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Ex Post Facto

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EX POST FACTO LAWS

U.S. CONST. art. I, § 10:

No State shall . . . pass any Bill of Attainder, ex post facto Law . . . .

N.Y. CONST. art. I, § 9:

No Bill of Attainder or ex post facto Law shall be passed.

SUPREME COURT, APPELLATE DIVISION SECOND DEPARTMENT

People v. Hernandez[1]
(Decided September 20, 1999)

Defendant, Jose Hernandez, was convicted of sexual abuse in the first degree and attempted rape in the first degree in County Court, Nassau County.[2] On February 13, 1995, the defendant confronted a woman outside of her apartment building, "told her that he wanted to 'make love' to her, that he would kill her if she made a noise, and then choked her when she cried out."[3] She pretended to lose consciousness while the defendant pulled her to the basement of the building and fondled her groin area through her clothes.[4] As they reached the door to the basement, the victim escaped into a neighbor's apartment.[5] Responding to the neighbor's telephone call, the police took the victim and her husband to the hospital.[6]

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[1]. 695 N.Y.S.2d 126 (App. Div. 2d Dep't 1999).
[2] *Id.*
[3] People v. Hernandez, 93 N.Y.2d 261, 265, 711 N.E.2d 972, 973, 689 N.Y.S.2d 695, 697 (1999) (giving an account of the facts in this case).
[4] *Id.*, 711 N.E.2d at 973, 689 N.Y.S.2d at 696.
[5] *Id.*
[6] *Id.*

After searching the area, the police located the defendant hiding in shrubbery.[7] The victim identified the defendant in police custody after she returned from the hospital.[8] The defendant's sentence included a "certification that defendant was a sex offender pursuant to"[9] the Sex Offender Registration Act[10] (SORA). The Appellate Division, Second Department affirmed his conviction,[11] but did not address Hernandez's constitutional claim that his certification pursuant to the SORA was a violation[12] of the Ex Post Facto Clause,[13] so Hernandez appealed. The Court of Appeals ruled that the mandatory SORA certification was part of a defendant's conviction,[14] and was appealable as a mandatory surcharge.[15]

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[7] *Id.*

[8] *People v. Hernandez*, 93 N.Y.2d 265, 711 N.E.2d at 973, 689 N.Y.S.2d at 696.

[9] *Id.* at 266, 711 N.E.2d at 974, 689 N.Y.S.2d at 697.

[10] N.Y. CORRECT. LAW §§ 168 to 168-v (McKinney 1996). Subsection d (1) provides in pertinent part: "Upon conviction the court shall certify that the person is a sex offender and shall include the certification in the order of commitment. The court shall also advise the sex offender of the duties of this article." *Id.* This law is New York's version of Megan's law, *see* Doe v. Pataki, 120 F.3d 1263, 1266 (2d Cir. 1997). The law became effective on January 21, 1996. N.Y. CORRECT. LAW § 168 (McKinney 1996). It was passed to bring New York State in compliance with the Jacob Wetterling Act, 42 U.S.C.A. § 14071(d) (West 1995) (providing guidelines to State Attorneys General to establish programs for registration of the current address of persons convicted of sex crimes against minors).

[11] People v. Hernandez, 250 A.D.2d 704, 673 N.Y.S.2d 169 (2d Dep't 1998).

[12] 93 N.Y.2d at 266, 711 N.E.2d at 974, 689 N.Y.S.2d at 697.

[13] U.S. CONST. art. I, § 10. This section provides in pertinent part: "No State shall . . . pass any . . . ex post facto Law . . .." *Id.* A statute violating the Ex Post Facto Clause must inflict criminal punishment retroactively on the actor. Doe v. Pataki, 120 F.3d 1263, 1272 (2d Cir. 1997) (citing the formulation of the term of art "Ex post facto" from Beazell v. Ohio, 269 U.S. 167, 169-170 (1925)). The federal Constitution provides this limitation on the legislatures of the state (U.S. CONST. art. I, § 10) and the federal government (U.S. CONST. art. I, § 3, cl. 9); *See also* N.Y. CONST. art. I, § 9 (providing in pertinent part: "No Bill of Attainder or ex post facto Law shall be passed").

[14] 93 N.Y.2d at 268, 711 N.E.2d at 975, 689 N.Y.S.2d at 698 (overruling the holding in People v. Grice, 254 A.D.2d 710, 679 N.Y.S.2d 771 (4th Dep't 1998)).

