

No. 18-39

In the Supreme Court of the United States

JASON BOYD,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

*On Petition for a Writ of Certiorari to the
Court of Appeals of the State of Washington*

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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RESTATEMENT OF QUESTION PRESENTED

Washington's sex offender registration statutes require limited information about the offender. Since registration requires location information, regular in-person contacts were added if a person lacked a fixed address. Washington has not added other significant conditions. Other jurisdictions added conditions severely restricting where offenders can reside, requiring more information and precluding relief of the duty to register. Based upon the varying registration burdens, federal courts and state courts have issued varying decisions about whether these changes have resulted in ex post facto violations.

The Petitioner's first registration offense occurred prior to the addition of transient registration. However, multiple convictions occurred after the change, extending and renewing his registration obligations resulting in the present offense covered by the change in the law.

Given registration depends upon location information, is Washington's regular in-person reporting requirement for transients necessary for effective regulation?

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INTRODUCTION

The Petitioner claims a split of authority on the issue of whether “substantially similar registration statutes” are punitive. *See* Pet. I. 8-13. However, the registration requirements in these cases are not substantially similar to each other or Washington law. The federal case the Petitioner primarily cites included restrictive location conditions. In addition, the state cases cited involve individuals added lifetime registration and for which the state courts granted relief.

In contrast, the change in the Washington law that Petitioner claims was applied *ex post facto*, is the addition of in-person registration for transient offenders. The law was enacted following case law holding transients were not subject to registration due to a lack of residence. This change in the law occurred between the date of the petitioner’s offense and his conviction. The change makes the regulation effective.

In this case, that registration was not even applied *ex post facto*, making this a poor vehicle for addressing the question presented. The Petitioner was convicted of multiple felonies, extending his registration obligation under the law in question, which was in effect at the time of his later offense. These subsequent convictions, including failure to register charges that subjected him to the updated registration statute, cause the Petitioner’s conviction to be subject to in-person registration. In this circumstance, *ex post facto* concerns do not exist.

For these and other reasons detailed below, the petition should be denied

STATEMENT OF THE CASE

1. In 1999, Jayson¹ Boyd was convicted of Rape of Child in the Third Degree occurring February 20, 1998. At the time of the offense, the State of Washington required registration as a sex offender based upon the conviction. Wash. Rev. Code § 9A.44.130 (1) (1997), App. 1. Offenders were required to provide their name, address, date and place of birth, place of employment, crime of conviction, date and place of conviction, aliases used, and social security number. Wash. Rev. Code § 9A.44.130(2) (1997), App. 1. Registration was required for ten years following release from confinement. Wash. Rev. Code § 9A.44.140 (1)(c) (1997), App. 6-7. The ten-year period renewed upon conviction of new offenses. *Id.*, App. 7. No provision addressed registration for individuals who lacked a residence.

In 1999, prior to Boyd's conviction, the registration statute was amended to require sex offenders who lacked a fixed residence to register in-person, either monthly or weekly based on their individual risk assessment. Wash. Rev. Code § 9A.44.130(6)(b) (1999), App. 11.

¹ The State uses the first name, which has been used throughout pleadings below, both in this case and prior cases.

On March 30, 2001, Boyd was released from prison.²

Weekly in-person registration for all transients began in 2001. Wash. Rev. Code § 9A.44.130(6)(b) (2001).

2. Boyd was subsequently convicted of multiple felonies. Boyd was convicted of the felony of Assault in the Second Degree occurring April 12, 2002. Pl. Exh. 10 at page 2.³ 2/29/16 Report of Proceedings at page 52, App. 21, (Certified Copy of Judgment & Sentence in Skagit County Cause #12-1-00677-5). Boyd was convicted for Failure to Register as a transient occurring December 2, 2008. *Id.* Boyd was convicted of Malicious Mischief in the Second Degree, occurring March 31, 2009. *Id.*

On November 22, 2010, Boyd was convicted of Failure to Register occurring November 4, 2009. Pl. Exh. 10 at pages 1-2. The offense to which Boyd pled guilty involved moving from a fixed residence without notice.⁴

² The undersigned attorney located the date by reviewing the records of the Washington State Department of Corrections pertaining to Boyd's confinement.

