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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000703-MR

WILLIAM KEITH HYATT, JR. — APPELLANT

v.

APPEAL FROM ANDERSON CIRCUIT COURT
HONORABLE WILLIAM F. STEWART, JUDGE
INDICTMENT NO. 92-CR-00024

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION

AFFIRMING IN PART,

REVERSING IN PART AND REMANDING

** ** ** ** **

BEFORE: DYCHE, EMBERTON and HUDDLESTON, Judges.

HUDDLESTON, Judge: William Keith Hyatt, Jr. appeals from an Anderson Circuit Court order classifying him as a high risk sex offender pursuant to Kentucky Revised Statute (KRS) 17.570. The issues presented are: (1) whether Kentucky's sex offender registration law, KRS 17.500-.991, violates the United States Constitution and Kentucky Constitution because the law exposes Hyatt to double jeopardy; (2) whether the sex offender registration law is an ex post facto law; (3) whether Hyatt has a constitutionally protected privacy interest in the disclosure of

personal information under the United States Constitution and Kentucky Constitution and is thus entitled to procedural due process; and (4) whether the trial court violated Hyatt's due process rights by not providing the prerelease sex offender risk assessment to his counsel until the morning of the hearing, by failing to have the person who completed the risk assessment attend the hearing, by not requiring the victim to testify at the hearing, and by not allowing Hyatt to call expert witnesses to refute the risk assessment report's conclusions.

I. FACTS AND PROCEDURAL HISTORY

Over a period of years, Hyatt sexually abused his younger sister. In October or November 1990, Hyatt, who was apparently intoxicated, threw his thirteen-year-old sister onto a couch in their parents' home and fondled her vaginal area and breasts. The victim managed to escape and fled to the kitchen. Hyatt followed and, while holding a knife to the victim's throat, threatened to kill her if she told anyone.

In April 1991, Lawrenceburg Social Services became aware of the abuse and referred the allegation to the Kentucky State Police. Hyatt was subsequently arrested and charged with first-degree sexual abuse. On July 18, a grand jury charged Hyatt in an indictment with one count of first-degree sexual abuse. On October 8, Hyatt pled guilty, and the circuit court sentenced him to imprisonment for one year. The sentence was suspended and Hyatt was placed on probation for three years.

In 1992, Hyatt's probation was revoked for various violations.

At some point after Hyatt had pled guilty to first-degree abuse, the victim divulged additional details about the abuse. According to the victim, Hyatt had also forced her to perform oral sex on him and forced her to have sexual intercourse. Hyatt was then charged in an indictment with first-degree rape and first-degree sodomy. On January 11, 1993, Hyatt pled guilty to amended charges of second-degree rape and second-degree sodomy. He was sentenced to imprisonment for five years on each count to be served consecutively.

On January 11, 1999, Hyatt was ordered to undergo a sex offender assessment pursuant to KRS 17.570. Hyatt requested assistance of counsel at the hearing and sought to appear in person. On the morning of the hearing, the prerelease sex offender risk assessment conducted by Dr. Dennis E. Wagner, a licensed psychologist, arrived by facsimile. The Commonwealth did not enter the original into evidence at the hearing, nor was Dr. Wagner present to testify. The court admitted the report, and Hyatt did not present any evidence to counter the report's conclusions. Thus, relying exclusively on the report, the court classified Hyatt as a high risk sex offender pursuant to KRS 17.550.[1] This appeal followed.[2]

II. LEGISLATIVE HISTORY

[1] Specific details regarding the hearing will be developed as necessary in addressing Hyatt's arguments.

[2] Hyatt requests that we take judicial notice of various exhibits totaling approximately one hundred pages, which include newspaper articles containing comments of legislators who voted on Kentucky sex offender registration laws. Because the exhibits are irrelevant to the ultimate issues before this Court, we decline to do so.

In response to public outrage after the abduction and sexual abuse of children, a number of states across this country attempted to find ways to protect children. In particular, legislators expressed concern for the high rate of recidivism by the perpetrators of sex crimes. The State of New Jersey gained the national spotlight after it adopted a sex offender law, which was named "Megan's Law" after one of the victims of a sex crime.[3]

In 1994, Congress adopted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program to encourage states to adopt sex offender registration laws.[4] If a state failed to adopt a version of Megan's Law with certain provisions, Congress would withhold ten percent of funds that the state would ordinarily receive under 42 United States Code (U.S.C.) § 3756, the Omnibus Crime Control and Safe Streets Act of 1968.[5]

A. THE 1994 ACT

In 1994, the General Assembly adopted Kentucky's first version of Megan's Law. The act, codified at KRS 17.500-.540, required persons to register in certain circumstances after

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[3] See Doe v. Poritz, 662 A.2d 367 (1995) (upholding the constitutionality of Megan's Law in New Jersey).

[4] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038 (codified as amended at 42 U.S.C. § 14071). Congress subsequently amended the statute in Pub. L. No. 104-145, § 2, 110 Stat. 1345, 1345 (1996); the Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, §§ 3-7, 110 Stat. 3093, 3096-97; the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 115(a)(1)-(5), 111 Stat. 2440, 2461-63; and the Protection of Children from Sexual Predators Act of 1998, Pub. L. No. 105-314, § 607(a), 112 Stat. 2974, 2985.

[5] 42 U.S.C. § 14071(g)(2)(A).

committing a sex crime. A "sex crime" was defined under the 1994 Act, and is still defined, as "a felony offense defined in KRS Chapter 510, KRS 530.020, 530.064, or 531.310, a felony attempt to commit a sex crime, or similar offenses in another jurisdiction."[6] These crimes include all degrees of rape, sodomy and sexual abuse; incest; unlawful transaction with a minor in the first degree; and the use of a minor in a sexual performance.

Under the 1994 Act, an actor who committed a sex crime was required to register beginning January 1, 1995, if the actor was:

> [A] person eighteen (18) years of age or older at the time of the offense who is released on probation, shock probation, conditional discharge by the court, parole, or a final discharge from a penal institution for committing or attempting to commit a sex crime shall, within fourteen (14) days after his release, register with the local probation and parole office in the county in which he resides.[7]

The law also required the jail, prison or other institution to inform the sex offender prior to discharge of that person's duty to register, have the prisoner read and sign a form acknowledging awareness of the duty to register and have the prisoner complete

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[6] KRS 17.500(4).

