

Sex Offender Registration and Notification

Case Law Summary

January 2008-July 2009

Table of Contents

I.	Registration	1
A.	Conviction Triggering Registration	1
i.	Generally	1
ii.	Non-Sex Offenses	1
iii.	Elements vs. Facts	1
iv.	Unlisted Offenses	2
B.	Out-of-State Conviction	3
i.	Generally	3
ii.	Classification of Offense	4
C.	Federal SORNA and the Requirement to Register	4
D.	Subsequent Amendments to Registration Statute	5
II.	Juvenile Registration	5
III.	Constitutional Issues	7
A.	Article 1: <i>Ex Post Facto</i>	7
B.	Fifth Amendment: Double Jeopardy	8
C.	Fifth Amendment: Procedural Due Process	9
D.	Fifth Amendment: Substantive Due Process	10
E.	Sixth Amendment: <i>Apprendi</i>	10
F.	Sixth Amendment: Ineffective Assistance of Counsel	11
i.	Generally	11
ii.	Collateral Consequence	11
G.	Sixth Amendment: Trial by Jury	12
H.	Eighth Amendment	12
IV.	Items Required to be Registered	13
A.	DNA	13
B.	Internet Identifiers	13

V. Community Notification	13
A. Posting on Public Registry Website	13
B. Challenges to Notification	14
VI. Failure to Register	14
A. Continuing Offense	14
B. “Knowing”	14
C. Multiplicity	14
D. Notice	15
E. Strict Liability	15
F. Sufficiency	15
G. Trial issues	15
VII. Miscellaneous	16
A. Federal Housing	16
B. Governing Law	16
C. Habeas Corpus	16
D. Homeless Offenders	17
E. Immigration	18
F. Offenses Based on Registration Status	18
G. Removal of Information from the Registry	18
H. Residency Restrictions	19
I. Standing	20
J. Transient Offenders	20

I. Requirement to Register

A. Conviction Triggering Registration

i. General

a. People v. Hernandez, 166 Cal. App. 4th 641 (Cal. App. 2d Dist. 2008)

Hernandez (22 at the time of the offense) was convicted of oral copulation with a 14 year old and ordered to register as a sex offender. Based on the decisions in *People v. Hofsheier*, 129 P.3d 29 (2006) and *People v. Garcia*, 161 Cal. App.4th 475 (2008), the court held that there was no “rational reason” to treat him differently because the victim was 14, as opposed to 16, or 18—and his mandatory registration provision was lifted.

b. Mayo v. People, 181 P.3d 1207 (Colo. Ct. App. 2008)

Mayo was indicted for sexual abuse of a minor and later civilly committed as a Sexually Dangerous Person in Illinois in 1988. As part of that process, he stipulated that he committed or attempted to commit at least one act of sexual abuse. He was never found guilty of the offense and was released from his commitment in 1995. In 2001 he asked to have his release conditions terminated and the indictment dismissed, and that motion was granted by the court. However, as part of the original disposition in 1988 he was still required to register as a sex offender.

He then moved to Colorado and challenged the requirement to register under Colorado law. Colorado concluded that he was “convicted” for purposes of Colorado’s sex offender registration law, and he was required to continue his registration obligations.

ii. Non-Sex Offense

a. People v. Knox, 903 N.E.2d 1149 (N.Y. 2009)

Knox and her co-petitioners had all been convicted of non-parental kidnapping of a minor. Their due process challenge to being listed on the New York Sex Offender Registry was rejected.

iii. Elements vs. Facts

a. Duran v. Maryland, 948 A.2d 139 (Md. App. 2008)

Because Duran was not convicted of an offense requiring registration, and the Maryland offense of Indecent Exposure did not “by its nature [involve] a sexual offense against a person under the age of 18 years”, he could not be ordered to register.

iv. **“Unlisted” Offenses**

a. **U.S. v. Jensen, 278 Fed. Appx. 548 (6th Cir. 2008)**

Jensen was convicted of Complicity to Commit Sexual Abuse under Kentucky law. Sexual Abuse is a listed offense requiring registration, and Jensen argued that she should not have to register. Under an analysis of Kentucky law, a conviction of Complicity to commit the underlying registration offense was sufficient to require registration.

b. **U.S. v. Hahn, 551 F.3d 977 (10th Cir. 2008)**

Hahn was convicted of a violation of 18 U.S.C. §656 (misapplication of financial institution funds). He was ordered to register as a sex offender as part of his probation requirements under 18 U.S.C. §3583(d) because of a state-level sex offense and conviction which occurred between his arrest and sentencing on this federal charge. The court upheld the imposition of sex offender registration requirements on Hahn. The case did not directly address SORNA.

c. **State v. Haynes, 760 N.W.2d 283 (Mich. App. 2008)**

Where Haynes was convicted of bestiality, he could not be required to register as a sex offender. He was convicted under a “crimes against nature”-style offense which only required registration if “the victim is an individual less than 18 years of age”. Here, the victim sheep was not an “individual” and, therefore, no registration was required.

d. **U.S. v. Ybarra, 289 Fed. Appx. 726 (5th Cir. 2008)**

Part of Ybarra’s probation violation was based on an adjudicated sexual assault against his girlfriend. His original convictions were for drug offenses. Based on 18 U.S.C. §3583(d), however, he was properly ordered to register as a sex offender.

e. **U.S. v. Byun, 539 F.3d 982 (9th Cir. 2008)**

Byun was on probation for convictions which occurred prior to the passage of SORNA, and was ordered by her probation officer to register as a sex offender after its passage. She challenged that order. Byun had been originally convicted of alien smuggling under title 8 of the U.S. Code, but the underlying facts of the case had to do with bringing a minor to Guam for the purposes of prostitution. Even though she was not convicted of a listed federal criminal offense under 42 U.S.C. §16911, the court determined that she was still required to register as a sex offender.

