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Retroactive Change in the Law to Punish a Defendant

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RETROACTIVE CHANGE IN THE LAW TO PUNISH A DEFENDANT

JUSTICE COURT OF NEW YORK
TOWN OF EAST ROCHESTER, MONROE COUNTY

People v. Luther[1]
(decided June 30, 2013)

I. INTRODUCTION

The court in *People v. Luther* granted the defendant's Criminal Procedure Law ("CPL") § 440.10 motion to vacate the prior plea of guilty to Driving While Intoxicated ("DWI") because it violated the basic principles of justice.[2] The court failed to answer whether the retroactive Department of Motor Vehicles Emergency Regulation § 136.5 was actually an ex post facto law.[3] The Supreme Court of the United States has stated that "every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective."[4] Article I, § 10 clause 1 of United States Constitution[5] prohibits any state from enacting an ex post facto law.[6] The Court has held that a law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed,"[7]

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1 970 N.Y.S.2d 674 (Just. Ct. 2013).
2 *Id.* at 681.
3 *Id.*
4 Landgraf v. USI Film Products, 511 U.S. 244, 270 (1994).
5 U.S. CONST. art. I, § 10:

> No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

6 *Luther*, 970 N.Y.S.2d at 678.
7 Calder v. Bull, 3 U.S. 386, 390 (1798).

violates the ex post facto clause of the United States Constitution.[8] The retroactive emergency regulation at issue in this case increased the mandatory ineligibility to hold a driver's license to two years, which quadrupled the previous punishment of a mandatory six months.[9]

On August 5, 2012, the defendant was charged with his third DWI.[10] The other DWI offenses occurred within the previous twenty-five years, one in 1990 and the other in 1993.[11] On February 11, 2012, following discovery, the defendant accepted a plea bargain and pled guilty to DWI, a violation of Vehicle and Traffic Law § 1192(3).[12] The plea bargain entailed a "mandatory six month suspension of his driver's license," along with other various punishments.[13] However, on March 14, 2012, the defendant moved to set aside the plea bargain.[14]

The defendant's main argument to set aside the plea bargain was that, when he entered into the plea, he reasonably believed that he would be able to apply to have his license restored after the mandatory six-month suspension period.[15] On February 22, 2012, shortly after the defendant's plea bargain, the New York Department of Motor Vehicles ("DMV") retroactively amended Emergency Regulation § 136.5, which made it clear that a plea to a third DWI within twenty-five years would result in the loss of a person's license well beyond the mandatory six-month suspension.[16] The new retroactive regulation made the defendant ineligible "to apply for a new license until two years after the six month revocation."[17] The new regulation imposed a much harsher punishment against the defendant than what he had originally agreed to in his plea.[18] Upon realizing the impact of the new emergency regulation, the defendant's new counsel moved to have the plea bargain set aside.[19]

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[8] *Luther*, 970 N.Y.S.2d at 680.
[9] *Id.* at 681.
[10] *Id.* at 675.
[11] *Id.*
[12] *Id.*
[13] *Luther*, 970 N.Y.S.2d at 675.
[14] *Id.* at 676.
[15] *Id.*
[16] *Id.* at 677.
[17] *Id.*
[18] *Luther*, 970 N.Y.S.2d at 677.
[19] *Id.*

The assistant district attorney ("ADA") argued that the defendant did not meet the expressly specified elements of CPL § 440.10 motion to vacate a plea.[20] The ADA also argued that the plea bargain did not include a specified date that the defendant would be able to get his license back after the mandatory six-month revocation.[21] However, the court set aside the plea bargain because the judgment was obtained against the right of the defendant under the constitution of New York, as well as the constitution of the United States.[22] The court stated the revised emergency regulation put into effect after the plea would retroactively apply to the defendant and warranted sufficient issues to grant the defendant's CPL § 440.10 motion.[23]

The court stated that it allowed the defendant to vacate his prior plea "based upon the ex post facto character and retroactive effect of the amended DMV regulation § 136.5."[24] The classic example of an ex post facto law is when a person engages in an act that is lawful at the time engaged in, but the act retroactively becomes unlawful.[25] There is no doubt that the DWI was an illegal act at the time of the defendant's arrest.[26] However, an additional category of an ex post facto law is "a law that imposes additional and harsher consequences than existed at the time of the offense,"[27] which appears to be the situation in *Luther*. It is often the case that ex post facto laws are at issue when a state tries to pass a law quickly or retroactively.[28]

