



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

Other Constitutional Issues

Nearly all persons required to register as sex offenders must do so because they have been convicted of a criminal offense. Accordingly, by the time a person is actually required to register, a number of constitutional protections have already been afforded — namely, those which inure to a defendant throughout the course of a criminal trial and sentencing.

In prosecutions for failure to register cases or civil challenges to registration requirements, offenders have launched unsuccessful challenges based on the following arguments: takings,¹ double jeopardy,² procedural due process,³ substantive due process,⁴ equal protection,⁵ the right to a trial by jury,⁶ right to travel,⁷ cruel and unusual punishment,⁸ full faith and credit,⁹ the supremacy clause,¹⁰ separation of powers,¹¹ and federalism concerns.¹² Another set of constitutional arguments are those advanced by the “sovereign citizen movement,” which, though creative, have proven unsuccessful.¹³

Varied Successful Challenges

Although, as noted above, the vast majority of constitutional challenges to sex offender registration and notification requirements are unsuccessful, there have been some notable decisions based on constitutional grounds. For example, a successful challenge was made in Maine utilizing the Bill of Attainder clause under Article I, Section 9 of the U.S. Constitution.¹⁴

There were two notable federal court decisions in 2017 where various provisions of state law were found to violate the Constitution. First, the United States Supreme Court held that a North Carolina law prohibiting registered sex offenders from accessing social media sites where minors are permitted (such as Facebook) violated the First Amendment.¹⁵ More than 1,000 people had previously been prosecuted under the law.¹⁶ Second, a federal court in Colorado found that the state’s sex offender registration and notification system violated both the Eighth and 14th Amendments.¹⁷

In addition to these two recent cases, state and federal courts have previously held the following:

- The collection of internet identifiers violates the First Amendment¹⁸

Disclaimer: The U.S. Department of Justice makes no claims, promises, or guarantees about the accuracy, completeness, or adequacy of the contents of this update, and expressly disclaims liability for errors and omissions in the contents of this update. The information appearing in this update is for general informational purposes only and is not intended to provide legal advice to any individual or entity. We urge you to consult with your own legal advisor before taking any action based on information appearing in this update.

- Being ordered to register as a sex offender triggers the protections of procedural due process¹⁹
- Publishing information about an offender’s “primary and secondary targets” violates due process²⁰
- Being ordered to register as a parole condition violates due process when the underlying convictions are not sexual in nature²¹
- Requiring registration for a conviction for solicitation, and not prostitution, when each offense had the same elements, violates due process²²
- A “three-strikes” sentence based on a failure to register conviction is cruel and unusual punishment²³
- Mandatory life imprisonment for a second conviction of failure to register is cruel and unusual punishment²⁴
- Requiring an offender to continue to register when he had been convicted of having consensual sex with his 14-year-old girlfriend (he was 18 at the time) and had his case successfully dismissed under a deferred disposition is cruel and unusual punishment²⁵

In addition, the Pennsylvania Supreme Court invalidated a portion of the state’s SORNA-implementing law because it violated the “single subject” rule of its constitution.²⁶

Interaction Between SORNA and State Law

There have been some notable cases regarding the interaction between SORNA and the existing registration and notification laws in a state: Missouri has held that SORNA preempts state law to the extent that any state constitutional concerns are not implicated,²⁷ and North Carolina concluded that SORNA is directly incorporated (in part) in to state law and that incorporation is not an unconstitutional delegation of legislative authority.²⁸ In addition, Texas explicitly considers the federal duration of registration under SORNA in making a determination about whether an offender’s registration period can be terminated.²⁹ The inclusion of an offense not required to be registered by SORNA in a state’s registration scheme was recently held to not violate an offender’s constitutional rights.³⁰