f. **Fountain v. State, 103 Ark. App. 15 (2008)**

Where Fountain was convicted of an offense not specifically listed in Arkansas’ sex offender registry scheme, he was still properly required to register under its “catch-all” provision requiring registration for conviction of a “sex offense even though the offense is not enumerated.”

g. People v. Gutierrez, 2008 Mich. App. LEXIS 1082 (May 22, 2008)

Gutierrez was convicted of an offense which was not listed among those requiring registration. Michigan had a ‘catch-all’ provision, however, requiring registration for any violation that “by its nature constitutes a sexual offense against an individual” who is a minor. Under the facts of this case, the offense did fulfill that definition, and Gutierrez should have been required to register as a sex offender.

h. U.S. v. Jimenez, 275 Fed. Appx. 433 (5th Cir. 2008)

Where Jimenez was convicted of a non-sexual offense, and had no prior sex offense arrests, it was not appropriate to order him to register as a sex offender as a “special condition” of supervised release under 18 U.S.C. §3853(d) when the only indication of any sexual misconduct was three unsubstantiated police reports—without more—complaining of child sexual abuse. The Court did indicate that it would likely be appropriate to order a sex offender evaluation to make a determination regarding treatment and possible future registration requirements.

B. Out-of-state conviction

i. Generally

a. Commonwealth v. McBride, 281 S.W.3d 799 (Ky. 2009)

McBride was convicted of a sex offense in Tennessee and registered as a sex offender there. He subsequently moved to Kentucky, and failed to register as a sex offender as required by Kentucky law. Even though he was not specifically notified of his registration obligations in Kentucky, the Court held that failure to register was a strict liability offense, and that he had an absolute duty to register as a sex offender once he became a resident of Kentucky.

b. State v. Werneth, 197 P.3d 1195 (Wash. App. 2008)

Werneth was convicted of child molestation in Georgia in 1992. He subsequently moved to Washington State. The court concluded that the Georgia conviction was not “comparable” to a Washington Sex Offense and that Werneth, therefore, was not required to register as a sex offender.

c. Sharma v. State, 670 S.E.2d 494 (Ga. App. 2008)

Sharma was convicted of second degree sexual assault in Texas in 2000. He subsequently moved to Georgia. The court concluded that the Texas conviction was not the “same or similar to” a Georgia sex offense which would require registration and that Sharma, therefore, was not required to register as a sex offender.

d. Stallworth v. Miss. Dep’t of Pub. Safety, 986 So. 2d 259 (Miss. 2008)

Stallworth was a Mississippi resident, convicted of a sex offense in Maryland. The offense for which he was convicted did not require registration in Maryland. In this civil action he challenged Mississippi’s requirement that he register as a sex offender. The Mississippi court found that the totality of the evidence (including Stallworth’s sworn testimony in a civil proceeding and the

Maryland plea colloquy) satisfied the definition of a Mississippi offense which required registration, and he was required to register.

e. Doe v. Pa. Bd. of Prob. & Parole, 513 F.3d 95 (3d Cir. 2008)

Pennsylvania's registration scheme mandated community notification for offenders with out-of-state convictions, where those with Pennsylvania convictions were only subject to community notification after a civil hearing to determine if they were a 'sexually violent predator'. This disparate treatment was found to violate the equal protection clause and D's 42 USC §1983 claim was granted.

f. Commonwealth v. Becker, 879 N.E.2d 691 (Mass. App. 2008)

Becker was convicted of a sex offense requiring registration in New York State in 1995. He subsequently moved to Massachusetts. He was notified, in person, of his registry obligations once in Massachusetts. Even though his New York conviction was a misdemeanor, Massachusetts' "like offense" was a felony and required registration, despite Becker's conclusions from reviewing the sex offender registry statutes to the contrary. The court also rejected his constitutional arguments regarding right to travel and cruel and unusual punishment.

ii. Classification of Offense

a. People v. Mann, 52 A.D.3d 884 (N.Y. App. Div. 3d Dep't 2008)

Mann, convicted of a prior sex offense in California, moved from California to New York, and argued that he either (1) shouldn't be required to register as a sex offender or (2) shouldn't be classified in "risk level III". The New York court found that his prior conviction, number of victims, and prior failure to register sufficed to require registration at level III. The court found the record of the California court reliable hearsay for purposes of determining the issues in the case.

C. Federal SORNA and the Requirement to Register

i. Doe v. Keathley, 2009 Mo. App. LEXIS 4 (January 6, 2009)

Doe was convicted of a sex offense in Iowa in 1994 and moved to Missouri that same year. Missouri's sex offender registration laws have been limited to offenders convicted on or after January 1, 1995, via the holding in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. 2006). This court held that the Supremacy Clause, SORNA, and the retroactivity regulation of SORNA preempt *Doe's* holding, and that the SORNA requirement to register "is an obligation imposed by federal law." Doe, therefore, has to register as a sex offender in Missouri.

ii. Hudson v. Fed. Bureau of Prisons, 2008 U.S. Dist. LEXIS 86987 (E.D. Mich. Oct. 28, 2008)

Hudson was a federal prisoner incarcerated on non-sex offenses. He had been previously convicted of a state-level sex offense in Michigan in 1990. The Bureau of Prisons sought to notify Michigan of Hudson's requirement to register under SORNA, per 18 USC §4042(c). The federal court concluded that the state offense was a Tier III offense under SORNA and that the appropriate notice under §4042(c) must be given.

iii. U.S. v. Rhone, 535 F.3d 812 (8th Cir. 2008)

Rhone was sentenced for a firearms conviction. As a condition of his probation under 18 U.S.C. §3583(d), he was ordered to register as required by SORNA. The court did not specify, though, the basis for that requirement. Rhone had been adjudicated delinquent of a (presumably) state-level offense of “assault with intent to commit sexual abuse”. The Eighth Circuit held that, before the sentencing court could impose a registration requirement, it had to affirmatively determine that the juvenile adjudication qualified for registration under SORNA—and that the decision could not be delegated to U.S. Probation or the Bureau of Prisons.

