North Dakota Law Review

Volume 74 | Number 1 Article 8

1998

Criminal Procedure - Plea Withdrawal: Grounds for Allowance - North Dakota Adopts the Minority Rule regarding Court Notification of a Sex Offender's Duty to Register

Larry J. Richards

CRIMINAL PROCEDURE—PLEA WITHDRAWAL: GROUNDS FOR ALLOWANCE—NORTH DAKOTA ADOPTS THE MINORITY RULE REGARDING COURT NOTIFICATION OF A SEX OFFENDER'S DUTY TO REGISTER

State v. Breiner, 562 N.W.2d 565 (N.D. 1997)

I. FACTS

Jon Karter Breiner was charged with a class A misdemeanor under section 12.1-20-05 of the North Dakota Century Code, which prohibits engaging in a sexual act with a minor between the ages of fifteen and eighteen.[1] On May 1, 1996, Breiner's counsel moved to allow Breiner to enter a guilty plea.[2] The trial court then advised Breiner of his statutory and constitutional rights.[3] In addition, the trial court asked Breiner if his

---

1. State v. Breiner, 562 N.W.2d 565, 566 (N.D. 1997) (citing N.D. CENT. CODE § 12.1-20-05 (1985)). This statute has since been amended by the North Dakota Legislature. *See* N.D. CENT. CODE § 12.1-20-05 (1997). These changes became effective on August 1, 1997. *Id.* If Breiner had not plead guilty, the State asserted that it had evidence in the form of a blood analysis which showed with 99.999% probability that Breiner fathered a child with the then 15 year old victim. Record at 19-20, *Breiner*, 562 N.W.2d 565 (N.D. 1997) (No. 960298).

2. *Breiner*, 562 N.W.2d at 566.

3. *Id.* In doing so, the trial court sought to comply with Rule 11(b) of the North Dakota Rules of Criminal Procedure, which provides:

> (b) **Advice to defendant**. The court may not accept a plea of guilty without first, by addressing the defendant personally [except as provided in Rule 43(c)] in open court, informing the defendant of and determining that the defendant understands the following:
> (1) The nature of the charge to which the plea is offered;
> (2) The mandatory minimum punishment, if any, and the maximum possible punishment provided by the statute defining the offense to which the plea is offered;
> (3) That the defendant has the right to plead not guilty, or persist in that plea if it has already been made, or to plead guilty;
> (4) That if the defendant pleads guilty there will not be a further trial of any kind, so that by pleading guilty the defendant waives the right to a trial by jury or otherwise and the right to be confronted with adverse witnesses; and
> (5) If the defendant is not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding against the defendant and, if necessary, one will be appointed to represent the defendant, as provided in Rule 44, North Dakota Rules of Criminal Procedure.

N.D. R. CRIM. P. 11(b) (1998). Rule 11 of the North Dakota Rules of Criminal Procedure is similar to Rule 11 of the Federal Rules of Criminal Procedure. N.D. R. CRIM. P. 11 (explanatory note). The North Dakota Supreme Court has relied upon the Explanatory Note to Rule 11(b) to state that Rule 11(b) largely codifies the principles in Boykin v. Alabama, 395 U.S. 238 (1969). State v. Hagemann, 326 N.W.2d 861, 865 (N.D. 1982) (citing *Boykin*, 395 U.S. at 242 (holding that defendants must be apprised of their relinquishment of certain constitutional rights when they plead guilty)).

change in plea was voluntary.[4] The trial court then explained that the charge was a class A misdemeanor with a maximum penalty of one year in jail and a $1,000 fine.[5]

After accepting the guilty plea, the trial court sentenced Breiner to twelve months in prison, but suspended six months during two years of supervised probation.[6] The trial court did not express in the judgment or in any other court record that Breiner must register as a sexual offender for the next ten years under section 12.1-32-15 of the North Dakota Century Code.[7]

---

4. *Breiner*, 562 N.W.2d at 566. The trial court did this to comply with Rule 11(c), which requires courts to personally address the defendant in open court to determine that the plea is voluntary and not the result of force or threats. N.D. R. CRIM. P. 11(c). Rule 11(c) also requires the court to inquire if the plea resulted from a plea agreement. *Id.* Rule 11(c) codifies the rule in McCarthy v. United States, 394 U.S. 459, 466-67 (1969), which held that courts must personally address the defendant to determine the voluntariness of their plea under Rule 11 of the Federal Rules of Criminal Procedure. N.D. R. CRIM. P. 11(c) (explanatory note).

