

Seventh Circuit Court of Appeals Overturns Previous Victory

written by Larry Neely | August 25, 2021



By Larry . . . NARSOL previously reported on the case of [*Brian Hope v. Commissioner of Indiana Department of Correction*](#), which was favorably decided by a three-judge panel back in January. Unfortunately, the Seventh Circuit granted Indiana's request for en banc review, and the full court has now turned that victory into a defeat.

Trial Court History

United States District Court judge Richard Young, who serves in the Southern District of Indiana, handed down a fantastic decision back in 2019. We said at the time that the decision had the potential to help many similarly situated offenders who were: (1) convicted in other states and moved to Indiana; or (2) convicted in Indiana, moved away and returned again.

The case was brought on behalf of six named plaintiffs who asserted that the imposition of Indiana's SORA is

unconstitutional as applied to them. Plaintiffs Hope and Snider filed their joint complaint on October 21; Standish joined the case later in 2016. Plaintiffs Rice, Bash, and Rush filed a complaint on December 6, 2017. The court ultimately consolidated the cases. Plaintiffs sought a preliminary injunction which was granted. All but one of the six committed their offense prior to the enactment of Indiana's registration, and five of the six committed their offense in other states and subsequently moved to Indiana.

Plaintiffs argued that Indiana's SORA violates their fundamental right to travel, their right to equal protection of the laws, and their right to be free from retroactive punishment. The court examined two important cases. First, the court looked at *Smith v. Doe*, 538 U.S. 84 (2003) which is the landmark case from the U.S. Supreme Court. The court found the case distinguishable because none of the disabilities imposed by Indiana's scheme were required by Alaska. Second and more relevant was the case of *Wallace v. State*, 905 N.E.2d 371 (2009). In Wallace, the offense was committed in 1988; he pled guilty in 1989 and completed probation in 1992. After he failed to register in 2003, a jury found him guilty. He appealed and prevailed.

The court rejected all of Indiana's arguments, and they did put forth some interesting theories. NARSOL said at the time, "The judge's legal analysis is one of the best I've ever seen written, which will make it extremely difficult for the Seventh Circuit to reverse."

Initial Seventh Circuit Decision

Appellate courts typically decide appeals by having the case reviewed by a three-judge panel. [The three-judge panel did affirm Judge Young.](#)

None of the challengers would have been required to register if they: (1) had not moved out of Indiana and returned after

2006; or (2) had not moved into Indiana after 2006. It was in 2006 that the Indiana law was amended to include the requirement that forced a person to register if they relocated to Indiana and had a registration obligation in that state, regardless of whether it is equivalent to an Indiana offense.

All six of the plaintiffs were required to register in Indiana based on a determination by the Indiana Department of Corrections (DOC) and local sheriff's departments that they had committed a registrable offense or the out-of-state equivalent to such an offense and that they had been required to register in another jurisdiction. Indiana would not have required them to register on these grounds had they been living in the State at the time they committed their offenses and remained there continuously thereafter.

The Seventh Circuit's initial decision relying on a *Wallace v. State*, 905 N.E.2d 371, 379 (Ind. 2009) recognized that registration requires more than simply appearing at the sheriff's office. The person registering must be photographed and provide information including their name, date of birth, race, height, weight, hair color, eye color, identifying features such as scars and tattoos, social security number, driver's license or state identification card number, vehicle description and license plate number of any vehicle the registrant might operate regularly, principal address, name and address of any employer or educational institution, any electronic mail addresses, any instant messaging user names, any social networking website user name and "[a]ny other information required by the [Department of Corrections (DOC)]." Ind. Code § 11-8-8-8(a). Most of this information is published on the public registry. If any of this information changes, the registrant must go in person to the sheriff's office, within seventy-two hours, to report it. Ind. Code. § 11-8-8-8(c). Convicted sex offenders are required to maintain a valid driver's license or state identification card, are prohibited from seeking a name change, and must allow a local

law enforcement officer to visit their home at least once per year, and at least once every ninety days if the offender is a “sexually violent predator.” Ind. Code § 11-8-8-13(a).

In *Wallace v. State*, the Indiana Supreme Court concluded, “. . . the Act imposes significant affirmative obligations and a severe stigma on every person to whom it applies. ... [and the] duties imposed on offenders are significant and intrusive.” See *Wallace v. State*, 905 N.E.2d 371, 379 (Ind. 2009). As a result, the Indiana Supreme Court concluded that the Act had the “. . . effect of adding punishment beyond that which could have been imposed when his crime was committed,” and therefore the State could not impose the requirements of SORA on anyone whose offense predated the enactment of that statute. *Id.* at 384. To do so, it held, would violate the ex post facto clause of the Indiana Constitution. *Id.* As a result, Indiana does not require any person to register if the offense occurred prior to SORA— provided that person remains a resident of Indiana. This Seventh Circuit decision held that this different treatment “sets up the very sort of multi-tiered state citizenship that the Supreme Court’s right-to-travel cases prohibit.” *Original Opinion* at 26.

[Recent Seventh Circuit Decision](#)

The Seventh Circuit was very creative in how it managed to undo the previous victory. Judge St. Eve writing for the court noted that Wallace did not foreclose all retroactive applications of SORA because the same day that the state supreme court decided Wallace, it issued its opinion in *Jensen v. State*, 905 N.E.2d at 388. Unlike Wallace, Jensen pleaded guilty in 2000 which was after SORA’s enactment. At the time of Jensen’s conviction, SORA required that he register as a sex offender for ten years. Before the expiration of Jensen’s ten-year registration requirement, the Indiana General Assembly amended SORA to mandate that offenders like him register for life. He argued that this extension as applied to him violated Indiana’s Ex Post Facto Clause. Unfortunately,

the Indiana Supreme Court disagreed. This is in contrast to Wallace, who had no obligations before the legislature amended SORA to cover him. The court said that the broad and sweeping disclosure requirements were in place and applied to Jensen at the time of his guilty plea in January 2000. Nothing in that regard was changed by the 2006 amendments. They found that merely increasing the length of an existing registration obligation did not rise to the level of punishment such that it violated the Indiana Constitution.

This case was decided in favor of Indiana based on the fact that these challengers were either required to register by another state or that the person was already required to register due to a previously existing registration requirement. They found that any increase of an existing registration requirement is not unconstitutional. On page 32 of the decision the court stated, "The plaintiffs have not carried their heavy burden of proving that SORA is so punitive in effect as to override the Indiana legislature's intent to enact a civil law."

It appears that the Seventh Circuit disregarded Judge Young's analysis and simply deferred to the Legislature's stated intent, which they say is not punitive. The court did concede, "While SORA goes farther than the Alaska law in some respects, it is not so far afield as to warrant a different outcome than in Smith." See *Opinion* at 32. NARSOL is deeply disappointed that the decision of the full court was to not affirm the three-judge panel. We are not sure if the challengers will seek review by the United States Supreme Court.

This was discussed in more detail on [Episode 190 of the Registry Matters Podcast](#).