iv. Cameron v. U.S., 2008 U.S. Dist. LEXIS 36587 (E.D. Va. May 5, 2008)

Here, Cameron was convicted of a drug offense, and was ordered to register as a sex offender as a condition of probation under 18 U.S.C. §3553(d), based on a prior sex offense out of California. The court upheld this requirement, citing *U.S. v. Talbert*, 501 F.3d 449 (5th Cir. 2007), *U.S. v. Rosario*, 386 F.3d 166 (2d Cir. 2004), and *U.S. v. Dupes*, 513 F.3d 338 (2d Cir. 2008). It also found that there was no Tenth Amendment violation because of the probation language which required, in essence, “sex offender registration...if applicable”, making it clear that Cameron was simply required to comply with whatever state-imposed registration obligations are placed upon him.

D. Subsequent Amendments to Registration Statute

i. Jensen v. State, 905 N.E.2d 384 (Ind. 2009)

Where petitioner was convicted and sentenced in 2001, and the only changes to the sex offender registration and notification scheme since that time could fairly be characterized as ‘civil and regulatory’ under the factors in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), retroactive application of those amended provisions was not a violation of the Ex post facto clause.

II. Juvenile Registration

i. State v. Fletcher, 974 A.2d 188 (Del. 2009)

The two petitioners in this consolidated case had been ordered to register based on juvenile adjudications for sex offenses. Each successfully completed their periods of probation, asked for an expungement of their convictions, and a termination of their juvenile registration requirement. The Court held that their convictions could be expunged even though they had been required to register as sex offenders, and that once those convictions were expunged, they were no longer required to maintain their sex offender registration.

ii. U.S. v. Pomani, 608 F. Supp. 2d 1131 (D. S.D. 2009)

Pomani was adjudicated delinquent in federal court of an offense which occurred on tribal lands, namely, an offense similar to abusive sexual conduct (per the opinion, 18 U.S.C. 2241(c)). The court held that juveniles adjudicated of this offense are required to register by SORNA, failing to take in to account that SORNA’s final guidelines removed the registration requirement for

juveniles adjudicated delinquent of 2241(c). Having held that Pomani was required to register, the court affirmed his conviction.

iii. In re: Z.B., 757 N.W.2d 595 (S.D. 2008)

In certain cases, South Dakota's registration requirements for juveniles adjudicated delinquent are more onerous than those for similarly convicted adults. The court found an equal protection violation under both the federal and state constitutions, and rescinded the order requiring the juvenile to register as a sex offender.

iv. Clark v. State, 957 A.2d 1 (Del. 2008)

Plaintiff, a juvenile adjudicated delinquent of a sex offense and required to register under Delaware law, challenged that lifetime registration requirement on the grounds that it conflicts with other statutory provisions in Delaware that require the juvenile court to take the "best interests of the child" in to consideration when fashioning a disposition. This argument was rejected, as was the argument regarding any privacy concerns.

v. In re: C.P.T., 2008 Minn. App. Unpub. LEXIS 929 (Aug. 5, 2008)

Appellant's challenge to the constitutionality of Minnesota's statute requiring lifetime registration for predatory sex offenders—as applied to juveniles—was rejected.

vi. In re D.H., 886 N.E.2d 1209 (Ill. App. Ct. 1st Dist. 2008)

Discusses recent legislative actions in Illinois (citing *In re Rogelio S.*, 882 N.E.2d 612 (App. Ct. Ill. December 26, 2007)) which eliminated the provision requiring juveniles to register as adult sex offenders upon becoming an adult.

vii. In re Richard A., 946 A.2d 204 (R.I. 2008)

Richard A. was a juvenile adjudicated delinquent required to register as a sex offender, and he challenged the constitutionality of the sex offender registration statute. The court found that the registration requirements were constitutional as applied to juveniles. Of note, though, is their statement that it was a "significant consideration" in their decision that in Rhode Island juvenile registration information is only available to law enforcement and is not disseminated to the public.

viii. N.V. v. State, 2008 Ark. App. LEXIS 207 (March 5, 2008)

Per Arkansas' statutory scheme (in addition to the guarantees made by the judge in this case), a juvenile adjudicated delinquent of a sex offense was entitled to a due process hearing prior to being required to register as a sex offender.

ix. In re Crockett, 159 Cal. App. 4th 751 (Cal. App. 1st Dist. 2008)

Crockett was adjudicated delinquent of a penetration sex offense in Texas. He was placed on probation and Texas agreed that he could move to California to live with his mother. One of his probation conditions was that he was required to register as a sex offender in California. Even

though his probation was transferred via Interstate Compact, the court concluded that he was not required to register as a sex offender in California according to California's sex offender registration statute. Therefore, he could not be prosecuted for failure to register.

III. Constitutional Issues

A. Article I: *Ex Post Facto*

i. Doe v. California Department of Justice, 173 Cal. App. 4th 1095 (2009)

Petitioners had successfully had their names removed from California's public sex offender registry website via a special statutory procedure in 2005. In 2006, the law was changed to require that they once again be posted on that public web site. Their civil suit claiming equitable estoppel and ex post facto violations was dismissed.

ii. Wallace v. State, 905 N.E.2d 371 (Ind. 2009)

Relying in part on the decision in *Doe v. State*, 189 P.3d 999 (Alaska 2008), the Indiana Supreme Court held that the state's sex offender registration and notification scheme was punitive under the *Mendoza-Martinez* factors and, as such, application of its requirements to an offender convicted and sentenced prior to the initial passage of the law was unconstitutional.

iii. Jensen v. State, 905 N.E.2d 384 (Ind. 2009)

Where petitioner was convicted and sentenced in 2001, and the only changes to the sex offender registration and notification scheme since that time could fairly be characterized as 'civil and regulatory' under the *Mendoza-Martinez* factors, retroactive application of those amended provisions was not a violation of the ex post facto clause.

iv. Finnicum v. State, 673 S.E.2d 604 (Ga. 2009)

Finnicum was convicted of a sex offense before Georgia enacted its initial sex offender registration legislation. It was not a violation of the ex post facto clause for him to be required to register.

