that 'triggered' appellant's requirement to register in Maryland when he moved to Maryland in 2004. They contend that appellant was on notice

[10] R.E. 106.

that moving to Maryland while under a registration requirement in the District of Columbia would result in a registration obligation in Maryland.

Appellant relies on *Doe v. Dept. of Public Safety and Correctional Services* ("*Doe I*"), to support his assertion. In *Doe I*, the Court of Appeals addressed the constitutionality of the 2010 amendment's retroactivity provision as applied to an offender whose offense occurred before the Maryland sex offender registry existed. 430 Md. 535 (2013). The offender pled guilty to child sexual abuse, based on his inappropriate contact with a child that occurred in 1983-1984. *Id.* at 538. No charges were filed until 2005, and Doe was not sentenced until 2006. As part of his sentencing, the judge required that Doe register as a sex offender. *Id.*

Doe filed a motion to correct an illegal sentence, challenging the requirement that he register as violative of Article 17 of the Maryland Declaration of Rights. *Id.* at 540. Article 17 states "[t]hat retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made; nor any retrospective oath or restriction be imposed, or required." Doe noted that the Maryland sex offender registration statute in effect at the time applied retroactively only to a sex offender who committed their offense on or before October 1, 1995 *if* the offender was "under the custody or supervision of the supervising authority on October 1, 2001." Doe "contended that he could not be required to register because '[t]here was no registry at the time of the instant offense and the law, as written, [did] not apply retroactively to'" him because he was "not

under the custody or supervision of the supervising authority on October 1, 2001." *Doe I*, 430 Md. at 540.

The decision was rendered by a three-judge plurality, which began by acknowledging that in *ex post facto* analysis, Maryland had diverged from the Supreme Court's analysis of the federal prohibition on *ex post facto* laws. *Doe v. Dept. of Public Safety and Correctional Services*, 430 Md. 535, 551 (2013). The plurality then held that *ex post facto* claims under Article 17 should be analyzed by using the 'disadvantage' standard, whereby "'two critical elements'" "'must be present' for a law to be unconstitutional under the *ex post facto* prohibition:" "the law is retroactively applie[d] and the application disadvantages the offender." *Id.* at 551-52 (noting that in *Collins v. Youngblood*, 497 U.S. 37, 50 (1990), "the United States Supreme Court rejected the 'disadvantage' standard."). "Article 17 prohibits the retroactive application of laws that have the effect on an offender that is the equivalent of imposing a new criminal sanction or punishment." *Id*. at 561.

The court ultimately agreed with appellant Doe and held the "prohibition against *ex post facto* laws is rooted in a basic sense of fairness, namely that a person should have 'fair warning' of the consequences of his or her actions." *Doe*, 430 Md. at 552. Because the registry did not come into existence until after his offense, and the amendment which required Doe to register did not come into effect until 2010, the Court stated that Doe "could not have had fair warning that he would be required to register." *Id.* at 553.

Judge McDonald, joined by Judge Adkins, concurred with the court's conclusion that the statute violated Article 17, but, in contrast, read Article 17 *in pari materia* with Article I, § 10 of the United States Constitution. "Although his concurrence did not expressly state the test that was used, both the language of the concurrence and the two law review articles cited therein lead us to conclude that Judge McDonald analyzed the issue under the 'intent-effects test.'" *Long v. Maryland State Department of Public Safety*, 230 Md. App. 1, 17 (2016) (citing *In re Nick H.*, 224 Md. App. 668, 687 (2015)).

The United States Supreme Court explained the 'intents-effects' test in *Smith v. Doe*. 538 U.S. 84 (2003). In *Smith*, the Supreme Court examined an Alaskan sex registration statute that went into effect after the offenders in the case were convicted, and required sex offenders and child kidnappers to register, and to re-register every three months after. The Court held that the rights of the respondents were not violated because "the respondents cannot show, much less by the clearest proof, that the effects of the law negate Alaska's intention to establish a civil regulatory scheme." *Id.* at 105. Using the 'intents-effects' test, the Court explained that it requires a reviewing court to engage in a two-party inquiry: first, "[w]e must 'ascertain whether the legislature meant the statute to establish 'civil' proceedings.'" *Id.* at 92. "If the intention of the legislature was to impose punishment, that ends the inquiry." *Id.* "If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" *Id.* (quoting *United States v. Ward*, 448 U.S. 242, 248-49 (1980)).