³ See also 2/29/16 Report of Proceedings at page 52, (Certified Copy of Judgment & Sentence in Skagit County Cause #12-1-00677-5).

⁴ The public record consisting of the charging Affidavit filed on December 23, 2009, in Skagit County Superior Court cause #09-1-01015-2 described that Boyd had last registered with an address on August 18, 2009, subsequently moved from that address, and failed to register a new address.

Each of these convictions resulted in his registration period being extended for ten years. Wash. Rev. Code § 9A.44.140(1)(c) (1997), App. 7, Wash. Rev. Code § 9A.44.140(2) (2015), App 13.

His 2008 and 2009 convictions for Failure to Register were considered sex offenses at the time of conviction and required registration under the law in effect at that time. Wash. Rev. Code § 9A.44.130(10), (12) (2008), App. 15, Wash. Rev. Code § 9.94A.030(46)(a) (2008), App. 16.

3. In the present case, Boyd was tried and convicted for failure to register as a sex offender and bail jumping. *State v. Boyd*, 408 P.3d 362 (Wash. Ct. App. 2017).

At trial, the State called the registered sex offender coordinator from the Skagit County Sheriff's Office. 2/29/16 Report of Proceedings at page 26, App. 17. She identified Boyd, his prior convictions, the registration obligations, and Boyd's failure to appear over three weeks leading to the charge. 2/29/16 Report of Proceedings at pages 26, 30, 48-9, 52, App. 17-21. Boyd did not testify at trial, and no evidence was presented to the jury regarding any difficulties in registering as required over those three weeks or that registration caused any impact on his ability to obtain social services or employment.

4. Boyd raised the ex post facto violation at the Washington State Court of Appeals. *State v. Boyd*, 408 P.3d 362, 366 (Wash. Ct. App. 2017). The court evaluated whether the in-person registration requirements amounted to an affirmatively disability or restraint. The court noted that while transient

registration may be a burden, that did not by itself result in punishment. *Id.* at 368. “Notably, while Boyd failed to report several weeks, there is no evidence in the record that reporting in person weekly interfered with his ability to get a job, find housing, or travel.” *Id.*

5. The Washington State Supreme Court denied review. 414 P.3d 578 (Wash. 2018).

REASONS FOR DENYING THE PETITION

The Petitioner attempts to frame a split based upon the frequency of in-person registration. In-person registration is just one part in evaluating whether regulations constitute punishment, which in turn is just one part in considering whether a regulation causes an ex post facto violation. A review of the cases cited shows, different factors were considered by the courts and thus no such split of authority exists.

I. Federal court decisions differ on ex post facto claims based upon burdens imposed.

In evaluating whether registration obligations constituted punishment in *Smith v. Doe*, 538 U.S. 84 (2003), this Court used a two-part test: (1) Did the legislature intend to impose punishment? And (2), if not, is the statutory scheme “ ‘so punitive either in purpose or effect as to negate [the State's] intention’ to deem it ‘civil.’ ” *Id.* at 92. In determining whether

the effects are punitive, five “guideposts” were considered:

- (1) Does the law inflict what has been regarded in our history and traditions as punishment?
- (2) Does it impose an affirmative disability or restraint?
- (3) Does it promote the traditional aims of punishment?
- (4) Does it have a rational connection to a non-punitive purpose?
- (5) Is it excessive with respect to this purpose?

Smith, 538 U.S. at 97 (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963)). The Court’s discussion of the in-person reporting obligation in *Smith*, was considered as a part of question about whether registration caused an affirmative disability or restraint. *Smith*, 538 U.S. at 101. In evaluating that question, this Court noted registration was not similar to probation or supervised release and the offenders “are free to move where they wish and to live and work as other citizens, with no supervision.” *Id.* This Court held that registration requirements, which make a valid regulatory program effective, do not impose punitive restraints in violation of the Ex Post Facto Clause. *Smith*, 538 U.S. at 102.