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

The District Court granted a permanent injunction prohibiting the retroactive application of the sex offender registration laws passed in Nevada in 2007, concluding that they were punitive in nature and therefore violated the ex post facto clause of the U.S. Constitution.

vi. State v. Ferguson, 896 N.E.2d 110 (Ohio 2008)

In a 4-3 decision, the Ohio Supreme Court found that the 2003 amendments to their sex offender registration scheme were not punitive and, therefore, did not violate the ex post facto clause of the U.S. Constitution or the Retroactivity Clause of the Ohio Constitution. The majority did not address the "intent-effects" test of *Mendoza-Martinez*.

vii. Doe v. State, 189 P.3d 999 (Alaska 2008)

A significant case out of Alaska involving the same plaintiff as *Smith v. Doe*, 538 U.S. 84 (2003). Here, the Alaska Supreme Court found—under its State Constitution—that Alaska’s sex offender registration requirements were *punitive*, not *regulatory*, and as such could not be applied to individuals such as Doe who committed their crimes prior to its enactment.

viii. Ridner v. State, 892 N.E.2d 151 (Ind. Ct. App. 2008)

Ridner was convicted of an offense in 2006 which, at the time, did not require registration as a sex offender. The sex offender registration law was subsequently amended to require registration for that conviction, and he was required to register. This was not an unconstitutional ex post facto law as applied to him.

ix. Miranda v. Madigan, 888 N.E.2d 158 (Ill. App. Ct. 2008)

Because the requirement to register as a sexual or violent offender is procedural, not punitive, retroactive application was appropriate.

x. State v. Jedlicka, 747 N.W.2d 580 (Minn. App. 2008)

Jedlicka was convicted of an offense that took place in 2003 and was required to register as a predatory offender. After he was incarcerated for that offense, but prior to his release, the statute was amended to exclude him from registration. The Court held that the amendment should apply retroactively, and that Jedlicka was no longer required to register.

xi. Doe v. Board, 882 N.E.2d 298 (Mass. 2008)

Doe was convicted of Rape in 1979, and finished serving his sentence and supervision in 1981. In 2003, he was notified that he was required to register as a sex offender based solely on his 1979 conviction (the current Massachusetts registration scheme was enacted in 1999). The court held that the “retroactive imposition of the registration requirement without an opportunity to overcome the conclusive presumption of dangerousness that flows solely from Doe’s conviction [] violates his right to due process under the Massachusetts Constitution.”

xii. Buffington v. State, 2008 Ark. LEXIS 71 (Jan. 31, 2008)

Arkansas’ registration and notification components are regulatory and not a form of punishment and his Habeas challenge to a requirement to register as a sex offender was rejected.

B. Fifth Amendment: Double Jeopardy

i. Minnesota v. Larson, 2008 Minn. App. Unpub. LEXIS 1525 (Dec. 30, 2008)

Larson was incarcerated for a failure to register conviction. Prior to his release, he was approached three separate times with a sex offender registration form for his signature, and each time he refused to sign the form. He was properly convicted of two counts of failure to register as a sex offender (the state had dismissed one of the charges pre-trial). Although the duty to register is a

continuing obligation, Larson could be prosecuted when he committed the same offense (of failing to register) multiple times, as he did here.

ii. State v. Sparks, 657 S.E.2d 655 (N.C. 2008)

Where Sparks' suspended sentence was revoked because of his failure to register as a sex offender (he absconded) it was permissible to prosecute him for the separate criminal charge of failure to register as a sex offender in addition to proceeding on a post-release revocation hearing.

C. Fifth Amendment: Procedural Due Process

i. Doe v. Department of Public Safety, 971 A.2d 975 (Md. App. 2009)

Doe challenged the conclusive presumption of dangerousness (and the attendant registration and notification requirements for a "sexually violent offender") that flowed from a conviction for rape. This presumption was permissible. In addition, his privacy, due process, and equal protection challenges were rejected.

ii. State v. Arthur H., 953 A.2d 630 (Conn. 2008)

Arthur H. argued that he should have been entitled to an adversarial evidentiary hearing before being ordered to register as a sex offender. Connecticut allows a court to order registration when it makes a finding that a "felony was committed for a sexual purpose". Relying on settled sentencing case law, *Williams v. New York*, 337 U.S. 241 (1949), and others, the court concluded that he had received all of the process which he was due in the proceeding, and was not entitled to an adversarial evidentiary hearing.

iii. Doe v. Board, 882 N.E.2d 298 (Mass. 2008)

Doe was convicted of Rape in 1979, and finished serving his sentence and supervision in 1981. In 2003, he was notified that he was required to register as a sex offender based solely on his 1979 conviction (the current Massachusetts registration scheme was enacted in 1999). The court held that the "retroactive imposition of the registration requirement without an opportunity to overcome the conclusive presumption of dangerousness that flows solely from Doe's conviction [] violates his right to due process under the Massachusetts Constitution."

iv. Utah v. Briggs, 199 P.3d 935 (2008)

Utah's sex offender registration scheme required posting of an offender's "primary and secondary targets [on its public registration website], implying that [an offender] is currently dangerous." The court held that such information may not be published (including the designation that he is "currently dangerous" unless an offender has notice and an opportunity to be heard at a hearing regarding its validity.

v. **Burchette v. Sex Offender Screening and Risk Assessment Cmte., 2008 Ark. LEXIS 551 (Oct. 23, 2008)**

Arkansas' sex offender registry scheme calls for a risk assessment to determine what level of community notification is required for an offender. Burchette wanted to have a hearing (where he could testify, in person) before that determination was made. The court concluded that because Burchette was interviewed as part of the assessment process, and could submit a written statement to the appellate committee, there was no due process violation.

