

**To: Colonel Dennis A Garrett
Director, Arizona Department
of Public Safety**

**December 18, 2000
Re: Sex Offender Registration Requirements
I00-030, (R00-028)**

Questions Presented

You have asked:

1. What are the sex offender registration requirements for individuals convicted and required to register under prior Arizona statutes who, if convicted today, would not meet the sex offender registration criteria? Your opinion request specifically mentioned legislative changes in 1995 that eliminated the registration requirement for offenders with a single conviction for indecent exposure or public sexual indecency.
2. What are the obligations of the Department of Public Safety ("DPS") regarding court orders that waive the statutorily required sex offender registration or notification requirements?
3. What are DPS's obligations regarding court orders that set aside sex offense convictions contrary to A.R.S. § 13-907?

Summary Answer

1. Convicted sex offenders who were required to register under the law in effect at the time of conviction are not required to register if they do not meet the current statutory criteria in A.R.S. § 13-3821. Therefore, for example, a person with a single conviction for indecent exposure or public sexual indecency before 1995 is no longer statutorily required to register as a sex offender.
2. DPS must comply with any court order, including an order that appears to be contrary to law, such as an order waiving statutorily required sex offender registration or notification requirements, until that order is modified or vacated.
3. In performing its recordkeeping responsibilities, DPS must recognize a court order entered pursuant to A.R.S. § 13-907 that improperly sets aside a sex offense conviction until such an order is modified or vacated. However, an order under A.R.S. § 13-907, whether proper or improper, does not relieve an offender of the statutory obligation to register under A.R.S. § 13-3821.

Background and Analysis

1. Sex Offender Registration

The Legislature enacted sex offender registration requirements in 1983.⁽¹⁾ 1983 Ariz. Sess. Laws Ch. 202, § 13 (codified at A.R.S. § 13-3821). Under A.R.S. §§ 13-3821 and -3822, specified offenders must register with the sheriff in the county in which they reside and must also notify the county sheriff of any change of address. The sheriff must provide the registration information and any change of address to DPS. Failure to comply with the registration requirements is a Class 4 felony.

A.R.S. § 13-3824. There are other statutory provisions, such as providing that a registrant's drivers license is valid for only one year, that facilitate the identification and location of convicted sex offenders who are required to register. A.R.S. § 13-3821(H). In addition, in 1995, the Legislature established a sex offender community notification program that applies to offenders

who are required to register, and DPS oversees this program. A.R.S. §§ 13-3825 (notification program); 41-1719 (DPS coordinator of notification program).

Initially, the Legislature required individuals convicted of any violation of Chapter 14 (sexual offenses) or Chapter 35.1 (sexual exploitation of children) of Title 13 to register as sex offenders. See 1983 Ariz. Sess. Laws ch. 202, § 13. In 1995, the Legislature eliminated the requirement that all persons convicted under Chapter 14 or Chapter 35.1 register and, instead, specified the particular offenses that require registration. 1995 Ariz. Sess. Laws ch. 257. Although no longer requiring registration for all convictions under chapters 14 or 35.1, the Legislature gave the sentencing judge discretion to require registration for any violation of those chapters. A.R.S.

§ 13-3821(C).⁽²⁾ In addition, although a first conviction for indecent exposure or public sexual indecency no longer required registration, a second or subsequent conviction for these crimes involving a minor under 15 would require registration, as would any third conviction for those offenses, regardless of the age of the victim. A.R.S. § 13-3821(A)(13) - (16).

