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THE DANGER IN NEW MEXICO'S METHOD OF DECIDING WHETHER AN OUT-OF-STATE CONVICTION IS A REGISTRABLE SEX OFFENSE

Sam Ashman*

ABSTRACT

*Plea offers present criminal defendants with the option of acquiescing to specific punitive or rehabilitative measures rather than allowing judges and juries to determine those measures at trial. Defendants often accept plea offers over going to trial because a plea agreement provides the comfort of knowing what consequences to expect. However, in cases involving sexual misconduct, it is more difficult to anticipate the consequences of plea agreements. All fifty states maintain sex-offender registries with varying criteria for when a resident must register. In 2013, the New Mexico Supreme Court decided *State v. Hall* and held that it may be necessary for courts to examine the facts supporting residents' out-of-state convictions when deciding whether New Mexico law requires those residents to register as sex offenders. The decision in *Hall* makes it possible for New Mexico to require new residents to register as sex offenders even when they did not know that their pleas could have had such consequences. This Note argues that New Mexico courts should not engage in a fact-specific inquiry when deciding whether an out-of-state conviction is a registrable sex offense because doing so offends an interest in protecting the voluntariness of defendants' pleas. Instead, this Note suggests that courts should defer to other states' decisions as to whether a particular crime was a registrable sex offense.*

INTRODUCTION

When negotiating a plea bargain, how much thought should defense attorneys give to the civil consequences of conviction? In cases involving sexual misconduct, when should defense counsel advise the client of the civil sanction of registering as a sex offender, and of what should that advice consist?

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Suppose Jones pleads guilty to indecent exposure in violation of section 30-9-14 of the New Mexico Criminal Code,¹ a misdemeanor that does not require registration as a sex offender in New Mexico.² Should Jones's lawyer advise him of the possibility that another state may require him to register as a sex offender upon moving there? Suppose further that, years later, Jones decides to move to North Dakota. After some time, he receives notice that he must register as a sex offender because of his conviction in New Mexico.³ If Jones's attorney did not inform him that North Dakota, among several other states, treats indecent exposure as a registrable sex offense,⁴ can Jones withdraw his guilty plea in the New Mexico case on a theory of ineffective assistance of counsel?

This Note demonstrates a problem with New Mexico's method of determining whether an out-of-state conviction is a registrable sex offense. Part I explains the motivations behind New Mexico's Sex Offender Registration and Notification Act (SORNA) and the New Mexico Supreme Court case *State v. Hall*, which promulgated a fact-intensive inquiry for determining whether an out-of-state crime is a SORNA offense.⁵ Part II discusses the duties of criminal defense attorneys regarding SORNA by comparison to the duty to advise clients of the immigration consequences of conviction. In New Mexico, defense counsel has an affirmative duty to advise clients about SORNA in cases where registration is a near-certain consequence of a plea of guilty or no contest.⁶ Reasoning from the New Mexico standard for effective assistance of counsel, Part III illustrates how claims of ineffective assistance of counsel become viable when states determine that out-of-state crimes are registrable sex offenses based on the crimes' underlying facts. The Note concludes by positing a two-step inquiry to replace the fact-specific inquiry promulgated in *Hall*.

I. BACKGROUND

In 1994, Jesse Timmendequas raped and killed seven-year-old Megan Kanka in the neighborhood they shared in Hamilton Township, New Jersey.⁷ Timmendequas had previously served time in prison for sexual assault, and the case inspired outrage at the notion that Megan's family did not have notice of Timmendequas's criminal history.⁸ The New Jersey Legislature was quick to respond with Megan's Law, establishing a framework for sex-offender registration and community notification within the State.⁹ Soon after, the federal government

1. N.M. STAT. ANN. § 30-9-14 (2018).

2. See N.M. STAT. ANN. § 29-11A-3 (2013).

3. Cf. *Denault v. State*, 2017 ND 167, ¶ 2, 898 N.W.2d 452, 454.

4. E.g., N.D. CENT. CODE ANN. § 12.1-32-15(1)(g) (West 2008) (including the state's indecent exposure statute, section 12.1-20-12.1, among the enumerated offenses in the definition of "sexual offender").

5. *State v. Hall*, 2013-NMSC-001, ¶¶ 18, 30, 294 P.3d 1235.

6. *State v. Edwards*, 2007-NMCA-043, ¶ 31, 157 P.3d 56.

7. See generally *State v. Timmendequas*, 737 A.2d 55 (N.J. 1999).

8. Jan Hoffman, *New Law is Urged on Freed Sex Offenders*, N.Y. TIMES (Aug. 4, 1994), <https://www.nytimes.com/1994/08/04/nyregion/new-law-is-urged-on-freed-sex-offenders.html>.

9. Megan's Law, 1994 N.J. Sess. Law Serv. 133 (West) (codified as amended at N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 2015)).

conditioned states' receipt of some federal crime-prevention funding on states instituting a system like that in New Jersey.¹⁰

The New Mexico Legislature responded in 1995 by passing the first iteration of SORNA.¹¹ The Act imposes a duty on sex offenders to register with the sheriff in the county where they reside¹² and declares that the New Mexico Department of Public Safety shall maintain a website for public access to information on sex offenders living in the state.¹³ New Mexico courts have upheld SORNA under both state and federal constitutional scrutiny.¹⁴ In *State v. Druktenis*, the New Mexico Court of Appeals held that SORNA was not an ex post facto law,¹⁵ and that it did not violate the defendant's substantive or procedural due process rights under rational-basis scrutiny.¹⁶ Moreover, the court construed SORNA as a "civil, remedial, regulatory, nonpunitive law."¹⁷ Therefore, as a nonpunitive law, SORNA does not implicate the U.S. Constitution's procedural protections for criminal defendants.

SORNA requires registration of any "sex offender,"¹⁸ defined as a person convicted of any one of twelve enumerated offenses, or an attempt to commit one of the first eleven.¹⁹ Additionally, SORNA requires registration of any person convicted of a crime in another jurisdiction that is "equivalent" to any one of New Mexico's enumerated sex offenses.²⁰ Every state provides a means of comparing other states' crimes to its own for the purpose of determining whether a foreign conviction is a registrable sex offense.²¹ Statutes in California and Wyoming explicitly provide that

10. Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, Pub. L. No. 103-322, § 170101, 108 Stat. 1796, 2038-42 (1994), amended by Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345 (1996) (codified as amended at 34 U.S.C. §§ 20901-20962).