D. Fifth Amendment: Substantive Due Process

i. **Woe v. Spitzer, 571 F. Supp. 2d 382 (E.D. N.Y. 2008)**

Plaintiff was a sex offender originally required to register for a period of ten years. Three days before those ten years expired, the statute was amended to extend his registration requirements to twenty years. The court held that there was no protected liberty interest with regards to the length of the registration period standing alone, and that he was not entitled to further 'due process' safeguards upon the extension of his registration period.

E. Sixth Amendment: *Apprendi*

i. **Colorado v. Rowland, 207 P.3d 890 (Colo. Ct. App. 2009)**

Rowland was designated a Sexually Violent Predator by the trial court, and was not given a hearing in which to contest that designation. He argued that the community notification provisions which accompany such a designation were additional punishment and that he was therefore entitled to an evidentiary hearing per the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The court found that the community notification provisions were not punitive (per the *Mendoza-Martinez* factors) and that *Apprendi* was inapplicable.

ii. **People v. Mosley, 168 Cal. App. 4th 512 (2008), *review granted*, 203 P.3d 425 (Cal. 2009)**

Mosley was convicted by a jury of assault, but acquitted at trial of committing a sex offense against a minor. The trial court, based on its own fact-finding, ordered him to register as a sex offender, and thus submitting him to the residency restrictions in place in California. The Court of Appeals held that the residency restriction is punitive (per *Mendoza-Martinez*) and, therefore, *Apprendi* requires a hearing where facts supporting the imposition of the residency requirement are proven beyond a reasonable doubt to a jury.

iii. **State v. Meredith, 2008 Minn. App. Unpub. LEXIS 324 (April 8, 2008)**

Meredith was ordered to register as a sex offender even though his conviction was not for an offense listed in the statute. Instead, he was subject to the Minnesota law requiring registration for any "offense arising out of the same set of circumstances [as]..." a listed sex offense. Meredith challenged the trial court's determination that his Child Endangerment conviction 'arose out of the same set of circumstances' as a listed sex offense on *Apprendi* grounds. The Court held that, because

Apprendi only applies where “punishment” is implicated—and the registration scheme is civil, not punitive—there is no violation of *Apprendi*.

iv. **Virsnieks v. Smith, 521 F.3d 707 (7th Cir. 2008)**

Here, Virsnieks had been ordered by a Wisconsin court to register based on a non-sex offense. He brought an *Apprendi* challenge. The 7th Circuit did not reach the argument, however, deciding that it was not cognizable because he was not “in custody” for the purposes of this Habeas case.

F. Sixth Amendment: Ineffective Assistance of Counsel

i. **Generally**

a. **U.S. v. Rose, 67 M.J. 630 (A.F.C.C.A. 2009)**

Because the court concluded that Rose’s counsel “affirmatively misrepresented” that he would not have to register as a sex offender, and he pled guilty at least in part because of that misrepresentation, it constituted ineffective assistance of counsel, and the findings of guilt were set aside.

b. **U.S. v. Wilson, 2008 CCA LEXIS 296 (A.F.C.C.A. Aug. 11, 2008)**

Wilson was convicted of carnal knowledge under the UCMJ and was advised by counsel that there was a ‘possibility’ he would have to register as a sex offender. The court held that advice was adequate assistance of counsel. Because “sex offender registration requirements [vary] from state to state, any more specific advisement would have been excessively burdensome.”

ii. **Collateral Consequence**

a. **Ward v. Tennessee, 2009 Tenn. Crim. App. LEXIS 43 (Jan. 14, 2009)**

In this Habeas petition, the court found that the requirement to register as a sex offender is a collateral consequence of the underlying criminal conviction. The trial court did not commit plain error by failing to advise him of the requirement.

b. **State v. Nash, 48 A.D.3d 837 (N.Y. App. Div. 2008)**

Nash challenged the voluntariness of his guilty plea. He lost his challenge, as “certification under the Sex Offender Registration Act is a collateral consequence of the plea, and the failure to inform a defendant that he or she will be subject to its requirements will not undermine the voluntariness of a guilty plea.”

c. **Mireles v. Bell, 2008 U.S. Dist. LEXIS 2451 (D. Mich. Jan. 11, 2008)**

Even though Mireles was not advised that he would be required to register as a sex offender, because it is a “collateral consequence of conviction...and an attorney is not ineffective for failing to notify his client of all the collateral consequences of a plea”, his attorney was not ineffective and his claim was rejected.

G. Sixth Amendment: Trial by Jury

i. In re Richard A., 946 A.2d 204 (R.I. 2008)

Richard A. was a juvenile adjudicated delinquent required to register as a sex offender, and he challenged the constitutionality of the sex offender registration statute. The court found that the registration requirements were constitutional as applied to juveniles. Also found that, because the registration requirement does not constitute criminal punishment, there is no right to a jury trial for a juvenile.

ii. Thomas v. U.S., 942 A.2d 1180 (D.C. 2008)

Thomas was convicted of misdemeanor child sexual abuse, each offense having a maximum incarceration of 180 days. Even though he was subject to registration as a sex offender based on his conviction, he was not entitled to a trial by jury as the offense was “petty” for purposes of the Sixth Amendment and the registration requirements were not penal in nature.

iii. Fushek v. State, 183 P.3d 536 (Ariz. 2008)

Because of the seriousness of the consequences of being designated a sex offender, the Arizona Constitution requires that a defendant be afforded a trial by jury when the State files a special allegation of sexual motivation in misdemeanor cases. This decision is based on Arizona’s Constitution and statutory framework.

