

**YOU DO THE CRIME, YOU DO DOUBLE THE TIME? THE SEX
OFFENDER REGISTRATION AND NOTIFICATION ACT DOES
NOT CONSTITUTE EX POST FACTO PUNISHMENT: *UNITED
STATES V. YOUNG*, NO. 08-51047, 2009 WL 3192872
(5TH CIR. OCT. 7, 2009)**

Highlight

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In *United States v. Young*, appellant Norman Lamar Young appealed his conviction under 18 U.S.C. § 2250(a) “for traveling in interstate commerce and knowingly failing to update his registration information as required by the Sex Offender Registration and Notification Act (SORNA).”¹ Congress enacted SORNA to establish a “comprehensive national system for the registration of [sex] offenders.”² SORNA requires sex offenders to register “in each jurisdiction in which they reside or work” and criminalizes the act of traveling in interstate commerce and knowingly failing to register or update a registration.³

On appeal, Young argued that SORNA violated his constitutional rights by allowing ex post facto punishment.⁴ The ex post facto punishment provisions of the Constitution prohibit any law that “imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment” for a prior crime.⁵ Young challenged SORNA by arguing first, that sanctioning the act of traveling interstate and knowingly failing to register retroactively punished Young and second, that requiring registration as a sex offender increased the punishment for appellant’s prior crime by causing “inconvenience and embarrassment.”⁶ Both arguments were a matter of first impression for the Fifth Circuit Court of Appeals.⁷

The court first evaluated Young’s argument regarding the sanctioning provision.⁸ The court stated that, while the sanctioning provision related to Young’s prior conviction, the act that the sanctioning provision sought to punish was Young’s current conduct (traveling interstate and knowingly

¹ *United States v. Young*, No. 08-51047, 2009 WL 3192872, at *1 (5th Cir. Oct. 7, 2009).

² *Id.* (quoting 42 U.S.C. § 16901).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at *2 (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-26 (1867)).

⁶ *Id.* at *2, 3.

⁷ *Id.* at *2.

⁸ *See id.*

failing to register).⁹ Because a law must seek to punish events occurring before its enactment in order to fall within ex post facto punishment, the court held that the sanctioning provision of SORNA did not violate Young's constitutional rights.¹⁰

The court then looked at Young's argument regarding the registration provision.¹¹ The court, adopting the reasoning of the Supreme Court, stated that an act that requires registration as a sex offender could be considered additional punishment only if the legislature intended to impose punishment, rather than merely to "establish civil proceedings," or if the statute was "so punitive either in purpose or effect as to negate" the intent to establish civil proceedings.¹² The court looked at SORNA and determined that Congress lacked intent to punish because Congress designed the registration requirement to protect the public (a civil remedy) and not to further punish sex offenders.¹³ The court then looked at the punitive purpose and effect of SORNA and determined that the differences in SORNA from that of the statute in the Supreme Court case were not sufficient to constitute a punitive purpose.¹⁴ The court briefly addressed the punitive effect of SORNA, holding that to argue that the effect is "so punitive as to make it not a civil scheme . . . would [be] futile."¹⁵ The court thus held that SORNA's requirement to register as a sex offender did not constitute increased punishment for ex post facto purposes.¹⁶

The court accurately interpreted both SORNA and constitutional law. The constitutional protections against ex post facto punishment are designed to either protect a defendant from being punished for conduct that was legal at the time or from receiving increased punishment for an already-punished prior crime—both of which protect a defendant against something similar to double jeopardy.¹⁷ In contrast, the sanctions provision of SORNA punishes only new crimes (failing to register) that occur after the law was enacted, and the registration provision of SORNA is not an actual punishment to the defendant, but rather a method of attempting to protect the public.¹⁸ While the defendant may suffer embarrassment or inconvenience due to the registration provision, such "harm" is not comparable to other traditionally accepted forms of punishment such as incarceration and probation. Further, to interpret mere embarrassment and inconvenience as forms of "punishment" could create a slippery slope for future claims and could substantially limit Congress' ability to pass useful legislation.

Ultimately, the Fifth Circuit Court joined other Circuits and the

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See id.* at *3.

¹² *Id.*; *Smith v. Doe*, 538 U.S. 84, 92 (2003).

¹³ *See Young*, No. 08-51047, 2009 WL 3192872, at *3.

¹⁴ *See id.* at *3-4; *Smith*, 538 U.S. at 92.

¹⁵ *Id.* at *4.

¹⁶ *See id.* at *4-5.

¹⁷ *See id.* at *2.

¹⁸ *See id.* at *3-5.

Supreme Court in holding that SORNA's provisions requiring registration as a sex offender and sanctioning the failure to register do not constitute ex post facto punishment.¹⁹ Texas attorneys appealing their client's failure to register as a sex offender will have to find a basis other than an ex post facto argument. This decision places the Fifth Circuit in line with other courts on this issue and notifies practicing attorneys of the current state of the law following *United States v. Young* with regard to SORNA and ex post facto punishment.

¹⁹ *See id.* at *4-5.