II. HISTORY OF EX POST FACTO LAWS

Ex post facto literally means done or made after the fact; having retroactive force or effect.[29] The Ex Post Facto Clause appears in the United States Constitution in Article I, § 9, clause 3 stating "No Bill of Attainder or ex post facto Law shall be passed,"[30] and in the

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[20] *Id.* at 678.
[21] *Id.*
[22] *Id.*
[23] *Luther*, 970 N.Y.S.2d at 678.
[24] *Id.*
[25] *Id.* at 679.
[26] *Id.*
[27] *Id.*
[28] *Luther*, 970 N.Y.S.2d at 679.
[29] BLACK'S LAW DICTIONARY 271 (8th ed. 2006).
[30] U.S. CONST. art. I, § 9.

United States Constitution Article I, § 10, clause 1, in which the applicable part states "No State shall enter into any . . . ex post facto Law."[31]

Calder v. Bull,[32] a landmark case dealing with the Ex Post Facto Clause, set up four different categories of ex post facto laws:

> [First,] Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. [Second,] Every law that aggravates a crime, or makes it greater than it was, when committed. [Third,] Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. [Fourth,] Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.[33]

Justice Chase implied that the Framers of the United States Constitution incorporated two ex post facto clauses to avoid the acts of violence and injustice that Parliament of Great Britain exercised over American citizens.[34] The Court expressed "that no man should be compelled to do what the laws do not require."[35]

III. SUPREME COURT DEALING WITH EX POST FACTO LAWS

In *Landgraf v. USI Film Products*,[36] the petitioner brought suit under Title VII of the Civil Rights Act of 1964, claiming a coworker sexually harassed her.[37] The district court found the sexual harassment did not justify her decision to resign.[38] Therefore, the petitioner was not terminated in violation of Title VII and was not enti-

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[31] U.S. CONST. art. I, § 10.
[32] 3 U.S. 386 (1798).
[33] *Id.* at 390-91.
[34] *Id.* at 389.
[35] *Id.* at 388.
[36] 511 U.S. 244 (1994).
[37] *Id.* at 248.
[38] *Id.*

tled to equitable relief.[39] While awaiting appeal, the Civil Rights Act of 1991 retroactively went into effect.[40] The petitioner wanted the Court of Appeals to remand her case for a jury trial on damages pursuant to the new Act of 1991.[41] The Court of Appeals rejected the petitioner's request on the premise that "a court must apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[42] The Supreme Court of the United States granted certiorari to determine whether § 102 of the Civil Rights Act of 1991 applied to cases pending when it became law.[43]

The Court stated that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted."[44] Retroactive statutes and regulations allow the legislature to take away settled expectations immediately without individualized consideration.[45] The legislature is faced with political pressures, which "pose[] a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals."[46] The ex post facto clause was drafted to ensure that individuals have "fair warning" about the effect of criminal statutes, but also "restricts governmental power by restraining arbitrary and potentially vindictive legislation."[47]

Although retroactive laws can cause controversy, unfairness of a retroactive law is an insufficient reason for a court to not give the retroactive law its intended meaning.[48] Retroactivity provisions usu-

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[39] *Id.*

[40] *Id.* at 249; *see* Civil Rights Act of 1991 § 102 (noting it expanded the monetary relief available to plaintiffs and also allowed monetary relief for some workplace discrimination that would not previously have justified any relief under Title VII).

[41] *Landgraf*, 511 U.S. at 249.

[42] *Id.* (quoting Bradley v. School Bd. of Richmond, 416 U.S. 696, 711 (1974)).

[43] *Landgraf*, 511 U.S. at 249-50. The Court assumed "that if the same conduct were to occur today, petitioner would be entitled to jury trail and that the jury might find that she was constructively discharged, or that her mental anguish or other injuries would support an award of damages against her former employer." *Id.*

[44] *Id.*; *see* General Motors Corp. v. Romein, 503 U.S. 181, 191 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions.").

[45] *Landgraf*, 511 U.S. at 266.