The sex offender registration law is regulatory and its "overriding purpose . . . is facilitating the location of child sex offenders by law enforcement personnel, a purpose unrelated to punishing . . . for past offenses." *State v. Noble*, 171 Ariz. 171, 178, 829 P.2d 1217, 1224 (1992). Consistent with this purpose, the Legislature's 1995 amendments focused the registration requirement on certain serious offenders or repeat offenders, with a particular emphasis on offenses involving children. The 1995 legislation did not evidence any legislative intent to require continued registration by persons who would not be required to register under the amended law. Generally, the law at the time the offense is committed governs criminal sentencing, and a change in the law does not affect the sentence of a person convicted and sentenced under the earlier law. A.R.S. § 1-246; *State v. Stine*, 184 Ariz. 1, 3, 906 P.2d 58, 60 (App. 1995). These principles, however, do not apply to sex offender registration because registration is not part of a person's punishment. Registration is regulatory, rather than punitive. *Noble*, 171 Ariz. at 178, 829 P.2d at 1224 (holding that requiring a person register for an offense committed before the effective date of the registration laws does not violate the ex post facto clause of the State and federal constitutions). For offenses subject to mandatory registration, the duty to register as a sex offender arises from statute. See *State v. Garcia*, 156 Ariz. 381, 382, 752 P.2d 34, 35 (App. 1987). Thus, the people currently obligated to register are those convicted of an offense currently listed in statute and any others a judge, in his or her discretion, has ordered to register. Accordingly, those offenders who were previously required to register, but are not required to register under current law, are no longer

statutorily required to register.⁽³⁾

If a court required registration as a term of probation, the analysis changes. Although, as established in *State v. Garcia*, the registration obligation arises from statute, if the court included it as a term of probation, that court order creates an obligation that must be honored. See A.R.S. § 13-901 (probation). Thus, if a court included registration as a term of probation for a person convicted of an offense before 1995 that is no longer subject to the registration requirement, that person was not immediately relieved of the obligation to register when the 1995 legislation became effective. Instead, that person was required to comply with the registration requirement as long as it remained a term of his or her probation.⁽⁴⁾

2. Court Orders Waiving Sex Offender Registration.

You have also asked about DPS's "obligation to recognize" court orders that purport to waive sex offender registration requirements. This question arises because A.R.S. § 13-3821 does not authorize courts to waive the statutory sex offender registration requirement. DPS's relevant statutory responsibilities include maintaining a database with information about sex offenders required to register and notifying the appropriate county if, according to the information available, a person has failed to register as required by A.R.S. § 13-3821. A.R.S. § 13-3825(A), (B). DPS also maintains an internet website (www.azsexoffender.com) that provides information to the public concerning certain sex offenders. A.R.S. § 13-3827.

The Arizona Supreme Court has stated that "the concept that any person, lay or professional, may determine whether a court order is 'void on its face' and thus susceptible to being ignored as unconstitutional can find no justification in the law." *State v. McLaughlin*, 125 Ariz. 505, 507, 611 P.2d 92, 94 (1980) (quoting *State v. Chavez*, 123 Ariz. 538, 543, 601 P.2d 301, 306 (App. 1979)).⁽⁵⁾ Similarly here, although a court may have erred by waiving statutorily required sex offender registration, DPS must respect such an order until the order is modified or vacated through appropriate judicial proceedings. *Cf. Broomfield v. Maricopa County*, 112 Ariz. 565, 568, 544 P.2d 1080, 1083 (1975) ("It is a settled principle of law that an order issued by a court with jurisdiction over the subject matter must be obeyed by the parties until that order is reversed by orderly and proper proceedings.").

3. Court Orders Under A.R.S. § 13-907.

You also asked about DPS's obligations regarding an order under A.R.S. § 13-907 that improperly sets aside a sex offense conviction.⁽⁶⁾ This question has implications for DPS's general responsibilities to maintain criminal justice records and for the sex offender registration program.