[7] Act of April 11, 1994, ch. 392, § 2, 1994 Kentucky Acts 1165, 1165 (codified at KRS 17.510) (repealed in part and amended in part 1998).

the necessary registration form.[8] The law also mandated that courts inform a person found guilty of sex crimes by a guilty plea or jury verdict of his duty to register, have the individual sign an acknowledgment of such responsibilities and have the person complete the registration form.[9] The act also contained provisions for the registration of sex offenders convicted in other states who moved to Kentucky prior to the expiration of the other jurisdiction's registration period.[10]

Under the 1994 Act, sex offenders were required to register "for a period of ten (10) years following their discharge from confinement or ten (10) years following their maximum discharge date on probation, shock probation, conditional discharge, parole, or other form of early release, whichever period is greater."[11] If a sex offender failed to register with local authorities, he could be convicted of committing a Class A misdemeanor, for providing "false, misleading, or incomplete information."[12] The provisions of the law became effective on July 15, 1994, and applied to any person who pled guilty or was convicted of a sex crime after that date.[13]

B. THE 1998 ACT

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[8] Id. § 2, 1994 Kentucky Acts at 1165-66.

[9] Id. § 2, 1994 Kentucky Acts at 1166.

[10] Id.

[11] Id. § 3, 1994 Kentucky Acts at 1166 (codified at KRS 17.520) (repealed in part and amended in part 1998).

[12] Id. § 2, 1994 Kentucky Acts at 1167 (codified as amended at KRS 17.510(11)-(12)).

[13] Id. § 6, 1994 Kentucky Acts at 1167.

In 1998, the General Assembly amended the sex offender registration laws and imposed additional requirements. The amendment required the classification of sex offenders based on their potential for recidivism and public notification to varying degrees depending on the sex offender's classification.

The 1998 Act defines a "sex offender" as "a person who has been convicted of a sex crime as defined in KRS 17.500 who suffers from a mental or behavioral abnormality or personality disorder characterized by a pattern or repetitive, compulsive behavior that makes the offender a threat to public safety."[14] A major departure from the 1994 Act is that the 1998 law creates a process of classifying the potential for recidivism by sex offenders.

KRS 17.550(1)-(3) divides sex offenders into three classes based on their potential for recidivism. A "low risk sex offender" is a sex offender who has "a low risk of recommitting a sex crime" as determined by the Sex Offender Risk Assessment Advisory Board's criteria.[15] A "moderate risk sex offender" is a sex offender who has a "moderate risk of recommitting a sex crime" according to Board's criteria.[16] "[L]ow or moderate risk sex offenders shall remain registered for a period of ten (10) years following their discharge from confinement or ten (10) years following their maximum discharge date on probation, shock probation, conditional discharge, parole, or other form of early

[14] KRS 17.550(2).

[15] KRS 17.550(5).

[16] KRS 17.550(4).

release, whichever period is greater."[17] If the sex offender is incarcerated during the registration period for committing another offense or due to a violation of the terms of his conditional discharge, parole or probation, the registration is tolled during the period of imprisonment.[18]

As part of the process of creating a recidivism risk assessment program, the law created a Sex Offender Risk Assessment Advisory Board.[19] To classify sex offenders, the law empowered the Board to certify providers to conduct the assessments.[20] Under KRS 17.554(2):

> The [B]oard shall develop a risk assessment procedure that shall be used by certified providers in assessing the risk of recommitting a sex crime by a sex offender and the threat posed to public safety. The procedure shall be based upon, but not limited to the following factors:
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> (a) Criminal history;
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> (b) Nature of the offense;
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> (c) Conditions of release that minimize risk;
>
> (d) Physical conditions that minimize risk;
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> (e) Psychological or psychiatric profiles;

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[17] KRS 17.520(2).

[18] KRS 17.520(3).

[19] Act of April 14, 1998, ch. 606, § 142, 1998 Kentucky Acts 3598, 3676-77 (codified at KRS 17.554). See also id. § 143, 1998 Kentucky Acts at 3677 (outlining the composition and operation of the Board).

[20] KRS 17.554(1).

(f) Recent behavior that indicates an increased risk of recommitting a sex crime;

(g) Recent threats or gestures against persons or expressions of an intent to commit additional offenses; and

(h) Review of the victim impact statement.

A certified provider then conducts a risk assessment based on the criteria set forth in the law and the procedures established by the Board.

KRS 17.570(1) provides that:

Upon conviction of a "sex crime" as defined in KRS 17.500 and within sixty (60) calendar days prior to the discharge, release, or parole of a sex offender, the sentencing court shall order a sex offender risk assessment by a certified provider for the following purposes:

(a) To determine whether the offender should be classified as a high, moderate, or low risk sex offender;

(b) To designate the length of time a sex offender shall register pursuant to KRS 17.500 to 17.540; and

(c) To designate the type of community notification that shall be provided upon the release of the sex offender pursuant to KRS 17.500 to 17.540.

After the risk assessment has been completed, the circuit court must hold a hearing and "review the recommendations of the certified provider along with any statement by a victim or victims and any materials submitted by the sex offender."[21] The Kentucky Rules of Criminal Procedure (RCr) apply, and the sex offender has the right to attend the hearing and be heard.[22] The circuit court must inform the sex offender of the right to have appointed counsel.[23] After the hearing, the circuit court must make findings of fact and conclusions of law in classifying the sex offender's risk of recidivism, which can then be appealed.[24] When the sex offender is released from incarceration, the court or official in charge of the institution must forward the risk determination to the sheriff of the county of the sex offender's residence.[25] If the sex offender has the ability, the court can require the sex offender to pay the cost of the hearing.[26]

A "high risk sex offender" is a sex offender who has "a high risk of recommitting a sex crime" as classified by the Board.[27] In addition, an offender who meets the definition of "sexually violent predator" under 42 U.S.C. § 14071(a)(3)(C) may also be

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[21] KRS 17.570(3).

[22] KRS 17.570(4).

[23] KRS 17.570(5).

[24] KRS 17.570(6).

[25] KRS 17.570(8).

[26] KRS 17.570(2).

[27] KRS 17.550(3).

considered a high risk sex offender under KRS 17.550(3).[28] A high risk sex offender must register for life unless reclassified.[29] However, a high risk sex offender can petition for relief from the sentencing court by filing a petition ten years or more "after the date of discharge from probation, parole, or release from incarceration, whichever is most recent."[30] Following an adverse decision on the first petition, the sex offender can repetition for relief every five years thereafter.[31] Prior to ruling on the petition, the sentencing court will order an updated risk assessment from a certified provider and then follow with a hearing pursuant to KRS 17.570.[32]

An important differentiation from the 1994 Act is who can have access to sex offender registry information and to what extent. The information that the sex offender must provide to the registry includes:

> [N]ame, Social Security number, age, race, sex, date of birth, height, weight, hair and eye color, aliases used, residence, vehicle registration data, a brief description of the crime or crimes committed, and other information

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[28] Under 42 U.S.C. § 14071(a)(3)(C), a "sexually violent predator" is "a person who has been convicted of a sexually violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses."

[29] KRS 17.520.

[30] KRS 17.578(1).

[31] Id.

