

No.

OCTOBER TERM 2017

IN THE
SUPREME COURT OF THE UNITED STATES

TIMOTHY SEWELL,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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March 19, 2018

QUESTION PRESENTED

Timothy Sewell was convicted of misdemeanor sexual abuse in 1995 and 1999, more than five years before the enactment of the Sex Offender Registration and Notification Act (SORNA).¹ At his resentencing on other charges in 2017, the trial court ordered that he register as a sex offender as a condition of supervised release. He objected on *ex post facto* grounds. The trial court and the Court of Appeals for the Eleventh Circuit rejected this argument. The issue before this Court is:

Does it violate the *ex post facto* clause to subject an individual to registration as a sex offender when the sex offenses at issue were misdemeanors committed prior to SORNA's enactment, and he only became subject to the federal registration requirement because his pre-SORNA federal sentence on other charges was invalidated?

¹ 42 U.S.C. §§ 16911, 16913.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Timothy Sewell respectfully requests that this Court grant a writ of certiorari to review the Court of Appeals for the Eleventh Circuit's judgment requiring him to register as a sex offender.

OPINIONS BELOW

The Court of Appeals' decision is unpublished.² The opinion is included in Petitioner's Appendix.³

JURISDICTION

The Eleventh Circuit's opinion was issued on October 20, 2017, rendering his Petition for Writ of Certiorari due in this Court on January 18, 2018. Mr. Sewell requested and received an extension of time to file the petition until March 19, 2018. The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISION

Article I, § 9 of the United States Constitution provides in pertinent part:

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

RELEVANT STATUTORY PROVISIONS

18 U.S.C. § 2250 provides:

(a) In General.—Whoever—

² *United States v. Sewell*, 2017 WL 4712434 (11th Cir. 2017) (unpublished).

³ Pet. App. 1a.

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)

(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act; shall be fined under this title or imprisoned not more than 10 years, or both.

42 U.S.C. § 16913 provides:

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.

STATEMENT OF THE CASE

In 2004, prior to SORNA's enactment, Timothy Sewell was convicted of various drug and firearms offenses and sentenced to 250 months' imprisonment. His convictions were affirmed on direct appeal, but Mr. Sewell successfully challenged his status as an armed career criminal based on *Johnson v. United States*,⁴ and his sentences were vacated.

At his resentencing hearing, the District Court indicated that Mr. Sewell would be required to register as a sex offender. Mr. Sewell argued

⁴ 135 S. Ct. 2551, 2558-63 (2015).

that he should not be required to register because his two misdemeanor sex offenses were committed in 1995 and 1999, and thus predated the enactment of SORNA, rendering SORNA's registration requirement in violation of the Ex Post Facto Clause as applied to him. The District Court overruled the objection, and required him to register under SORNA as a condition of his supervised release.

Mr. Sewell appealed the District Court's ruling requiring him to register under SORNA, but the Eleventh Circuit affirmed this decision based on its prior precedent.⁵

REASONS FOR GRANTING THE WRIT

The question of whether a federal defendant may be subject to the registration requirements of SORNA based on misdemeanor convictions occurring years prior to SORNA'S enactment has never been resolved by this Court.

Certiorari in this case is appropriate because this Court has never addressed whether the federal version of SORNA violates the ex post facto clause as it applies to defendants whose misdemeanor sex offense convictions occurred prior to the enactment of the statute. The Court had the opportunity to address the issue in *Carr v. United States*,⁶ but did not do so when it

⁵ Pet. App. 6; citing *United States v. W.B.H.*, 664 F.3d 848, 860 (11th Cir. 2011).

⁶ 560 U.S. 438 (2010).

resolved Mr. Carr’s case.⁷ The Court has never applied the analysis from *Smith v. Doe*⁸ to the federal version of SORNA.

In *Carr*, the question was whether failure to report interstate travel taking place prior to SORNA’s enactment could be used to support a conviction for violation of the Act. The Court decided the case on statutory interpretation grounds, not on constitutional grounds, and expressly declined to review the issue. Here, the issue is whether pre-enactment sex offense convictions can be used to subject someone to the requirements and potential penalties of the Act.

Congress may not enact “any statute which punishes as a crime an act previously committed, which was innocent when done; [or] which makes more burdensome the punishment for a crime, after its commission.”⁹ To determine whether a statute constitutes retroactive punishment forbidden by the Ex Post Facto Clause, this Court must “ascertain whether the legislature meant the statute to establish civil proceedings.”¹⁰ “If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and non-punitive, the court must further examine whether the statutory scheme is so punitive

⁷ *Id.* at 458. (“Having concluded that § 2250 does not extend to pre-enactment travel, we need not consider whether such a construction would present difficulties under the Constitution’s *Ex Post Facto* Clause.”)