H. Eighth Amendment

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

Gonzalez was convicted of failure to register as a sex offender, and because of his prior felony convictions, was sentenced under California’s 3-Strikes law. The ninth circuit held that the sentence was “grossly disproportionate to the offense” under the 8th Amendment and granted his Habeas petition.

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

Bradshaw was convicted of a second offense of failure to register as a sex offender, and sentenced to mandatory life imprisonment. The court found that the mandatory sentence violated the Eighth Amendment of the U.S. Constitution, and remanded for resentencing. The opinion contains an excellent summary of the current sentencing ranges for failure to register among the states.

IV. Items Required to Be Registered

A. DNA

i. Good v. Superior Court, 71 Cal. Rptr. 3d 125 (Cal. App. 2008)

Held that California's Proposition 69, passed in 2004, requires "misdemeanants who must register as sex offenders to provide DNA samples, regardless of whether the conviction triggering the registration requirement occurred before or after" the passage of Prop 69.

B. Internet Identifiers

i. Doe v. Shurtleff, 2009 U.S. Dist. LEXIS 73955 (D. Utah Aug. 20, 2009)

This opinion vacates the injunction issued in *Doe v. Shurtleff*, 2008 U.S. Dist. LEXIS 73787 (D. Utah, Sept. 25, 2008), which was put in place because of First Amendment concerns surrounding the collection of internet identifiers from registered sex offenders. Because of legislative amendments that were made effective in May of 2009, those First Amendment concerns no longer exist, and the statute may be enforced as written. The opinion also addressed Fourth Amendment and ex post facto challenges to the collection of internet identifiers.

V. Community Notification

A. Posting on Public Registry Website

i. Doe v. California Department of Justice, 173 Cal. App. 4th 1095 (2009)

Petitioners had successfully had their names removed from California's public sex offender registry website via a special statutory procedure in 2005. In 2006, the law was changed to require that they once again be posted on that public web site. Their civil suit claiming equitable estoppel and ex post facto violations was dismissed.

ii. Utah v. Briggs, 199 P.3d 935 (2008)

Utah's sex offender registration scheme required posting of an offender's "primary and secondary targets [on its public registration website], implying that [an offender] is currently dangerous." The court held that such information may not be published (including the designation that he is "currently dangerous" unless an offender has notice and an opportunity to be heard at a hearing regarding its validity.

iii. Doe v. Phillips, et. al., 259 S.W.3d 34 (Mo. Ct. App. 2008)

The plaintiffs in this case successfully argued (in prior litigation) that they were not required to register under Missouri's sex offender registration scheme because they were convicted prior to the enactment of the sex offender registration laws. Here, they sought to enjoin the State Highway Patrol from publishing their photographs and other identifying information, as they were no longer required to register. That injunction was granted, though the Highway Patrol was permitted to retain any information not obtained through the (now prohibited) sex offender registry process.

B. Challenges to Notification

- i. Burchette v. Sex Offender Screening and Risk Assessment Cmte., 2008 Ark. LEXIS 551 (Oct. 23, 2008)

Arkansas' sex offender registry scheme calls for a risk assessment to determine what level of community notification is required for an offender. Burchette wanted to have a hearing (where he could testify, in person) before that determination was made. The court concluded that because Burchette was interviewed as part of the assessment process, and could submit a written statement to the appellate committee, there was no due process violation.

VI. Failure to Register

A. Continuing Offense

- i. Longoria v. State, 749 N.W.2d 104 (Minn. App. 2008)

The court held that failure to register is a continuing offense and, as such, Longoria could be prosecuted. "The offense is a continuing one until such time as a defendant properly registers, as required by the statute."

- ii. State v. Cook, 187 P.3d 1283 (Kan. 2008)

Held that failure to register is analogous to the offense of escape and, as such, is properly viewed as a continuing crime. Because of this, Cook was subject to the increased punishment which was enacted while he was in his 'failure to register' status.

B. "Knowing"

- i. People v. Haddock, 48 A.D.3d 969 (N.Y. App. Div. 2008)

Even though New York's failure to register statute (Correction Law §168-t) does not specify a specific *mens rea* requirement, the failure to include a "knowledge" element on the jury instructions was reversible error.

C. Multiplicity

- i. Villanueva v. State, 2008 Tex. App. LEXIS 2958 (April 25, 2008)

Where Villanueva failed to register his new address, he could not be charged with a separate count for each month that he failed to report that change of address. Villanueva's six convictions were amended to a single count, but his 45-year sentence stood.

D. Notice

i. Petway v. State, 661 S.E.2d 667 (Ga. App. 2008)

Where Georgia did not strictly comply with the notice requirements imposed upon incarceration officials, but where Petway was fully aware of his registration requirements and failed to register as required, his obligation to register was independent of any notice required to be given. His conviction for failure to register was affirmed.

E. Strict Liability

i. Commonwealth v. McBride, 281 S.W.3d 799 (Ky. 2009)

McBride was convicted of a sex offense in Tennessee and registered as a sex offender there. He subsequently moved to Kentucky, and failed to register as a sex offender as required by Kentucky law. Even though he was not specifically notified of his registration obligations in Kentucky, the Court held that failure to register was a strict liability offense, and that he had an absolute duty to register as a sex offender once he became a resident of Kentucky.

ii. State v. T.R.D., 947 A.2d 343 (Conn. 2008)

Held that Connecticut's failure to register statute was a strict liability offense. The State was not required to prove any *mens rea*, whether general or specific, to convict T.R.D. In addition, T.R.D. had no due process right to the State making any further attempts to contact him (so that he could come in to compliance) prior to his arrest.

iii. Christie v. State, 2008 Ark. App. LEXIS 10 (Jan. 9, 2008)

Arkansas' failure to register statute does not require proof of a culpable mental state. "Failure to register as a sex offender is a strict-liability offense and...proof of a particular culpable mental state is not required."