11. Sex Offender Registration Act, 1995 N.M. Laws 106 (codified as amended at N.M. STAT. ANN. § 29-11A (2013)).

12. N.M. STAT. ANN. § 29-11A-4(B) (2013).

13. N.M. STAT. ANN. § 29-11A-5.1(E) (2013).

14. *State v. Druktenis*, 2004-NMCA-032, ¶¶ 37-38, 86 P.3d 1050.

15. *Id.*

16. *Id.* ¶ 116.

17. *Id.* ¶ 32.

18. N.M. STAT. ANN. § 29-11A-4(A) (2013).

19. *Id.* § 29-11A-3(H)-(I).

20. *Id.* § 29-11A-3(I).

21. *E.g.*, N.J. STAT. ANN. § 2C:7-2(b)(3) (West 2015) (treating as registrable any out-of-state offenses that are "similar" to New Jersey's enumerated sex offenses); KAN. STAT. ANN. § 22-4902(b)(7) (West 2017) (treating "comparable" offenses as registrable); MASS. GEN. LAWS ANN. ch. 6, § 178C (West 2016) (treating "like violations" as registrable); MONT. CODE ANN. § 46-23-502(9)(b) (West 2009) (treating "reasonably equivalent" offenses as registrable); IND. CODE ANN. § 11-8-8-4.5(a)(22) (West 2016) (treating "substantially equivalent" offenses as registrable); MICH. COMP. LAWS ANN. § 28.722(w)(viii) (West 2012) (treating "substantially similar" offenses as registrable); *see also* ALA. CODE § 15-20A-5(35) (2018); ALASKA STAT. § 12.63.100(6) (2019); ARIZ. REV. STAT. ANN. § 13-3821(A) (2010); ARK. CODE ANN. § 12-12-903(13)(A)(iii) (2019); CAL. PENAL CODE § 290.005(a) (West 2018); COLO. REV. STAT. ANN. § 16-22-103(1)(b) (West 2016); CONN. GEN. STAT. ANN. § 54-253(a) (West 2009); DEL. CODE ANN. tit. 11, § 4121(a)(4)(c) (2019); FLA. STAT. ANN. § 943.0435(1)(h)(1)(a)(I) (West 2015); GA. CODE ANN. § 42-1-12(a)(20)(B) (2019); HAW. REV. STAT. ANN. § 846E-1 (West 2008); IDAHO CODE § 18-8304(1)(b)-(c) (2019); 730 ILL. COMP. STAT. 150/2(C) (2016); IOWA CODE ANN. § 692A.101(27) (West 2016); KY. REV. STAT. ANN. § 17.500(8)(c) (West 2010); LA. STAT. ANN. § 15:541(24)(a) (2012); ME. REV. STAT. ANN. tit. 34-A, § 11203(6)(C) (2010); MD. CODE ANN., CRIM. PROC. § 11-701(l)(2) (West 2011); MINN. STAT. ANN. § 243.166, subdiv. 1b(a)(4) (West 2010); MISS. CODE ANN. § 45-33-23(h)(xxi)

the facts underlying the foreign conviction may determine whether the crime is equivalent to one of the state's registrable sex offenses.²² In several other states, including New Mexico, courts have reasoned it appropriate to consider the facts in determining whether a foreign conviction equates to one of the reviewing state's registrable sex offenses.²³

a. The case: *State v. Hall*.

In *State v. Hall*, the defendant, while living in California, pleaded guilty to “annoying or molesting a child younger than eighteen” in violation of section 647.6(a)(1) of the California Penal Code.²⁴ “Annoying or molesting a child younger than eighteen” is an enumerated sex offense in California,²⁵ so the defendant had to register as a sex offender as a result of pleading guilty.²⁶ The defendant moved to New Mexico in 2006.²⁷ SORNA provides that a sex offender who changes residence to New Mexico must register with the county sheriff within five days of arrival.²⁸

(2019); MO. ANN. STAT. § 589.400(1)(7) (West 2018); NEB. REV. STAT. ANN. § 29-4003(1)(a)(ii), (b)(ii) (West 2016); NEV. REV. STAT. ANN. § 179D.097(1)(u) (West 2015); N.H. REV. STAT. ANN. § 651-B:1(V)(b) (2018); N.M. STAT. ANN. § 29-11A-3(I) (2013); N.Y. CORRECT. LAW § 168-a(2)(d) (McKinney 2014); N.C. GEN. STAT. ANN. § 14-208.6(4)(b) (West 2014); N.D. CENT. CODE ANN. § 12.1-32-15(1)(g) (West 2008); OHIO REV. CODE ANN. § 2950.01(A)(12) (West 2006); OKLA. STAT. ANN. tit. 57, § 582(B) (West 2017); OR. REV. STAT. ANN. § 163A.005(6)(c) (West 2015); 42 PA. STAT. AND CONS. STAT. ANN. § 9799.14(b)(21), (c)(17), (d)(13) (West 2014); 11 R.I. GEN. LAWS § 11-37.1-2(k) (2019); S.C. CODE ANN. § 23-3-430(A) (2007); S.D. CODIFIED LAWS § 22-24B-1(16) (2019); TENN. CODE ANN. § 40-39-202(19) (2019); TEX. CODE CRIM. PROC. ANN. art. 62.001(5)(H) (West 2018); UTAH CODE ANN. § 77-41-102(17)(b), (d) (West 2017); VT. STAT. ANN. tit. 13, § 5401(10)(C) (2019); VA. CODE ANN. § 9.1-902(A)(5) (West 2011); WASH. REV. CODE ANN. § 9.94A.030(47)(d) (West 2010); W. VA. CODE ANN. § 15-12-2(b) (West 2002); WIS. STAT. ANN. § 301.45(1d)(am) (West 2010); WYO. STAT. ANN. § 7-19-301(a)(viii)(B) (2019).

