



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

## Miscellaneous

The status of having been convicted of a sex offense, being required to register as a sex offender or having failed to register as a sex offender can trigger other legal issues in a variety of contexts.<sup>1</sup>

### Defamation

Defamation is a civil tort action that can be pursued when someone's reputation in the community has been injured by false or malicious statements.<sup>2</sup> Some individuals have unsuccessfully made claims under 42 U.S.C. § 1983 on the basis of defamation, when they were posted on the sex offender registry website without the due process provided by statute.<sup>3</sup>

### Fair Credit Reporting Act

Certain people have had limited success in pursuing claims under the Fair Credit Reporting Act when they have been incorrectly reported by a credit bureau as having prior sex offense convictions.<sup>4</sup>

### Federally Assisted Housing

One collateral consequence of a state-imposed lifetime sex offender registration requirement is that a person is no longer permitted to be admitted to any "federally assisted housing."<sup>5</sup> Some courts have held that once a person has been admitted to a federal program such as Section 8,<sup>6</sup> they cannot be thereafter terminated because of a new, or newly discovered, lifetime sex offender registration requirement,<sup>7</sup> while others take a different approach.<sup>8</sup>

A person may be prosecuted for perjury if they have lied on an application for Section 8 housing about a lifetime registered sex offender living in the residence.<sup>9</sup> One case permitted the termination of a beneficiary's federal assistance based only on the fact that the address displayed on the jurisdiction's public sex offender registry website for the individual was in a federally subsidized housing development.<sup>10</sup>

### Homeless & Transient Offenders

Homeless or transient sex offenders engender litigation as states have tried to enforce registration requirements. Many states are rewriting their laws to clarify that these offenders are required to register.<sup>11</sup> This issue came to the fore in Chicago, where there was a great deal of civil

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litigation based on the city's policy to deny registration to any sex offender who lacked a fixed address.<sup>12</sup>

In most cases, an offender's homelessness has not prevented a successful prosecution for failure to register, although sometimes statutory or evidentiary problems have arisen.<sup>13</sup> Differing check-in requirements for homeless offenders as opposed to offenders who have a residence address have been affirmed.<sup>14</sup> Homeless offenders have also been successfully prosecuted for failing to update their "residence" location.<sup>15</sup> In one case, a court found that when an offender repeatedly uses a "mail drop" address as his legal address, he "resides" at that location for the purposes of a prosecution for failure to register as a sex offender.<sup>16</sup> In another, when an offender still technically lived at the same address, even though he lived in an outbuilding or his truck rather than the main residence, he could not be prosecuted for a failure to update his residence address.<sup>17</sup> However, in an attempt to prosecute a long-haul trucker for failure to register, a conviction could not be had, even when he had prolonged absences from his registered residence.<sup>18</sup>

## **Immigration & Deportation**

The Adam Walsh Act requires that a person convicted of a specified offense against a minor is not entitled to file a petition to sponsor a fiancé(e) or family member unless the Secretary of the Department of Homeland Security determines that the offender poses no risk to the person on whose behalf the petition is filed.<sup>19</sup>

Convictions for failure to register have triggered subsequent deportation proceedings in some cases. There is currently a circuit split as to whether a conviction for a state failure to register offense is a crime involving "moral turpitude" under the immigration code such that a person is removable because of that conviction.<sup>20</sup>

When a naturalized U.S. citizen received his citizenship at least in part because he concealed a prior serious sex offense conviction, he can be denaturalized and have his citizenship revoked.<sup>21</sup> A recent case also held that the possible penalty of deportation, when combined with a maximum period of incarceration of six months, triggers the Sixth Amendment right to a jury trial.<sup>22</sup> In addition, difficulties may arise when a U.S. citizen, convicted of a sex offense and required to register, attempts to renounce their citizenship.<sup>23</sup>

## **Impeachment**

Generally speaking, rules of evidence permit attacking the credibility of a witness by way of introducing evidence of certain prior convictions. In one state, a conviction for failure to register was determined to be a "crime of deception," rendering it admissible in a subsequent criminal trial to impeach the defendant's testimony.<sup>24</sup>

## **Sentencing Enhancement Under Federal Law**

Under federal law, additional punishment can result if certain crimes are committed while an offender is required to register as a sex offender. Under 18 U.S.C. § 2260A, the commission of certain offenses against a minor while the perpetrator is required to register as a sex offender under any law will result in a 10-year mandatory minimum sentence to run consecutively to any other sentences imposed.<sup>25</sup> The retroactive application of these provisions does not violate the ex post facto clause.<sup>26</sup>

<sup>1</sup> The fact that a person has been convicted of a sex offense involving children can result in the revocation of a person's Certified Shorthand Reporter's License, *Sonntag v. Stewart*, 53 N.E.3d 46 (Ill. Ct. App. 2015), or their amateur radio license, FCC Reverses ALJ's Decision, Revokes Convicted Sex Offender's Ham License, ARRL.org, [www.arrl.org/news/fcc-reverses-alj-s-decision-revokes-convicted-sex-offender-s-amateur-radio-license](http://www.arrl.org/news/fcc-reverses-alj-s-decision-revokes-convicted-sex-offender-s-amateur-radio-license) (Nov. 13, 2014). In at least one state, there is a statutory presumption against any registered sex offender being granted unsupervised visitation, custody or residential placement of a child. 13 Del. Code Ann. § 724A.