For the reasons discussed previously, when performing its record keeping responsibilities, DPS must respect any court order entered under A.R.S. § 13-907, even if such an order appears to improperly set aside a sex offense conviction. Unless such an order is modified or vacated through appropriate judicial

proceedings, DPS records should reflect entry of any such order under A.R.S. § 13-907.⁽⁷⁾

An order under A.R.S. § 13-907, however, has no impact on an offender's obligation to register under A.R.S. § 13-3821. With limited exceptions, offenders required to register are ineligible for orders to set aside convictions under A.R.S. § 13-907. Section 13-907, A.R.S., does not apply to offenses: (1) involving the infliction of serious injury; (2) involving the use or exhibition of a deadly weapon or dangerous instrument; (3) in violation of Chapter 14 of the Title; (4) in which the victim is a minor under fifteen years of age; or (5) in violation of certain local or State traffic laws. Although most offenses requiring registration are in Chapter 14, some are not, such as taking a child for the purpose of prostitution (A.R.S. § 13-3212); sexual exploitation of a minor (A.R.S. § 13-3553); commercial sexual exploitation of a minor (A.R.S. § 13-3552); unlawful imprisonment involving a victim under eighteen (A.R.S. § 13-1303); and kidnapping involving a victim under eighteen (A.R.S. § 13-1304). If the victim is under fifteen years of age, those offenders are ineligible under A.R.S. § 13-907, but those offenders whose victims were older children may seek orders under A.R.S. § 13-907. Thus, a proper order under A.R.S. § 13-907 could be issued for certain offenders subject to the registration requirements.

An order under A.R.S. § 13-907 does not affect a person's obligation to register under A.R.S. § 13-3821 for three reasons. First, because registration is merely regulatory under *Noble*, it is not a "penalt[y]" or "disabilit[y]" under A.R.S. § 13-907. In the past, this Office has emphasized that setting aside a judgment under A.R.S. § 13-907 "does not bar consideration of the fact of conviction in matters pertaining to the protection of the public." Ariz. Att'y Gen. Op. I86-003. As the Supreme Court explained in *Noble*, registration is not to punish the offender but to facilitate the work of law enforcement. Therefore, it is not a penalty or disability within A.R.S. § 13-907. *Cf. Noble*, 171 Ariz. at 178, 829 P.2d at 1224.

Second, under A.R.S. § 13-3821, a person "who has been convicted" of one of the specified offenses must register, and an order under A.R.S. § 13-907 does not erase "the fact of conviction." *See Russell v. Royal Maccabees Life Ins. Co.*, 193 Ariz. 464, 467-468, 974 P.2d 443, 446-447 (App. 1998) (duty to disclose conviction on insurance application). A conviction that has been set aside may still be used as a prior conviction in any subsequent prosecution and may be used by the Department of Transportation for license suspensions and revocations. A.R.S. § 13-907(A). In addition, a person still has an obligation to disclose the conviction, despite an order under A.R.S. § 13-907. *Russell*, 193 Ariz. at 470, 974 P.2d at 449. The conviction may also be used for licensing decisions, Ariz. Att'y Gen. Op. I83-042, and it is not removed from DPS records, Ariz. Att'y Gen. Op. I89-082. Because an order under § 13-907 does not erase "the fact" of conviction, a person receiving such an order remains a person "who has been convicted" for the purposes of A.R.S. § 13-3821.⁽⁸⁾

Third, allowing an order under §13-907 to eliminate an obligation to register is inconsistent with A.R.S. § 13-3821. The current sex offender registration statute

establishes, with limited

exceptions, a life-long procedure for those convicted of a specified offense.⁽⁹⁾ As described earlier, the Legislature may eliminate the registration requirement or make other changes that limit a person's obligation to register; however, the statutes governing sex offender registration do not provide a mechanism for a court to release from the registration requirement an offender who is statutorily required to register.

Conclusion

Because the Legislature eliminated registration requirements for particular offenses, persons previously convicted of those offenses are no longer statutorily required to register. They must, however, continue to register if a court has required registration as a term of probation.

An order purporting to waive a statutory obligation to register as a sex offender, although contrary to A.R.S. § 13-3821, must be obeyed until it is vacated or modified.

An order under A.R.S. § 13-907 setting aside a conviction, whether or not the order is proper, does not affect a person's obligation to register as a sex offender as required by A.R.S. § 13-3821.

