Sex Offender Registration and Notification In the United States Current Case Law and Issues — March 2018

Retroactive Application & Ex Post Facto Considerations

One of the first issues to be litigated as sex offender registration systems were established across the country was whether or not an offender who had been convicted prior to the passage of the laws requiring registration could be required to register.[1] Numerous challenges to the retroactive application of registration laws were heard throughout the 1990s and 2000s.

United States Supreme Court

In 2003, the United States Supreme Court seemingly settled the issue in the case of *Smith v. Doe*, a challenge from a sex offender in Alaska who argued that the imposition of registration requirements on him violated the ex post facto clause of the Constitution.[2] The court held that registration and notification — under the specific facts of that case — were not punitive, and therefore could be retroactively imposed as regulatory actions.[3]

While the issue was settled for a time, subsequent litigation has ensued based on increased sex offender registration and notification requirements in many jurisdictions since the *Doe* decision.[4] In a series of recent cases interpreting 18 U.S.C. § 2250, the Supreme Court has declined to take a fresh look at any ex post facto implications raised by the increasing requirements that have been placed on registered sex offenders over the past 15 years.[5]

Federal Courts

From the *Smith v. Doe* decision until 2017, federal courts had nearly universally held that sex offender registration and notification schemes did not violate the ex post facto clause.[6] However, in *Doe v. Snyder*, the Sixth Circuit Court of Appeals held that Michigan's SORNA-implementing law is punitive and, therefore, could not be applied retroactively.[7] The Supreme Court denied certiorari in the case in October 2017 and it is now binding for the states in the circuit: Kentucky, Michigan, Ohio and Tennessee.

Significant State Court Decisions

Eight state supreme courts in recent years have held that the retroactive application of their sex offender registration and notification laws violate their respective state constitutions.[8] Other state courts have found issues with the retroactive application of their sex offender registration laws in less sweeping fashion.[9] In 2017, the Supreme Court of Pennsylvania held that the application of the state's SORNA-implementing law to a person whose offense occurred prior to the law's effective date was unconstitutional under the ex post facto clause.[10] Conversely, many courts continue to stand by the reasoning of the *Smith v. Doe* case in affirming the retroactive application of sex offender registration laws.[11] However, at least one state that has found an ex post facto violation as applied to its own offenders does not apply to persons convicted in another state who then relocate.[12]

Some courts require the specific performance of a plea agreement or court order when sex offender registration was not specifically ordered by the sentencing court, was bargained away as part of plea negotiations or when an offender was given a specific classification or tier at sentencing.[13] However, many states continue to permit registration and notification under such circumstances. For example, California held that a defendant was properly subjected to community notification in 2004 even though he had entered a plea agreement in 1991 that was silent on the issue.[14]

Additional Court Opinions

A review of pertinent case law since the passage of SORNA reveals that, in one case, a federal court enjoined the enactment of Nevada's SORNA-implementing legislation based on ex post facto concerns;[15] although the federal court injunction has been lifted,[16] the matter remains in litigation at the state level.[17] In Texas, a writ of mandamus was granted compelling the Department of Public Safety to comply with a court order to remove an offender from the registry.[18] In other states, some offenders have been able to be removed from the registry when the statute is changed in a way that benefits them.[19] One court has held that increasing the penalties for a *failure to register* does not violate the ex post facto clause.[20]

Massachusetts requires a due process hearing before an offender is ordered to comply with its full registration requirements, including those convicted prior to the registration statute's effective date.[21] Applying community notification retroactively to Massachusetts' existing *Level 2* offenders was held to violate due process.[22]

[1] SORNA Guidelines require that jurisdictions register offenders whose "predicate convictions predate the enactment of SORNA or the implementation of SORNA in the jurisdiction" when an offender is —

(1) incarcerated or under supervision, either for the predicate sex offense or for some other crime;

(2) already registered or subject to a pre-existing sex offender registration requirement under the jurisdiction's law; or

(3) reenters the jurisdiction's justice system because of a subsequent felony conviction.

The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,046 (July 2, 2008); Supplemental Guidelines for Sex Offender Registration and Notification, 76 Fed. Reg. 1630, 1639 (Jan. 11, 2011).

[2] Smith v. Doe, 538 U.S. 1009 (2003).

[3] *Id.*

[4] *See, e.g.*, Jensen v. State, 905 N.E.2d 384 (Ind. 2009) (person convicted after the initial passage of the law could be required to comply with amended requirements).

[5] *See* United States v. Kebodeaux, 133 S.Ct. 2496 (2013) (assuming without deciding that Congress did not violate the ex post facto clause in enacting SORNA's registration requirements); United States v. Juvenile Male, 131 S.Ct. 2860 (2011) (declining to address whether SORNA's requirements violated the ex post facto clause on grounds of mootness); Carr v. United States, 560 U.S. 438 (2010) (declining to address the issue of whether SORNA violates the ex post facto clause).

[6] *See, e.g.*, Shaw v. Patton, 823 F.3d 556 (10th Cir. 2016); United States v. Parks, 698 F.3d 1 (1st Cir. 2012); United States v. WBH, 664 F.3d 848 (11th Cir. 2011).

[7] Doe v. Snyder, 834 F.3d 696 (6th Cir. 2016), *cert. denied*, 2017 U.S. LEXIS 4754 (Oct. 2, 2017).