Jury Determination of Obligation to Register as a Sex Offender

There are a number of Supreme Court cases that do not directly address sex offender registration, yet continue to have a bearing on litigation in the field.³¹ For example, the case of *Apprendi v. New Jersey* spurred a number of challenges to registration requirements; namely, contending that a jury should be required to determine whether an offender should be subject to the additional “punishment” of sex offender registration.³² The test as to whether sex offender registration constitutes “punishment” is the same as that used to determine whether something is “punitive” for purposes of an ex post facto analysis as discussed in the section on Retroactive Registration.³³ To date, most challenges under *Apprendi* have been unsuccessful.³⁴

Ineffective Assistance of Counsel

One frequent argument in failure to register cases is that the offender had ineffective assistance of counsel during the trial for the underlying sex offense, because counsel did not advise them that they would be required to register as a sex offender. Most of these cases have focused on sex offender registration as a “collateral consequence” of conviction;³⁵ other cases involving whether a guilty plea is knowing, voluntary and intelligent have also discussed the issue.³⁶ At least one court has concluded that the heightened registration and notification requirements imposed on sex offenders have rendered any registration requirement a “direct consequence,” rather than a “collateral consequence,” of conviction.³⁷

While most courts do not find any constitutional violation in these circumstances, one court held that an affirmative misrepresentation that an offender would not have to register as a sex offender is ineffective assistance of counsel;³⁸ another determined that incorrect advice to an offender regarding whether he would be required to register as a sex offender is ineffective assistance of counsel;³⁹ a constitutional violation was found where counsel advised that an offender plead guilty to a charge of failure to register when the offender had never been convicted of an offense legally requiring registration;⁴⁰ and one recent case found that counsel’s failure to advise that an offender’s registration requirements had expired prior to his failure to register offense date was ineffective assistance of counsel.⁴¹

Padilla v. Kentucky

*Padilla v. Kentucky*⁴² held that counsel’s failure to correctly advise a client that a conviction would count as a deportable offense under the Immigration and Naturalization Act was deficient assistance under the Sixth Amendment.⁴³ Since the decision in *Padilla*, a number of cases have addressed the issue of whether counsel’s failure to advise their client that a conviction would result in sex offender registration also runs afoul of the Sixth Amendment; thus far, many of those challenges have been unsuccessful.⁴⁴ However, in 2018 the Kentucky Supreme Court held that the provisions of *Padilla* require that defendants be permitted to raise an ineffective assistance of counsel claim where their attorney failed to advise them of their registration responsibilities upon conviction.⁴⁵ The U.S. Supreme Court concluded that the holding in *Padilla* does not apply retroactively.⁴⁶

¹ *Smith v. Commonwealth*, 743 S.E.2d 146 (Va. 2013); *see also Does v. Wasden*, 2018 U.S. Dist. LEXIS 84138 (D. Idaho May 17, 2018) (varied constitutional challenges).

² *Vazquez v. Foxx*, 895 F.3d 515 (7th Cir. 2018); *State v. Sparks*, 657 S.E. 2d 655 (N.C. 2008); *State v. Green*, 230 P.3d 654 (Wash. Ct. App. 2010).

³ *Murphy v. Rychlowski*, 868 F.3d 561 (7th Cir. 2017); *Meza v. Livingston*, 607 F.3d 392 (5th Cir. 2010) (defendant had a liberty interest in being free from registration requirements where he had not been convicted of a sex offense); *State v. Arthur H.*, 953 A.2d 630 (Conn. 2008) (no due process hearing required); *Doe v. Dep’t of Public Safety*, 971 A.2d 975 (Md. Ct. Spec. App. 2009) (presumption of dangerousness flowing from a rape conviction was permissible); *Smith v. Commonwealth*, *supra* note 1.

⁴ *Litmon v. Harris*, 768 F.3d 1237 (9th Cir. 2014) (requiring sexually violent predators to check in every 90 days did not violate substantive due process); *Woe v. Spitzer*, 571 F. Supp. 2d 382 (E.D.N.Y. 2008) (when

amended statute extended the registration period by 10 years three days before petitioner's registration requirement expired, there was no protected liberty interest).

