



Sex Offender Registration and Notification In the United States Current Case Law and Issues — March 2019

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 16 years since the *Doe* case.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 in an as-applied challenge that Michigan's SORNA-implementing law is punitive and, therefore, could not be applied retroactively.⁷ In addition, in Alabama a federal court held that the retroactive application of certain provisions regarding homeless offenders and in-state travel notifications violated the ex post facto clause.⁸

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.⁹ Other state courts have found issues with the retroactive application of their sex offender registration laws in less sweeping fashion.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

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to its own offenders does not apply to persons convicted in another state who then relocate.¹²

Occasionally an offender's registration requirements might begin — or become more onerous — when laws are amended after the date of an offender's sentencing. 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 require 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 federal court enjoined the enactment of Nevada's SORNA-implementing legislation based on ex post facto concerns for a number of years.¹⁵ In Kentucky, one court has held that increasing the penalties for a failure to register does not violate the ex post facto clause.¹⁶ 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.¹⁷

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 —

- i. incarcerated or under supervision, either for the predicate sex offense or for some other crime;
- ii. already registered or subject to a pre-existing sex offender registration requirement under the jurisdiction's law; or
- iii. re-enters 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), available at <https://www.govinfo.gov/content/pkg/FR-2008-07-02/pdf/E8-14656.pdf>.

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*, 570 U.S. 387 (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*, 564 U.S. 932 (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. W.B.H.*, 664 F.3d 848 (11th Cir. 2011).

⁷ *Doe v. Snyder*, 834 F.3d 696 (6th Cir. 2016).

⁸ *McGuire v. Strange*, 83 F. Supp. 3d 1231 (M.D. Ala. 2015).

⁹ *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*, 164 A.3d 1189 (Pa. 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).

¹⁰ 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").

¹¹ *See, e.g.*, Shaw v. Patton, 823 F.3d 556 (10th Cir. 2016); State v. Yeoman, 236 P.3d 1265 (Idaho 2010); 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* United States v. Paul, 718 Fed. Appx. 360 (6th Cir. 2017) (trial court excused defendant from registration at sentencing but federal requirement to register still applied); Jensen v. State, 882 N.W.2d 873 (Iowa Ct. App. 2016) (defendant not entitled to a 10-year registration duration, as ordered by the court per a plea agreement, when the determination of registration duration was vested in the state's Department of Public Safety); Commonwealth v. Giannattonio, 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 Buck v. Commonwealth, 308 S.W.3d 661 (Ky. 2010).

¹⁷ State v. Jedlicka, 747 N.W.2d 580 (Minn. Ct. App. 2008); *see also* Flanders v. State, 955 N.E.2d 732 (Ind. Ct. App. 2011).