22. CAL. PENAL CODE § 290.005(a) (West 2018) (treating out-of-state convictions as registrable “based on the elements of the convicted offense or facts admitted by the person or found true by the trier of fact”); WYO. STAT. ANN. § 7-19-301(a)(viii)(B) (2019) (treating as registrable any out-of-state convictions “containing the same or similar elements, or arising out of the same or similar facts or circumstances” as criminalized by a Wyoming sex offense).

23. *E.g.*, *State v. Hall*, 2013-NMSC-001, ¶ 18, 294 P.3d 1235 (“To determine equivalence, courts must look beyond the elements of the conviction to the defendant’s actual conduct.”); *North v. Bd. of Exam’rs of Sex Offenders*, 871 N.E.2d 1133, 1139 (N.Y. 2007) (“In circumstances where the offenses overlap but the foreign offense also criminalizes conduct not covered under the New York offense, the Board must review the conduct underlying the foreign conviction to determine if that conduct is, in fact, within the scope of the New York offense.”); *State v. Lloyd*, 132 Ohio St. 3d 135, 2012-Ohio-2015, 970 N.E.2d 870, at ¶ 31 (“If the out-of-state statute defines the offense in such a way that the court cannot discern from a comparison of the statutes whether the offenses are substantially equivalent, a court may go beyond the statutes and rely on a limited portion of the record in a narrow class of cases where the factfinder was required to find all the elements essential to a conviction under the listed Ohio statute.”); *State v. Howe*, 212 P.3d 565, 567 (Wash. Ct. App. 2009) (quoting *State v. Morley*, 952 P.2d 167, 175–76 (Wash. 1998)) (“[I]f the elements are not identical, or the foreign statute is broader than the Washington definition of the particular crime,” then, as a second step, the trial court may examine the facts of the out-of-state crime.”).

24. *Hall*, 2013-NMSC-001, ¶ 2; CAL. PENAL CODE § 647.6(a)(1) (West 2018).

25. CAL. PENAL CODE § 290(c) (West 2018).

26. *Hall*, 2013-NMSC-001, ¶ 2.

27. *Id.*

28. N.M. STAT. ANN. § 29-11A-4(B) (2013).

The defendant failed to do so, and, in 2008, the state charged him for failing to register as a sex offender.²⁹

The defendant entered a conditional guilty plea on the charge of failure to register as a sex offender, preserving the opportunity to appeal the finding that his California conviction was a registrable sex offense in New Mexico.³⁰ The New Mexico Court of Appeals compared California's annoying-or-molesting-a-child-younger-than-eighteen statute to New Mexico's criminal-contact-of-a-minor statute and held that the two crimes were not equivalent, reasoning that they had different elements.³¹ The court of appeals thus held that New Mexico's laws did not require that the defendant register as a sex offender.³²

On writ of certiorari, the attorney general argued that the New Mexico Supreme Court should consider the conduct underlying the defendant's California conviction to determine whether his crime was equivalent to the New Mexico crime of criminal contact of a minor.³³ The court agreed with the attorney general and reversed the decision of the court of appeals.³⁴ The New Mexico Supreme Court held that "courts must look beyond the elements" of the out-of-state crime and consider the defendant's actual conduct in determining whether a foreign conviction is equivalent to one of New Mexico's enumerated sex offenses.³⁵ The court reasoned that it owed broad construction to SORNA to help facilitate the Act's remedial purpose.³⁶

Hall established a two-step inquiry for determining whether a foreign conviction is a registrable sex offense in New Mexico.³⁷ Courts must first compare the elements of the foreign crime to those of the nearest New Mexico sex offense.³⁸ If the elements are the same, then the defendant must register as a sex offender.³⁹ When the elements are not the same, courts should proceed to the second step of the inquiry and analyze whether the defendant's conduct would have satisfied the elements of a New Mexico sex offense, had the conduct occurred in New Mexico.⁴⁰

Applying its new analysis, the court held that the record was insufficient to determine whether the defendant's conduct satisfied the elements of the New Mexico crime of criminal contact of a minor.⁴¹ The court thus granted the defendant leave to withdraw his guilty plea on the charge of failure to register as a sex offender.⁴²

29. *Hall*, 2013-NMSC-001, ¶ 3.

30. *Id.* ¶ 4.

31. *Id.* ¶ 5.

32. *Id.*

33. *Id.* ¶ 8.

34. *Id.* ¶ 18.

35. *Id.*

36. *Id.* ¶ 17.

37. *Id.* ¶¶ 18, 30.

38. *Id.* ¶ 18.

39. *Id.*

40. *Id.* ¶¶ 18, 30.

41. *Id.* ¶ 26.

42. *Id.* ¶ 30.

II. ANALYSIS

New Mexico is not the only state to embrace a fact-specific inquiry in determining whether an out-of-state crime is a registrable sex offense under the state's own laws. However, other states' reasoning for doing so appears to be aimed at protecting defendants' rights. In support of its holding in *Hall*, the New Mexico Supreme Court cited New York as another jurisdiction subscribing to the fact-specific approach.⁴³ But in the New York case, the court reasoned that the facts underlying a defendant's out-of-state conviction are reviewable only when the foreign crime is broader than the comparable New York statute.⁴⁴ New York's fact-specific inquiry thus operates to register fewer people by avoiding registration of new residents whose prior conduct does not fall within the scope of a New York sex offense. In contrast, New Mexico's reasoning for adopting a fact-specific inquiry was to register more potential-recidivist sex offenders rather than fewer.⁴⁵

The decision in *Hall* authorizes New Mexico courts to adjudicate a person a sex offender by hypothesizing that the facts of an out-of-state conviction would have supported a conviction under a different statute had the events occurred in New Mexico. If sex-offender registration were considered punishment, this sort of inquiry would violate the Double Jeopardy Clause of the Fifth Amendment to the U.S. Constitution, as it would cause a person to be "twice put in jeopardy of life or limb" for the same offense.⁴⁶ If sex-offender registration were punitive, the fact-specific inquiry might also violate the Due Process Clause of the Fourteenth Amendment by depriving a person of "life, liberty, or property" based on the record of another state's judgment, without adequate procedure.⁴⁷ But, because sex-offender registration is nonpunitive,⁴⁸ the U.S. Constitution permits the fact-specific inquiry that the New Mexico Supreme Court put forth in *Hall*. Nonetheless, the fact-specific inquiry is problematic for its effect on defense attorneys' ability to meet standards for effective assistance of counsel.

a. New Mexico protects the right of criminal defendants to effective assistance of counsel.