This Court, in *In re Nick H.*, addressed using the intents-effects test in Article 17 analysis and the effect of the plurality decision in *Doe I*. 224 Md. App. 668 (2015). There, Nick H. entered a plea in June of 2006 to one count of sexual abuse of a minor and two counts of second degree sexual offense. At the time, appellant was sixteen years old, and, because he was a juvenile, was not required to register as a sex offender in Maryland. The 2009 and 2010 amendments to the MSORA, however, required certain juvenile offenders to register as sex offenders once they left the jurisdiction of the juvenile court. Nick H. was required to register, given that he was "adjudicated delinquent of second degree sexual assault," "he was over thirteen years old at the time of the offense;" "the State requested that appellant be required to register;" "the juvenile court determined by clear and convincing evidence that appellant was at significant risk of re-offending;" and "appellant was over eighteen…when his registration began." *Id.* at 688.

We began by noting that, "[b]ecause *Doe I* is a plurality decision, we employ the *Marks* Rule to determine the Court's ruling." 224 Md. App. 668, 684 (2015). "[W]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [four judges], the holding of the court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." *Id.* at 684-85 (internal citations omitted).

"In *Doe I*, the decision that MSORA violates the Article 17 ban on *ex post facto* laws is the common denominator representing the position taken by five judges who agreed that Doe should be granted relief." *Id*. at 685. "Because the *Marks* Rule directs us to the

narrowest ground common to the plurality and the concurrence, Judge McDonald's interpretation of Article 17 as read *in pari materia* with the less expansive federal *ex post facto* clause represents 'the position taken by those Members who concurred in the judgment on the narrowest grounds.'" *Id*. While recognizing "that in reaching its holding in *Doe I*, three members of the Court applied the disadvantage test (the plurality opinion), while only two applied the intent-effects test (Judge McDonald's concurrence)," we nevertheless concluded that the appropriate test to determine whether MSORA violates Article 17 was the intent-effects case. *Id.* at 686; *see also Long v. Maryland State Department of Public Safety and Correctional Services*, 230 Md. App. 1 (2016) (finding the 'intent-effects' test was the appropriate test to determine whether the MSORA violated Article 17); *Young v. State*, 370 Md. 686 (2002) (finding the same).

After examining the legislative intent of the MSORA, this Court found that, "[a]lthough no statement of purpose is expressly set forth in MSORA, its history and language suggest that it is not intended to be punitive." *In re Nick H.*, 224 Md. App. at 690. We noted that, in *Young v. State*, 370 Md. 686, 712 (2002), the Court of Appeals discussed the legislative purpose of MSORA as it was in 2002, and concluded "that the plain language and overall design of [the MSORA] clearly indicate that it was not intended as punishment, but rather was intended as a regulatory requirement aimed at protection of the public." *Id*.

The next step in the intents-effects inquiry required "determin[ing] whether the statute's effect 'overrides the legislative purpose to render the statute punitive.'" *Id*. at 691

(citing *Doe I*); *see also Smith v. Doe*, 538 U.S. 84, 97 (2003) (analyzing whether the effects of the Alaskan sex offender registration statute's using the seven factors). "Factors derived from the Supreme Court's decision in *Kennedy v. Mendoza-Martinez* assist us in analyzing whether an otherwise regulatory statute becomes punitive." *Id*. at 691 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)). "These factors include, but are not limited to:

> [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 re Nick. H., 224 Md. at 691. While several of these factors imposed an affirmative disability on the appellant, were historically considered punishment, and applied to activities that were criminal in nature, we found "these disadvantages are outweighed by the public safety purpose of the MSORA." Ultimately, we held, using the 'intent-effects' test, that requiring appellant to register under the amendments to the Act did not violate Article 17 of the Maryland Declaration of Rights.

In *Long v. Maryland State Department of Public Safety and Correctional Services*, this Court again addressed what was the appropriate test for determining whether the MSORA violated Article 17. 230 Md. App. 1 (2016). In 2000, Long committed a third-degree sexual offense against a child. In 2001, he entered a guilty plea, and was sentenced to five years' incarceration with all but six months suspended, and five years' probation. At the time, third-degree child sexual offenders were required to register for life. *Id.* at 6.

Due to the nature of his crimes, Long qualified as a sexually violent offender and thus was required to register for life.