A. Federal cases find in-person registration serves a remedial and non-punitive purpose and is not punishment.

Numerous Federal Circuit decisions have determined that in-person registration does not transform registration into punishment. *United States v. Parks*, 698 F.3d 1, 6 (1st Cir. 2012) (appearing in person “serves the remedial purpose of establishing that the individual is in the vicinity and not in some other jurisdiction where he may not have registered”); *Doe v. Cuomo*, 755 F.3d 105, 112 (2nd Cir. 2014) (a requirement of quarterly in-person reporting is not punitive); *United States v. Under Seal*, 709 F.3d 257, 265 (4th Cir.2013) (requirement “to appear periodically in person to verify his information and submit to a photograph, this is not an affirmative disability or restraint.” *Hatton v. Bonner*, 356 F.3d 955, 964 (9th Cir. 2003) (in-person reporting “is simply not enough to turn [the California statute] into an affirmative disability or restraint”); *Shaw v. Patton*, 823 F.3d 556, 564-6, 568 (10th Cir. 2016) (reporting requirements are not supervision in absence of a probation officer and conditions of supervision and are regulatory)⁵; *United States v. W.B.H.*, 664 F.3d 848, 855, 857–58 (11th Cir. 2011) (requirement of frequent,

⁵ The Petitioner cites to *Starkey v. Oklahoma Dep't of Corr.*, 305 P.3d 1004 (Okla. 2013) as disagreeing with *Shaw v. Patton*. *Starkey* involved an initial ten year registration period in Oklahoma following a deferred adjudication in Texas. The case involved a change which made the plaintiff subject to lifetime registration. *Id.* at 1010. The Oklahoma banned residing with two-thousand feet of schools, playgrounds, public parks and child care centers. *Id.* at 1023. It also prohibited residing with minor children. *Id.* The *Starkey* court decided the case on state constitutional grounds. *Id.* at 1030-1. *Shaw v. Patton* involved application of other registration conditions as applied. *Shaw v. Patton*, 823 F.3d at 560.

in-person reporting is “not enough” to change a statutory regime from civil and regulatory to criminal and punitive).

B. The Sixth Circuit decision *Does #1-5 v. Snyder* held residency restrictions had punitive effects.

The Petitioner relies extensively upon *Does #1-5 v. Snyder*, 834 F.3d 696 (6th Cir. 2016)⁶ to contend that in-person registration obligations are punitive. In *Does #1-5 v. Snyder*, six plaintiffs sued the governor of Michigan and the director of Michigan's state police contending added sex offender registration requirements constituted punishment.

The Court characterized the changes as “a byzantine code governing in minute detail the lives of the state’s sex offenders.” *Id.* at 697. The changes were an “aggressive tack in 2006,” adding extensive residency restrictions including “living, working, or ‘loitering’ within 1,000 feet of a school” and immediate in person reporting requirements for numerous daily events such as new vehicles or changes in “internet identifiers.” *Id.* at 698. Because registrants could not live, work, or loiter within 1000 feet of a school, they had trouble finding homes and jobs. *Id.* at 698.

The Sixth Circuit concluded that geographic restrictions were burdensome, resembled the traditional punishment of banishment, constituted an affirmative restraint, and were excessive in relation to the non-punitive purpose. *Id.* at 701–05. Although

⁶ Rehearing denied (Sept. 15, 2016), cert. denied sub nom. *Snyder v. John Does #s1-5*, 138 S. Ct. 55 (2017).

in-person reporting requirements were discussed, it was the geographic restriction that was held to be the most significant. This was because regulation of where registrants may live, work, and loiter “put significant restraints on how registrants may live their lives.” *Does #1-5 v. Snyder*, 834 F.3d at 703 (6th Cir. 2016). The decision in *Does #1-5 v. Snyder* did not hold that in-person reporting itself constitutes punishment.

Washington registration statutes contain no banishment provisions. They are not significantly similar to those considered in *Does #1-5 v. Snyder*. Thus, the primary conflict alleged by the Petitioner does not exist because the laws in question are so different.

II. Registration obligations differ such that there is no split among state courts on in-person registration meriting review.

