

# IN Court of Appeals hands down disappointing decision

written by Larry Neely | May 26, 2022



By Larry . . . The case of [Tracey William Crowley v. the State of Indiana](#) was just handed down by the Indiana Court of Appeals. We are disappointed. The issue before the court was whether Crowley's 1988 Michigan conviction triggers a duty to register in Indiana. The Court concluded that it does. Tracey William Crowley was previously convicted in Michigan of a felony sexual offense and registered in Indiana in 2004. He appealed the trial court's denial of his petition for removal from Indiana's registry pursuant to Ind. Code § 11-8-8-22.

The underlying conduct occurred back in 1988 when Crowley was twenty years old. He was convicted in Michigan before the registry existed in either Michigan or Indiana. He asserted that Indiana's registration laws as applied to him violate Indiana's ex post facto clause because a registry did not exist at the time of his conviction. According to the court, the most relevant to their determination was that the Sex Offender Registry Act (SORA) was amended in 2006 to define a sex offender to include a person who is required to register

in any jurisdiction. See I.C. § 11-8-8-4.5(b)(1); see also I.C. § 11-8-8-5(b)(1). And in 2007 SORA was amended to provide that a person who is required to register in any jurisdiction shall register in Indiana for the period required by the other jurisdiction or the period described in this section, whichever is longer. See I.C. § 11-8-8-19(f). Their explanation is that the law is the law.

It is noteworthy that the Indiana Supreme Court was one of the first courts to find problems with applying registration requirements retroactively. They first ruled against the state in *Wallace v. State*, 905 N.E.2d 371 back in 2009 and again in *Gonzalez v. State*, 980 N.E.2d 312 decided in 2013. In *Wallace*, an offender who had pled guilty in 1989 and completed his sentence and probation in 1992 – two years prior to the enactment of Indiana’s SORA in 1994 – argued that the Act as applied to him violated Indiana’s ex post facto clause. The *Wallace* Court held that Richard Wallace was charged, convicted, and served the sentence for his crime before the statutes collectively referred to as the Indiana Sex Offender Registration Act were enacted. They stated, “We conclude that as applied to Wallace, the Act violates the prohibition on ex post facto laws contained in the Indiana Constitution because it imposes burdens that have the effect of adding punishment beyond that which could have been imposed when his crime was committed.” See *Wallace v. State*, 905 N.E.2d at 384.

In this case, Crowley’s offense occurred before the creation of the registry in Michigan or Indiana. The State moved to dismiss or deny Crowley’s petition, arguing that application of the relevant registration laws, and in particular the “other jurisdiction” requirement, to Crowley does not constitute ex post facto punishment. The State relied in large part on a pair of Indiana Supreme Court decisions. *Tyson v. State*, 51 N.E.3d 88 (2016), and *State v. Zerbe*, 50 N.E.3d 368 (2016), which challenged the retroactive application of the Act’s 2006-07 “other jurisdiction” requirement that a person

with an out-of-state registration requirement must register in Indiana upon arrival. The Court in both of those cases concluded that the effect of registering in Indiana upon moving here was, effectively, maintaining an out-of-state registration and thus not punitive, regardless of when or where the registrable crime had been committed. The Zerbe Court explained, "it is not Zerbe's crime that triggers his obligation to register as a sex offender in Indiana; rather it is his Michigan registry requirement that does so." See ***State v. Zerbe***, 50 N.E.3d at 370.

In ***Hope v. Commissioner of Indiana Department of Correction***, the Seventh Circuit Court of Appeals addressed claims by six registrants who relocated to Indiana. They filed for declaratory and injunctive relief, arguing that Indiana's SORA violates their right to travel under the Privileges or Immunities Clause, their right to equal protection under the Fourteenth Amendment, and the prohibition on ex post facto laws in the United States Constitution. The District Court granted relief to plaintiff-offenders on all claims, enjoining Indiana from requiring them to register, and the State appealed. Like Crowley, at least one offender had a registry obligation in another state but moved to Indiana before the 2006-07 "other jurisdiction" amendments. Ultimately, a divided panel of the Seventh Circuit Court of Appeals concluded that *Wallace* prevents the State from requiring a new resident to register under the "other jurisdiction" provisions of the Act if the new resident committed the crime before Indiana adopted the other jurisdiction requirements in 2006-07. On rehearing en banc, the Seventh Circuit, in a divided opinion, reversed the victory. See ***Hope v. Comm'r of Ind. Dept. of Correction***, 9 F.4th 513, 519 (7th Cir. 2021) (Hope II). The Hope II Court acknowledged that under *Wallace*, if an offender was under no registration requirement prior to SORA's passage, imposing a registration requirement in the first instance is impermissibly punitive. However, if another state previously subjected a pre-SORA offender to a registration requirement,

requiring him to register in Indiana is not punitive. Indiana case law thus has the peculiar effect of permitting the State to treat similarly situated offenders differently based solely on whether an offender had an out-of-state registration obligation when they arrived.

This decision is unfortunate; however, it does not preclude future litigation. Crowley could appeal to the Indiana Supreme Court. In addition, there could be other challengers who might raise issues that were not litigated in Crowley's removal petition.