The Sixth Amendment to the U.S. Constitution guarantees criminal defendants a right to assistance of counsel.⁴⁹ In *Strickland v. Washington*, the U.S. Supreme Court determined that the minimum assistance required is that of "reasonably effective assistance," and established a two-pronged test: counsel is ineffective if (1) "counsel's performance was deficient," and (2) "the deficient performance prejudiced the defense."⁵⁰ In *Hill v. Lockhart*, the Court held that the *Strickland* test applies to cases where the defendant moves to withdraw a guilty plea

43. *Id.* ¶ 21.

44. *North v. Bd. of Exam'rs of Sex Offenders*, 871 N.E.2d 1133, 1139 (N.Y. 2007).

45. *Hall*, 2013-NMSC-001, ¶¶ 16–18.

46. U.S. CONST. amend. V.

47. U.S. CONST. amend. XIV, § 1.

48. *State v. Druktenis*, 2004-NMCA-032, ¶ 32, 86 P.3d 1050.

49. U.S. CONST. amend. VI.

50. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

on a theory of ineffective assistance of counsel.⁵¹ The relevant question in such cases is whether the defendant entered the plea agreement as the result of a “voluntary and intelligent choice.”⁵² Application of the *Strickland* test answers that question because the “voluntariness of the plea depends on whether counsel’s advice ‘was within the range of competence demanded of attorneys in criminal cases.’”⁵³

New Mexico courts follow *Strickland* and *Hill* in determining whether an attorney provided competent representation in an earlier case.⁵⁴ New Mexico’s court rules prohibit a trial court from accepting a defendant’s guilty plea without first establishing that the defendant understands certain penal and civil consequences of conviction.⁵⁵ And a defendant’s comprehension of those consequences is dependent upon the advice of counsel. Hence, when a defendant enters a guilty plea without truly understanding its consequences, responsibility lies with the defendant’s attorney.⁵⁶ Defense counsel’s performance is deficient, establishing the first prong of the *Strickland* test, when it is responsible for a defendant’s failure to comprehend the consequences of conviction.⁵⁷ The following section demonstrates attorneys’ responsibilities regarding the civil consequences of conviction through a discussion of defense counsel’s duty to advise clients on the immigration consequences of pleading guilty or no contest.

1. *The standard for effective assistance of counsel regarding adverse immigration consequences: State v. Paredes and its progeny.*

In cases where deportation is a near-certain consequence of a plea agreement, defense counsel is under an obligation to inform clients of that reality. In *State v. Paredes*, defense counsel advised the defendant that entering a plea agreement on a charge of criminal sexual contact of a minor “could” affect his immigration status.⁵⁸ Criminal sexual contact of a minor is an aggravated felony under federal law,⁵⁹ and a noncitizen with an aggravated felony conviction is subject to deportation without discretionary relief.⁶⁰ Therefore, deportation was a near-certain consequence of the plea agreement.⁶¹ Because deportation was a near-certain consequence of the plea agreement, defense counsel misrepresented the consequences of conviction in advising the defendant that pleading guilty “could” affect his immigration status. The court thus held that defense counsel’s performance was deficient in failing to convey the near certainty of deportation.⁶² The *Paredes*

51. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

52. *Id.* at 56 (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)).

53. *Id.* (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)).

54. *E.g.*, *State v. Paredes*, 2004-NMSC-036, ¶ 13, 101 P.3d 799.

55. Rule 5-303(F) NMRA.

56. *See Paredes*, 2004-NMSC-036, ¶ 12 (reasoning that the trial court’s failure to instruct the defendant on the immigration consequences of conviction did not relieve his attorney of a responsibility to have done so).

57. *See, e.g., id.* ¶ 19.

58. *Id.* ¶ 2.

59. 8 U.S.C. § 1101(a)(43)(A).

60. *Id.* §§ 1227(a)(2)(A)(iii), 1229b(a).

61. *Paredes*, 2004-NMSC-036, ¶ 4.

62. *Id.* ¶ 15.

decision established an affirmative duty of counsel to determine the “specific immigration consequences of pleading guilty” so that the client may knowingly and voluntarily decide whether to enter a guilty plea.⁶³

The progeny of *Paredes* demonstrates that New Mexico’s standard for effective assistance of counsel is broader than the federal standard as it relates to the immigration consequences of pleading guilty. Six years after *Paredes*, the U.S. Supreme Court decided *Padilla v. Kentucky* and established the federal standard for effective assistance of counsel in cases where deportation is a likely result of a plea agreement.⁶⁴ In *Padilla*, the Court held that defense counsel is under a duty to inform clients of the immigration consequences of conviction when those consequences are “truly clear.”⁶⁵ However, the Court also held that it is sufficient to advise clients that pleading guilty or no contest may carry adverse immigration consequences in situations where the potential consequences are not “truly clear.”⁶⁶ In *State v. Favela*, the New Mexico Court of Appeals observed that the *Paredes* decision has no such caveat.⁶⁷

Unlike the U.S. Supreme Court, the *Paredes* court declined to invert the proposition that defense counsel must advise clients as to the immigration consequences of conviction when those consequences are nearly certain.⁶⁸ Under *Paredes*, defense counsel must make an effort to predict the specific immigration consequences of conviction; warning that a client may face adverse consequences is never enough.⁶⁹ Defense counsel has a similar duty to inform clients of the potential consequence of sex-offender registration.