5. *Id. See* N.D. R. CRIM. P. 11(b)(2). A trial court is not required to advise of a minimum possible sentence under Rule 11(b)(2) of the North Dakota Rules of Criminal Procedure, but only advise of the mandatory minimum punishment. State v. Hamann, 262 N.W.2d 495, 501 (N.D. 1978).

6. *Breiner*, 562 N.W.2d at 566.

7. *Id.* Section 12.1-32-15 of the North Dakota Century Code provides:

> 3. After a person has pled guilty to or been found guilty of a crime against a child or an attempted crime against a child, or after a person has pled guilty or been found guilty as a sexual offender, the court shall impose, in addition to any penalty provided by law, a requirement that the person register, within ten days of coming into a county in which the person resides or is temporarily domiciled, with the chief of police of the city or the sheriff of the county if the person resides in an area other than a city. The court shall require a person to register by stating the requirement on the court records. A person must also register if that person:
>
> a. Is incarcerated or is on probation or parole on August 1, 1995, for a crime against a child or as a sex offender;
>
> b. Has pled guilty or nolo contendre to, or been found guilty of, an offense in a court of another state or the federal government equivalent to those offenses set forth in subdivision a and c of subsection 1; or
>
> c. Has pled guilty to or been found guilty of a crime against a child or as a sexual offender within ten years prior to August 1, 1995.

N.D. CENT. CODE § 12.1-32-15(3) (1997). Under North Dakota's registration statute, the official in charge of a correctional facility is required to provide future registrants with information explaining their duty to register and obtain the address where registrants expects to reside prior to their discharge, parole, or release. *Id.* § 12.1-32-15(4). This official must then supply this information to the attorney general 45 days before the offender's release. *Id.* The attorney general forwards a copy of this information, at least 30 days prior to the offender's release, to the law enforcement agency having jurisdiction over the registrant's expected address, the prosecutor who prosecuted the registrant, and the court in which the registrant was convicted or pled guilty. *Id.*

If a registrant is sentenced to probation, a fine, or both and is subsequently released by a court, the court is required to inform a registrant of the duty to register, obtain the registrant's expected address, and forward the information to the attorney general within three days. *Id.* § 12.1- 32- 5(5). The attorney general then informs the law enforcement agency having jurisdiction over that address. *Id.*

Under this statute, registration consists of a written statement signed by the registrant, the registrant's fingerprints, photographs of the registrant, and any other information required by the attorney general. *Id.* § 12.1-32-15(6). If a registrant changes his or her name or address, he or she must inform, in writing, the law enforcement agency with whom he or she last registered and any agency having jurisdiction over the registrant's new address within 10 days of the change. *Id.* Within three days of receipt, this information is forwarded to the attorney general, who also forwards a copy

On June 15, 1996, Breiner wrote the trial court relating that he was unaware of the registration requirement at trial, and that if he had been, he would not have plead guilty.[8] Breiner claimed he first learned of the registration requirement from state penitentiary officials when he was imprisoned.[9]

Shortly thereafter, Breiner's attorney formally moved to withdraw his guilty plea.[10] The trial court concluded that Breiner failed to show a "manifest injustice" under Rule 32(d) of the North Dakota Rules of Criminal Procedure in the court's acceptance of the guilty plea and denied the motion.[11] Breiner then appealed the ruling to the North Dakota Supreme Court.[12]

On appeal, a plurality of the North Dakota Supreme Court *held* that a trial court's failure to advise a defendant of his or her statutory duty to register under section 12.1-32-15 of the North Dakota Century Code, prior to accepting a defendant's guilty plea, is grounds to allow a

---

to any law enforcement agency having jurisdiction over the registrant's new address. *Id.* These provisions also apply in any other state that requires registration. *Id.* This registration requirement is imposed for a period of 10 years from the date of sentencing or after release from incarceration, whichever is later. *Id.* § 12.1-32-15(7)(a). However, if a registrant is classified a "sexually violent predator," the registration requirement can only be lifted by a court order. *Id.* § 12.1-32-15(7)(b).