[46] *Id.*

[47] *Id.* at 267; Weaver v. Graham, 450 U.S. 24, 28-29 (1981).

[48] *Landgraf*, 511 U.S. at 267.

ally serve good-natured and legitimate purposes, "whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary."[49] It is important that Congress makes its intentions unambiguous in a retroactive law and must weigh the benefits of the retroactive law against the potential for unfairness.[50]

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect. *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.[51]

It is clear that the Court was required to first look at whether § 102 of the Civil Rights Act of 1991 should apply to cases before its enactment because Congress did not give any instruction about the Act's proper reach.[52] Section 102 of the Act provides a victim with new rights to relief that were not available under Title VII, which only authorized back pay in some cases.[53] If § 102 did apply to cases before its enactment, it would make employers liable for past events.[54] The Court had never "read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment."[55] Although reading § 102 retroac-

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[49] *Id.* at 267-68.

[50] *Id.* at 268.

[51] *Id.* at 280.

[52] *Id.*

[53] *Landgraf*, 511 U.S. at 283.

[54] *Id.*

[55] *Id.* at 284; *see* Winfree v. N. Pac. Ry. Co., 227 U.S. 296, 301 (1913) (noting a statute creating new federal cause of action for wrongful death inapplicable to case arising before

tively would help the petitioner in this case, there is no clear evidence it should apply to cases before it was enacted.[56] If the Act were imposed retroactively, it would increase the liability of employers for past conduct and therefore raise an ex post facto clause issue.[57]

In *Stogner v. California*,[58] the state enacted § 1 of Chapter 390 of the California Statute (amended as California Penal Code §803(g)(3)(A)),[59] in 1993; a new criminal statute related to sexually abused children.[60] The new statute made it clear that prosecution could revive any sexual abuse case if it met the three conditions of the statute.[61] The statute allowed prosecutors to seek criminal punishment for acts committed many years before, which had previously been time barred by statute of limitations.[62]

In 1998, Marion Strogner was indicted in California for sex-related child abuse which he committed nearly thirty-to-forty years prior.[63] At the time of the alleged sexual abuse, the statute of limitations was only three years.[64] However, the new statute allowed state prosecutors to seek a cause of action in Stogner's case.[65] Stogner argued for the dismissal of the case based on the theory that it violated the Federal Constitution's ex post facto clause and Fourteenth Amendment Due Process Clause; however, the trial court denied his motion, and the Court of Appeals upheld the denial.[66] The Supreme Court of the United States granted certiorari to consider the constitutional claims asserted by Stogner.[67]

The Court made it clear that the California statute was in di-

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enactment in absence of "explicit words" or "clear implication").

[56] *Landgraf*, 511 U.S. at 285.

[57] *Id.*

[58] 539 U.S. 607 (2003).

[59] CAL. STATS. CH. 390, § 1(1993).

[60] *Stonger*, 539 U.S. at 609.

[61] *Id.*

> The new statute permits for prosecution crimes that the statute of limitations is expired, provided that (1) a victim has reported an allegation of abuse to the police, (2) there is independent evidence that clearly and convincingly corroborates the victim's allegation, and (3) the prosecution is begun within one year of the victim's report.

Id.

[62] *Id.*

[63] *Stogner*, 539 U.S. at 609.

[64] *Id.* at 610.

[65] *Id.*

[66] *Id.*

[67] *Id.*

rect conflict with what the ex post facto clause sought to avoid.[68] The Court has held in prior cases that "extending a limitations period after the State has assured 'a man that he has become safe from its pursuit . . . seems to most of us unfair and dishonest.' "[69] It also seems that the ex post facto law in this case fell directly under the one of main categories of ex post facto laws stated in *Calder v. Bull*.[70] Although Stogner was liable for his crime before the statute of limitations ran out, it appears he was no longer liable for punishment once the three years had passed.[71] The Court stated that it has long been settled that the ex post facto clause "forbids resurrection of a time-barred prosecution."[72]

IV. SECOND CIRCUIT DEALING WITH EX POST FACTO

In *Doe v. Pataki*,[73] three prior sex offenders claimed New York's Sex Offender Registration Act ("SORA") was an ex post facto violation.[74] The SORA statute, which became effective on January 21, 1996, retroactively applied and required sex offenders to register with law enforcement officials, and provided for different degrees of public notification of identity and address after serving their sentences.[75] SORA applied "to sex offenders incarcerated or on parole or probation on its effective date, as well as to those sentenced thereafter, thereby imposing its obligations on many persons whose crimes

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[68] *Stogner*, 539 U.S. at 610.