On the day Long was sentenced, he acknowledged receipt of an 'order for probation upon release from incarceration,' which set forth as a condition for probation that he must register as a sex offender, but did not specify the required length of his registration. 230 Md. App. at 6. Ten days later, he received a document informing him, incorrectly, that he was only required to register as a child sex offender for 10 years. In 2004, Long received a document that advised him he was required to register as a child sexual offender for life. Long argued in his petition that, amongst other things, if this Court found he was required to register for life, we should, nevertheless, decide that he should only have to meet the reporting requirements that were in place in 2000 and not the more stringent requirements imposed by the 2009 and 2010 amendments.

We began by noting that "[i]n large measure, the reason for the 2009 and 2010 changes to the [MSORA] was that the United States Congress, in 2006, passed the Sex Offender Registration and Notification Act ("SORNA")." *Long*, 230 Md. App. at 12. "SORNA required states to set up a sex offender registry and specified what information must be contained in the registry." *Id.* "In addition, SORNA authorized the United States Attorney General to issue guidelines to the states specifying additional information about sex offenders that should be compiled and contained in the registry." *Id.* "A review of SORNA, together with the Attorney General's guidelines, show that many of the 2009-2010 changes to the Act were required by either SORNA or the guidelines." *Id.* at 13.

After addressing both the 'disadvantage' test and the 'intent-effects' test, we concluded that "under the holding in *Nick H.*," that the 'intent-effects' test was the narrowest ground common to the plurality and the concurrence in *Doe I*, "the disadvantage test is inapplicable when construing Article 17 of the Declaration of Rights." *Long*, 230 Md. App. at 20 (citing *In re Nick H.*, 224 Md. at 685-86). Because Long was already required to register at the time of his conviction, we analyzed only the 2009 and 2010 amendments under the 'intent-effects' test, and found that "it is clear that the General Assembly, by the 2009 and 2010 amendments, intended the statute to be a regulatory measure needed to accomplish two public safety regulatory objectives." *Id.* at 20. "[T]here is nothing in the language used in either the 2009 or 2010 amendments that indicates a legislative intent to punish the sex offender," and, therefore, "the General Assembly meant the amendments to be part of a civil regulatory scheme and not punitive." *Id.* at 21.

We then analyzed "whether the effect of the statute 'overrides the legislative purpose [in such a way as] to render the statute punitive.'" *Id.* Although "the additional requirements set forth in the amendments…can be said to amount to an affirmative disability[,]" "the [added] burden is not so unreasonable, in light of the statute's remedial aims, that it converts the statute into a punitive one." *Id.* at 22. Finally, "after balancing all relevant factors, we conclude[d] that appellant ha[d] failed to produce 'the clearest proof' that despite the non-punitive intent of the amendments, the effect of the 2009 and 2010 changes in the Act are punitive." *Id.* at 23. "Because the added burdens brought

about by the amendments do not constitute punishment forcing appellant to comply with the new requirements, they did not violate appellant's rights as set forth in Article 17."

In the case at bar, appellant is correct that the MSORA has been applied retroactively to him. However, in accordance with *In re Nick H.*, *Long*, and *Young*, the proper test to determine whether the MSORA violates Article 17 as applied to appellant is the 'intent-effects' case.[11] The first step, therefore, is determining the legislative intent of the statute. *Smith*, 538 U.S. at 92. As in *Young*, *In re Nick H.*, and *Long*, the plain language and overall design of the MSORA indicates it was not intended as punishment, but rather was intended as a regulatory requirement aimed at protection of the public, including, as the circuit court found, preventing Maryland from becoming a safe-haven for violent sex offenders.

The second step in the intents-effects test requires examining whether, even if the statute's purpose is non-punitive, its effect overrides the legislative purpose to render it punitive, *Smith*, 538 U.S. at 92, using the factors as set forth in *Kennedy v. Mendoza-Martinez*. *In re Nick H.*, 224 Md. at 691 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)). "The first factor is whether the statute imposes an 'affirmative disability or restraint.'" *Long*, 230 Md. App. at 22 (citing *Doe I*, 430 Md. at 572). In the case *sub judice*, the registration requirements set forth by the State of Maryland are no more a

[11] Appellant argues that the 'intent-effects' was not argued below. However, "[w]hether summary judgment was granted properly is a question of law" and "[t]he standard of review is *de novo*, and whether the trial court was legally correct." *Livesay v. Baltimore County*, 384 Md. 1, 10 (2004).