⁵ Doe v. Jindal, 2011 U.S. Dist. LEXIS 100408 (E.D. La., Sept. 7, 2011); State v. Dickerson, 97 A.3d 15 (Conn. App. Ct. 2014). California has a long line of cases litigating equal protection issues in sex offender registration cases, based on People v. Hofsheier, 129 P.3d 29 (Cal. 2006), which was overruled in Johnson v. Dep't of Justice, 341 P.3d 1075 (Cal. 2015).

⁶ See Thomas v. United States, 942 A.2d 1180 (D.C. 2008) (underlying misdemeanor charges which required registration upon conviction were "petty" for purposes of the Sixth Amendment, and a jury trial was not required); *In re Richard A.*, 946 A.2d 204 (R.I. 2008). *But see* Fushek v. State, 183 P.3d 536 (Ariz. 2008) (because of the seriousness of the consequences of being designated a sex offender, jury trial must be afforded when there is a special allegation of sexual motivation in a misdemeanor case).

⁷ Doe v. Jindal, 2015 U.S. Dist. LEXIS 155908 (E.D. La. Nov. 18, 2015); State v. Smith, 344 P.3d 1244 (Wash. Ct. App. 2015).

⁸ Carney v. Okla. Dep't of Pub. Safety, 875 F.3d 1347 (10th Cir. 2017) (requiring sex offender to obtain driver's license which indicates he is a sex offender does not violate the Eighth Amendment or due process clause); People v. Nichols, 176 Cal. App. 4th 428 (3d Dist. 2009) (28 years to life sentence for failure to register under California's three-strikes law did not violate the Eighth Amendment); State v. Kinney, 417 P.3d 989 (Idaho Ct. App. 2018); People v. T.D., 823 N.W.2d 101 (Mich. Ct. App. 2011) (requiring a juvenile to register was not cruel and unusual punishment), *dismissed as moot*, 821 N.W.2d 569 (Mich. 2012); State v. Blankenship, 48 N.E.3d 516 (Ohio 2015) (tier II registration requirements for an offense committed when the offender was 21 and the victim was 15 is not cruel and unusual punishment).

⁹ Rosin v. Monken, 599 F.3d 574 (7th Cir. 2010) (an offender convicted in New York was promised in his plea agreement that he would never have to register as a sex offender, but when he moved to Illinois and was required to register under its laws, it was not a violation of the Full Faith and Credit Clause); see Burton v. State, 977 N.E.2d 1004 (Ind. Ct. App. 2012) (state unsuccessfully argued that the Full Faith and Credit clause should apply).

¹⁰ United States v. King, 431 Fed. Appx. 630 (10th Cir. 2011).

¹¹ State v. Caton, 260 P.3d 946 (Wash. Ct. App. 2011), *rev'd on other grounds*, 273 P.3d 980 (Wash. 2012).

¹² In Bond v. United States, 564 U.S. 211 (2011), *on remand at* 681 F.3d 149 (3d Cir. 2012), *cert. granted on other grounds*, 568 U.S. 1140 (2013), the Supreme Court granted standing to sex offenders to challenge SORNA on 10th Amendment grounds where previously they had no standing to do so, but no challenges on those grounds have been successful at the circuit level thus far. Thus far, 10th Amendment challenges raised under Bond have been unsuccessful. See United States v. Felts, 674 F.3d 599 (6th Cir. 2012); United States v. Smith, 504 Fed. Appx. 519 (8th Cir. 2012).

¹³ Proponents of the sovereign citizen movement "believe they are not subject to federal or state statutes or proceedings, reject most forms of taxation as illegitimate, and place special significance on commercial law." United States v. Harding, 2013 U.S. Dist. LEXIS 62471 (W.D. Va., May 1, 2013) (18 U.S.C. § 2250 prosecution), *quoting* United States v. Brown, 669 F.3d 10 (1st Cir. 2012). In Harding the defendant argued that the federal court did not have jurisdiction over him, citing the Organic Act of 1871, the fact that his name was listed in all caps on the indictment, that there was no corpus delicti for the offense, and that the federal court was an "Admiralty Court" because the flag in the courtroom had fringe on it. *Id.* at *3-*15.

