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

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] and separation of powers.[11] Another set of constitutional arguments are those advanced by the "sovereign citizen movement," which, though creative, have proven unsuccessful.[12] In addition, in *Bond v. United States*,[13] 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.[14]

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.[15]

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.[16] More than 1,000 people had previously been prosecuted under the law.[17] Second, a federal court in Colorado found that the state's sex offender registration and notification system violated both the Eighth and 14th Amendments.[18]

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

- The collection of internet identifiers violates the First Amendment[19]
- Being ordered to register as a sex offender triggers the protections of procedural due process[20]

- Publishing information about an offender's "primary and secondary targets" violates due process[21]
- Being ordered to register as a parole condition violates due process when the underlying convictions are not sexual in nature[22]
- Requiring registration for a conviction for solicitation, and not prostitution, when each offense had the same elements, violates due process[23]
- A "three-strikes" sentence based on a failure to register conviction is cruel and unusual punishment[24]
- Mandatory life imprisonment for a second conviction of failure to register is cruel and unusual punishment[25]
- 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 punishment[26]

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.[27]

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,[28] 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.[29] 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.[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] and 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] In addition, when an attorney does not advise their client of their duty to register and the court's advisement is limited to an admonition that "[y]ou'd have to sign up with the sexual registry and different other things," counsel's performance is constitutionally insufficient.[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, those challenges have been unsuccessful.[44] The Supreme Court concluded that the holding in *Padilla* does not apply retroactively.[45]

[1] Smith v. Commonwealth, 743 S.E.2d 146 (Va. 2013).

[2] State v. Larson, 2008 Minn. App. Unpub. LEXIS 1525 (Dec. 30, 2008); State v. Sparks, 657 S.E. 2d 655 (N.C. 2008); State v. Green, 230 P.3d 654 (Wash. App. 2010).

[3] Murphy v. Rychlowski, 2017 U.S. App. LEXIS 15662 (7th Cir. Aug. 18, 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. 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 ten 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. Cal. 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. App. 2015).

[8] 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); People v. T.D., 823 N.W.2d 101 (Mich. 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] 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.

[13] 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). Thus far, 10th Amendment challenges raised under *Bond* have been unsuccessful. *See* United States v. Kidd, 2013 U.S. App. LEXIS 5032 (6th Cir., Mar. 11, 2013); United States v. Smith, 504 Fed. Appx. 519 (8th Cir. 2012).

[14] *See* United States v. Reynolds, 565 U.S. 432 (2012).

[15] Doe v. Anderson, 108 A.3d 378 (Me. 2015) (holding, in part, that a guilty plea is not a "criminal trial"). *But see* Bell v. Pennsylvania Board of Probation & Parole, 2014 Pa. Commw. Unpub. LEXIS 460 (July 24, 2014).

[16] Packingham v. North Carolina, 137 S.Ct. 1730 (2017).

[17] *Id*. at 1731.

[18] Millard v. Rankin, 2017 U.S. Dist. LEXIS 140301 (D. Colo. Aug. 31, 2017).

[19] Doe v. Prosecutor, Marion County, 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. State, 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).

[20] Brown v. Montoya, 662 F.3d 1152 (10th Cir. 2011).

[21] 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).

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

[23] Doe v. Jindal, 851 F. Supp.2d 995 (E.D. La. 2012).

[24] Gonzalez v. Duncan, 551 F.3d 875 (9th Cir. 2008).

[25] Bradshaw v. State, 671 S.E.2d 485 (Ga. 2008).

[26] People v. Dipiazza, 778 N.W.2d 264 (Mich. Ct. App. 2009).

[27] State v. Nieman, 84 A.3d 603 (Pa. 2013).

[28] 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).

[29] *In re* McClain, 741 S.E.2d 893 (N.C. 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).

[30] Tex. Code. Crim. Proc. §§ 62.402 & 62.405.

[31] While beyond the scope of this update, other cases such as *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519 (2012), and *Arlington* v. *FCC*, 569 U.S. 220 (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); Colorado 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 which 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 (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. 3d Dep't 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).

[41] Vaughn v. Nixon, 2015 U.S. Dist. LEXIS 164918 (M.D. Tenn. Dec. 9, 2015).

[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, 2016 Minn. LEXIS 786 (Dec. 7, 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] Chaidez v. United States, 568 U.S. 342 (2013).