⁸ 538 U.S. 84 (2003).

⁹ *United States v. Collins*, 497 U.S. 37, 42 (1990) (emphasis added).

¹⁰ *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997).

either in purpose or effect as to negate the government’s intention to deem it civil.”¹¹

To analyze the punitive nature of a sex offender registration law, this Court has established five “guideposts:”

The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a non-punitive purpose; or is excessive with respect to this purpose.¹²

SORNA is so overwhelmingly punitive in this case that it negates its intended regulatory purpose.¹³

Mr. Sewell was convicted of misdemeanors, the latest of which occurred 18 years before the district court required him to register as a sex offender as a condition of his supervised release. He only became subject to that condition of supervised release because his federal sentence, which was initially imposed prior to SORNA’s enactment, was invalidated and he was resentenced in 2017.

Mr. Sewell is aware that there is consensus among the circuits that SORNA does not violate the *ex post facto* clause.¹⁴ However, none of those cases involved an application of *Doe* to a defendant who has not yet violated

¹¹ *Smith v. Doe*, 538 U.S. 84, 92 (2003).

¹² *Id* at 97.

¹³ *See Smith*, 538 U.S. at 92.

¹⁴ *United States v. Felts*, 674 F.3d 599, 606 (6th Cir. 2014).

the provisions of SORNA. Mr. Sewell is protesting any application of SORNA to him because he was made subject to SORNA because of two misdemeanors committed long before SORNA's enactment, and because of a resentencing done after SORNA became effective.

In *United States v. Hardeman*,¹⁵ the Ninth Circuit held that a defendant's pre-SORNA misdemeanors did not prevent him from being charged with a crime under § 2260A, which provides for a conviction for committing certain crimes while under a duty to register.¹⁶ However, the defendant in *Hardeman* was subject to that charge because he had committed a subsequent sex crime, making a conviction under that statute rationally related to the previous misdemeanors. The crime that triggered Mr. Sewell's resentencing and the order requiring him to register as a sex offender was not a sex crime.

Sex offender registration statutes have been found unconstitutional using the *Smith* analysis. The Sixth Circuit, in *Doe v. Snyder*,¹⁷ found that Michigan's sex offender registration law violated the *ex post facto* clause. The Court analyzed the provisions of the Michigan law in detail using this Court's opinion in *Smith*, and concluded that, while sex offenses may involve horrific conduct, defendants cannot be retroactively punished for committing those

¹⁵ 704 F.3d 1266 (9th Cir. 2013).

¹⁶ *Id.* at 1269.

¹⁷ 834 F.3d 696 (6th Cir. 2016).

crimes. As the *Snyder* court stated: “*Smith* cannot be “understood as writing a blank check to states to do whatever they please.”¹⁸

Here, Mr. Sewell is facing a lifetime of registration and restrictions. Under the first *Doe* guidepost, the sanction of sex offender registration is historically regarded as punishment for criminal conduct, because the requirement arises at the time of criminal sentencing, and is imposed in direct response to a criminal act.¹⁹ The punitive nature of this punishment was illustrated at sentencing when Mr. Sewell suggested a particular, post-release residence, and the district court expressed concerns about whether he would be able to reside there: “as a registered sex offender in Alabama, there are going to be restrictions on . . . the residence.”

Second, SORNA clearly imposes an “affirmative disability or restraint,” as it requires Mr. Sewell to appear in person at a local police station, every year, to take a current photograph, and verify the information in the registry.²⁰

Third, SORNA promotes the traditional aims of punishment: retribution and deterrence. The registration requirements are triggered upon conviction, and serve as a powerful, general deterrent of criminal conduct. A leading empirical study has concluded that sex offender registration and

¹⁸ *Id.* at 706.

¹⁹ *See* 42 U.S.C. § 16913(b) (“The sex offender shall initially register before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement”)

²⁰ *See* 42 U.S.C. § 16916(1).

notification requirements “appear[] to reduce crime, not by disrupting the criminal conduct of convicted sex offenders, but by deterring nonregistered offenders. We find that notification may actually increase recidivism.”²¹ SORNA cannot be reasonably related to recidivism concerns, if its effect is to *increase* recidivism rates. Thus, although SORNA bears a rational relationship to public safety, it is grossly excessive in relation to its non-punitive purpose.

