

STATE OF INDIANA )  
 )  
COUNTY OF MARION )

IN THE MARION SUPERIOR COURT  
ROOM NO.  
CAUSE NO.

JOHN DOES I-III, on their own behalf, )  
and on behalf of a class of those similarly )  
situated, )

49D13 09 05 PL 023351

Plaintiffs, )

v. )

INDIANA DEPARTMENT OF )  
CORRECTION, )  
MAYOR OF INDIANAPOLIS AND )  
RIPLEY COUNTY SHERIFF, on their )  
own behalf and on )  
behalf of a class of those similarly )  
situated, )  
MARION AND RIPLEY COUNTY )  
PROSECUTORS, on their own behalf and )  
on behalf of those similarly situated, )

FILED

MAY 18 2009 (176)

Defendants. )

**CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE  
RELIEF / NOTICE OF CHALLENGE TO CONSTITUTIONALITY OF INDIANA  
STATUTE**

**Introduction**

1. In *Wallace v. Indiana*, --N.E.2d--, No. 49S02-0803-CR-138 (Ind. Apr. 30, 2009), the Indiana Supreme Court held that Indiana's Sex Offender Registration Act imposed retroactive punishment in violation of Art. 1, § 24 of the Indiana Constitution to the extent the requirements of the Act were imposed on a defendant who committed his offense prior to the time its requirements were applicable to him. In this action a plaintiff class of sex offenders who committed their offenses prior to the time the Act's

requirements were applicable to them seek injunctive and declaratory relief that the Act is also unconstitutional as applied to them.

**Parties**

2. John Doe I, a pseudonym, is a resident of Marion County, Indiana.
3. John Doe II, a pseudonym, is a resident of Marion County, Indiana.
4. John Doe III, a pseudonym, is a resident of Ripley County, Indiana.
5. The Indiana Department of Correction is an agency of the State of Indiana, located in Marion County, Indiana.
6. The Mayor of Indianapolis is the head of the Indianapolis Metropolitan Police Department, an agency of the City of Indianapolis.
7. The Ripley County Sheriff is the chief law enforcement official for Ripley County, Indiana.
8. The Marion County Prosecutor is the elected official charged with prosecution of alleged criminals and criminal acts in Marion County, Indiana.
9. The Ripley County Prosecutor is the elected official charged with prosecution of alleged criminals and criminal acts in Ripley County, Indiana.

**Class action allegations**

*The plaintiff Class*

10. Plaintiffs John Does I-III bring this action on their own behalf and on behalf of a class of those similarly situated pursuant to Rule 23(A) and (B)(2) of the Indiana Rules of Trial Procedure, with the class defined as:

all persons designated as “sex offenders” under Indiana law and listed on Indiana’s sex and violent offender registry and/or required to register as “sex offenders” pursuant to Indiana law, who committed their sex offenses prior to the effective date of the registration requirements

11. As defined, the proposed class meets all the requirements of Rule 23(A) of the Indiana Rules of Trial Procedure. Specifically,

- a. The class is so numerous that joinder of all members is impracticable.
- b. There are questions of law or fact common to the class, namely whether the retroactive application of the requirements of the Indiana Sex Offender Registration Act is unconstitutional as violating the *ex post facto* prohibition of Art. 1, § 24 of the Indiana Constitution.
- c. The claims of the representative parties are typical of those of the class.
- d. The representative parties will fairly and adequately protect the interests of the class.

12. The further requirements of Rule 23(B)(2) are met in this case inasmuch as the parties opposing the class have acted or refused to act on ground generally applicable to the class, thereby making appropriate final injunctive or corresponding declaratory relief with respect to the class as a whole.

*The defendant Law Enforcement Authority Class*

13. This action is brought against a defendant class represented by the Mayor of Indianapolis and the Ripley County Sheriff and is defined as:

All local law enforcement authorities in Indiana as defined by IND. CODE § 11-8-8-2.