[69] *Id.* at 611 (quoting Falter v. United States, 23 F.2d 420, 426 (2d Cir. 1928)).

[70] *Stogner*, 539 U.S. at 612.

> I will state what laws I consider ex post facto laws, within the words and the intent of the prohibition. 1st. · Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.

Calder, 3 U.S. at 390.

[71] *Stogner*, 539 U.S. at 613.

[72] *Id.* at 616.

[73] 120 F.3d 1263 (2d Cir. 1997).

[74] *Id.* at 1265.

[75] *Id.*

were committed prior to the effective date."[76] The three sex offenders committed their crimes prior to the effective date of SORA and asserted SORA increased the punishment imposed on them at the time of their offense, which was a violation of the ex post facto clause.[77]

SORA provided that all convicted sex offenders must register with law enforcement and that law enforcement may notify the public about where the sex offender resides and background information about the sexual offense committed.[78] The two main goals of SORA were "(1) protecting members of the community, particularly their children, by notifying them of the presence of individuals in their midst who may present a danger, and (2) enhancing law enforcement authorities' ability to investigate and prosecute future sex crimes."[79] Any sexual offender who failed to register with the proper authority under SORA would face criminal charges.[80]

The district court concluded the main question of the "case is whether, as the [sex offenders] contend, [SORA] increases the 'punishment' for sex offenses, or whether, as the [state legislature] contends, [SORA] merely regulates by protecting the public."[81] The district court applied a four-part test to resolve the question of whether the registration and notification was in fact an ex post facto violation.[82] The district court, relying on the ex post facto argument, issued a permanent injunction against SORA, which denied the state legislature from enforcing the public notification of SORA against sexual offenders before January 21, 1996.[83] However, the district court did not find the retroactive application of SORA registration to conflict with the ex post facto clause.[84] The Second Circuit had to decide whether the notification and registration for SORA increased the sex offenders' punishment for their prior sexual offenses.[85]

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[76] *Id.* at 1266.

[77] *Id.*

[78] *Doe*, 120 F.3d at 1266.

[79] *Id.*

[80] *Id.* at 1267-68. An offender who fails to register is guilty of a Class A misdemeanor for the offense, and is guilty of a class D felony for each subsequent offense. *Id.* at 1266.

[81] *Id.* at 1271.

[82] *Doe*, 120 F.3d at 1271. Four part test which was applied: "(1) legislative intent, (2) statutory design, (3) historical analogies, and (4) effect of the statute." *Id.*

[83] *Id.*

[84] *Id.*

[85] *Id.* at 1272.

The Second Circuit looked at whether the retroactively imposed burden placed on sex offenders constituted a punishment within the meaning of ex post facto clause.[86] The court looked at the purpose to be served by SORA to see if it was constitutionally prohibited.[87] First, the ex post facto clause ensures that legislative acts "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed."[88] Second, the ex post facto clause "erects a barrier to legislative abuses in the form of arbitrary or vindictive legislation directed against disfavored groups."[89]

The court found there was sufficient information to find the legislature intended SORA to be a nonpunitive punishment.[90] It found that the legislature's intent was "protecting communities by notifying them of the presence of individuals who may present a danger and enhancing law enforcement authorities' ability to fight sex crimes."[91] The court recognized the importance of protecting children, a vulnerable group, from potential harm.[92] The New York Legislature enacted SORA retroactively to "protect the public from potentially dangerous persons."[93] The court, therefore, concluded that the sex offenders failed to show evidence that SORA had a punitive intent.[94] "[N]othing in its text suggests that the legislature sought to punish sex offenders for their past offenses rather than to prevent any future harms that they might cause, and several of its features manifest a nonpunitive purpose."[95]

Next, the court examined whether the notification requirement had a punitive intent under the ex post facto clause.[96] The court noted "that although notification conveys to the public the information that prompts some people to take unlawful action against the convicted sex offender, it is the offender's prior conviction—or, more precisely, the offender's criminal act itself—that motivates such hostile

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[86] *Doe*, 120 F.3d at 1273.