[32] KRS 17.578(2)-(3).

the cabinet determines, by administrative regulation, may be useful in the identification of sex offenders.[33]

The information is then made available, in varying degrees, to groups according to risk classification.[34] If the sex offender

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[33] KRS 17.500(3).

[34] KRS 17.572 provides:

(1) If the offender is determined to be a high risk sex offender, the notification shall include offender information as defined in KRS 17.500 and any special conditions imposed by the court or the Parole Board. The Social Security number of the offender shall not be released to those persons identified in paragraphs (c), (d), and (f) of this subsection. The following individuals shall be notified by the sheriff of the county to which the offender is to be released:
(a) The law enforcement agency having jurisdiction;
(b) The law enforcement agency having had jurisdiction at the time of the offender's conviction;
(c) Victims who have requested to be notified;
(d) The Information Services Center, Kentucky State Police;
(e) Any agency, organization, or group serving individuals who have similar characteristics to the previous victims of the offender, if the agency, organization, or group has filed a request for notification with the local sheriff; and
(f) The general public through statewide media outlets and by any other means as technology becomes available.
(2) Upon a finding by the sentencing court that the offender is a high risk sexual offender, the designation shall continue until the sentencing court determines that the individual is no longer a high risk sex offender.
(3) An offender who has been designated by the sentencing court to be a high risk sex offender shall upon his release by the court, parole board, or the cabinet be required to register for his lifetime in accordance with the provisions of KRS 17.510 and shall be subject to community notification pursuant to this section and KRS 17.574.
(4) If the offender is determined to be a moderate risk sex offender, the notification shall include offender information as defined under KRS 17.500, the zip code in which the offender resides, and any special conditions imposed by the court or the Parole Board. The Social Security number, personal residential address, and vehicle registration shall not be disclosed to the individuals identified in paragraphs (c) and (e) of this subsection. The following individuals
(continued...)

moves, it is the sex offender's responsibility to complete a registry update within ten days of the move.[35] Failing to comply with the registration requirements or knowingly providing "false, misleading, or incomplete information" is a Class A misdemeanor.[36]

Under the 1998 Act, KRS 17.510-.520, as amended, KRS 17.550-.991 "appl[ies] to persons individually sentenced or incarcerated after the effective date of this Act [(July 15,

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[34] (...continued)
shall be notified by the sheriff of the county to which the offender is released:
(a) The law enforcement agency having jurisdiction;
(b) The law enforcement agency having had jurisdiction at the time of the offender's conviction;
(c) Victims who have requested to be notified;
(d) The Information Services Center, Kentucky State Police; and
(e) Any agency, organization, or group serving individuals who have similar characteristics to the previous victim or victims of the sexual offender, if the agency, organization, or group has filed a request for notification with the local sheriff.
(5) If the offender is determined to be a low risk sex offender, the notification shall include offender information as defined in KRS 17.500. The Social Security number, personal residential address and, vehicle registration shall not be disclosed to the persons identified in paragraph (c) of this subsection. The following individuals shall be notified by the sheriff of the county to which the offender is released:
(a) The law enforcement agency having jurisdiction;
(b) The law enforcement agency having had jurisdiction at the time of the offender's conviction;
(c) Victims who have requested to be notified; and
(d) The Information Services Center, Kentucky State Police.

[35] KRS 17.510(10).

[36] KRS 17.510(11)-(12).

1998)]."[37] However, KRS 17.520, 17.552, 17.570-.578, and 17.991 did not become effective until January 11, 1999.[38]

III. WHETHER THE APPLICATION OF KRS 17.500-.991 TO HYATT VIOLATES THE CONSTITUTIONAL PROHIBITIONS AGAINST DOUBLE JEOPARDY AND EX POST FACTO LAWS

Hyatt argues that Kentucky's sex offender registration statutes have various constitutional flaws. In particular, Hyatt claims that these statutes expose him to double jeopardy and are ex post facto laws.

A. DOUBLE JEOPARDY

The Fifth Amendment to the United States Constitution, in relevant part, provides that: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." The United States Supreme Court has determined that the Fifth Amendment is applicable to the states by way of the Fourteenth Amendment.[39] Section 13 of the Kentucky Constitution also provides that "[n]o person shall, for the same offense, be twice put in jeopardy of his life or limb . . . ."

In Hourigan v. Commonwealth,[40] the Kentucky Supreme Court addressed a double jeopardy claim. The Court stated that the

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[37] Act of April 14, 1998, ch. 606, § 199, 1998 Kentucky Acts 3598, 3694. See also Ky. Const. § 55 ("No act . . . shall become a law until ninety days after the adjournment of the session at which it was passed, except in cases of emergency . . .").

[38] Id. § 200, 1998 Kentucky Acts at 3694.

[39] See Benton v. Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062, 23 L. Ed. 2d 707, 716 (1969).

[40] Ky., 962 S.W.2d 860 (1998).

double jeopardy clauses of the United States Constitution and the Kentucky Constitution "protect a criminal defendant from three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense."[41] Similarly, the U.S. Supreme Court in Hudson v. United States[42] noted:

> The Double Jeopardy Clause provides that no "person [shall] be subject for the same offence to be twice put in jeopardy of life or limb." We have long recognized that the Double Jeopardy Clause does not prohibit the imposition of any additional sanction that could, "'in common parlance,'" be described as punishment. The Clause protects only against the imposition of multiple criminal punishments for the same offense, . . . and then only when such occurs in successive proceedings.[43]

In addressing whether a law exposes a defendant to double jeopardy because it imposes additional punishment, the Court has established a two-part test:

> A court must first ask whether the legislature, "in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the

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[41] Id. at 862 (citing United States v. Halper, 490 U.S. 435, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989)).

[42] 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).

[43] Id. at 98-99, 118 S. Ct. at 493, 139 L. Ed. 2d at 458-59 (internal citations omitted).

other." Even in those cases where the legislature "has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect," as to "transfor[m] what was clearly intended as a civil remedy into a criminal penalty."[44]

Applying the first part of the analysis to the present case, we must attempt to ascertain the purpose of KRS 17.500-.991. The General Assembly does not maintain detailed records of its debates or its committees hearings. Furthermore, the preamble of the adopting act is virtually silent on the legislation's purpose.[45] Thus, we must rely on the plain language and clear intent of the statutes.[46]

We do not find that the statutes serve anything but a regulatory purpose. The sex offender registration statutes are codified in Chapter 17 of KRS, a chapter dealing with public safety. This suggests that the statutes serve a regulatory purpose, but does not conclusively resolve this question.

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[44] Id. at 99, 118 S. Ct. at 493, 139 L. Ed. 2d at 459 (internal citations omitted).

[45] Act of April 11, 1994, ch. 392, preamble, 1994 Kentucky Acts 1165, 1165 ("AN ACT relating to the registration of sexual offenders."); Act of April 14, 1998, ch. 606, preamble, 1998 Kentucky Acts 3598, 3598 ("AN ACT relating to criminal justice matters.").