¹⁴ Doe XLVI v. Anderson, 108 A.3d 378 (Me. 2015) (holding, in part, that a guilty plea is not a "criminal trial").

¹⁵ Packingham v. North Carolina, 137 S.Ct. 1730 (2017).

¹⁶ *Id.* at 1731.

¹⁷ Millard v. Rankin, 265 F. Supp. 3d 1211 (D. Colo. 2017).

¹⁸ Doe v. Prosecutor, 705 F.3d 694 (7th Cir. 2013) (statute prohibiting sex offenders from using social networking websites, instant messaging services and chat programs violated the First Amendment); Doe v. Neb., 898 F. Supp. 2d 1086 (D. Ne. 2012) (requirement to provide internet identifiers found unconstitutional on First Amendment and other grounds); Doe v. Shurtleff, 2008 U.S. Dist. LEXIS 73787 (D. Utah Sept. 25, 2008), *vacated after legislative changes*, 628 F.3d 1217 (10th Cir. 2010); Harris v. State, 985

N.E.2d 767 (Ind. Ct. App. 2013) (statute prohibiting use of a social networking site by a registered sex offender violated the First Amendment).

¹⁹ *Brown v. Montoya*, 662 F.3d 1152 (10th Cir. 2011). 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. *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 Bd.*, 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." Applying community notification retroactively to Massachusetts' existing Level 2 offenders was held to violate due process. *Moe v. Sex Offender Registry Board*, 6 N.E.3d 530 (Mass. 2014).

²⁰ *State v. Briggs*, 199 P.3d 935 (Utah 2008) ("target" information could include, among other things, a description of the offender's preferred victim demographics).

²¹ *Ex parte Evans*, 338 S.W.3d 545 (Tex. Crim. App. 2011).

²² *Doe v. Jindal*, 851 F. Supp. 2d 995 (E.D. La. 2012).

²³ *Gonzalez v. Duncan*, 551 F.3d 875 (9th Cir. 2008).

²⁴ *Bradshaw v. State*, 671 S.E.2d 485 (Ga. 2008).

²⁵ *People v. Dipiazza*, 778 N.W.2d 264 (Mich. Ct. App. 2009).

²⁶ *Commonwealth v. Nieman*, 84 A.3d 603 (Pa. 2013).

²⁷ *Doe v. Keathley*, 2009 Mo. App. LEXIS 4 (Jan. 6, 2009). *But see* *State v. Hough*, 978 N.E.2d 505 (Ind. Ct. App. 2012); *Andrews v. State*, 978 N.E.2d 494 (Ind. Ct. App. 2012) (stating without deciding that the federal duty to register could apply if the offender engaged in interstate travel).

²⁸ *In re McClain*, 741 S.E.2d 893 (N.C. Ct. App. 2013) (North Carolina's registration law directly incorporates the clean record provisions of SORNA); *see In re Hall*, 768 S.E.2d 39 (N.C. Ct. App. 2014) (using SORNA's tiering structure).

²⁹ Tex. Code. Crim. Proc. §§ 62.402 & 62.405.

³⁰ *Thomas v. Miss. Dep't of Corr.*, 248 So.3d 786 (Miss. 2018) (state's requirement that a parental kidnapping offense be registered was permissible because SORNA's standards are a floor, not a ceiling).

³¹ While beyond the scope of this update, other cases such as *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012), and *Arlington v. FCC*, 569 U.S. 290 (2013), are having an impact on certain prosecutions under 18 U.S.C. § 2250.

³² 530 U.S. 466 (2000).

³³ However, the fact that a state has found its sex offender registration and notification system "punitive" does not render any person registered under it "in custody" for purposes of a Habeas Corpus petition. *Dickey v. Allbaugh*, 664 Fed. Appx. 690 (10th Cir. 2016) (offender registered in Oklahoma).

