

## THE AGC UPDATE

a special report on legal developments

October 16, 2008



### THE STATUS OF SEX OFFENDER REGULATION IN CALIFORNIA

Despite the passage of Jessica's Law in 2006, many communities throughout California continue to be plagued with problems relating to the housing of sex offenders. These problems often stem from the intricate, overlapping statutory and constitutional issues involved in regulating sex offenders. A recent decision of the California Court of Appeal, *Good v. Superior Court*,<sup>1</sup> exemplifies the complexities of these issues. In *Good*, the court determined that sex offenders must submit DNA samples under Proposition 69, even if they were convicted of their crimes prior to the Act's enactment. This case and a number of other cases involving sex offender regulation are explained in this update.

#### A Brief Legal History Of Jessica's Law

Jessica's Law prohibits registered sex offenders from living within 2,000 feet of any public or private school or park where children regularly gather.<sup>2</sup> In addition, Jessica's Law empowers cities and counties to enact further *community-specific* restrictions on where registered sex offenders may live.

Soon after its passage, Jessica's Law faced many legal challenges, and those challenges continue to loom today. Initially, Jessica's Law was challenged in U.S. District Court by an unidentified class of sex offenders who asserted that the law violated various constitutional rights. However, these challenges were dismissed on the ground that Jessica's Law was not retroactive, and therefore did not apply to the offenders at issue: because they had been paroled from prison years before Jessica's Law took effect, the court found those offenders were outside the reach of Jessica's Law.<sup>3</sup>

Since then, a number of new challenges have been filed by other sex offenders in California, and many of these cases are currently being litigated in various State and Federal Courts. While these cases are pending, many other states have enacted their own versions of Jessica's Law similar to California's, and some of those

*Southern California*  
13181 Crossroads Pkwy  
Suite 400 West Tower  
City of Industry, CA 91746  
tel 562.699.5500

*Northern California*  
600 Bicentennial Way  
Suite 300  
Santa Rosa, CA 95403  
tel 707.542.4833

To learn more about AGC and the fields of law that comprise our practice, please visit our [website](#), or contact *Matthew Gorman* at 562.699.5500



ALVAREZ-GLASMAN & COLVIN

ATTORNEYS AT LAW

THE AGC UPDATE is a publication of Alvarez-Glasman & Colvin. Alvarez-Glasman & Colvin specializes in all aspects of public law, regulatory compliance, law enforcement, environmental law, real estate development, redevelopment, and legislative advocacy.

© 2008 Alvarez-Glasman & Colvin

THE AGC UPDATE is intended to provide important information about developments in the law, but is not intended as legal advice. Application of the law to any given circumstance may vary depending on factual differences and other factors. Alvarez-Glasman & Colvin takes extensive steps to ensure the accuracy of this information, but we recommend consulting with a licensed attorney before making any legal decision.



enactments have been adjudicated by other courts. For example, the Ohio Supreme Court recently decided that Ohio's version of Jessica's Law was *not* retroactive. Similarly, while Ohio has refused to overturn its version of Jessica's Law on constitutional grounds such as the Takings Clause, the Georgia Supreme Court recently held that its state's version of Jessica's Law was unconstitutional under that clause.

Thus, as challenges to Jessica's Law work their way through the courts in California, it is likely that competing – and often contradictory – claims will be made as to its legality and adherence to constitutional requirements.

### ***People v. Milligan* Limits the Scope of Residency Restriction Statutes**

In a recent California Court of Appeal decision, the Fourth Appellate District considered whether certain amendments to sex offender laws, including amendments enacted by Jessica's Law, violate the Ex-Post Facto Clause of the U.S. Constitution.<sup>4</sup> The Ex-Post Facto Clause bars the government from imposing criminal punishment on individuals beyond that of their original sentence. However, the Ex-Post Facto Clause is *not* triggered by public safety measures which, although they might apply only to individuals with a criminal record, do not go so far as constituting "extra punishment."