[15] *Id.* A statutory mandatory surcharge is an additional fee that is effected when the defendant is convicted and assessed when the convict is sentenced. Because

The Court of Appeals remitted the case to the Appellate Division, Second Department, to review Hernandez's ex post facto challenge of his sex offender certification pursuant to[16] the SORA.[17] The Appellate Division held that retroactive application of the SORA was constitutional[18] as evidenced by the numerous ex post facto challenges antedating defendant's claim.[19]

The defendant argued on remand to the Appellate Division that his certification as a sex offender by the sentencing court violated the constitutional prohibition against ex post facto laws since the SORA was effective after January 21, 1996, almost a year after the

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the SORA certification is finalized on conviction and recorded when sentenced, it has the same procedural tack. Conviction and sentencing are part of the judgment, and since the surcharge component is appealable, likewise the Court of Appeals held the SORA certification should also be appealable. *Id.*

[16] 695 N.Y.S.2d at 126.

[17] 93 N.Y.2d at 269-71, 711 N.E.2d at 976-77, 689 N.Y.S.2d at 699-700 (characterizing the Appellate Division's use of People v. Stevens, 91 N.Y.2d 270, 692 N.E.2d 985, 669 N.Y.S.2d 962 as inapt because that case dealt with retroactive application of the notification and reporting requirements of the SORA and not the certification provision).

[18] 695 N.Y.S.2d at 126.

[19] *See* Doe v. Pataki, 120 F.3d 1263 (2d Cir. 1997) (holding that application of the registration and notification provisions to persons committing offenses prior to the effective date of SORA is constitutional), *cert. denied*, 522 U.S. 1122 (1998); People v. Langdon, 258 A.D.2d 937, 685 N.Y.S.2d 877 (4th Dep't 1999) (ruling that "retroactive application of SORA to sex offenders convicted prior to the act's effective date" is constitutional); People v. Griffin, 171 Misc. 2d 145, 652 N.Y.S.2d 922 (Sup. Ct. 1996) (holding that certification of a sex offender as required by SORA §168-d (1) after conviction but during a stay of execution of a judgment is ministerial and not punitive, thus constitutional). *See also, e.g.*, People v. Grice, 254 A.D.2d 710, 679 N.Y.S.2d 771 (4th Dep't 1998) (ruling that certification as a sex offender, designation of risk level, and "subjection to notification requirements of SORA are not part of the judgment of conviction," and the registration requirement of SORA as a condition of parole does not violate the Ex Post Facto Clause); Matter of S.V. v. Calabrese, 246 A.D.2d 655, 668 N.Y.S.2d 53 (2d Dep't 1998) (holding that retroactive risk level determination of a sex offender under the SORA is constitutional); Matter of M.G. v. Travis, 236 A.D.2d 163, 667 N.Y.S.2d 11 (2d Dep't 1997) (applying special conditions of parole in accordance with SORA constitutes prevention and not punishment, therefore is constitutional);

defendant committed his offense.[20] The Appellate Division found Hernandez's sole contention unpersuasive, noting that many courts upheld application of the SORA to convicted sex offenders whose crime was committed before the effective date of the SORA.[21] Most of the reasoning that the cited cases relied upon can be found in *Doe v. Pataki*.[22]

A two part Ex Post Facto Clause test was enunciated in *Pataki*. The first determination required examination of the statute to determine whether the legislature intended to impose criminal punishment. If the legislature clearly intended the statute to be punitive, the statute could not be applied retroactively without violating the Ex Post Facto Clause. If the legislature intended not to impose criminal punishment, then secondly, the challenger would have to show that the law had an essentially punitive character in purpose or effect, contrary to legislative intent.[23]

In the preamble of the SORA, "the legislature articulated two goals: (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."[24] The SORA established a Board[25] that would classify

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[20] 695 N.Y.S.2d at 126. Besides the certification provision, the SORA contains registration and notification provisions that take effect upon release or parole of the convict. N.Y. CORRECT. LAW § 168-d (Consol. 1999) (subsect. 2. requiring the sentencing court to notify the offender of his duty to register, and subsect. 3. requiring the court to make the appropriate notifications pursuant to §168-l).

[21] *Id. See also* text accompanying note 19.

[22] 120 F.3d 1263 (2nd Cir. 1997).. The three plaintiffs in this case challenged retroactive application of the SORA. The first was convicted of first degree attempted rape in 1990 and paroled since 1994. The second was convicted of first degree sexual abuse in 1995 and sentenced to probation. The third was convicted of first degree attempted sodomy in 1989 and is entitled to conditional release. *Id.* at 1266 n.3.

[23] *Id.* at 1274-75 (citing Kansas v. Hendricks, 521 U.S. 346, 360-61 (1997) where involuntary commitment of "mentally abnormal" convicted sex offenders was not considered punishment, thus did not violate the Ex Post Facto or Double Jeopardy Clauses).