[46] Bob Hook Chevrolet Isuzu, Inc. v. Transportation Cabinet, Ky., 983 S.W.2d 488, 492 (1998) ("A statute should be construed, if possible, so as to effectuate the plain meaning and unambiguous intent expressed in the law.") (citing McCracken County Fiscal Court v. Graves, Ky., 885 S.W.2d 307, 309 (1994)).

The statutes can be grouped according to their purpose. KRS 17.552-.568 establish the Board, outline its role in the registration of sex offenders and create the requirements for the certification of professionals who conduct risk assessments. As discussed, the Board is responsible for creating procedures for conducting assessments. KRS 17.554(2), for example, directs the Board to "develop a risk assessment procedure to be used by certified providers in assessing the risk of recommitting a sex crime by a sex offender and the threat posed to public safety."[47] The statute also expressly outlines the factors to be utilized in the assessment. None of the factors suggest a punitive purpose, and the factors are an indication that the registration serves a regulatory function.

Other statutes — KRS 17.510-.520, KRS 17.570 and KRS 15.574 — deal primarily with the process of classifying and registering sex offenders. Neither these statutes nor, in fact, any of the challenged statutes use the word "punitive" or "punishment." These statutes merely direct the sentencing court to order a risk assessment for the criminal prior to release. Based on that assessment and the hearing on the assessment, the circuit court then classifies the prisoner's risk of recidivism, which affects the information to be provided to the registry, the length of registration and who is entitled to the registry information.

KRS 17.530 and KRS 17.572 address the dissemination of the registration information to law enforcement and the public.

[47] KRS 17.554(2) (emphasis supplied). See also 501 KAR 6:200 (establishing the procedure for sex offender risk assessments).

Based on the classification of the criminal, the statutes allow the dissemination of varying amounts of personal information. KRS 17.510 even provides a penalty for the misuse of registry information.

In light of the statutory scheme, we cannot say that the statutes punish prisoners twice. Rather, the statutes create a mechanism for protecting public welfare and safety by monitoring the location of sex offenders and providing information to law enforcement officials and the public.

Although we have determined that the language of the statutes does not indicate a punitive purpose, we must then determine whether the statutes do, in actuality, punish a criminal twice for the same crime. To apply the second part of the analysis, the U.S. Supreme Court in Kennedy v. Mendoza-Martinez[48] set out factors to consider in determining whether a law imposes a second punishment: (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

[48] 372 U.S. 144, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963).

relation to the alternative purpose assigned . . . ."[49] Commenting on the application of these factors, the Court, in United States v. Ward,[50] said that "[t]his list of considerations, while certainly neither exhaustive nor dispositive, has proved helpful in our own consideration of [whether a law is punitive] . . . ."[51] If these factors are applied, "[a]bsent conclusive evidence of [legislative] intent as to the penal nature of a statute, [they] must be considered in relation to the statute on its face."[52]

Applying the first Kennedy factor, we must determine whether these statues are sanctions that involve "an affirmative disability or restraint." In answering this question, the U.S. Supreme Court in Hudson concluded that the indefinite barring of someone from the banking industry did not arise to the level of affirmative disability or restraint.[53]

In this case, Hyatt can still seek employment and live in the location of his choice. However, he must notify the appropriate officials of his location by updating his registry information pursuant to KRS 17.510(10). We do not believe that this arises to the level of affirmative disability or restraint.

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[49] Id. at 168-69, 83 S. Ct. at 567-68, 9 L. Ed. 2d at 661 (footnotes omitted) (citations omitted). See also Burnett v. Commonwealth, Ky. App., 3 S.W.3d 359, 361 (1999) (applying the Kennedy factors in a double jeopardy context).

[50] 448 U.S. 242, 100 S. Ct. 2636, 65 L. Ed. 2d 742 (1980).

[51] Id. at 249, 100 S. Ct. at 2641, 65 L. Ed. 2d at 750.

[52] Kennedy, 372 U.S. at 169, 83 S. Ct. at 568, 9 L. Ed. 2d at 661.

[53] Hudson, 522 U.S. at 103, 118 S. Ct. at 495, 139 L. Ed. 2d at 462.

Under the second Kennedy factor, we must determine whether this sanction has traditionally been viewed as punishment. Traditional forms of punishment include incarceration, incapacitation and rehabilitation.

The laws in question do not impose restrictions on sex offenders that can be equated with traditional forms of incarceration or incapacitation. The registry laws do not force sex offenders to conform their conduct. The purpose of the sex offender registration laws is to protect the public welfare and safety by notifying the public of the location of sex offenders and, possibly, other personal information.

The dissemination of information has not been considered a traditional form of punishment. As the United States Court of Appeals for the Sixth Circuit noted in Cutshall v. Sundquist[54] in applying the second Kennedy factor to Tennessee's sex offender registration statutes:

> We are mindful of the fact that shaming punishments, such as banishment and pillory, have historically been used to punish criminals. However, these practices involved more than the mere dissemination of information. Moreover, the possibility of a shaming effect from disclosure of registry information is certainly not the clearest of proof necessary to overcome the legislative intent that the Act serve regulatory and not punitive purposes.

[54] 193 F.3d 466 (6th Cir. 1999), cert. denied, 120 S. Ct. 1554 (2000).

> Dissemination of information is fundamentally different from traditional forms of punishment . . . .[55]

Thus, we find that this Kennedy factor has not been met.

In addition, we must determine whether the provisions of the laws are implicated only by a showing of scienter under the third Kennedy factor. Scienter is defined as "knowingly."[56]

The sex offender registration statutes apply to any criminal who was convicted of committing "a felony offense defined in KRS Chapter 510, KRS 530.020, 530.064, or 531.310, a felony attempt to commit a sex crime, or similar offenses in another jurisdiction."[57] The registration statutes do not consider the state of mind of the criminal in committing the act. Instead, the statutes apply to all persons convicted of a sex crime. The statutes then require the sentencing court to direct a certified provider to assess a sex offender's potential for recidivism prior to release, probation, etc. The circuit court conducts a hearing on the risk assessment results and classifies the sex offenders.[58] Thus, no finding of scienter is required in forcing a sex offender to register.

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[55] Id. at 475.

[56] Black's Law Dictionary 1345 (6th ed. 1990).

[57] KRS 17.500(4).

[58] See Kansas v. Hendricks, 521 U.S. 346, 362, 117 S. Ct. 2072, 2082, 138 L. Ed. 2d 501, 515 (1997) (noting that "[t]he absence of [] a requirement [of a finding of scienter] is evidence that confinement under [a sexually violent predator incarceration] statute is not intended to be retributive.").