The Court in *Milligan* first reviewed a 2003 amendment requiring sex offenders to "re-register" with local law enforcement every time they change residences. The Court concluded that the re-registration requirement serves as a necessary **public safety measure** rather than as additional criminal punishment. Therefore, the re-registration requirement is a valid regulatory measure which does *not* violate the Ex-Post Facto Clause.

However, while the Court also held that public notification statutes (such as those allowing law enforcement to notify the public of the presence of sex offenders in the community) could be applied retroactively (because they were not punitive in nature), the Court made a different conclusion about **residency restrictions** which prohibit sex offenders from residing within 2,000 feet of a school or park where children regularly gather, as well as **tracking restrictions** which require sex offenders to wear GPS tracking devices. As to these restrictions, the Court held that they may only be applied to those who *commit their crimes after Jessica's Law was enacted*. Therefore, the Court's decision effectively limits application of residency and GPS restrictions to those whose crimes were committed November 2006.



Importantly, *Milligan* did *not* address the unique circumstance where a city or other local agency adopts residency restrictions **independent of those under Jessica's Law**. Because Jessica's Law expressly authorizes cities to adopt such additional restrictions, it is unclear whether *Milligan* would apply with equal strength to them. Thus, application of *Milligan* to city residency restrictions which are applied **retroactively** is unclear at this time. Cities and counties should be mindful of applying provisions of their residency restriction statutes on sex offenders retroactively – namely those who committed their crimes before November 2006.



## ***Good v. Superior Court and Stadley v. Town of Woodfin*** **May Expand Sex Offender Regulation**

The foregoing cases may be aided by the holding in *Good v. Superior Court*, noted above. In *Good*, the California Court of Appeal determined that a sex offender was required to provide DNA samples under Proposition 69 (the “DNA Fingerprint, Unsolved Crime and Innocence Protection Act of 2004”). The Court made this ruling, despite the fact that the offender had been convicted eight years prior to Proposition 69’s passage.

The *Good* Court determined that the voters intended to make the Proposition retroactive because it contained express language applying it to those convicted prior to its passage. The Court also found that the Act could be applied retroactively, since requiring a DNA sample is an administrative procedure, and is not punitive. Further, the Court found that the purpose of sex offender registration is to protect the public, and thus the voters desired to require sex offenders, regardless of when they were convicted, to provide DNA samples.

While this holding is important in its own right (by recognizing the importance of monitoring sex offenders through such techniques as DNA sampling), the holding may have even broader impact: because the Court recognized that DNA sampling was *administrative* in nature rather than *punitive*, the decision supports the fundamental point that sex offender regulation is not *punishment* for past crimes, but *protection* for the public. This is a point of crucial constitutional significance, as many of the sex offenders currently challenging Jessica’s Law assert that the law is unconstitutional because its restrictions constitute an added *punishment* for their crimes, beyond what they had been originally sentenced for.



The decision in *Good* rejects this claim, and in doing so, establishes precedent which may go well-beyond the seemingly narrow issue of DNA sampling. The court in *Milligan* made a similar conclusion finding that a statute requiring DNA sampling from registered sex offenders could be applied retroactively to those who committed their crimes long before the statute was enacted. However, the court also limited retroactive application to non-punitive measures; therefore, a residency restriction could not be applied retroactively because an additional restriction on residency is considered an additional punishment.

Furthermore, in a recent North Carolina state court case, the North Carolina Supreme Court upheld a local entity’s ordinance that prohibited a registered sex offender from “knowingly enter[ing] into or on any public park owned, operated, or maintained by the Town of Woodfin.”<sup>5</sup> The Court found that the ordinance did not infringe upon constitutionally-protected rights to “freedom of travel” because the ordinance did not restrict *interstate travel* – a prerequisite for finding infringement of this federal right. The Court also concluded that a person does not have a fundamental right to loiter in a park, and that the ordinance survived “rational basis scrutiny” because the town had a legitimate interest in protecting children by keeping registered sex offenders away from city parks.