2. *The standard for effective assistance of counsel regarding sex-offender registration: the extension of Paredes in State v. Edwards.*

While, incidentally, *Paredes* arose from a sex offense, the case did not involve defense counsel’s duty to advise the defendant as to the requirements of SORNA. Where registration as a sex offender is or may be a consequence of a plea agreement, defense counsel is under an obligation to advise the client of that fact:

The court shall not accept a plea of guilty or no contest without first, by addressing the defendant personally in open court, informing the defendant of and determining that the defendant understands . . . that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act.⁷⁰

When sex-offender registration is a near-certain consequence of a plea agreement, as when adverse immigration consequences are nearly certain, defense

63. *Id.* ¶ 19.

64. *Padilla v. Kentucky*, 559 U.S. 356, 374 (2010).

65. *Id.* at 368–69.

66. *Id.* at 369.

67. *State v. Favela*, 2013-NMCA-102, ¶ 18, 311 P.3d 1213.

68. *Id.*

69. *State v. Carlos*, 2006-NMCA-141, ¶ 14, 147 P.3d 897 (reading *Paredes* as “stating a general rule” requiring defense counsel to make “a definite prediction as to the likelihood of deportation”).

70. Rule 5-303(F)(7) NMRA.

counsel is under a duty to provide specific advice. In *State v. Edwards*, the New Mexico Court of Appeals extended *Paredes* to cases where sex-offender registration is a potential consequence of a plea agreement.⁷¹ *Edwards* established an affirmative duty of counsel to advise defendants as to the requirements of SORNA in cases where a guilty plea “will almost certainly” result in the defendant having to register as a sex offender.⁷² In such cases, counsel must, at minimum, advise the defendant as to sections 29-11A-4, 4.1, 5, 5.1, and 7 of SORNA,⁷³ “as well as the likely social consequences of being a registered sex offender.”⁷⁴ Hence, counsel must address the duty to register, the procedure for registering, the information retained by the department of public safety, public access to the registry, and the procedure one must follow in moving from New Mexico to another state.⁷⁵

State v. Cunningham, a 2018 New Mexico Court of Appeals decision, illustrates the duty of counsel under *Edwards*.⁷⁶ In *Cunningham*, the defendant sought to withdraw his plea of no contest on a charge of criminal sexual contact of a minor in the fourth degree.⁷⁷ The defendant claimed that he received ineffective assistance of counsel because his attorney failed to inform him that pleading no contest would require him to register as a sex offender.⁷⁸ At the hearing in which the defendant pleaded no contest, the district court determined that the defendant had not been advised as to the requirements of SORNA.⁷⁹ The judge ordered a thirty-second recess for defense counsel to so advise the defendant, after which the district court accepted the defendant’s plea.⁸⁰ Hearing the defendant’s claim of ineffective assistance of counsel, the court of appeals reasoned that thirty seconds was insufficient time to provide the minimum advice required under *Edwards*.⁸¹ The court thus found defense counsel’s performance deficient,⁸² satisfying the first prong of the *Strickland* test.

In creating a heightened standard for effective assistance of counsel in sex-offense cases, the *Edwards* court took account of the social stigma attached to the label “sex offender.”⁸³ The social consequences of sex-offender registration can be severe. Consider the experience of a woman on Michigan’s sex-offender registry because she exposed herself to her stepsiblings and some of her elementary-school classmates when she was ten years old.⁸⁴ As a college student living in the dorms,

71. *State v. Edwards*, 2007-NMCA-043, ¶ 31, 157 P.3d 56.

72. *Id.*

73. N.M. STAT. ANN. §§ 29-11A-4, -4.1, -5, -5.1, -7 (2013).

74. *Edwards*, 2007-NMCA-043, ¶ 31.

75. §§ 29-11A-4, -4.1, -5, -5.1, -7.

76. *State v. Cunningham*, No. A-1-CA-35540, 2018 WL 1801152 (N.M. Ct. App. Mar. 29, 2018).

77. *Id.* ¶ 1.

78. *Id.* ¶ 12.

79. *Id.* ¶ 14.

80. *Id.*

81. *Id.* ¶ 15.

82. *Id.* ¶ 12.

83. *State v. Edwards*, 2007-NMCA-043, ¶ 25, 157 P.3d 56.

84. See generally Sarah Stillman, *When Juveniles Are Found Guilty of Sexual Misconduct, the Sex-Offender Registry Can Be a Life Sentence*, NEW YORKER MAG. (Mar. 14, 2016), <http://www.newyorker.com/magazine/2016/03/14/when-kids-are-accused-of-sex-crimes>.

she faced harassment for her status as a registered sex offender, leading her to drop out of school.⁸⁵ When her status also prevented her from employment, she moved into a homeless shelter.⁸⁶ The public notification aspect of sex-offender registration allows for—and perhaps encourages—the ostracism of those registered. Because the consequences of sex-offender registration can be so severe, New Mexico asks more of defense counsel when the client may have to register, as is the case when the client may face deportation.⁸⁷

Like the duty under *Paredes*, the duty under *Edwards* requires more than a simple warning as to the potential for adverse civil consequences. Under *Edwards*, defense counsel must determine the likelihood that a plea agreement will carry the consequence of sex-offender registration. When the likelihood is great, defense counsel must instruct the client on what sex-offender registration entails. In determining the likelihood that a client will have to register as a sex offender, defense counsel may have to take other states' laws into account.

- A. The *Edwards* standard requires defense counsel to consider other states' laws in determining whether a plea agreement carries the consequence of sex-offender registration.

Like the *Paredes* court, the *Edwards* court did not add a qualification to its holding that allows for defense counsel to offer a mere warning as to the possibility of adverse consequences when those consequences are not clear. By extending *Paredes* to the context of sex-offender registration, *Edwards* requires defense counsel to predict the likelihood that clients will be subject to registration; warning that registration is a possibility is never enough. In making these predictions, defense counsel must determine whether other states treat particular crimes as registrable sex offenses, even when New Mexico does not.