Next, we must determine if the statutes further the traditional aims of punishment, namely retribution and deterrence. It would be intellectually dishonest to argue that the statutes do not serve any deterrent function. If a sex offender knows that law enforcement officials are aware of the location of his residence and place of employment, the sex offender may be less likely to commit another sex crime. However, as the U.S. Supreme Court observed in Hudson, "[t]o hold that the mere presence of a deterrent purpose renders such sanctions 'criminal' for double jeopardy purposes would severely undermine the Government's ability to engage in effective regulation . . . ."[59] In addition, as the United States Court of Appeals for the Second Circuit noted in Doe v. Pataki,[60] "[e]ven if the [sex offender registration law] advances some goals traditionally associated with the criminal law, it primarily 'serve[s] important nonpunitive goals' of protecting the public from potential dangers and facilitating future law enforcement efforts."[61] While the statutes do serve to deter recidivism, like the Pataki court, we do not believe this factor alone is enough to warrant declaring the statutes unconstitutional.

Fifth, we must consider whether the statutes apply to acts which are already crimes under Kentucky law. A sex offender is a criminal convicted of a sex crime under KRS Chapter 510, KRS 530.020, 530.064, 531.310, a felony attempt to commit a sex crime

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[59] Hudson, 522 U.S. at 105, 118 S. Ct. at 496, 139 L. Ed. 2d at 463.

[60] 120 F.3d 1263 (2d Cir. 1997).

[61] Id. at 1283 (citing United States v. Ursery, 518 U.S. 267, 290, 116 S. Ct. 2135, 2148, 135 L. Ed. 2d 549, 569 (1996)).

or similar offenses in another jurisdiction. The sex offender registration statutes only apply to individuals convicted of a sex crime. Thus, it cannot be denied that the sex offender registration statutes only apply to convicted sex offenders.

However, we do not believe this fact makes the registration statutes punitive for double jeopardy purposes. In Herbert v. Billy,[62] the U.S. Court of Appeals for the Sixth Circuit considered a constitutional challenge to convictions under Ohio law when the appellants had their drivers' licenses suspended and were subsequently convicted of driving under the influence. The appellants argued that these laws exposed them to Double Jeopardy under the Fifth Amendment of the United States Constitution. In upholding the constitutionality of the statutes, the Court found that the suspension statute was not punitive.

> To hold otherwise would undermine the state's ability to effectively regulate its highways. In similar circumstances, the Hudson Court said that a finding of double jeopardy "would severely undermine the Government's ability to engage in effective regulation of institutions such as banks."[63]

Consistent with the holding in that case, we do not believe that the registration requirements impose any additional punishment on Hyatt. To hold otherwise would severely undermine the

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[62] 160 F.3d 1131 (6th Cir. 1998).

[63] Id. at 1138 (quoting Hudson v United States, 522 U.S. 93, 496, 118 S. Ct. 488, 496, 139 L. Ed. 2d 450, 463 (1997)).

Commonwealth's interest in public welfare and safety due to the high rate of recidivism of sex offenders.

Finally, the sixth and seventh Kennedy factors require us to determine whether the registration laws have a remedial purpose and whether the laws are excessive compared to the remedial purpose. We conclude that the laws do not have such a purpose and are not excessive.

Kentucky sex offender registrations laws both protect the public and aid law enforcement in monitoring sex offenders. Congress and many states have considered the heinousness of sex crimes and their impact on children. We recognize that the registration laws do impose at least some burden on sex offenders. In his brief, Hyatt asserts that:

> Being designated as a high risk sex offender has also caused Mr. Hyatt considerable personal hardship. Two newspaper articles have been published about his release. He has been unable to find stable employment. An attempt was made to involuntarily commit him to Eastern State Hospital. He is currently incarcerated in the Franklin County jail accused of stealing a car. He has received threatening letters from the families of some women with whom he allegedly corresponded while in prison. As a direct result of his high risk designation, Mr. Hyatt has had affirmative disabilities and restraints imposed upon him from four different sources: the Anderson Circuit Court, the statute itself, his family, and his local community.

As Hyatt himself acknowledges, many of the burdens of which Hyatt complains are not a result of the statutes but from the potential abuse by the public of the information contained in the sex offender registry.

As the Sixth Circuit Court of Appeals commented in upholding Tennessee's sex offender registration laws, "[g]iven the gravity of the state's interest in protecting the public from recidivist sex offenders, and the small burdens imposed on registrants, we cannot say that the requirements of the Act exceed its remedial purpose."[64] The Court's words are equally true in this case. While Hyatt must register for life — subject to his right to petition for reclassification pursuant to KRS 17.578 — this burden is not unduly onerous compared to the Commonwealth's interest in protecting the public.

As did the circuit court, we reject Hyatt's allegation that the statutes are unconstitutional because they impose an additional punishment. Thus, we conclude that Kentucky's sex offender registration laws do not expose individuals to double jeopardy when applied to a criminal who has been convicted of committing a sex crime.

[64] Cutshall v. Sundquist, supra, n. 54, at 476.

B. EX POST FACTO LAWS

The United States Constitution prohibits the enactment of ex post facto laws by states.[65] Similarly, Section 19 of the Kentucky Constitution provides that "[n]o ex post facto law . . . shall be enacted."

In addressing an allegation that a law was ex post facto, the U.S. Supreme Court said in Weaver v. Graham[66] that "the ex post facto prohibition . . . forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred."[67] We have stated that "two elements must be present for a law to be considered ex post facto: (1) 'it must apply to events occurring before its enactment,' and (2) 'it must disadvantage the offender.'"[68]

Applying the first element to this case, there is no question but that the sex offender registration statutes are being applied retroactively. Hyatt committed the crimes to which he pled guilty prior to 1991. The sex offender registration statutes did not become effective until 1994. Thus, we conclude that the first element has been met.

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[65] U.S. Const. art. I, § 10 ("No State shall . . . pass any . . . ex post facto Law . . . ."). See also Calder v. Bull, 3 U.S. (3 Dall.) 386, 390, 1 L. Ed. 648, ___ (1798) (stating that it is prohibited under the Ex Post Facto Clause to retroactively apply any law that "inflicts a greater punishment, than the law annexed to the crime, when committed").

[66] 450 U.S. 24, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

[67] Id. at 30, 101 S. Ct. at 965, 67 L. Ed. 2d at 24.

[68] Lattimore v. Corrections Cabinet, Ky. App., 790 S.W.2d 238, 239 (1990) (quoting Weaver, 450 U.S. at 29, 101 S. Ct. at 964, 67 L. Ed. 2d at 23) (footnotes omitted).

We must now focus on whether Hyatt has been disadvantaged by the application of the statutes. In answering this question, we must consider whether the statutes are punitive or regulatory.