A. Washington and other states hold in-person reporting with modest registration conditions and length are not punishment.

In the present case, and in *State v. Enquist*, 256 P.3d 1277, 1281 (Wash. Ct. App. 2011), the Washington Court of Appeals held that weekly in-person reporting for those lacking a fixed residence do not constitute punishment. In *Enquist*, the defendant testified that the weekly reporting was inconvenient. *Id.* at 1281. He admittedly relied on speculation that

his registration obligations interfered with his ability to hold a job he lost. *Id.* at 1279. The Washington statutes permit relief of the duty to register for lower level sex offenses, such as Boyd's, following an offense free period of ten years. Wash. Rev. Code § 9A.44.140(1)(c) (1997), App. 7, Wash. Rev. Code § 9A.44.140(3) (2015), App. 13.

In *Kammerer v. State*, 322 P.3d 827 (Wyo. 2014), the court evaluated whether reporting requirements were akin to supervised probation or parole and whether the in-person reporting requirements every three months and for any change in residence, vehicle, or employment caused an affirmative disability or restraint. *Id.* at 836. The court noted registrants were free to change residence or employment. *Id.* at 837. The court held the effect of registration was not an affirmative disability or restraint. *Id.* Wyoming applies the duration of registration for life but permits a petition to remove the duty to register in certain cases. *Id.* at 831.

B. The New Hampshire and Maine cases cited by the Petitioner involve greater restrictions which could never be removed.

In *Doe v. State*, 111 A.3d 1077 (N.H. 2015), the New Hampshire Supreme Court considered the addition of significant restrictions made permanent. Offenders had to provide electronic mail addresses, any internet messaging, chat, or other internet communication name identities; information about all places generally worked, any regular routes of travel; any professional licenses or certifications held;

registration of any vehicle owned or regularly driven, and the place or places where such vehicles were regularly kept; telephone numbers for both fixed location and cell phones; passport, travel, and immigration documents; and the name, address, and telephone number of any landlord, if the offender resided in rental property. *Id.* at 1086.⁷ Any change in this information had to be reported in-person within five days. *Id.* at 1088. The New Hampshire court noted other cases held in-person obligations were not an affirmative disability or restraint, when there was the ability to terminate registration.

This decreased the potential affirmative disability or restraint involved. *See also Letalien*, 985 A.2d at 18, n.9 (distinguishing cases that found the in-person requirement alone not to be punitive by noting that in many of those cases the laws “afforded offenders the opportunity to seek the early termination of the registration requirement.”). The petitioner in this case cannot ever seek termination of his registration requirements.

⁷ No such conditions were required under the Washington law in effect either at the time of the Petitioner’s conviction for failure to register or in 2015. Wash. Rev. Code § 9A.44.130 (2) (1997), App. 1, Wash. Rev. Code § 9A.44.130 (2015)(2)(a), App. 23.

Doe v. State, 111 A.3d at 1095 (N.H. 2015). The New Hampshire Court did not terminate the obligation to register but instead remanded the case for a hearing to determine whether the offender could demonstrate that he no longer posed a risk sufficient to justify continued registration. *Id.* at 1101.

In *State v. Letalien*, 985 A.2d 4 (Me. 2009), the Maine legislature had added quarterly registration for all offenses and extended the period of registration from fifteen years to life. *Id.* at 10. It was the inability to ever be relieved of the burden which the Court determined rendered the registration punitive.

Specifically, we hold that the retroactive application of the lifetime registration requirement and quarterly in-person verification procedures of SORNA of 1999 to offenders originally sentenced subject to SORA of 1991 and SORNA of 1995, without, at a minimum, affording those offenders any opportunity to ever be relieved of the duty as was permitted under those laws, is punitive.

State v. Letalien, 985 A.2d at 26 (Me. 2009). The *Letalien* court delayed issuance of the mandate to allow the legislature to address revisions. *Id.*

These courts granted a remedy either by addressing relief from registration or amendment of the statute to ameliorate ex post facto concerns.