F. Sufficiency

i. State v. Moore, 2008 Minn. App. Unpub. LEXIS 416 (April 22, 2008)

Where Moore was ordered to register as a sex offender by Minnesota for a Minnesota conviction, he was properly prosecuted in a Minnesota court for a subsequent move from Illinois to Missouri where he failed to update his registration information with Minnesota.

G. Trial Issues

i. McClain v. State, 898 N.E. 2d 409 (Ind. 2008)

McClain was charged with failure to register as a sex offender, and the State sought to introduce the sex offender registration form which he had signed. That form also contained factual details about his offense beyond the text of the offense itself. It was admitted at trial without redaction. The court found that the "prejudicial impact of the details of his [conviction] is clear...

[and] the trial court abused its discretion form into evidence” despite McClain’s offer to stipulate his sex offender status.

ii. **State v. Peterson, 186 P.3d 1179 (Wash. App. 2008)**

Where Peterson was charged with failure to register, there was no burden on the State to prove his whereabouts during that period. Washington law provides for certain registration requirements based on whether a defendant is homeless, moves to a new fixed address, or moves to a new county.

iii. **Martin v. Texas (II), 252 S.W.3d 803 (Tex. App. 2008)**

iv. **Martin v. State (III), 252 S.W.3d 809 (Tex. App. 2008)**

Dual opinions from the same case. A good demonstration of how a poorly-handled registration procedure can result in an acquittal in a trial for failure to update a registry form. This county required annual confirmation of the previous year’s information without showing the previous year’s form to the person.

VII. Miscellaneous

A. Federal Housing

i. **Miller v. McCormick, 605 F. Supp.2d 296 (D. Me. 2009)**

Where petitioner had been admitted to the section 8 home ownership program, he could not be thereafter terminated because he was a lifetime registered sex offender. There is a ban in place for *admission* to the program for such offenders, but should an offender somehow avoid the ban, they cannot be terminated.

B. Governing Law

i. **Hazel v. State, 659 S.E.2d 137 (S.C. 2008)**

Hazel was convicted prior to the passage of sex offender registration legislation and there were multiple versions of the law—as it would apply to him—throughout the duration of his incarceration. The governing registration law is the one in effect when an offender is actually released from prison.

C. Habeas Corpus

i. **Hansen v. Marr, 594 F. Supp. 2d 1097 (D. Neb. 2009)**

Petitioner filed a Habeas Petition, claiming that he was “in custody” for Habeas purposes because he was required to register as a sex offender. The court disagreed, stating that “where sex offender registration statutes are remedial, rather than punitive, the registration requirements...do not satisfy the ‘in custody’ requirements” for a Habeas Petition.

D. Homeless Offenders

i. Tobar v. Kentucky, 284 S.W.3d 133 (Ky. 2009)

Petitioner had properly registered as a sex offender through a series of moves, but failed to notify Kentucky when he left a shelter and became homeless. He was properly convicted of failure to comply with his sex offender registration requirements.

ii. State v. Samples, 198 P.3d 803 (Mont. 2008)

Samples registered properly as a sex offender up until he left his residence at a homeless shelter in June of 2002, and remained homeless after that time. He did not inform registration officials that he had left the shelter. The statute requiring him to notify those officials was not void for vagueness, and his conviction was affirmed.

iii. Santos v. State, 668 S.E.2d 676 (Ga. 2008)

The Georgia Supreme Court found that the state registration requirements were unconstitutionally vague in their application to homeless sex offenders, as the statute did not “give homeless sexual offenders without a residence address fair notice of how they can comply with the statute’s registration requirement”. The court was careful to note that only the address registration requirement in such cases was unconstitutional, and that homeless offenders remain subject to the remainder of the sex offender registration requirements.

iv. Commonwealth v. Bolling, 893 N.E.2d 371 (Mass. App. 2008)

Bolling was homeless and occasionally spent the night in the homes of friends, and doing so without notifying registration officials of a change of address was not a violation of the failure to register statute.

v. Milliner v. State, 890 N.E.2d 789 (Ind. Ct. App. 2008)

When Milliner moved out of his marital home and stayed at various friends’ homes for a period of weeks, he was still required to register his new residence address. The court found that “he made his home with others, not that he was homeless”, and that he did not have to live in one place for seven days or more to trigger a requirement to register that address.

vi. State v. Crofton, 2008 Wash. App. LEXIS 1283 (June 2, 2008)

Where Washington State required a homeless registered sex offender to appear once a week to the sheriff’s office in the county where they are registered, this was not a violation of either the ex post facto or equal protection provisions of the Constitution.

vii. Breeden v. State, 2008 Tex. App. LEXIS 2150 (March 26, 2008)

Breeden was transient, and frequently updated his address with the authorities. After living in a motel for a brief period of time, he checked out and began sleeping in his car in the parking lot of that hotel. About a week later he checked in at a new motel and updated his registration

information. By moving out of the motel room in to his vehicle, that constituted a change of address which had to be given to the registration authorities. The jury sentenced him to 55 years of incarceration.

viii. **Commonwealth v. Rosado, 881 N.E.2d 112 (Mass. 2008)**

Where Rosado was homeless, but registered as required by Massachusetts law. On one occasion, he listed his shelter address (where he periodically stayed and where beds are distributed on a lottery system), and was later prosecuted for providing false information and failing to update. Rosado's convictions were reversed because there was insufficient proof of a "knowing" violation of the sex offender registry statutes.

In addition, the form used by Massachusetts to register its offenders was criticized for not comporting with the most recent legislation regarding homeless offenders, as it failed to provide a homeless registrant with the opportunity to show their homeless status.