'disability' than those imposed by the District of Columbia. However, even despite appellant's previous compliance with the District's registration requirements, as in *Long*, although the requirements set forth under the MSORA "can be said to amount to an affirmative disability[,]" "as in *Young*, 'we ultimately conclude that the [added] burden is not so unreasonable, in light of the statute's remedial aims, that it converts the statute into a punitive one.'" *Long*, 230 Md. App. at 22 (citing *Young*, 370 Md. at 713).

"The second factor (whether the added requirements have been historically viewed as punishment) weighs in favor of the State." *Long*, 230 Md. App. at 22. "Providing detailed information to a local law enforcement agency coupled with the requirement that the offender appear in person once every three months has historically not been viewed as punishment; instead, such requirements have historically been viewed as servicing a regulatory purpose." *Id.* (quoting *Smith*, 538 U.S. at 98-99).

"The third factor also weighs in favor of the State because no finding of *scienter* is required in order for the additional registration requirements to apply." *Long*, 230 Md. App. at 22. "The fourth factor (whether the statute will promote the traditional goals of punishment: retribution and [deterrence]), weighs in favor of appellant." *Id.* "Although not retributive, the [requirements] set forth in the [MSORA] can be said to serve a deterrence function by continuously reminding the offender of the ever-present interest of law enforcement in the registrant's behavior." *Id.* "This factor, however, is afforded slight weight because," similarly to *Long*, before the appellant moved to Maryland, "appellant already had to provide significant information to [law enforcement]." *Id.* at 22-23.

"The fifth factor (whether the behavior to which the [MSORA] applies is already a crime) is one that also favors the appellant because, quite obviously, in order to be required to provide the additional information, one must be a convicted sex offender." *Long*, 230 Md. App. at 23. That is also afforded limited weight, however, given that "[t]he fact that the statute is triggered by a criminal conviction does not undermine the Legislature's intent to create a sex offender registry to aid in a civil purpose[.]" *Young*, 370 Md. at 714.

"The sixth factor (whether an alternative purpose – other than punishment – may be assigned for the added burden) strongly favors the State because the amendments clearly have a purpose other than punishment." *Long*, 230 Md. App. at 23. "That alternative purpose was to protect the public from the grave threat of repeat sex offenders by requiring convicted sex offenders to supply added information and to present themselves more frequently to law enforcement agencies so that their whereabouts can always be determined." *Id.* In the instant case, there is the additional purpose of preventing Maryland from becoming a safe-haven for violent sex offenders to live unregistered.

"The seventh factor (whether the burden appears excessive in relation to the alternative purpose), favors the State." *Id.* "In light of the serious problems cause by repeat sex offenders and the attendant need to be aware of the location and activities of the offender," and the additional interest of preventing the creation of a safe-haven for violent sex offenders, "while perhaps inconvenient for the offender, are not excessive." *Id.*

"Because we 'ordinarily defer to the legislature's stated intent,'" "only the clearest proof will suffice to override legislative intent and transform what has been denominated

a civil remedy into a criminal penalty." *Long*, 230 Md. App. at 21; *see also In re Nick H.*, 224 Md. App. 668, 705 (2015); *Smith v. Doe*, 538 U.S. 84, 92 (2003). Therefore, as in *Young*, *In re Nick H.*, and *Long*, after balancing all the relevant factors, and absent "the clearest proof," we conclude that the burdens imposed by the MSORA do not constitute punishment, and it does not violate appellant's rights as set forth in Article 17.

However, even if, *arguendo*, we did apply the 'disadvantage' test, we would still find that requiring appellant to register on the MSOR would not violate Article 17. Appellant contends that under the disadvantage analysis in *Doe I*, the circuit court erred in requiring him to continue to register. However, the case *sub judice* is distinguishable from the case in *Doe* on several pertinent fronts. First and foremost, unlike the offender in *Doe I*, appellant has been required to register since his release in 2000, and did not suddenly become required to register. He was also willingly complying with both the District of Columbia, and Maryland's, requirement that he register for 15 years before filing this action. Unlike the offender in *Doe I,* he was under the custody and supervision of the State in 2001, as required by the MSORA. Moreover, appellant signed the Addendum to his parole in 2000, in which he explicitly agreed that "if a state requires, [he] w[ould] register as a sex offender" and when he moved to the State in 2004. Therefore, appellant had more than 'fair notice' that he would be required to register.