Reconsider the hypothetical posed above in which Jones pleaded guilty to indecent exposure, which is not a registrable sex offense in New Mexico. Indecent exposure is a registrable offense in North Dakota, however, and when Jones happens to move there, he receives notice that he must register as a sex offender. When Jones entered his plea, it was not “truly clear” that it would require him to register as a sex offender because he was living in New Mexico at the time. Therefore, under federal standards, Jones does not have a claim to ineffective assistance of counsel so long as his attorney mentioned the possibility of sex-offender registration.⁸⁸ But under the New Mexico standard, his attorney had to provide more affirmative advice. New Mexico standards require that Jones's attorney make a “definite prediction as to the likelihood”⁸⁹ that conviction will result in a requirement to register as a sex offender. If Jones's attorney failed to inform him that other states are likely to treat his conviction as a registrable sex offense, then, under *Edwards*, Jones did not enter the

85. *Id.*

86. *Id.*

87. *Edwards*, 2007-NMCA-043, ¶ 26 (“We see no reason why the similarly harsh consequences of sex offender registration should not also necessitate specific advice from counsel so that defendants can make informed decisions regarding their pleas.”).

88. *Cf. Padilla v. Kentucky*, 559 U.S. 356, 368–69 (2010) (creating a duty of counsel that only applies when the civil consequences of conviction are “truly clear”).

89. *State v. Carlos*, 2006-NMCA-141, ¶ 14, 147 P.3d 897 (interpreting *Paredes*).

plea agreement knowingly and voluntarily. His attorney's performance thus fails the *Strickland* test for effective assistance of counsel because it did not provide Jones a genuine opportunity to consider, in his decision to forgo trial, the likelihood that he may have to register as a sex offender in another state.

B. The *Edwards* standard is broad in scope: analogy to *Ramirez v. State*.

In *Ramirez v. State*, the defendant was arrested in a public park on drug charges.⁹⁰ In 1997, he pleaded guilty to three misdemeanor offenses including possession of marijuana, in an amount under 30 grams, and possession of drug paraphernalia.⁹¹ Twelve years later, U.S. Citizenship and Immigration Services (USCIS) informed the defendant that his 1997 convictions rendered him deportable from the United States.⁹² Under the Immigration and Nationality Act (INA), a violation of any state law relating to a controlled substance is grounds for deportation.⁹³ However, the Department of Justice has discretion to waive deportability based on “a *single offense* of simple possession of 30 grams or less of marijuana.”⁹⁴ USCIS informed the defendant that he was not eligible for the waiver because he had admitted guilt on two charges relating to a controlled substance,⁹⁵ even though both violations arose from the same conduct.

When the defendant entered the 1997 plea agreement, it was not “truly clear” that conviction would render him deportable. Indeed, twelve years passed before USCIS initiated deportation proceedings. Since the defendant's convictions were the result of a single instance in which he was found to be in possession of less than thirty grams of marijuana, it may have appeared that he would qualify for discretionary relief. Despite the lack of clarity in the immigration consequences of the plea agreement, the New Mexico Supreme Court held that the defendant had a viable claim to withdraw his guilty pleas on a theory of ineffective assistance of counsel.⁹⁶ Therefore, in New Mexico, a defendant may be able to establish ineffective assistance of counsel based on counsel's failure to offer advice as to the immigration consequences of conviction even when those consequences were unclear. The *Ramirez* decision affirms the recognition in *Favela* that New Mexico courts have gone farther than the U.S. Supreme Court in creating a duty of counsel to determine the immigration consequences of conviction. In New Mexico, the duty is not confined to those cases where the consequences are “truly clear.”

Similarly, in the scenario where Jones faces the decision of pleading guilty to misdemeanor indecent exposure, it is not “truly clear” whether a conviction will render him registrable as a sex offender in other states. However, if his attorney were to research other states' statutes, she would find that a conviction for indecent exposure, while not a registrable offense in New Mexico, is likely to require Jones

90. *Ramirez v. State*, 2014-NMSC-023, ¶ 3, 333 P.3d 240.

91. *Id.*

92. *Id.* at 242 n.1.

93. 8 U.S.C. § 1182(a)(2)(A)(i)(II).

94. *Id.* § 1182(h) (emphasis added).

95. Petitioner-Respondent's Answer Brief at 2, *Ramirez v. State*, 2014-NMSC-023, 333 P.3d 240 (No. 33,604), 2013 WL 9873024, at *2.

96. *Ramirez*, 2014-NMSC-023, ¶ 17.

to register as a sex offender in some other states.⁹⁷ In *Ramirez*, defense counsel's performance was deficient in that it failed to address the defendant's risk under the INA and the subtlety that disqualified him from a waiver of deportation. Likewise, in Jones's case, defense counsel's performance is deficient if it fails to address other states' treatment of indecent exposure as a registrable sex offense. *Edwards* demands that Jones's attorney predict the likelihood that he will have to register as a sex offender; an equivocal warning, that he may have to register, is not sufficient.

b. New Mexico cannot expect defense counsel to predict how courts in other states will interpret clients' conduct.

Now suppose that, cognizant of other states' treatment of indecent exposure as a registrable sex offense, Jones's attorney negotiates a plea offer on a charge of disorderly conduct in violation of section 30-20-1 of the New Mexico Criminal Code.⁹⁸ Confident that a conviction for disorderly conduct will not require Jones to register as a sex offender in New Mexico or elsewhere, Jones's attorney advises him to accept the offer. Jones does so, but the sexual nature of his conduct remains part of the record. When Jones moves to North Dakota several years later, the local attorney general's office notifies him that he must register as a sex offender.⁹⁹

In *Denault v. State*, the petitioner sought declaratory relief from sex-offender registration in North Dakota.¹⁰⁰ He alleged that, upon moving to North Dakota, the attorney general's office notified him that his Minnesota conviction required him to register as a sex offender in North Dakota, even when it did not require registration in Minnesota.¹⁰¹ The North Dakota Supreme Court determined that the lewd exhibition provision of a Minnesota statute¹⁰² was equivalent to the North Dakota crime of indecent exposure,¹⁰³ a registrable sex offense.¹⁰⁴ The court determined further that a foreign conviction may be registrable in North Dakota even when the foreign court did not order the defendant to register as a sex offender.¹⁰⁵ The *Denault* court thus held that the defendant's Minnesota conviction required him to register as a sex offender upon moving to North Dakota.¹⁰⁶ Because the court determined that the statutes themselves were equivalent, it did not reach the issue of whether the defendant's conduct satisfied the elements of the North Dakota statute.¹⁰⁷ However, the court suggested that it would be willing to do so when it

97. See, e.g., N.D. CENT. CODE ANN. § 12.1-32-15(1)(g) (West 2008) (including North Dakota's indecent exposure statute, section 12.1-20-12.1, among the state's enumerated sex offenses).