E. Immigration

i. **Plascencia-Ayala v. Mukasey, 516 F.3d 738 (9th Cir. 2008)**

A conviction for failure to register as a sex offender (under Nevada's state code) is not a crime involving moral turpitude within the meaning of 8 U.S.C. §1182(a)(2)(A)(i)(I). As such, the Plascencia-Ayala was not removable.

F. Offenses based on Registration Status

i. **Iowa v. Mitchell, 757 N.W.2d 431 (Iowa 2008)**

In 2005, Iowa passed a provision prohibiting a parent from knowingly cohabiting with a person required to register as a sex offender. The provision does not prohibit cohabiting with a spouse who is a registered sex offender. Mitchell was convicted of this offense for living with her boyfriend, who had been convicted in 2000 of indecent exposure where the victim was a teenager. The Iowa Supreme Court upheld the conviction, rejecting Mitchell's constitutional challenges (two justices dissented).

G. Removal of Information from Registry

i. **Doe v. Merritt, 261 S.W.3d 672 (Mo. 2008)**

The plaintiff in this case was a person wrongfully required to register as a sex offender, per the decision in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. 2006)(en banc)(retroactive application of sex offender registration requirements violates Missouri's constitution). He then asked to have his information, provided prior to that ruling, removed from Missouri's sex offender registries. The court required such a removal.

H. Residency Restrictions

- i. **People v. Mosley, 168 Cal. App. 4th 512 (2008), review granted, 203 P.3d 425 (Cal. 2009)**

Mosley was convicted by a jury of assault, but acquitted at trial of committing a sex offense against a minor. The trial court, based on its own fact-finding, ordered him to register as a sex offender, and thus submitting him to the residency restrictions in place in California. The Court of Appeals held that the residency restriction is punitive (per *Mendoza-Martinez*) and, therefore, *Apprendi* requires a hearing where facts supporting the imposition of the residency requirement are proven beyond a reasonable doubt to a jury.

- ii. **People v. Blair, 2009 N.Y.S.2d 890 (CCNY Albany, Feb. 18, 2009); People v. Oberlander, 2009 N.Y. Misc. LEXIS 325 (Rockland Cty., Jan. 22, 2009)**

Citing the decision in *G.H. v. Township of Galloway*, the court held these local residency restrictions invalid because they are preempted by the comprehensive and detailed State-level regulatory scheme regarding the registration of sex offenders.

- iii. **G.H. v. Township of Galloway, 951 A.2d 221 (N.J. 2008)**

Two municipal residency restrictions ordinances were invalidated because they were preempted by state law. The court did not reach any constitutional arguments.

- iv. **Wright v. Iowa Department of Corrections, 747 N.W.2d 213 (Iowa 2008)**

Even though Wright was not required to register as a sex offender, he was still subject to Iowa's residency restrictions, based on the definitions in Iowa's code. The Iowa Legislature "chose to make the residency restrictions applicable to a broader category of persons—those who have committed certain criminal offenses against minors", not just those who are required to register.

- v. **McAteer v. Riley, 2008 U.S. Dist. LEXIS 26209 (M.D. Ala. March 31, 2008)**
- vi. **Parker v. King, 2008 U.S. Dist. LEXIS 26226 (M.D. Ala. March 31, 2008)**

Rejected the plaintiffs' ex post facto challenges to the imposition of residency restrictions (for both residence and employment). Noted that the plaintiffs failed to present any evidence of the specific punitive effects the law would have on them.

- vii. **Hyle v. Porter, 882 N.E.2d 889 (Ohio 2008)**

Based on Ohio's rules of statutory construction, the residency restriction found in R.C. §2950.031 was "not made expressly retroactive [and therefore] it does not apply to an offender who bought his home and committed his offense before the effective date of the [residency restriction] statute."

viii. **R.L. v. State, 245 S.W.2d 236 (Mo. 2008)**

Citing its decision in *Doe v. Phillips*, 194 S.W.3d 833 (Mo. 2006)—which held that “requiring registration as a sex offender for an offense that occurred prior to the registration law’s effective date was an invalid retrospective law in violation of...the Missouri Constitution”—the Missouri Supreme Court concluded that attaching residency restrictions to offenders who committed their offenses prior to the enactment of the residency restriction statute is unconstitutional, as well.

ix. **State v. Finders, 743 N.W.2d 546 (Iowa 2008)**

Finders was convicted of a sex offense against a minor. After his conviction, Iowa passed a 2,000 foot residency restriction law. Finders’ house was within a 2,000 foot zone, but he was permitted to stay there because he was “grandfathered” in with the law. However, when he moved to a new home in that same 2,000 foot zone, he was no longer ‘grandfathered’ and could be prosecuted for violating the residency restriction. The ‘grandfather’ provisions are tied to the residence, not the individual.

I. Standing

i. **Gautier v. Jones, 2008 U.S. Dist. LEXIS 66425 (W.D. Okla. Aug. 29, 2008)**

Plaintiff was convicted of a sexual offense that required him to register in Oklahoma for a period of 10 years. While he was still under that registration obligation, Oklahoma amended its statute to require him to register for life. Plaintiff did establish standing to sue, based on the recent Supreme Court case of *Davis v. Federal Election Comm’n*, 128 S.Ct. 2759 (2008).

J. Transient Offenders

i. **State v. Anderson, 2008 Wash. App. LEXIS 2386 (Sept. 30, 2008)**

Anderson had a residence in Washington State but left to travel the country for a number of months (as a tattoo show artist)—intending to return to reside in Washington. He failed to comply with his sex offender registration requirements while on the road. He was properly convicted of failure to register, as he was still required to register as a sex offender based on his Washington “residence”.

ii. **Smith v. State, 275 S.W.3d 686 (Ark. App. 2008)**

Where Smith was a long-haul trucker and claimed that he used his sister’s address “for registration purposes” (which she denied), he was still properly convicted of failure to register as a sex offender and to keep his registration current.