14. As defined, the proposed class meets all the requirements of Rule 23(A) of the Indiana Rules of Trial Procedure. Specifically,

- a. the class is so numerous that joinder of all members is impracticable. It consists of 91 sheriffs in all counties but Marion County and the chief of police in Marion County, although in Marion County the Mayor of Indianapolis functions as the chief of the Indianapolis Metropolitan Police Department.
- b. there are questions of law or fact common to the class, namely whether the requirements of the requirements of the Indiana Sex Offender Registry Act

on the plaintiffs and the plaintiff classes A and B violate the *ex post facto* prohibitions of the Indiana Constitution, Art. 1, §24.

- c. the claims of the representative parties are typical of those of the class.
- d. the representative parties will fairly and adequately protect the interests of the class.

15. The further requirements of Rule 23(B)(2) are met in this case inasmuch as the parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and corresponding declaratory relief with respect to the class as a whole.

*The defendant Prosecutors class*

16. This action is brought against a class represented by the Marion and Ripley County Prosecutors and is defined as:

All county prosecutors in the State of Indiana.

17. As defined, the proposed class meets all the requirements of Rule 23(A) of the Indiana Rules of Trial Procedure. Specifically,

- a. the class is so numerous that joinder of all members is impracticable. It consists of 92 county prosecutors.
- b. there are questions of law or fact common to the class, namely whether the requirements of the Indiana Sex Offender Registry Act on the plaintiffs and the plaintiff classes A and B violate the *ex post facto* prohibitions of the Indiana Constitution, Art. 1, §24.
- c. the claims of the representative parties are typical of those of the class.
- d. the representative parties will fairly and adequately protect the interests of the class.

18. The further requirements of Rule 23(B)(2) are met in this case inasmuch as the parties opposing the class have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive and corresponding declaratory

relief with respect to the class as a whole.

*Legal background*

19. In 1994 the Indiana General Assembly adopted its first version of a sex offender registration law. (Act of March 2, 1994, Pub.L. No. 11-1994, § 7, codified at Indiana Code § 5-2-12-1, *et seq* ).

20. The new law required persons convicted of certain sex offenses to register and also required that a public registry be maintained.

21. Specifically, the law applied to sex offenders and offender was defined as persons on probation or parole as the result of conviction for: rape, if the victim was less than 18 years of age; criminal deviate conduct, if the victim was less than 18 years of age; child molesting; child exploitation; vicarious sexual gratification; child solicitation; child seduction; and incest, if the victim was less than 18. IND. CODE § 5-2-12-4 (1994).

22. Registration required a physical description of the offender as well as information about the offense and the registration requirement terminated when the offender was no longer on probation or parole. IND. CODE §§ 5-2-12-6, 11 (1994)

23. Effective July 1, 1995, the law was changed to add as an offense requiring registration the crime of sexual misconduct with a minor as a Class A or B felony. Additionally, the term offender was redefined to remove the language concerning the individual being on probation or parole and instead indicating that it included persons convicted of the enumerated crimes after June 30, 1994. IND. CODE § 5-2-12-4 (1995).

24. In 1995, the law was also changed to provide that the duty to register expired 10 years after the dates the offender was released from prison, placed on parole, or placed on probation, whichever occurs last. IND. CODE § 5-2-12-13 (1995).

25. Effective July 1, 1996, the crime of sexual battery, if the victim is less than 18, was added as a sexual offense. IND. CODE § 5-2-12-4 (1996).

26. In 1997, the law was changed again to remove the limitation that the victim of the crime had to be less than 18 from the previous listed offenses of rape, criminal deviate conduct, incest and sexual battery. IND. CODE § 5-2-12-4 (1997).

27. Effective July 1, 1998, the law was changed to provide that a person was a sex offender who was required to register if he or she was convicted after June 30, 1994 of : rape, criminal deviate conduct, child molesting, child exploitation, vicarious sexual gratification, child solicitation, child seduction, sexual misconduct with a minor as a Class A or Class B felony, incest or sexual battery or convicted after June 30, 1998 of kidnapping or criminal confinement if the victim was less than 18. IND. CODE § 5-2-12-4 (1998). Additionally, the law was amended to provide that registration was for a 10 year period as specified above except for someone found by a court to be a sexual violent predator in which case the person had to register for an indefinite period. IND. CODE § 5-2-12-13 (1998).