98. N.M. STAT. ANN. § 30-20-1 (2018).

99. Cf. *Denault v. State*, 2017 ND 167, ¶ 2, 898 N.W.2d 452, 454.

100. *Id.*

101. *Id.*

102. MINN. STAT. ANN. § 609.3451, subdiv. 1(2) (West 2010).

103. N.D. CENT. CODE ANN. § 12.1-20-12.1(1) (West 2008).

104. N.D. CENT. CODE ANN. § 12.1-32-15(1)(g) (West 2008) (including section 12.1-20-12.1 among the state's enumerated sex offenses).

105. *Denault*, 2017 ND 167, ¶ 24, 898 N.W.2d 452.

106. *Id.*

107. *Id.* ¶ 23.

cited the Ohio Supreme Court for the proposition that “a court may go beyond the statutes and rely on a limited portion of the record in a narrow class of cases.”¹⁰⁸

If North Dakota were to follow Ohio, New Mexico, and the few other states whose courts have endorsed a fact-specific inquiry,¹⁰⁹ then Jones’s disorderly conduct conviction could require him to register as a sex offender in North Dakota. Jones pleaded guilty to disorderly conduct on the advice of counsel that conviction would not require him to register as a sex offender. Upon learning that he must register as a sex offender after all, Jones might seek to withdraw his plea on a theory of ineffective assistance of counsel. Where an attorney “provides incorrect advice or misrepresents the consequences of a plea,” counsel’s performance is deficient.¹¹⁰ Since Jones’s attorney incorrectly advised him that he would not have to register as a sex offender, Jones can establish the first prong of the *Strickland* test for ineffective assistance of counsel under New Mexico standards. As to the second prong, Jones must demonstrate a “reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.”¹¹¹ New Mexico courts have followed the U.S. Supreme Court in adopting a broad approach to the second prong of the *Strickland* test, reasoning that “the petitioner need only show ‘that a decision to reject the plea bargain would have been rational under the circumstances.’”¹¹² Jones contends that he would have insisted on proceeding to trial had he known that a conviction under the plea agreement could require him to register as a sex offender in another state. Assuming he can produce sufficient evidence to corroborate his contention¹¹³ and show that it would have been rational to so proceed, Jones has a viable claim to withdraw his guilty plea on a theory of ineffective assistance of counsel.

The upshot of the above scenario is that, in some sex-offense cases, effective assistance requires defense counsel to determine whether other states have adopted a fact-specific inquiry in equating out-of-state crimes to their enumerated sex offenses. Such a task, however, is too burdensome a duty to impose on defense counsel. New Mexico cannot expect defense counsel to become familiar with the statutes and jurisprudence of each of the fifty states for the purpose of determining how certain it is that a client will have to register as a sex offender upon moving elsewhere.

III. IMPLICATIONS

Standards for effective assistance of counsel help ensure that defendants enter plea agreements knowingly and voluntarily.¹¹⁴ A successful claim of ineffective assistance of counsel forces the court to invalidate its prior decision and

108. *Id.* ¶ 20 (quoting *State v. Lloyd*, 132 Ohio St. 3d 135, 2012-Ohio-2015, 970 N.E.2d 870, at ¶ 31).

109. *See, e.g.,* *North v. Bd. of Examiners of Sex Offenders*, 871 N.E.2d 1133, 1139 (N.Y. 2007); *State v. Howe*, 212 P.3d 565, 567 (Wash. Ct. App. 2009).

110. *State v. Tejeiro*, 2015-NMCA-029, ¶ 7, 345 P.3d 1074.

111. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

112. *Tejeiro*, 2015-NMCA-029, ¶ 14 (quoting *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010)).

113. *See id.* ¶ 15 (citing *Patterson v. LeMaster*, 2001-NMSC-013, ¶ 30, 21 P.3d 1032) (“Corroborating evidence may include pre-conviction statements or actions that indicate the defendant’s preferences or intentions.”).

114. *See State v. Paredez*, 2004-NMSC-036, ¶ 19, 101 P.3d 799.

try the case anew. Ultimately, ineffective assistance of counsel blemishes the authority of the court and unduly consumes its resources. Effective assistance of counsel thus benefits the state as much as it does the defendant.

When a state requires a new resident to register as a sex offender based on the facts of a conviction from another state, the state risks imposing consequences that the person did not know of at the time of pleading guilty. The fact-specific inquiry can thus render the defendant's plea involuntary and open the door to a claim of ineffective assistance of counsel in the court that accepted the plea. In promulgating a fact-specific inquiry in *Hall*, the New Mexico Supreme Court has opened the door to the invalidation of other states' judgments through successful claims of ineffective assistance of counsel in those states.

a. New Mexico should depart from the fact-specific inquiry promulgated in *Hall*.

To avoid invalidating the decisions of other state courts, New Mexico courts ought to abandon the fact-specific approach to determining whether a foreign conviction is equivalent to one of New Mexico's enumerated sex offenses. In *Doe v. Sex Offender Registry Board*, the Supreme Judicial Court of Massachusetts found it impermissible to consider the facts underlying an out-of-state conviction in determining whether it was a "like violation" to one of Massachusetts's enumerated sex offenses.¹¹⁵ The court rejected the fact-specific approach for concerns like those expressed in Part II(b) of this Note. The Massachusetts court reasoned that the fact-specific approach allows a state to "transform a crime that does not involve sexual conduct into a registrable offense."¹¹⁶ Such a consequence, the court reasoned, was in direct controversy with the legislative intent behind the "like violation" provision, which was aimed at treating "sex offenses in the same manner regardless of where the offenses were committed."¹¹⁷ Most notably, the court reasoned against the fact-specific approach because its adoption could result in the state requiring people to register as sex offenders when they did not know that their convictions carried such a risk.¹¹⁸

As discussed above, when a court requires sex-offender registration of a person who had no opportunity to consider such a consequence at the time of pleading guilty, the court casts doubt on the validity of the person's conviction. In adopting a fact-specific approach to equating out-of-state crimes to its enumerated sex offenses, New Mexico risks burdening other states with hearing claims of ineffective assistance of counsel. Application of the fact-specific approach could result in the successful withdrawal of a defendant's plea, requiring the forum state to prosecute the case for a second time or accept a vacated conviction. New Mexico should not place such a burden on other states.¹¹⁹

115. *Doe v. Sex Offender Registry Bd.*, 925 N.E.2d 533, 540 (Mass. 2010).