<sup>2</sup> See Black's Law Dictionary (Abr. 6th ed., 1991) at p. 288.

<sup>3</sup> *Balentine v. Tremblay*, 554 Fed. Appx. 58 (2d Cir. 2014).

<sup>4</sup> *Meyer v. Nat'l Tenant Network Inc.*, 10 F. Supp. 3d 1096 (N.D. Cal. 2014).

<sup>5</sup> 42 U.S.C. § 13663; see also *When Must I Prohibit Admission of Sex Offenders?*, 24 C.F.R. § 5.856 (2001); *To What Criminal Records and Searches Does this Subpart Apply?*, 24 C.F.R. § 5.901 (2001); *What Special Authority is there to Obtain Access to Sex Offender Registration Information?*, 24 C.F.R. § 5.905 (2001); *Fair Housing and Equal Opportunity*, 24 C.F.R. § 578.93(b)(4) (2012); *Denial of Admission for Criminal Activity or Drug Abuse by Household Members* (2001) 24 C.F.R. § 960.204(a)(4); *Denial of Admission and Termination of Assistance for Criminals and Alcohol Abusers*, 24 C.F.R. § 982.553(a)(2) (2015). HUD issued guidance in 2012 describing the duties of owners, agents, and public housing authorities with regards to admitting registered sex offenders. State Registered Lifetime Sex Offenders in Federally Assisted Housing, [portal.hud.gov/hudportal/documents/huddoc?id=12-28pihn12-11hsgn.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=12-28pihn12-11hsgn.pdf). This guidance was drafted in part as a response to a 2009 HUD Office of Inspector General's report. HUD Subsidized an Estimated 2,094 to 3,046 Households that Included Lifetime Registered Sex Offenders, Audit Rep't No. 2009-KC-0001 (Aug. 14, 2009), [www.hudoig.gov/sites/default/files/pdf/Inter-nal/2009/ig0970001.pdf](http://www.hudoig.gov/sites/default/files/pdf/Inter-nal/2009/ig0970001.pdf).

<sup>6</sup> "Section 8" refers to the housing assistance provisions contained in the United States Housing Act of 1937, ch. 896, Title I, § 8 (Sept. 1, 1937), as amended.

<sup>7</sup> *Miller v. McCormick*, 605 F. Supp. 2d 296 (D. Me. 2009). *But see* State Registered Lifetime Offenders in Federally Assisted Housing, United States Dep't of Housing and Urban Development, Notice PIH 2012-28/H 2012-11 (June 11, 2012), [portal.hud.gov/hudportal/documents/huddoc?id=12-28pihn12-11hsgn.pdf](http://portal.hud.gov/hudportal/documents/huddoc?id=12-28pihn12-11hsgn.pdf) (persons that are a sex offender subject to a lifetime registration requirement who are wrongfully admitted to Section 8 housing are subject to termination procedures).

<sup>8</sup> *Bostic v. D.C. Hous. Auth.*, 162 A.3d 170 (D.C. 2017).

<sup>9</sup> *Johnson v. California*, 2011 U.S. Dist. LEXIS 101623 (C.D. Cal. July 25, 2011).

<sup>10</sup> *Henley v. Housing Auth. of New Orleans*, 2013 U.S. Dist. LEXIS 62255 (E.D. La. May 1, 2013).

<sup>11</sup> *Santos v. State*, 668 S.E.2d 676 (Ga. 2008) (registration requirements unconstitutionally vague); *Rodriguez v. State*, 108 A.3d 438 (Md. Ct. Spec. App. 2015) (weekly registration requirement for homeless offenders not unconstitutional); *State v. Crofton*, 2008 Wash. App. LEXIS 1283 (June 2, 2008) (weekly registration requirement for homeless offenders permissible).

<sup>12</sup> See *Beley v. City of Chicago*, 2015 U.S. Dist. LEXIS 163919 (N.D. Ill., Dec. 27, 2015), *summary judgment granted, partial summary judgment denied* 2017 U.S. Dist. LEXIS 28167 (N.D. Ill. Feb. 28, 2017); *Saiger v. City of Chicago*, 2014 U.S. Dist. LEXIS 83206 (N.D. Ill., June 19, 2014) (permitting plaintiff's Due Process claim to proceed); *Derfus v. City of Chicago*, 42 F. Supp. 3d 888 (N.D. Ill. 2014), *summary judgment granted*, 2015 U.S. Dist. LEXIS 44529 (N.D. Ill. April 6, 2015); *People v. Wlecke*, 6 N.E.3d 745 (Ill. App. Ct. 2014) (offender who lacked identification and was turned away from registering could not be convicted for failure to register).