[8] Doe v. State, 189 P.3d 999 (Alaska 2008); Wallace v. State, 905 N.E.2d 371 (Ind. 2009); State v. Letalien, 985 A.2d 4 (Me. 2009); Doe v. Dep't of Pub. Safety & Corr. Servs., 62 A.3d 123 (Md. 2013); State v. Williams, 952 N.E.2d 1108 (Ohio 2011); Starkey v. Okla. Dep't of Corr., 305 P.3d 1004 (Okla. 2013) (detailing all case law from state courts regarding retroactive application of sex offender registration and notification statutes); Commonwealth v. Muniz, 2017 Pa. LEXIS 1682 (2017). One additional case along these lines, *Doe v. Phillips*, 194 S.W.3d 833 (Mo. 2006), has subsequently been rendered moot, *Doe v. Keathley*, 2009 Mo. App. LEXIS 4 (Jan. 6, 2009). In 2016, an unusual series of cases in Kansas first held that the state's registration system was punitive in effect — and thus retroactive application was unconstitutional — then overturned that decision. Doe v. Thompson, 373 P.3d 750 (Kan. 2016) (registration system is punitive); State v. Buser, 371 P.3d 886 (Kan. 2016) (same); State v. Redmond, 371 P.3d 900 (Kan. 2016) (same). *But see* State v. Petersen-Beard, 304 Kan. 192 (2016) (registration system does not violate the Ex Post Facto clause).

[9] The New Hampshire Supreme Court held that requiring lifetime registration without the opportunity for review violates the ex post facto provisions of the state's constitution. Doe v. State, 111 A.3d 1077 (N.H. 2015) (registration requirements can only be applied to the petitioner if he is "promptly given an opportunity for either a court hearing, or an administrative hearing subject to judicial review, at which he is permitted to demonstrate that he no longer poses a risk sufficient to justify continued registration ....[and] must be afforded periodic opportunities for further hearings, at reasonable intervals, to revisit whether registration continues to be necessary to protect the public"). In Pennsylvania, the retroactive application of a requirement to appear in person to update any changes to an offender's registration information was held to violate the ex post facto clause. Cappolino v. Commissioner, 102 A.3d 1254 (Pa. Commw. Ct. 2014). *But see* Commonwealth v. Perez, 97 A.3d 747 (Pa. Super. Ct. 2014) (retroactive application of new registration scheme did not violate the ex post facto clause).

[10] Commonwealth v. Muniz, 2017 Pa. LEXIS 1682 (2017).

[11] *See, e.g.*, Shaw v. Patton, 823 F.3d 556 (10th Cir. 2016); State v. Henry, 228 P.3d 900 (Ariz. Ct. App. 2010); Finnicum v. State, 673 S.E.2d 604 (Ga. 2009); State v. Yeoman, 236 P.3d 1265 (Idaho 2010); Illinois *ex. rel.* Birkett v. Konetski, 909 N.E.2d 783 (Ill. 2009); *In re* Nick. H., 123 A.3d 229 (Md. 2015); Smith v. Commonwealth, 743 S.E.2d 146 (Va. 2013); Kammerer v. State, 322 P.3d 827 (Wyo. 2014). In addition, one federal circuit concluded that retroactive application of New York's registration amendments to an offender did not violate the ex post facto clause. Doe v. Cuomo, 755 F.3d 105 (2d Cir. 2014).

[12] State v. Zerbe, 50 N.E.3d 368 (Ind. 2016).

[13] Commonwealth v. Hainesworth, 82 A.3d 444 (Pa. 2014) (defendant entitled to specific performance of his plea agreement, a component of whose negotiation was that he would not be required to register as a sex offender). *But see* Commonwealth v. Giannatonio, 114 A.3d 429 (Pa. Super. Ct. 2015) (extension of state duration of registration period did not violate Ex Post Facto when conviction secured pursuant to federal plea agreement).

[14] Doe v. Harris, 302 P.3d 598 (Cal. 2013).

[15] ACLU v. Masto, 2:08-cv-00822-JCM-PAL (D. Nev., Oct. 7, 2008).

[16] ACLU v. Masto, 670 F.3d 1046 (9th Cir. 2012). The Nevada Supreme Court also held that retroactive application of registration and notification requirements to juveniles adjudicated delinquent does not violate due process or the ex post facto clause. State v. Eighth Jud. Dist. Ct., 306 P.3d 369 (Nev. 2013); *injunction dissolved*, S.M. v. State, 2015 Nev. Unpub. LEXIS 131 (Feb. 6, 2015).

[17] Sandra Chereb, *Nevada Supreme Court Stops Sex Offender Law from Being Implemented*, Las Vegas Review Journal (July 1, 2016), https://www.reviewjournal.com/news/nevada/nevada-supreme-court-stops-sex-offender-law-being-implemented; Sandra Chereb, *Nevada to Add Hundreds to Sex Offender Registry*, Las Vegas Review Journal (June 3, 2016), https://www.reviewjournal.com/crime/nevada-add-hundreds-sex-offender-registry.

[18] McCraw v. Gomez, 2014 Tex. App. LEXIS 13911 (Dec. 30, 2014).

[19] State v. Jedlicka, 747 N.W.2d 580 (Minn. App. 2008); *see also* Flanders v. State, 955 N.E.2d 732 (Ind. App. 2011).

[20] Buck v. Commonwealth, 308 S.W.3d 661 (Ky. 2010).

[21] *See* the procedure followed in Massachusetts, where the Sex Offender Registry Board must find that the offender poses a danger to the community before requiring registration: 803 CMR 106(B), *available at* http://www.mass.gov/courts/docs/lawlib/800-899cmr/803cmr1.pdf. In *Doe v. Sex Offender Registry Board*, 41 N.E.3d 1058 (Mass. 2015), the court held that the burden of proof for classification was no longer by a 'preponderance of the evidence' but was constitutionally required to be by the higher standard of "clear and convincing evidence."

[22] Moe v. Sex Offender Registry Board, 6 N.E.3d 530 (Mass. 2014).