Hyatt "bears the 'heavy burden' of overcoming the regulatory or remedial purpose served by notification, a burden that may be sustained only by the 'clearest proof' that notification is 'so punitive in form and effect' as to render it punitive despite [a] [] prospective, regulatory intent."[69] In Kansas v. Hendricks,[70] the U.S. Supreme Court applied many of the same Kennedy factors in determining whether a statute was an ex post facto law. In the same manner, we will apply the Kennedy factors in this case that were articulated earlier.[71]

In light of our previous analysis, we conclude that Kentucky sex offender registration statutes are not intended to punish sex offenders. Thus, the laws, KRS 17.500-.991, do not impose additional punishment on Hyatt and are not ex post facto laws under the United States Constitution or Kentucky Constitution.

IV. JURISDICTION

Hyatt argues that the circuit court lacked subject matter jurisdiction because the court scheduled the hearing prior to the effective date of KRS 17.570, which requires the hearing. Although this issue was not raised below, Hyatt believes that it can be

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[69] Roe v. Office of Adult Probation, 125 F.3d 47, 54 (2d Cir. 1997) (internal citations omitted).

[70] 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997).

[71] See text accompanying note 49, supra. See also Cutshall v. Sundquist, supra, n. 54, (applying the Kennedy factors in determining whether Tennessee's sex offender registration laws were ex post facto laws).

raised for the first time on appeal in light of the decision in Commonwealth Health Corp. v. Croslin,[72] where the Supreme Court noted that "defects in subject matter jurisdiction may be raised by the parties or the court at any time and cannot be waived."[73] We agree that we can address Hyatt's challenge to the subject matter jurisdiction of the circuit court.

KRS 17.570(1) directs the sentencing court to order a risk assessment sixty days prior to the sex offender's release from incarceration. A certified provider conducts the assessment and sends a report to the court. In this case, the court ordered the assessment on January 11, 1999. However, KRS 17.570 did not become effective until January 15.

The circuit court did not classify Hyatt as a sex offender prior to the effective date of the law, nor did Dr. Wagner conduct his assessment prior to that date. Rather, the circuit court merely ordered that the evaluation take place. We believe that the January 11 order providing for the evaluation did not invalidate the court's subsequent classification of Hyatt as a sex offender.

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[72] Ky., 920 S.W.2d 46 (1996).

[73] Id. at 47 (citing Louisville & Nashville R.R. v. Mottley, 211 U.S. 149, 152, 29 S. Ct. 42, 43, 53 L. Ed. 126, ___ (1908)). See also Johnson v. Bishop, Ky. App., 587 S.W.2d 284, 285 (1979) ("[S]ubject matter jurisdiction may not be conferred by waiver, or even consent, while a question as to such jurisdiction generally may be raised at any time.") (citing Duncan v. O'Nan, Ky., 451 S.W.2d 626 (1970)).

V. DUE PROCESS

Hyatt also argues that the circuit court violated his due process rights by: (1) not providing a copy of the risk assessment to him or his counsel until the morning of the hearing; (2) not requiring Dr. Wagner, the certified provider, to authenticate the report or submit to cross-examination regarding its contents; (3) not requiring the victim to testify; and (4) not allowing Hyatt to present expert testimony to refute Dr. Wagner's recommendation that Hyatt should be classified as a high risk sex offender. Because we agree with some of Hyatt's arguments, we reverse and remand this case for another risk assessment hearing.

A. DUE PROCESS RIGHTS IMPLICATED BY RIGHT OF PRIVACY

Hyatt avers that the release of personal information contained in the sex offender registry violates his right of privacy under the United States Constitution. Even if this right is not protected in these circumstances under the U.S. Constitution, Hyatt argues in the alternative that Kentucky has recognized a more expansive right of privacy that applies in this case, and he draws our attention to the Kentucky Supreme Court's decision in Commonwealth v. Wasson.[74] Because he has a privacy interest in the release of personal information, Hyatt insists he was entitled to procedural due process during the risk assessment hearing.

[74] Ky., 842 S.W.2d 487 (1992).

Both the federal and state constitutions guarantee due process of law.[75] In appraising claims for violation of procedural due process, the U.S. Supreme Court has utilized a two-part analysis: (1) "whether the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property';" and (2) "if protected interests are implicated, . . . then . . . what procedures constitute 'due process of law.'"[76]

Applying that analysis to the case sub judice, we must examine the interest asserted by Hyatt — his personal right of privacy. While not an enumerated right in the U.S. Constitution, the Supreme Court has interpreted the Constitution to grant that right in limited areas. As the Court said in Paul v. Davis:[77]

> [P]ersonal rights found in this guarantee of personal privacy must be limited to those which are "fundamental" or "implicit in the concept of ordered liberty" . . . . The activities detailed as being within this definitions

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[75] U.S. Const. amend. XIV, § 1 ("[No] State [shall] deprive any person of life, liberty, or property, without due process of law . . ."); Ky. Const. § 11 ("In all criminal prosecutions the accused . . . can[not] be deprived of his life, liberty or property, unless by the judgment of his peers or the law of the land . . .").

[76] Ingraham v. Wright, 430 U.S. 651, 672, 97 S. Ct. 1401, 1413, 51 L. Ed. 2d 711, 731 (1977) (citing Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L. Ed. 2d 484, 494 (1972); Board of Regents v. Roth, 408 U.S. 564, 569-72, 92 S. Ct. 2701, 2705-07, 33 L. Ed. 2d 548, 556-58 (1972)). See also Bliek v. Palmer, 102 F.3d 1472, 1475 (8th Cir. 1997) ("We engage in a two-part analysis when addressing a procedural due process argument, asking, first, whether the plaintiffs have a protected interest at stake, and if so, what process is due.") (citing Schneider v. United States, 27 F.3d 1427, 1333 (8th Cir. 1994)).

[77] 424 U.S. 693, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976).

> were . . . matters relating to marriage, procreation, contraception, family relationships, and child rearing and education. In these areas it has been held that there are limitations on the States' power to substantively regulate conduct.[78]

In Whalen v. Roe,[79] the Supreme Court classified privacy interests into two categories: "the individual interest in avoiding the disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions."[80] Hyatt argument focuses on the first category.

While everyone enjoys certain privacy rights, those rights must be balanced with the needs and demands of society. This case presents the competing interests government has in public welfare and safety by making the public aware of the location of sex offenders versus Hyatt's individual right of privacy. As we noted in Board of Education v. Lexington-Fayette Urban County Human Rights Comm'n,[81] the right of privacy "is based on the right of an individual to be left alone, to be free from unwarranted publicity, and to live without unwarranted interference by the

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[78] Id. at 713, 96 S. Ct. at 1166, 47 L. Ed. 2d at 420-21 (internal citations omitted).

[79] 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977).

[80] Id. at 599-600, 97 S. Ct. at 876, 51 L. Ed. 2d at 73 (footnotes omitted) (citations omitted).