An individual who violates this statute is guilty of a class A misdemeanor with a minimum mandatory sentence of 90 days in jail and one year probation. *Id.* § 12.1-32-15(8). Repeat violators of this statute will be found guilty of a class C felony. *Id.* In addition, any sex offender who fails to register and is on parole or probation will also have these privileges revoked. *Id.* § 12.1-32-15(9).

In regard to disclosure, this statute requires law enforcement agencies to disclose to the public any "relevant and necessary" registration information if the agency determines that disclosure is "necessary for public protection." *Id.* § 12.1-32-15(11). In addition, a law enforcement agency may disclose nonregistration information to the public which includes the offender's name and last known address, the offense(s) to which the offender was found guilty of, or pled guilty to, the date of the judgment or order imposing sentence, and if known, any disposition of a sentence. *Id.* The statute also requires that an offender's registration statement, photographs, and fingerprints be open for public inspection. *Id.* § 12.1-32-15(9).

8. *Breiner*, 562 N.W.2d at 566. Breiner's letter to the trial court states:

> [T]he problem is sir, that no-one [sic] told me that I would have to registar [sic] as a sex offender, and under that reason alone I would have not plead guilty without a change by the States [sic] attorney or by going to trial. So I would please like a court appointed attorney so that I can have help in removing my plea of guilty. Which would not have been made if all of the undisclosed parts of sentencing would have been known.

Id. at 566.

9. *Id.*

10. *Id.*

11. *Id.* Under Rule 32(d)(1) of the North Dakota Rules of Criminal Procedure, courts must allow defendants to withdraw a guilty plea if the motion is timely and the withdrawal is necessary to correct a "manifest injustice." N.D. R. CRIM. P. 32(d)(1) (1998). A motion for withdrawal is timely if made with due diligence considering the nature of the allegations. N.D. R. CRIM. P. 32(d)(2). However, if the withdrawal motion is made before sentencing, the court in its discretion may allow the defendant to withdraw a plea for any "fair and just reason" unless the prosecution has been substantially prejudiced by reliance upon the defendant's plea. N.D. R. CRIM. P. 32(d)(3). Rule 32 of the North Dakota Rules of Criminal Procedure is similar to Rule 32 of the Federal Rules of Criminal Procedure and adapted from the A.B.A. Standards relating to Pleas of Guilty, sections 2.1(a), 2.1(a)(1), 2.1(b). N.D. R. CRIM. P. 32(d) (explanatory note).

12. *Breiner*, 562 N.W.2d at 566.

defendant to withdraw a guilty plea.[13] In doing so, the plurality found that a trial court's failure to advise a defendant of this direct consequence of conviction constitutes a "manifest injustice" under Rule 32(d) of the North Dakota Rules of Criminal Procedure.[14]

II. LEGAL BACKGROUND

A. WITHDRAWAL OF A GUILTY PLEA AS A "MANIFEST INJUSTICE" UNDER RULE 32(D) OF THE NORTH DAKOTA RULES OF CRIMINAL PROCEDURE

Rule 32(d) of the North Dakota Rules of Criminal Procedure allows a defendant to withdraw a guilty plea when it "is necessary to correct a manifest injustice."[15] The determination of what constitutes a manifest injustice is typically within a trial court's discretion and is only reversed on appeal for an abuse of that discretion.[16] An abuse of discretion occurs when the court's discretion is not exercised in the interest of justice.[17] A manifest injustice includes procedural errors by the sentencing court.[18]

A failure to substantially comply with Rule 11 of the North Dakota Rules of Criminal Procedure is a procedural error which can constitute a "manifest injustice" under Rule 32(d) of the North Dakota Rules of Criminal Procedure.[19] For instance, a "manifest injustice" includes a failure to substantially comply with Rule 11(b) of the North Dakota Rules of Criminal Procedure by failing to properly advise a defendant.[20] However, the trial court's duty to advise defendants under Rule 11(b) of

---

13. *Id.* at 567.

14. *Id.*

15. N.D. R. CRIM. P. 32(d).

16. State v. Gunwall, 522 N.W.2d 183, 185 (N.D. 1994) (citing State v. Boushee, 459 N.W.2d 552, 556 (N.D. 1990)); *see also* State v. Dalman, 520 N.W.2d 860, 862 (N.D. 1994); State v. Trieb, 516 N.W.2d 287, 290 (N.D. 1994); Houle v. State, 482 N.W.2d 24, 25 (N.D. 1992); State v. Schumacher, 452 N.W.2d 345, 348 (N.D. 1990).