In contrast to these states, Washington statutes provide automatic relief of the burden to register for after ten years offense free for individuals

convicted of offense such as the Petitioner's. Wash. Rev. Code § 9A.44.140(1)(c) (1997), App. 7, Wash. Rev. Code § 9A.44.140(2) (2015), App 13.

In short, the Petitioner's attempts to frame a split based upon in-person registration fails.

III. This case presents a poor vehicle because the Petitioner cannot show ex post facto application of the law.

A. The Petitioner's multiple felony convictions extended his initial registration requirements.

The Petitioner was first required to register due to his conviction for his sexual offense which occurred 1998. Wash. Rev. Code § 9A.44.130(1) (1997), App. 1. The registration obligation in effect at the time the Petitioner committed the offense provided for extension of registration upon new convictions. Wash. Rev. Code § 9A.44.140 (1)(c) (1997), App. 6-7.

Thus, the Petitioner's subsequent convictions in 2002, 2009, 2010, and 2013 each extended his registration obligation based upon the law in effect at the time he committed his initial offense.

As a result, the petitioner was then required to comply with the registration obligation that was in effect at time he committed each later offense.

B. The Petitioner's subsequent failure to register convictions

caused the updated registration statute to apply.

The Petitioner's initial year period registration period began from his initial release from confinement. Wash. Rev. Code § 9A.44.140(1)(c) (1997). App 6-7. The registration statute did not provide an option for those who lacked a fixed residence. After he committed the offense, but before his conviction in 1999, regular in-person reporting was required for those lacking a fixed residence. Wash. Rev. Code § 9A.44.130(3)(b), (4)(a)(vii) (1999). App 9-10.

The Petitioner was subsequently convicted of failure to register as a sex offender both in 2009 and 2010. At the time he committed both offenses each separately required registration. Wash. Rev. Code § 9A.44.140(1)(c) (1997), App. 7. Thus, the petitioner was subject to the in person registration obligations that applied at the time he committed the offenses in 2009 and 2010.

The changes in the registration laws were not imposed on Petitioner after the fact, but rather as a result of his multiple continuing criminal convictions. Thus, the question of whether the registration is punitive for purposes of ex post facto protections should not even be reached by this Court

IV. The state court decision is correct because the requirement of in-person reporting for transient offenders furthers the regulation.

The Washington courts recognized that registration obligations by residence could not be applied to individuals who lacked a residence. *State v. Pickett*, 975 P.2d 584, 587 (Wash. Ct. App. 1999). “The objective of registration is to allow law enforcement to remain aware of the residence of sex offenders for reasons of public notification. The statute fails however to require an offender to maintain a residence address.” *Id.* The court recognized that the legislature must resolve the situation. *Id.*

In response, the legislature required in-person registration for homeless individuals on a monthly or weekly basis depending on risk. Wash. Rev. Code § 9A.44.130 (6)(b) (1999), App. 11. While doing so, the legislature did not increase other information required. Wash. Rev. Code § 9A.44.130(3)(b) (1999), App. 9, compare, Wash. Rev. Code § 9A.44.130(2) (1997), App. 1 and Wash. Rev. Code § 9A.44.130(2)(a) (2015), App. 23.

The method and frequency of transient offenders differs from others. Registration, which involves gathering information of the location of a person subject to regulation, is defeated if a person can avoid registration due to being transient. “It suffices to say the registration requirements make a valid regulatory program effective and do not impose punitive restraints in violation of the Ex Post Facto Clause.” *Smith v. Doe*, 538 U.S. at 102.

V. CONCLUSION

In sum, there is no conflict among federal and state decisions based upon the frequency of in-person

reporting as claimed by the Petition. The differing decisions arise from the level of restrictions in certain state statutes and the ability to be relieved of the burden.

This is also a poor vehicle for the Court to address the question presented, because there is no need to actually reach whether there is an ex facto violation. The Petitioner's subsequent convictions with both extended his registration requirements. This precludes his ability to establish an ex post fact violation.

Moreover, the Washington statute requires the minimum information required to make a meaningful registration. In-person registration for transients provides location information necessary for the regulation.

The petition should be denied.

Respectfully submitted,

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