³⁴ *See* *People v. Mosley*, 344 P.3d 788 (Cal. 2015) (residency restrictions are not punishment for the purposes of Sixth Amendment analysis); *People v. Rowland*, 207 P.3d 890 (Colo. Ct. App. 2009); *State v. Meredith*, 2008 Minn. App. Unpub. LEXIS 324 (April 8, 2008).

³⁵ The American Bar Association's Collateral Consequences Project, <http://www.abacollateralconsequences.org>, has produced a standing resource which lists all collateral consequences that flow at the federal and state level for convictions of certain crimes. Users may select "sex offenses" as a search term and view all of the collateral consequences which may be imposed on persons so convicted.

³⁶ *See* *United States v. Cottle*, 355 Fed. Appx. 18 (6th Cir. 2009); *Mireles v. Bell*, 2008 U.S. Dist. LEXIS 2451 (E.D. Mich. Jan. 11, 2008); *State v. Flowers*, 249 P.3d 367 (Idaho 2011); *Magyar v. State*, 18 So.3d 807 (Miss. 2009) (citing thorough collection of controlling case law across the country); *People v. Gravino*, 928 N.E.2d 1048 (N.Y. 2010) (guilty plea); *People v. Nash*, 48 A.D.3d 837 (N.Y. App. Div. 2008); *see also* *United States v. Molina*, 68 M.J. 532 (U.S.C.G. CCA 2009) (mutual misunderstanding of registration requirement was grounds for withdrawing a guilty plea entered pursuant to a plea agreement); *People v. Bowles*, 89

A.D.3d 171 (N.Y. App. Div. 2011) (offender has the right to the effective assistance of counsel in a risk level assessment hearing).

³⁷ *United States v. Riley*, 72 M.J. 115 (C.A.A.F. 2013) (substantial basis to question the providence of guilty plea when the judge failed to ensure that the defendant understood the registration requirements associated with a plea of guilty). The Riley decision was clarified in *United States v. Talkington*, 73 M.J. 212 (2014), as applying only to considerations raised by the Padilla case and its progeny regarding the voluntariness of guilty pleas, and is further clarified in *Washington v. United States*, 74 M.J. 560 (A.C.C.A. 2014), as not applying retroactively.

³⁸ *United States v. Rose*, 2010 CCA LEXIS 251 (A.F. Ct. Crim. App. June 11, 2010). *Contra Edmonds v. Pruett*, 2014 U.S. Dist. LEXIS 116736 (E.D. Va. Aug. 20, 2014).

³⁹ *People v. Fonville*, 804 N.W.2d 878 (Mich. Ct. App. 2011).

⁴⁰ *People v. Armstrong*, 50 N.E.3d 745 (Ill. App. Ct. 2016); *see also United States v. Shepherd*, 880 F.3d 734 (5th Cir. 2018).

⁴¹ *Ex Parte Dauer*, 2018 Tex. Crim. App. Unpub. LEXIS 212 (Tex. Crim. App. March 21, 2018).

⁴² 559 U.S. 356 (2010).

⁴³ *Id.*

⁴⁴ *Rodriguez-Moreno v. Oregon*, 2011 U.S. Dist. LEXIS 151123 (D. Or. Nov. 15, 2011) (failure to advise of registration requirements is not ineffective assistance of counsel); *People v. Cowart*, 28 N.E.3d 862 (Ill. App. Ct. 2015) (trial court failure to admonish regarding registration requirements is not constitutionally deficient); *Embry v. Commonwealth*, 476 S.W.3d 264 (Ky. 2015); *Taylor v. State*, 887 N.W.2d 812 (Minn. 2016) (distinguishing between deportation and predatory-offender registrations). *Contra Taylor v. State*, 698 S.E.2d 384 (Ga. Ct. App. 2010); *People v. Dodds*, 7 N.E.3d 83 (Ill. App. Ct. 2014); *People v. Fonville*, *supra* note 39; *State v. Trotter*, 330 P.3d 1267 (Utah 2014).

⁴⁵ *Commonwealth v. Thompson*, 548 S.W.3d 881 (Ky. 2018).

⁴⁶ *Chaidez v. United States*, 568 U.S. 342 (2013).