28. Effective July 1, 2001, the term sex offender was expanded to “sex and violent” offender and the temporal limitations imposed in earlier statutes were removed. Thus, the statute provided:

As used in this chapter sex and violent offender means a person convicted of any of the following sex and violent offenses

- (1) Rape (IC 35-42-4-1)
- (2) Criminal deviate conduct (IC 35-42-4-2)
- (3) Child molesting (IC 35-42-4-3)
- (4) Child exploitation (IC 35-42-4-4(b))
- (5) Vicarious sexual gratification (IC 35-42-4-5)
- (6) Child solicitation (IC 35-42-4-6)
- (7) Child seduction (IC 35-42-4-7)

- (8) Sexual misconduct with a minor as a Class A or Class B or Class C felony (IC 35-42-4-9)
- (9) Incest (IC 35-46-1-3)
- (10) Sexual battery (IC 35-42-4-8)
- (11) Kidnapping (IC 35-42-3-2), if the victim is less than eighteen (18) years of age.
- (12) Criminal confinement (IC 35-42-3-3), if the victim is less than eighteen (18) years of age.
- (13) An attempt or conspiracy to commit a crime listed in subdivisions (1) through (12).
- (14) A crime under the laws of another jurisdiction, including a military court, that is substantially equivalent to any of the offenses listed in subdivisions (1) through (13).

IND. CODE § 5-2-12-4 (2001).

29. Additionally, the law was changed to provide that certain sex or violent offenders were required to register for life, regardless of whether or not they were deemed to be sexually violent predators. IND. CODE § 5-2-12-13 (2001).

30. The law also required that the registry be available on the internet. IND. CODE 5-2-12-11 (2001).

31. Subsequent changes to the law has expanded the offenses for which registration is required.

32. When the law was first enacted failure to register was a class A misdemeanor or a Class D felony if the offender had a prior unrelated offense for failure to register. Ind. Code § 5-2-12-9 (1994). It is now a class D felony, or a class C felony if the offender has a prior unrelated offense for failure to register. IND. CODE § 11-8-8-17.

33. When the registration law went into effect in 1994, the registrant had to register only one time. IND. CODE § 5-2-12-5 (1994). At the current time the registrant must register at least annually and be photographed and if the person is deemed to be a

sexually violent predator he or she must register and be photographed for the registry every three months. IND. CODE § 11-8-8-14.

34. Additionally, a 2006 amendment to the law made it a crime for persons designated as sexually violent predators and offenders designated as “offenders against children” to live within one thousand feet of schools, youth program centers, public parks, or within one mile of the victim of their sex offense. IND. CODE § 35-42-4-11 (2005).

35. Indiana law currently requires that a sex or violent offender must register with the local law enforcement authority in the county where he or she resides, works, and/or is enrolled in school. IND. CODE § 11-8-8-7.

36. The term “local law enforcement authority” is defined by IND. CODE § 11-8-8-2 as “the: (1) chief of police of a consolidated city; or (2) sheriff of a county that does not contain a consolidated city.”

37. Failing to register is a felony. IND. CODE § 11-8-8-17.

38. The sex and violent offender registry is maintained by the Indiana Department of Correction and is published on the internet. IND. CODE §§ 11-8-2-12.4; 11-8-2-13.

#### **Factual allegations**

39. John Doe I was convicted of the offense of attempted rape of an adult in 1986, long before any registry or registration law went into effect.

40. John Doe I was released from prison in 1991 and completed parole in 1992, long before any registry or registration law went into effect.

41. In February of 2009, John Doe I plead guilty to the offense of operating a vehicle while intoxicated. He was placed on probation for slightly less than one year.

42. John Doe I was not placed on the registry until after his conviction for operating a vehicle while intoxicated.

43. He has now been placed on the registry as a sex offender and the registry indicates that he is subject to lifetime notification.

44. The only sex offense that he committed was the attempted rape, which took place in 1986.

45. He must register or is subject to criminal penalties.

46. Plaintiff John Doe II was convicted in 1988 of two related counts of child molesting arising out of events that occurred in approximately 1985 and 1986.