[81] Ky. App., 625 S.W.2d 109 (1981).

public in matters with which it is not necessarily concerned. However, the right is not absolute."[82]

Assuming that Hyatt could show that he has a privacy right, the Supreme Court has stated that "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."[83] Like the Pennslyvania Superior Court in Commonwealth v. Mountain,[84] we believe that "the registration provision of [the sex offender registration] law is a non-punitive measure with only the very slightest inconvenience to the defendant and the overwhelming policy objective of assuring public safety."[85]

In the context of privacy rights versus sex offender registration statutes, other courts have reached similar conclusions. In Lanni v. Engler,[86] the court rejected a convicted sex offender's argument that he was entitled to procedural due process because the court found that there was no deprivation of a property or liberty interest. The court commented that "[t]he Act merely compiles truthful, public information and makes it more readily available. * * * Moreover, this Court finds that any detrimental effects that may flow from the Act would flow most directly from the plaintiff's own misconduct and private citizen's

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[82] Id. at 110 (quoting Perry v. Moskins Stores, Inc., Ky., 249 S.W.2d 812, 813 (1952)) (citations omitted).

[83] Board of Regents v. Roth, 408 U.S. 564, 569, 92 S. Ct. 2701, 2705, 33 L. Ed. 2d 548, 556 (1972) (emphasis supplied).

[84] 711 A.2d 473 (Pa. Super. Ct. 1998)

[85] Id. at 477-78 (citations omitted).

[86] 994 F. Supp. 849 (E.D. Mich. 1998).

reaction thereto, and only tangentially from state action."[87] Although differing in its analysis, the United States Court of Appeals for the Third Circuit reached the same result in Paul P. v. Verniero.[88] The Court noted that it had previously concluded that the state interest "'would suffice to justify the deprivation even if a fundamental right of the registrant's were implicated.' * * * The public interest in knowing where prior sex offenders live so that susceptible individuals can be appropriately cautioned does not differ whether the issue is the registrant's claim under the Double Jeopardy or Ex Post Facto Clauses, or is the registrant's claim to privacy."[89]

Considering Hyatt's claim under the U.S. Constitution, we conclude that no privacy interest is implicated. Thus, we need not consider the procedural due process required on this claim under that Constitution. Assessing Hyatt's claim under the Kentucky Constitution, we reach the same conclusion.

Assuming arguendo that the U.S. Constitution does not guarantee the right of privacy in these circumstances, Hyatt draws our attention to the fact that the Kentucky Supreme Court has

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[87] Id. at 855. Under Michigan sex offender registration statute effective at the time of the Lanni case, Michigan's sex offender registry contained "name, aliases, address, physical description, birth date, and offense of conviction." Id. at 852. The registry is organized by ZIP code, which limits who has access to the information. Michigan also maintains a registry only accessible to law enforcement agencies, which has the following information: "offender's name, social security number, address, a brief summary of information regarding each conviction, a complete physical description, blood type, and DNA information." Id. at 851.

[88] 170 F.3d 396 (3d Cir. 1999).

[89] Id. at 404 (internal citation omitted).

recognized an expanded right of privacy under our state constitution and in support cites Commonwealth v. Wasson.[90] In Wasson, the Court did recognize the right of individuals to engage in homosexual sodomy — a right which had been rejected by the U.S. Supreme Court in Bowers v. Hardwick[91] as being protected under the U.S. Constitution. However, we find Hyatt's argument unpersuasive on privacy grounds in these circumstances. The public's need for information outweighs Hyatt's privacy interest.

In Lynch v. Commonwealth,[92] the Supreme Court noted that "the enjoyment of many personal rights and freedoms is subject to many kinds of restraints under the police power of the state, which includes reasonable conditions as may be determined by governmental authority to be essential to public welfare, safety, and good order of the people."[93] The Commonwealth has an interest in protecting the public welfare and safety of all its residents. In exercising this power, the General Assembly has determined that the registration of sex offenders and the distribution of information regarding sex offenders is necessary to protect the public welfare and safety. In the absence of any constitutional infirmity, we cannot fault this aim.

B. PROCEDURAL DUE PROCESS RIGHTS REGARDING THE HEARING

1. UNTIMELY ARRIVAL OF RISK ASSESSMENT REPORT

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[90] Supra, n. 74.

[91] 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986).

[92] Ky., 902 S.W.2d 813 (1995).

[93] Id. at 816 (citing Mansbach Scrap Iron Co. v. City of Ashland, 235 Ky. 265, 30 S.W.2d 968 (1930); Commonwealth v. Mitchell, Ky., 355 S.W.2d 686 (1962)).

AND FAILURE OF DR. WAGNER TO ATTEND HEARING

Hyatt contends that the circuit court erred in admitting Dr. Wagner's risk assessment report even though it arrived the morning of the hearing. We believe that Hyatt's procedural due process rights were violated in the risk assessment hearing because the report arrived too late to provide Hyatt notice of its contents, to allow his counsel to read and digest it, and to allow sufficient time for preparation, including calling expert witnesses to counter Dr. Wagner's conclusions.

Even though Hyatt has not established that he has a privacy interest, he does have an interest in the risk assessment being conducted in conformity with KRS 17.500-.991. As this Court pointed out in Belcher v. Kentucky Parole Board[94] — a case addressing due process rights in a parole proceeding — "[a criminal] has a legitimate interest in a decision rendered in conformity with the established procedures and policies; one which is based upon consideration of relevant criteria."[95] And as the Supreme Court said in Kentucky Central Life Insurance Co. v. Stephens,[96] "[n]ot always does due process require a trial or the strict application of evidentiary rules and/or unlimited discovery . . . . Procedural due process is not a static concept, but calls for such procedural protections as the particular situation may

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[94] Ky. App., 917 S.W.2d 584 (1996).

[95] Id. at 587. See also Morrissey v. Brewer, 408 U.S. 471, 488-89, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484, 498-99 (1972) (outlining the minimum due process requirements for a parole revocation hearing, which includes the right to present witnesses and to know the evidence to be presented against the parolee).

[96] Ky., 897 S.W.2d 583 (1995).

demand."[97] The Court went on to say that "[w]hile determining whether the process afforded is adequate, the court should consider the private interests affected, the governmental interests affected, and the fairness and reliability of the existing procedures and the probable value, if any, of additional procedural safeguards."[98]

KRS 17.570 provides procedural safeguards guaranteed a sex offender. In relevant part, the statute provides that:

> (3) In making the determination of risk, the sentencing court shall review the recommendations of the certified provider along with any statement by a victim or victims and any materials submitted by the sex offender.
>
> (4) The court shall conduct a hearing in accordance with the Rules of Criminal Procedure and shall allow the sex offender to appear and be heard.
>
> (5) The court shall inform the sex offender of the right to have counsel appointed in accordance with KRS 31.070 and 31.110.
>
> (6) The sentencing court shall issue findings of fact and conclusions of law and enter an order designating the level of risk.