That final point could not be any clearer in this case. Mr. Sewell was convicted of one of these misdemeanors over 20 years ago. The federal crime he was convicted of also occurred before SORNA. He only became subject to SORNA requirements because his federal sentence was illegal and he had to be resentenced. The imposition of these punitive requirements based on misdemeanors committed almost a decade before SORNA was enacted, as a condition of supervised release for a non-sex crime, when the original unconstitutional sentence was also imposed before SORNA was enacted, is grossly excessive, and as applied to Mr. Sewell, in violation of the *ex post facto* clause.

²¹ J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J. L. & Econ. 161 (2011).

CONCLUSION

For the above reasons, this Court should grant this petition for writ of *certiorari*.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 17-10637
Non-Argument Calendar

D.C. Docket No. 2:03-cr-00232-WKW-SRW-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

versus

TIMOTHY JEVON SEWELL,
a.k.a. Timothy Sewel,
a.k.a. Glen Armstrong,
a.k.a. Jerome Sewell,

Defendant - Appellant.

Appeal from the United States District Court
for the Middle District of Alabama

(October 20, 2017)

Before TJOFLET, JORDAN, and ROSENBAUM, Circuit Judges.

PER CURIAM:

In 2004, a jury convicted Timothy Sewell of conspiracy to distribute methamphetamine, possession with intent to distribute methamphetamine, and possession of a firearm by a convicted felon. 21 U.S.C. §§ 841(a)(1) and 846; 18 U.S.C. § 922(g)(1). Sewell had his original sentence of 250 months' imprisonment vacated after succeeding in an action under 28 U.S.C. § 2255. At resentencing, the District Court imposed a 188-month sentence, which exceeded the guideline range, and five years of supervised release. He appeals that sentence.

On appeal, Sewell advances two arguments. First, he contends that his sentence was substantively unreasonable. Second, he argues that his supervised release condition—which requires him to register as a sex offender under the Sex Offender Registration and Notification Act (“SORNA”)—violates the Ex Post Facto Clause of the United States Constitution. U.S. Const. art I, § 9, cl. 3. We dismiss the first challenge as moot. We reject the second as foreclosed by precedent.

I.

We first note that Sewell has served the challenged sentence. Records indicate that Sewell was released from custody on August 18, 2017. *See* Federal Bureau of Prisons Inmate Locator.¹ Although the parties have not addressed

¹ BOP Inmate Locator, *available at* <https://www.bop.gov/inmateloc/>.

mootness,² we consider it *sua sponte* because it is a jurisdictional issue. *National Advert. Co. v. City of Miami*, 402 F.3d 1329, 1331–32 (11th Cir. 2005) (noting that mootness “may be raised by the court *sua sponte*, regardless of whether the district court considered it or if the parties briefed the issue”). Mootness is a question of law that receives *de novo* review. *Id.* at 1331.

Article III of the United States Constitution limits federal courts’ jurisdiction to “Cases” and “Controversies.” U.S. Const. art. III, § 2, cl. 1. “A case on appeal becomes moot, and ceases to be a case or controversy, when it no longer presents a live controversy with respect to which the court can give meaningful relief.” *United States v. Al-Arian*, 514 F.3d 1184, 1189 (11th Cir. 2008). Therefore, the court must resolve the question before assuming jurisdiction. *Id.* The “fundamental question” is whether events subsequent to the filing of the appeal deprive the court of the ability to grant the appellant “meaningful relief.” *Id.*

A sentencing appeal is generally moot when the sentence has already been served. *See United States v. Farmer*, 923 F.2d 1557, 1568 (11th Cir. 1991). When a defendant challenges a sentence that has been fully served, the court will dismiss the appeal unless the defendant demonstrates some “collateral consequences” flowing from his sentence. *See Spencer v. Kemna*, 523 U.S. 1, 3, 14–17, 118 S. Ct. 978, 981, 986–88 (1998) (dismissing as moot a habeas petitioner’s challenge to his

² Both parties filed their briefs prior to Sewell’s release, and neither has made any subsequent filings.

parole revocation, when he had already served the underlying sentence, because he failed to show sufficient collateral consequences stemming from the revocation); *Minnesota v. Dickerson*, 508 U.S. 366, 371, 113 S. Ct. 2130, 2135 n.2 (1993) (“[T]he possibility of a criminal defendant’s suffering collateral legal consequences from a sentence already served precludes a finding of mootness.”) (internal quotation marks and citations omitted); *Farmer*, 923 F.2d at 1568 (dismissing as moot defendant’s sentencing issue on direct appeal because he completed his sentence and “ha[d] not advanced any argument that there may be benefits . . . in having his sentence reduced” after he served it) (internal quotation marks omitted). Nevertheless, we have declined to dismiss as moot challenges to sentences when the challengers were on supervised release and success on appeal could alter the supervised release portion of their sentences. *See Dawson v. Scott*, 50 F.3d 884, 886 n.2 (11th Cir. 1995); *United States v. Page*, 69 F.3d 482, 487 n.4 (11th Cir. 1995).