In addition, if an order is improperly entered under A.R.S. § 13-907 setting aside a sex offense conviction, DPS must still reflect the entry of such an order in its records for the particular offender, until such order is vacated or modified.

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1. The Legislature repealed a previous sex offender registration law in 1978. 1978 Ariz. Sess Laws ch. 201, § 242.
2. Offenses no longer subject to mandatory registration because of the 1995 amendments include, for example, adultery (§ 13-1408), cohabitation (§ 13-1409); sodomy (§ 13-1411), and lewd and lascivious acts (§ 13-1412). In 1998, the Legislature added to the crimes that require registration (i) unlawful imprisonment and (ii) kidnapping when the victim is under 18 and the crime is not committed by the child's parent. A.R.S. § 13-3821(A)(1), (2).
3. Those offenders previously required to register but who need not register under current law are also not required to comply with other statutory requirements that apply to people required to register, such as notifying the county sheriff of address changes, A.R.S. § 13-3822, and renewing driver's licenses annually, A.R.S. § 13-3821(H).
4. When sentencing a defendant who is statutorily required to register, a judge might also order the defendant to register. *See Noble* at 172-73, 829 P.2d at 1218-19. There may be a question whether such an order merely gives notice of the statutory obligation to register or whether it creates an obligation to register that exists independent of the statute. This Opinion does not address this question but instead focuses on the statutory duty.
5. Because of significant First Amendment considerations, the Arizona Supreme Court recognized an

exception to this principle in a case in which a newspaper printed a factual account of a judicial proceeding in violation of a court order. *Phoenix Newspapers, Inc. v. Superior Court*, 101 Ariz. 257, 418 P.2d 594 (1966). Citing the constitutional protections ensuring freedom of the press and open courts, the Supreme Court refused to hold the newspapers in contempt for violating the invalid court order. *Id.* The Court has not extended this opinion to other situations. See *State v. McLaughlin*, at 507, 6ll P.2d at 94 (refusing to apply *Phoenix Newspapers* rationale in kidnapping case in which defendant challenged validity of child's custody order).

6. Section 13-907 is Arizona's "expungement" statute. Under A.R.S. § 13-907(A), with some exceptions, "every person convicted of a criminal offense may, upon fulfillment of the conditions of probation or sentence and discharge by the court, apply to the judge, justice of the peace or magistrate who pronounced sentence or imposed probation . . . to have the judgment of guilt set aside." An order under A.R.S. § 13-907 releases the offender "from all penalties and disabilities resulting from the conviction."

7. Before an order to set aside a conviction under A.R.S. § 13-907 is entered, Arizona Rule of Criminal Procedure 29.2(C) requires notice to the prosecutor and, if it is a felony, to the Attorney General. The rules also provide time for the prosecutor to file an objection. Ariz. R. Crim. Proc. 29.4. A timely objection should be filed where an ineligible offender seeks to set aside a conviction under A.R.S. § 13-907. If such an order has been issued, the appropriate prosecutorial agency should assess what opportunities exist to have the order vacated.

8. The same is not true of a conviction that is reversed on appeal. See *G.R. Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 115 (1983) (in contrast to a conviction vacated or reversed on appeal, "expunction does not alter the legality of the previous conviction"); *State v. Kiser*, 111 Ariz. 316, 317, 529 P.2d 215, 216 (1974) (if prior felony conviction reversed on appeal there is no longer a judgment of conviction).

9. A person convicted for unlawful imprisonment of a minor or kidnapping of a minor must register for ten years after "the person is released from prison, jail, probation, community supervision or parole and the person has fulfilled all restitution obligations." A.R.S. § 13-3821(K). If that person, however, has any other convictions for an offense requiring registration, the person "is required to register for life." *Id.* In addition, a judge may order a juvenile who is adjudicated delinquent for an offense specified in A.R.S. § 13-3821 to register, but that requirement only extends until the juvenile reaches 25 years of age. A.R.S. § 13-3821(D).

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