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[97] Id. at 590 (citing Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)). See also Commonwealth v. Raines, Ky., 847 S.W.2d 724, 727 (1993), overruled on other grounds by Commonwealth v. Howard, Ky., 969 S.W.2d 700 (1998) (citing Matthews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)).

[98] Stephens, 897 S.W.2d at 590 (citing Palmer by Palmer v. Merluzzi, 868 F.2d 90 (3d Cir. 1989).

(7) The order designating risk shall be subject to appeal.[99]

According to the U.S. Supreme Court:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.[100]

Likewise, in Memphis Light, Gas & Water Div. v. Craft,[101] the Court noted that "[t]he purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending 'hearing.'"[102] This notice includes the opportunity to know what evidence will be presented against the party and have adequate time to collect his own evidence to refute it.

Here, the circuit court failed to address the risk assessment report's untimely arrival for review by Hyatt. The

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[99] KRS 17.570(3)-(7).

[100] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865, ___ (1950) (internal citations omitted).

[101] 436 U.S. 1, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978).

[102] Id. at 14, 98 S. Ct. at 1563, 56 L. Ed. 2d at 42.

report arrived at approximately 9:00 a.m. for a 10:30 a.m. hearing. The circuit court did delay the hearing until 11:30 a.m., but that did not rectify the infirmity. The court should have delayed the hearing until the parties had been given an opportunity to read and evaluate the report, and it should have given Hyatt an opportunity to present witnesses on his behalf if desired. Although the amount of procedural due process required is flexible, the circuit court violated Hyatt's procedural due process rights by failing to give him timely notice of the contents of the report.

However, we reject Hyatt's argument that the court erred by failing to require Dr. Wagner's attendance at the hearing. Hyatt certainly had the right to compel Dr. Wagner's attendance by subpoena. If Hyatt believes Dr. Wagner's testimony is critical to his challenge of the report's conclusions, Hyatt may subpoena Dr. Wagner on remand and subject him to cross-examination.

2. HYATT'S INABILITY TO CALL EXPERT WITNESSES

Hyatt also insists that his due process rights were violated because he was unable to call expert witnesses to challenge the conclusions reached in the assessment report. We agree.

Both the Fourteenth Amendment to the U.S. Constitution and Section 11 of the Kentucky Constitution guarantee the right of a defendant to call witnesses on his behalf.[103] While due process

[103] Mitchell v. Commonwealth, 225 Ky. 83, 7 S.W.2d 823, 824 (1928) ("Section 11 of the Constitution provides that in all criminal prosecutions the accused has the right 'to have compulsory process for obtaining witnesses in his favor'."); United States v. Pierce, 62 F.3d 818, 832 (6th Cir. 1995) ("The right of a defendant to establish a defense by presenting his own witnesses is a (continued...)

rights may be limited in certain proceedings, we believe that Hyatt was entitled to notice of the report's contents in order to be able to present experts to testify during the risk assessment hearing.

The circuit court should have given Hyatt an opportunity to call expert witnesses to refute Dr. Wagner's risk assessment. By failing to give Hyatt this opportunity, the court denied Hyatt due process of law under the Fourteenth Amendment to the U.S. Constitution and Section 11 of the Kentucky Constitution.

3. FAILURE OF VICTIM TO TESTIFY

Finally, Hyatt argues that the victim should have been forced to testify at the hearing. He alleges that the victim's failure to testify violated his right to confront witnesses under U.S. Constitution and Kentucky Constitution. We disagree.

When an individual has been indicted for committing a crime, he has a constitutional right to confront his or her accusers.[104] This right of confrontation has generally been held only to apply to trials.[105]

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[103] (...continued)
fundamental element of due process.") (citing Webb v. Texas, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972)).

[104] U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."); Ky. Const. § 11 ("In all criminal prosecutions the accused has the right . . . to meet the witnesses face to face . . . .").

[105] Nelson v. O'Neil, 402 U.S. 622, 91 S. Ct. 1723, 29 L. Ed. 2d 222 (1971). But see In re Oliver, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 982 (1948) (holding that the right applies to contempt proceeding); Wilmer v. Committee on Character & Fitness, 373 U.S. 96, 83 S. Ct. 1175, 10 L. Ed. 2d 224 (1963) (concluding that the right is applicable to bar admission proceedings); Application of Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967) (determining that the right applies to juvenile delinquency (continued...)

This case is distinguishable because it involves a risk assessment hearing pursuant to KRS 17.570, not a criminal trial. Hyatt waived his constitutional right to confront the victim by pleading guilty.[106] The subsequent hearing is to determine the potential for recidivism of the sex offender; the sex offender is not being charged with a new crime. Rather, the statutes subject the sex offender to registration for a crime to which he has previously pled guilty, or been found guilty by a judge or jury. As we have concluded, the sex offender classification process serves a regulatory purpose and does not impose additional punishment upon an offender. In considering Hyatt's claim for violation of his procedural due process rights, flexible due process entitled him to a hearing to challenge the veracity of the sex offender risk assessment report and to produce his own expert witnesses. His procedural due process rights do not extend to a confrontation with the victim. Thus, we conclude that a sex offender does not have a right to confront the victim during the risk assessment hearing.

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[105] (...continued)
proceedings); United States v. Ushery, 968 F.2d 575, 583 (6th Cir. 1992) (holding that a criminal defendant is not entitled to confront during sentencing proceedings) (citing United States v. Kikumara, 918 F.2d 1084 (3d Cir. 1990); United States v. Beaulieu, 893 F.2d 1177 (10th Cir. 1990)).

[106] Centers v. Commonwealth, Ky. App., 799 S.W.2d 51 (1990) (noting that a criminal defendant waives the right to confront accusers by pleading guilty).

VI. CONCLUSION

We affirm that portion of the Anderson Circuit Court order upholding the constitutionality of KRS 17.500-.991. For the reasons stated, we reverse the order insofar as it classifies Hyatt as a sex offender and remand this case for further proceedings consistent with this opinion.[107]

EMBERTON, Judge, CONCURS.

DYCHE, Judge, CONCURS IN RESULT.

BRIEF AND ORAL ARGUMENT FOR APPELLANT:

Carol R. Camp
Assistant Public Advocate
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Albert B. Chandler III
Attorney General

Anitria M. Franklin
Assistant Attorney General
Frankfort, Kentucky

ORAL ARGUMENT FOR APPELLEE:

Anitria M. Franklin

[107] In April 2000, the General Assembly enacted Senate Bill 263 which became effective immediately upon the Governor's signature. Senate Bill 263 eliminates the process of ordering a risk assessment prior to the classification of a sex offender and the entire classification scheme. On remand, the circuit court shall conduct the hearing in accordance with the pre-2000 amendments. In this opinion, we do not address the constitutionality of Senate Bill 263.