116. *Id.*

117. *Id.*

118. *Id.* at 540 & n.4.

119. In theorizing about what New Mexico should demand of other states, I have assumed the standard for effective assistance of counsel that New Mexico deems best. While some states may have lower

b. New Mexico should replace the fact-specific inquiry with deference to other states' judgments.

When a comparison of the elements fails to establish an equivalence between two crimes, the relevant inquiry should be whether the out-of-state conviction required registration as a sex offender in the forum state—not whether the defendant's actual conduct would have amounted to a registrable sex offense had it occurred in the reviewing state. In Jones's case, if North Dakota were to take this approach, there would be no threat to the validity of his New Mexico conviction. New Mexico's disorderly conduct statute criminalizes “engaging in violent, abusive, indecent, profane, boisterous, unreasonably loud or otherwise disorderly conduct which tends to disturb the peace.”¹²⁰ Indecent exposure is the nearest registrable sex offense in North Dakota, and it criminalizes (1) exposing “one's penis, vulva, or anus in a public place,” with (2) “intent to arouse, appeal to, or gratify that person's lust, passions, or sexual desires.”¹²¹ The North Dakota crime is narrower than the New Mexico crime in that it criminalizes specific conduct as opposed to broadly criminalizing conduct that tends to disturb the peace. Moreover, the North Dakota statute requires a specific mental state, while New Mexico's disorderly conduct statute does not. Therefore, the two crimes are not equivalent.

Having failed to establish an equivalence, the court should not proceed by inquiring into the facts underlying Jones's conviction because doing so could give him a viable claim to withdraw his guilty plea in the New Mexico case. The only relevant inquiry after comparison of the elements should be whether Jones's conviction required him to register as a sex offender in New Mexico. This approach avoids requiring sex-offender registration of people who did not know that their convictions could have such a consequence, and it closes the door on claims of ineffective assistance of counsel for lack of notice.

This proposal does not offer a windfall to dangerous sex offenders. The elemental comparison, on its own, can be effective in determining whether two states' statutes are equivalent. Considering only the elements of the statutes in question in *Doe*, the Supreme Judicial Court of Massachusetts held that Maine's crime of unlawful sexual contact was a like violation to the Massachusetts crime of indecent assault and battery on a child under fourteen.¹²² Without inquiring into the defendant's actual conduct, the court found that his conviction from Maine amounted to a registrable sex offense in Massachusetts.¹²³ When comparison of the elements does not establish an equivalence, courts should honor other states' determinations as to whether defendants' conduct warranted sex-offender registration. Doing so protects the voluntariness of defendants' pleas and insulates states from hearing claims of ineffective assistance of counsel in these cases. This approach also creates more uniformity in the registration of sex offenders across the fifty states, preventing

standards, I believe that opening the door to claims of ineffective assistance of counsel is problematic, even if the likelihood of the claims' success depends on the jurisdiction.

120. N.M. STAT. ANN. § 30-20-1 (2018).

121. N.D. CENT. CODE ANN. § 12.1-20-12.1(1) (West 2008).

122. *Doe*, 925 N.E.2d at 536.

123. *Id.* at 538–40.

states from becoming more or less attractive to sex offenders based on the way they compare out-of-state crimes to their enumerated sex offenses.

Arizona has already adopted such an approach. In *State v. Kuntz*, the Arizona Court of Appeals held that it was improper to consider the facts of an out-of-state conviction to determine whether it equated to a registrable sex offense in Arizona.¹²⁴ In 2005, Arizona's legislature amended its sex-offender registration statute to restrict the comparison of crimes to the elements of each crime and whether the out-of-state crime required sex-offender registration in the forum state.¹²⁵ Arizona rejected the fact-specific approach out of concern for defendants' rights¹²⁶ and embraced deference to other states to prevent sex offenders from avoiding registration by moving to Arizona.¹²⁷ For the reasons discussed above, New Mexico should recognize the prudence in Arizona's decision and follow its neighbor in rejecting the fact-specific inquiry in favor of deference to other states' judgments.

CONCLUSION

New Mexico should depart from the fact-specific approach to comparing out-of-state crimes to its registrable sex offenses because the practice could render those convictions invalid. Instead, when comparison of the elements of each crime fails to establish an equivalence, New Mexico courts should defer to the other state's judgment as to whether an offense warranted sex-offender registration. The proposed approach avoids imposing the requirements of SORNA on new residents who accepted plea offers in other states without knowing that they may have to register as sex offenders. As such, the proposed approach is better adapted than the current, fact-specific approach to preserve the validity of convictions from other jurisdictions.

124. *State v. Kuntz*, 100 P.3d 26, 29 (Ariz. Ct. App. 2004).

125. *State v. Lowery*, 287 P.3d 830, 835 (Ariz. Ct. App. 2012) (summarizing the legislative intent behind the amendment); *see also* ARIZ. REV. STAT. ANN. § 13-3821(A) (2010) (requiring registration of any person with an out-of-state conviction that "has the same elements of an offense listed in this section or who is required to register by the convicting or adjudicating jurisdiction").

126. *Kuntz*, 100 P.3d at 29 (citing *State v. Schaaf*, 819 P.2d 909, 919–20 (Ariz. 1991)) ("Consideration of events underlying the foreign conviction that are not necessarily part of the conviction would, in effect, constitute a prohibited second trial concerning that crime.").

127. *Lowery*, 287 P.3d at 835 (citing *Kuntz*, 100 P.3d at 29–30) ("Prior to 2005 . . . under Arizona law, one could evade registration if the elements of the respective statutes did not match.").