Appellant continues, however, that the Court of Appeal's decision in *Department of Public Safety and Correctional Services v. Doe* ("*Doe II*"), is decisive. 439 Md. 201 (2014). In *Doe II*, the Court considered whether circuit courts had the authority to direct

the State to remove a sex offender's information from the MSOR when specific provisions of SORNA directed those offenders to register in the state in which they reside, work, or attend school. The Court first detailed the SORNA requirements, including provisions that "expressly addresse[d] the possibility of a conflict between SORNA's provisions and a state constitution[.]" *Doe II*, 439 Md. at 229. The Court, relying on an Indiana Court of Appeals decision, found that individuals who "would only be required to register in Maryland," but whom the courts have found "the retroactive application of the Maryland registry is unconstitutional," "cannot be required to register" in Maryland under SORNA. *Doe II*, 439 Md. at 235 (citing *Andrews v. State*, 978 N.E.2d 494 (Ind. Ct. App. 2012)).

Appellant argues *Doe II* supports his contention, however, because of a "similarly situated" individual in the case. The case involved three individuals, but pertinent to the instant case, the third individual, 'amicus,' was a sex offender who was convicted of misdemeanor fifth degree criminal sexual conduct in Minnesota in 2010, for an incident that occurred in 2009. *Doe II*, 439 Md. at 214. He was placed on two years' probation, which was completed on July 21, 2012. Amicus complied with Minnesota's registration requirements, and was removed from Minnesota's registry when he moved. In September of 2010, Amicus inquired with the Department whether he must register as a sex offender in Maryland. He was told that he did not need to register at that time, but that pursuant to the 2010 amendment, effective October 1, 2010, he would be classified as a Tier I sex offender and required to register in Maryland every six months for fifteen years.

Despite appellant's contention otherwise, Amicus' situation and appellant's are distinguishable. Amicus was not required to register in Maryland when he moved, nor could he have been aware that he would be required to do so before moving into the State. Moreover, Amicus was not under the supervision or custody of the State in October of 2001.

Appellee argues that requiring appellant to continue his registration for life does not violate Article 17 under the 'disadvantage' standard because appellant was provided 'fair notice' that he would be required to register when he moved to Maryland. They contend the Act was not applied retrospectively to appellant because it was the District of Columbia's requirement to register, not his actual conviction, that 'triggered' appellant's requirement to register in Maryland when he moved to Maryland in 2004.

We found that to be the case in *Dietrich v. State*. No. 1388, Sept. Term 206 (reported December 5, 2017). In *Dietrich*, this Court addressed whether requiring a sex offender who moved to the State in 2009, who had been previously required to register by the state of Virginia for an offense that occurred in 1993, violated Article 17. We found that "[i]n [the appellant's] case, it was the date that he moved to Maryland, not the date of the offenses, that determined his obligation" to register on the MSOR. *Dietrich v. State*, No. 1388, at *7. "At the time [the appellant] moved to Maryland in 2009, he was subject to compliance with the Maryland sex offender statute that was in effect at that time." *Id.* We continued:

> Because Dietrich was obligated to register for life under Virginia law when he moved to Maryland, the Maryland sex offender registration statute was

> not applied to him retroactively. As the State points out, even if the sex offender registration were punitive, and this Court has recognized that it is not, *see In re Nick H.*, 224 Md. App. 668, 690-91 (2015) (citing *Young v. State*, 370 Md. 686, 712 (2002)), the sex offender registration statute does not impose any additional punishment on Dietrich. Rather, the statute simply continues Dietrich's registration obligation from Virginia, which would have remained in effect had he remained in Virginia.

Id. As in *Dietrich*, appellant was on notice of the Maryland registration requirement at the time he moved to Maryland in 2004. Because he was already under a lifetime registration requirement, the MSORA imposed no additional punishment on him at that time, nor have the amendments to the statute changed that obligation. Continuing to require appellant to register is not "altering his situation" to his disadvantage. Appellant was fully aware he would continue be required to register when he moved to Maryland. Maryland will not be a safe-haven for violent sexual offenders to avoid their registration requirements.

Accordingly, we find that the court did not err in requiring appellant to continue to register in the MSOR for life.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS AFFIRMED. COSTS TO BE PAID BY APPELLANT.