47. John Doe II was released from prison in 1991 and served one year probation.

48. All of these events concerning John Doe II took place long before the original registry law in 1994.

49. Nevertheless, Mr. Doe II is required to register and all of his information, including his current photograph, is placed on the sex offender registry.

50. Additionally, he has been identified by the Department of Correction as a sexually violent predator and is therefore subject to registration and a visit from an employee of the Indianapolis Metropolitan Police Department no less than every three months.

51. He is also subject to the various restrictions imposed by the law on persons designated as sexually violent predators.

52. At the current time he is subject to registration for the rest of his life.

53. John Doe III was convicted of a sex offense that was not included as a registration and registry offense at the time that he committed his offense or was convicted of his offense.

54. Mr. Doe III's offense became a registration and registry offense with the changes in the law which became effective on July 1, 2001.

55. John Doe III was released from prison prior to July 1, 2001.

56. Despite the fact that he was not convicted of an offense that required registration at the time of the offense or at the time of his conviction, John Doe III has been required to register and has been placed on the sex offender registry.

57. He has been informed that he must register with the Ripley County Sheriff for 10 years.

58. If John Does I-III do not register they will be subjected to arrest and prosecution for failing to register.

59. Being on the registry and being subjected to the registration requirements is causing the plaintiffs continuing harm. For example:

- a. As a person labeled a sexually violent predator, John Doe II is restricted in where he can live.
- b. All of the plaintiffs are subject to intrusive visits by representatives of the county sheriff's department of their counties or the Indianapolis Metropolitan Police Department or other law enforcement.
- c. All of the plaintiffs are subjected to having their current photographs and current information about them, including their physical description and photographs, available to the public through the registry which is posted on the internet.
- d. All of the plaintiffs are subject to various disabilities imposed on registrants, such as having keep a valid driver's license in their possession at all times and not being able to change their names. IND. CODE §§ 11-8-8-15, 16. Moreover, if they move they must promptly re-register. IND. CODE 11-8-8-11.
- e. All of the plaintiffs are subject to potential violence, loss of employment, loss of housing, and loss of friendships as persons discover that they are listed as sex offenders on the registry.

- f. All of the plaintiffs are subject to the stigma of being labeled as sex offenders.

60. Plaintiffs and the putative classes are being caused irreparable harm for which there is no adequate remedy at law.

**Legal claim**

61. Subjecting persons to the requirements of Indiana's Sex Offender Registration Act that entails both registration and listing on the registry where the persons committed their sex offenses prior to the time the Registration Act applied to their offenses, is unconstitutional as violating the *ex post facto* provision of the Indiana Constitution, Art. 1, § 24.

**Request for relief**

WHEREFORE, plaintiffs request that this Court:

- a. Certify this case as a class action with the class as defined above.
- b. Declare that subjecting persons to the requirements of Indiana's Sex Offender Registration Act that entails both registration and listing on the sex and violent offender registry where the persons committed their sex offenses prior to the time the Registration Act applied to their offenses, is unconstitutional as violating the *ex post facto* provision of the Indiana Constitution, Art. 1, § 24.
- c. Enjoin defendants from imposing any of the requirements of Indiana's Sex Offender Registration Act, including both registration and listing on the sex and violent offender registry.
- d. Award plaintiffs all other proper relief.

  
Kenneth J. Falk

No. 6777-49

ACLU of Indiana

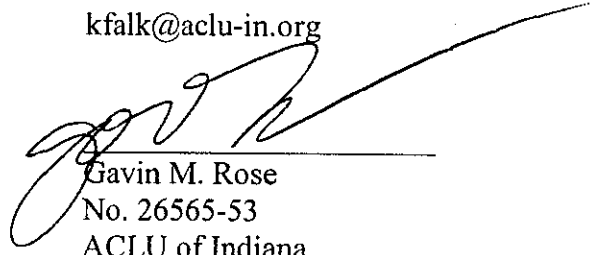
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A handwritten signature in black ink, appearing to read 'Gavin M. Rose', is written over a horizontal line. The signature is fluid and cursive, extending to the right of the line.

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