<sup>13</sup> See *People v. Deluca*, 176 Cal. Rptr. 3d 419 (Cal. App. 2d Dist. 2014) (even though shelter had limited hours, it counted as a "residence" for the purposes of registration); *People v. Allman*, 321 P.3d 557 (Colo. Ct. App. 2012) (offender used his car as a residence when working away from "home" during the week, was a "residence" for purposes of the statute); *Branch v. State*, 917 N.E.2d 1283 (Ind. Ct. App. 2009) (homeless defendant was successfully prosecuted for failure to register when he failed to inform authorities that he had left a shelter); *Milliner v. State*, 890 N.E.2d 789 (Ind. Ct. App. 2008) (offender kicked out of house by wife and staying with friends had to update his registration every time he moved); *Tobar v. Commonwealth*,

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284 S.W.3d 133 (Ky. 2009) (when offender did not notify authorities of leaving homeless shelter, conviction for failure to register was proper); *State v. Samples*, 198 P.3d 803 (Mont. 2008) (when offender failed to notify authorities of leaving shelter, conviction was proper); *Commonwealth v. Wilgus*, 40 A.3d 1201 (Pa. Super. Ct. 2009) (where defendant was unable to rent a room at his intended residence he had a duty to inform registry officials of a change of address); *Breeden v. State*, 2008 Tex. App. LEXIS 2150 (March 26, 2008) (offender who moved out of hotel into car in parking lot of hotel properly convicted and sentenced to 55 years). *But see* *Commonwealth v. Bolling*, 893 N.E.2d 371 (Mass. App. Ct. 2008) (offender did not need to update his address when he found a friend willing to take him in for a few days); *State v. Dinkins*, 810 N.W.2d 787 (Wis. 2012) (offender was charged with failure to register, prior to release from incarceration, for failure to provide a residence address, and this was not permissible).

<sup>14</sup> *Lamberty v. State*, 108 A.3d 1225 (Del. 2015).

<sup>15</sup> *McRae v. State*, 2015 Nev. Unpub. LEXIS 1261 (Oct. 16, 2015).

<sup>16</sup> *United States v. Pendleton*, 2009 U.S. Dist. LEXIS 85347 (D. Del. Sept. 18, 2009).

<sup>17</sup> *State v. Edwards*, 87 A.3d 1144 (Conn. App. Ct. 2014).

<sup>18</sup> *Nikolaev v. State*, 474 S.W.3d 711 (Tex. App. 2014).

<sup>19</sup> *Bakran v. United States Dep't of Homeland Sec.*, 894 F.3d 557 (3d Cir. 2018); *Struniak v. Lynch*, 159 F. Supp. 3d 643 (E.D. Va. 2016). For the full text of the requirement, *see* 8 U.S.C. § 1154(a)(1)(A)(viii)(I). Interoffice Memorandum from Michael Aytes, Assoc. Dir. Of Domestic Operations, U.S. Citizenship & Immigration Servs. to Reg'l Dirs. et al. (July 28, 2006), [https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static\\_Files\\_Memoranda/Archives%201998-2008/2006/adamwalshact072806.pdf](https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2006/adamwalshact072806.pdf); *see also* *Suhail v. United States Att'y Gen.*, 2015 U.S. Dist. LEXIS 152884 (E.D. Mich. Nov. 12, 2015); *In re Aceijas-Quiroz*, 26 I. & N. Dec. 294 (BIA 2014); *In re Introcaso*, 2014 26 I. & N. 304 (BIA 2014).

<sup>20</sup> *Bushra v. Holder*, 529 Fed. Appx. 659 (6th Cir. 2013) (conviction for failure to register is a crime involving moral turpitude). *Contra* *Mohamed v. Holder*, 769 F.3d 885 (4th Cir. 2014); *Efagene v. Holder*, 642 F.3d 918 (10th Cir. 2011); *Plasencia-Ayala v. Mukasey*, 516 F.3d 738 (9th Cir. 2008), *overruled on other grounds by* *Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009). A conviction for possession of child pornography was recently held to be a crime involving moral turpitude. *Moreno v. Att'y Gen.*, 887 F.3d 160 (3d Cir. 2018).

<sup>21</sup> News Release, *Repeat Sex Offender from Mexico Denaturalized in Houston* (June 29, 2017), [www.ice.gov/news/releases/repeat-sex-offender-mexico-denaturalized-houston](http://www.ice.gov/news/releases/repeat-sex-offender-mexico-denaturalized-houston).

<sup>22</sup> *Bado v. United States*, 186 A.3d 1243 (D.C. 2018).

<sup>23</sup> *Kaufman v. Nielsen*, 896 F.3d 475 (D.C. Cir. 2018).

<sup>24</sup> *Tristan v. State*, 393 S.W. 3d 806 (Tex. App. 2012). *Contra* *Dingman v. Cart Shield USA, LLC*, 2013 U.S. Dist. LEXIS 93551 (S.D. Fla., July 3, 2013) (failure to register not proven to involve a dishonest act or false statement).

<sup>25</sup> Statute addressed in *United States v. Walizer*, 600 Fed. Appx. 546 (9th Cir. 2015). In *Alleyne v. United States*, 133 S.Ct. 2151 (2013), the Supreme Court concluded that “any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury.” *Id.*

<sup>26</sup> *United States v. Hardeman*, 704 F.3d 1266 (9th Cir. 2013).