## The Importance of Regulating Multiple Sex Offender Housing

Individuals concerned about sex offenders residing in their communities should take particular note of the effect these legal decisions will have on multiple sex offender housing – i.e., single locations, such as hotels, group homes, or apartment complexes, where numerous sex offenders reside in close proximity to each other. Unfortunately, while Jessica’s Law does prevent multiple registered sex offenders from living together in a *single family dwelling* while on parole,<sup>6</sup> it is *silent* as to whether multiple sex offenders may live in the same *multi-family dwelling* (such as an apartment complex). Because Jessica’s Law has effectively barred registered sex offenders from living in wide swaths of urban areas, it is increasingly common for offenders to reside in concentrated areas, and landlords are finding it increasingly lucrative to rent to multiple registered sex offenders who have limited options of where to live.



Some cities have attempted to address the problems posed by multiple sex offender housing. The City of Pomona, for example, has adopted an ordinance geared specifically at regulating the congregation of sex offenders at individual apartment complexes, with the goal of preventing the overconcentration of sex offenders at specific points in the city.<sup>7</sup> Because Jessica’s Law authorizes cities and counties to enact their own regulations on sex offender residency, other cities may consider enacting similar restrictions aimed at preventing multiple sex offender housing.

A related issue of concern are sex offenders who identify themselves as “transients” in order to avoid listing an address when registering with law enforcement. When a registered sex offender identifies himself as a transient, he must only register once every thirty days and is only required to identify a residence if he gains a residence after five days.<sup>8</sup> Problems arise when offenders move from hotel to hotel to avoid registration, making it difficult for law enforcement agencies to track and monitor offenders. Under their authority to enact greater restrictions pursuant to Jessica’s Law, cities and counties may wish to consider ways to enhance restrictions and oversight on “transient sex offenders” in order to further protect communities.

## Future Legislation Aimed at Strengthening Jessica’s Law

Several bills were in the California Legislature’s previous session which may have expanded these authorities. **AB 370 (Adams)** would have allowed a city or county to prohibit registered sex offenders from living in a residential facility that serves six or fewer people, including sober living facilities. **AB 2363 (Ma)** would have allowed a landlord to terminate a residential tenancy if the tenant is a registered sex offender to protect a person at risk in jurisdictions that have rent control ordinances requiring specific cause to pursue an eviction. **AB 601 (Arambula)** would have provided guidance to rural communities to enact their own Jessica’s Law ordinances further restricting where registered sex offenders may live.



## Further Information

As a law firm committed to its public sector clients, **Alvarez-Glasman & Colvin** actively tracks litigation involving Jessica's Law and new developments regarding sex offenders as they come to light. For more information on any of the topics addressed in this update, please contact **Matthew Gorman at (562) 699-5500**.

## Legal Authorities:

- <sup>1</sup> *Good v. Superior Court* (2008) 158 Cal. App. 4th 1494.
- <sup>2</sup> Penal Code § 3003.5.
- <sup>3</sup> *Doe v. Schwarzenegger* (E.D. Cal. 2007) 476 F. Supp. 2d 1178; *Doe v. Schwarzenegger* (N.D. Cal.) 2007 WL 601977.
- <sup>4</sup> *People v. Milligan* 08 Cal. Daily Op. Serv. 12,321.
- <sup>5</sup> *Stadley v. Town of Woodfin* (2008) 362 N.C. 328.
- <sup>6</sup> Penal Code § 3003.5(a).
- <sup>7</sup> City of Pomona Ordinance No. 4049.
- <sup>8</sup> Penal Code § 290.011.

**THE AGC UPDATE** is a publication of Alvarez-Glasman & Colvin. Alvarez-Glasman & Colvin specializes in all aspects of public law, regulatory compliance, law enforcement, environmental law, real estate development, redevelopment, and legislative advocacy.