[24] *Id.* at 1266 (referring to the legislative history and preamble of the Act. *See* text accompanying note 10).

[25] *Id.* at 1268. "The five-member Board, composed of 'experts in the field of the behavior and treatment of sex offenders' from the Division of Parole and the

convicted sex offenders by severity of offense, which invoked a higher frequency and duration of registration and three corresponding levels of notification.[26]

The *Pataki* court found three reasons why the notification provision of the law was non-punitive despite its inclusion in the Corrections Law volume of the New York Statutes: (1) the scope of notification is related to the risk of recidivism;[27] (2) public access to information is carefully controlled through a pay-per-use 900 telephone number;[28] and, (3) there are many safeguards including criminal penalties for misuse of the information.[29] As held by the court in *Matter of M. G. v. Travis*, "[t]he registration provisions were adopted as a remedial measure to ameliorate the danger to the public caused by the release of sex offenders, to address recidivism and to provide law enforcement with an investigative tool for identifying and acting upon potential recurrence of sexual offenses by past offenders."[30] The court

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Department of Probation . . . is charged with the responsibility of developing guidelines and procedures to assess the risk of re-offense and the threat posed." *Id.* (citing N.Y. CORRECT. LAW § 168-l).

[26] *Id.* at 1267-68. The notification was made to law enforcement agencies and/or the public based on the potential for recidivism. *Id.*

[27] *Id.* at 1278. The risk level of the offender is determined according to the likelihood of recidivism, and a broader disclosure is given to the public for a higher risk level. A risk level one causes notification to be made to the law enforcement agency of the residence of the offender following release, and the law enforcement agency where the offender resided at the time of his conviction. N.Y. CORRECT. LAW § 168-l (6)(A). Risk level two permits the law enforcement agencies to disseminate relevant information to any entity having a vulnerable population related to the nature of the offense. N.Y. CORRECT. LAW § 168-l (6)(B). A risk level three is preserved for a "sexually violent predator," and additionally permits relevant information to be made available to the public. N.Y. CORRECT. LAW § 168-l (6)(C).

[28] *Id.* The caller must identify the individual by name, exact address, and other required information, and the amount of information released is dependent upon the risk level. N.Y. CORRECT. LAW § 168-p.

[29] *Id. See* N.Y. CORRECT. LAW § 168-p (3) for misuse of the 900 number, and N.Y. CORRECT. LAW § 168-q (2) for misuse of information received through other means, which is deemed to be a Class B misdemeanor. N.Y. CORRECT. LAW § 168-u.

[30] Matter of M.G. v. Travis, 236 A.D.2d 163, 166, 667 N.Y.S.2d 11, 14 (2d Dep't 1997).

reasoned that registration was necessary in order to implement the notification provisions of the law.[31] The public was not given notice of registration, and the burden imposed by registering was not severe enough to constitute punishment. When compared to other weightier burdens upheld by the U.S. Supreme Court "against ex post facto challenges, including deportation, termination of financial support, and loss of livelihood,"[32] registration is not punishment.

Since Hernandez merely established the temporal relationship of the commission of his crime and did not make a showing that certification was punitive in form and fact, the second part of the *Pataki* determination did not need to be invoked by the Appellate Division. The legislative intent of the SORA covers all three provisions of the law--certification, registration and notification. Hernandez failed to distinguish the certification provision from the registration and notification provisions of the SORA, and how the certification by the sentencing court of his status as a sex offender could be considered punishment.[33] The Appellate Division deemed the certification required by the SORA non-punitive and constitutional by reference to *People v. Langdon*.[34] Certification of Hernandez as a sex offender does no more than place a general classification upon him for conviction of the specific crimes with which he was charged. Retroactive application of the SORA through court certification of Hernandez as a sex offender thus withstood Hernandez's Ex Post Facto Clause challenge under both the New York State[35] and United States[36] Constitutions.

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[31] *Pataki*, 120 F.3d at 1285.

[32] *Id.*

[33] 695 N.Y.S.2d at 126.

[34] 258 A.D.2d 937, 685 N.Y.S.2d 877 (holding that the SORA may be applied retroactively to sex offenders convicted prior to the Act's effective date without violating the Ex Post Facto Clause). *Id.*

[35] N.Y. CONST. art. I, § 9 (providing in pertinent part: "No Bill of Attainder or ex post facto Law shall be passed.").

[36] U.S. CONST. art. I, § 10. This section provides in pertinent part: "No State shall . . . pass any . . . ex post facto Law . . . ." *Id.*