Here, Sewell challenges his 188-month sentence—an upward variance from the guideline range—as substantively unreasonable. Sewell’s success on his sentence appeal would not affect the supervised release portion of his sentence. Like the petitioners in *Dawson* and *Page*, Sewell remains on supervised release. But in those cases, the appeals were not moot because the defendants’ success could alter their supervised release. *See Dawson*, 50 F.3d at 886 n.2; *Page*, 69

F.3d at 487 n.4. As for Sewell, regardless of the length of his sentence, the maximum authorized term of supervision is five years. U.S.S.G. § 5D1.2(a)(1) (providing for a term of supervised release of at least two years but not more than five years for a defendant convicted of a Class A or B felony); Presentence Investigation Report at 1 (designating Counts I and II here as Class B felonies and Count IV as a Class A felony). Thus, if Sewell was to prevail, and we held that the sentencing judge abused his discretion by imposing a substantively unreasonable prison sentence, his position would not change. *See United States v. Irey*, 612 F.3d 1160, 1165 (11th Cir. 2010) (en banc) (explicating the proper standard of review). Nothing in the record suggests that if the District Court had imposed a shorter sentence, it would also have imposed a shorter or less restrictive period of supervised release. As a result, we cannot provide Sewell with meaningful relief. *See Al-Arian*, 514 F.3d at 1189. Finally, Sewell makes no arguments on this issue, and thus has not made the required showing of collateral consequences. *See Spencer*, 523 U.S. at 14–17, 118 S. Ct. 978 at 896–88 (asking “whether petitioner *demonstrated* [collateral] consequences”) (emphasis added). Sewell’s sentencing challenge is moot and this portion of his appeal dismissed.

II.

Sewell next challenges the condition of his supervised release requiring him to register as a sex offender under SORNA. Specifically, he argues that because

SORNA was not enacted until 2006, and his two sexual offense convictions occurred before SORNA's enactment, applying SORNA's registration requirements to him violates the Ex Post Facto Clause of the United States Constitution. According to Sewell, this amounts to unconstitutional retroactive punishment because it makes the punishment for his two prior sex offenses more burdensome.³

But as Sewell himself admits, this argument is foreclosed by this Court's decision in *United States v. W.B.H.*, 664 F.3d 848, 860 (11th Cir. 2011). In that case, we considered and rejected an *ex post facto* attack on SORNA's registration requirement. *Id.* Like Sewell, the challenger in *W.B.H.* had to, as a condition of his supervised release, register as a sex offender because of a sex offense conviction prior to SORNA's enactment. *Id.* at 851. We rejected that challenge pursuant to the Supreme Court's decision in *Smith v. Doe*, 538 U.S. 84, 123 S. Ct. 1140 (2003). We reasoned that because SORNA was not punitive as applied, the Ex Post Facto Clause had not been violated. *W.B.H.*, 664 F.3d at 860; *see also Smith*, 538 U.S. at 92–94, 123 S. Ct. at 1146–48. Sewell nevertheless argues *W.B.H.* was wrongly decided.

³ This portion of Sewell's appeal is not moot. Sewell is serving out his period of supervision, which includes the registration requirement. Finding that requirement unconstitutional would alter the condition of his supervised release, providing him with meaningful relief. *See Dawson*, 50 F.3d at 886 n.2, *Al-Arian*, 514 F.3d at 1189. We therefore have jurisdiction over this portion of Sewell's appeal.

Yet as Sewell admits, *W.B.H.* binds this Court under the prior precedent rule.⁴ *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (“[A] prior panel’s holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting *en banc*.”). Thus, we need not consider Sewell’s argument that *W.B.H.* was wrongly decided, and affirm this portion of his appeal.

DISMISSED IN PART, AFFIRMED IN PART.

⁴ We note that Sewell apparently includes this argument to “preserve the issue for review in case the Supreme Court, or this Court sitting *en banc*, later reconsiders its precedent.”