[87] *Id.*

[88] *Id.* (citing *Weaver*, 450 U.S. at 28-29).

[89] *Id.*; *see also Landgraf*, 511 U.S. at 266 (ruling that responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals).

[90] *Doe*, 120 F.3d at 1276.

[91] *Id.*

[92] *Id.*

[93] *Id.* at 1277.

[94] *Id.*

[95] *Doe*, 120 F.3d at 1278.

[96] *Id.* at 1279.

action."[97] The court, therefore, held that "SORA's notification provisions are reasonably related to the nonpunitive, prospective goals of protecting the public and facilitating law enforcement efforts, and that the Act's occasionally imprecise targeting does not suffice to render it punitive."[98] The fact that SORA "may serve civil as well as criminal goals" is not enough to indicate it is punitive in nature.[99]

V. DEALING WITH EX POST FACTO LAWS IN NEW YORK

In *People v. Ballman*,[100] the court looked at whether the amended Vehicle and Traffic Law § 1192(8) allowed the court to look at a defendant's prior out-of-state DWI conviction that occurred before November 1, 2006.[101] The statute was amended to allow out-of-state convictions for driving under the influence of alcohol or drugs to be used as convictions as if the action took place in New York, so that repeat DWI offenders would not be let off the hook because a previous conviction of DWI happened outside of New York.[102] Prior to the 2006 amendment of the statute, out-of-state convictions for DWI were treated as only traffic infractions under New York law.[103]

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[97] *Id.* at 1280.

[98] *Id.* at 1281-82.

[99] *Id.* at 1283.

[100] 904 N.Y.S.2d 361 (2d Cir. 2010).

[101] *Id*.;

> 8. Effect of prior out-of-state conviction. A prior out-of-state conviction for operating a motor vehicle while under the influence of alcohol or drugs shall be deemed to be a prior conviction of a violation of this section for purposes of determining penalties imposed under this section or for purposes of any administrative action required to be taken pursuant to subdivision two of section eleven hundred ninety-three of this article; provided, however, that such conduct, had it occurred in this state, would have constituted a misdemeanor or felony violation of any of the provisions of this section. Provided, however, that if such conduct, had it occurred in this state, would have constituted a violation of any provisions of this section which are not misdemeanor or felony offenses, then such conduct shall be deemed to be a prior conviction of a violation of subdivision one of this section for purposes of determining penalties imposed under this section or for purposes of any administrative action required to be taken pursuant to subdivision two of section eleven hundred ninety-three of this article.

N.Y. VEH. & TRAF. § 1192 (McKinney 2012).

[102] *Ballman*, 904 N.Y.S.2d at 362.

[103] *Id*.

The defendant in this case was indicted on a felony DWI for his actions on February 22, 2007.[104] The prosecution based its felony charge on the fact that the defendant had been convicted in the state of Georgia in 1999 for driving with an unlawful alcohol concentration.[105] The defendant moved to dismiss the felony indictment on the grounds that the date of Georgia conviction was well before the statute was amended, making the DWI charge ineligible for a felony upgrade.[106] The county court denied the motion; however, the Appellate Division reversed and dismissed the felony DWI charges.[107] The court concluded that "the 2006 amendment to Vehicle and Traffic Law § 1192(8) and its enabling language, convictions occurring prior to the November 1, 2006 effective date of statute, including defendant's 1999 Georgia conviction, could not be used to raise a DWI offense from a misdemeanor to a felony."[108]

It is clear that the purpose of the 2006 amendment to the statute was to "eliminate one of the loopholes that allow[ed] repeat DWI offenders to face lesser penalties simply because prior convictions occurred out of state."[109] The 2006 amendment ended the practice of treating all prior out-of-state DWI convictions as mere traffic infractions under New York law.[110] "Legislature recognized the harsher penalties that had been applied when a person had a prior in-state conviction, as opposed to a prior out-of-state conviction, and intended to remedy that discrepancy."[111] It is clear that the legislature wanted to fix this discrepancy, but knew there was potential to cause an ex post facto issue.[112] "[T]he legislature chose to remedy this differential treatment going forward, by continuing to apply the previous statutory scheme to out-of-state convictions occurring prior to November 1, 2006, and applying the statute as amended to out-of-state convictions occurring after the date."[113] This interpretation of the statute makes it clear that the defendant's prior conviction in Georgia

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104 *Id*.
105 *Id.*
106 *Id*.
107 *Ballman*, 904 N.Y.S.2d at 362.
108 *Id*.
109 *Id*. at 364.
110 *Id.*
111 *Id*.
112 *Ballman*, 904 N.Y.S.2d at 364.
113 *Id*.

in 1999 could not apply to his present DWI case.[114]

In *People v. Maldonado*,[115] the defendant pled guilty to two counts of DWI, which was sufficient to charge him with a class D felony pursuant to New York Vehicle and Traffic Law § 1192(2).[116] The DWI offenses occurred on July 18, 1991 and October 9, 1991.[117] The defendant moved to dismiss the guilty pleas on the grounds that the "newly enacted [Vehicle and Traffic Law] § 1193(1)(c)(ii) requires that the pleas were entered and that sentence upon the two predicate DWI convictions must have been imposed at different times to elevate the present charge of operating a motor vehicle while under the influence of alcohol to a class D felony."[118]

The defendant believed his two pleas should be taken as one, making it insufficient to charge him with a class D felony as prohibited under ex post facto laws.[119]

The court held that the "enhanced sentencing provision did not violate the ex post facto clause even where the prior conviction was not classified as a violent felony offense at the time it was sustained by the defendant."[120] The court explained that it considered

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[114] *Id*.

[115] 661 N.Y.S.2d 937 (Sup. Ct. 1997).

[116] *Id*. at 938;

> Driving while intoxicated; per se. No person shall operate a motor vehicle while such person has .08 of one per centum or more by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article.

N.Y. VEH. & TRAF. § 1192 (McKinney 2012).

[117] *Maldonado*, 661 N.Y.S.2d at 938.

[118] *Id*.;

> (ii) A person who operates a vehicle in violation of subdivision two, two-a, three, four or four-a of section eleven hundred ninety-two of this article after having been convicted of a violation of subdivision two, two-a, three, four or four-a of such section or of vehicular assault in the second or first degree, as defined, respectively, in sections 120.03 and 120.04 and aggravated vehicular assault as defined in section 120.04-a of the penal law or of vehicular manslaughter in the second or first degree, as defined, respectively, in sections 125.12 and 125.13 and aggravated vehicular homicide as defined in section 125.14 of such law, twice within the preceding ten years, shall be guilty of a class D felony, and shall be punished by a fine of not less than two thousand dollars nor more than ten thousand dollars or by a period of imprisonment as provided in the penal law, or by both such fine and imprisonment.

N.Y. VEH. & TRAF. § 1193 (McKinney 2012).

[119] *Maldonado*, 661 N.Y.S.2d at 939.

[120] *Id.* at 941; *see* People v. Morse, 62 N.Y.2d 205, 217 (2d Cir. 1984) (holding that the

the latest DWI crime as an aggravated offense allowing for a harsher penalty to deter repeat DWI offenders.[121] Increasing the penalty for a DWI for a defendant's repetitive conduct does not violate the provision against ex post facto laws.[122]

VI. CONCLUSION

It appears unambiguously that the court in *People v. Luther* recognized it was dealing with a potential ex post facto problem if it had not granted the defendant's motion to vacate the prior plea of guilty to DWI. Instead of addressing the Ex Post Facto Clause question, it vacated the defendant's prior plea. However, the retroactive nature of the Department of Motor Vehicles Emergency Regulation § 136.5 may still be questioned by future defendants as applying a punitive punishment. Increasing the mandatory suspension of a person's driver's license appears to be punishing a defendant, rather than protecting the public. There is no doubt that DWI is a serious offense; however, increasing the punishment after a defendant takes a plea is a violation of the Ex Post Facto Clause.

George Schoenwaelder[*]

provisions for mandatory enhanced prison sentences for violent felony offenders did not violate the restriction against ex post facto laws).

[121] *Maldonado*, 661 N.Y.S.2d at 941.

[122] *Id*.

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