17. *Dalman*, 520 N.W.2d at 862 (citing *Trieb*, 516 N.W.2d at 290-291); *see also Houle*, 482 N.W.2d at 25; *Schumacher*, 452 N.W.2d at 348.

18. *Gunwall*, 522 N.W.2d at 185 (citing *Boushee*, 459 N.W.2d at 556).

19. *Gunwall*, 522 N.W.2d at 186 (finding that the record did not support the defendant's claim that a "manifest injustice" occurred because he failed to understand the consequences of his guilty plea); *see also Boushee*, 459 N.W.2d at 556.

20. *Gunwall*, 522 N.W.2d at 186 (finding that a trial court which reminded a defendant during a change of plea hearing of the court's advice at arraignment complied with Rule 11(b) of the North Dakota Rules of Criminal Procedure); *see also Boushee*, 459 N.W.2d at 556 (finding that the trial court's failure to substantially comply with Rule 11(b) of the North Dakota Rules of Criminal Procedure constituted a "manifest injustice"); *Schumacher*, 452 N.W.2d at 348 (holding a "manifest injustice" occurred because of the trial court's failure to advise the defendant of the mandatory minimum sentence in accordance with Rule 11(b)(2) of the North Dakota Rules of Criminal Procedure).

the consequences of their guilty pleas is limited to direct, not collateral, consequences.[21]

B. MAJORITY VIEW: SEX REGISTRATION STATUTES AS A COLLATERAL CONSEQUENCE

Presently, all fifty states and the District of Columbia have sex-offender registration statutes.[22] Courts in several of these states have held that registration of a sex offender is a collateral, rather than a direct, consequence of a conviction of which defendants need not be advised by trial courts.[23] The distinction between "direct" and "collateral" consequences of a plea has been defined as turning "on whether the result

---

21. *Dalman*, 520 N.W.2d at 863 (holding that deportation is a collateral consequence of which defendants need not be advised under Rule 11(b)(2) of the North Dakota Rules of Criminal Procedure); *Houle*, 482 N.W.2d at 30 (holding that parole eligibility is a collateral consequence of which defendants need not be advised under Rule 11(b) of the North Dakota Rules of Criminal Procedure).

22. *See* ALA. CODE §§ 13A-11-200 to 203 (1994); ALASKA STAT. §§ 12.63.010 to 12.63.100, 18.65.087 (Michie 1996); ARIZ. REV. STAT. ANN. §§ 13-3821 to 13-3826 (West 1989 & Supp. 1997); ARK. CODE ANN. §§ 12-12-901 to 12-12-920 (Michie Supp. 1997); CAL. PENAL CODE § 290 to 290.9 (West 1988 & Supp. 1998); COLO. REV. STAT. ANN. § 18-3-412.5 (1997); CONN. GEN. STAT. ANN. § 54-102r (West Supp. 1996); DEL. CODE ANN. tit. 11 § 4120 (1995 & Supp. 1996); D.C. CODE ANN. §§ 24-1101 to 24-1117 (Supp. 1997); FLA. STAT. ANN. § 775.21 (West Supp. 1998); GA. CODE ANN. § 42-1-12 (Harrison Supp. 1997); HAW. REV. STAT. § 707-743 (Supp. 1996); IDAHO CODE §§ 18-8301 to 18-8311 (1997); 730 ILL. COMP. STAT. ANN. 150/1 to 150/10 (West 1997); IND. CODE ANN. §§ 5-2-12-1 to 5-2-12-13 (Michie 1997); IOWA CODE ANN. §§ 692A.1 to 692A.15 (West Supp. 1997); KAN. STAT. ANN. §§ 22-4901 to 22-4909 (Supp. 1997); KY. REV. STAT. ANN. §§ 17.500 to 17.540 (Michie 1996); LA. REV. STAT. ANN. §§ 15.540 to 549 (West Supp. 1998); ME. REV. STAT. ANN. tit. 34-A, §§ 11001 to 11144 (West Supp. 1997); MD. ANN. CODE art. 27, § 792 (Supp. 1997); MASS. GEN. LAWS ANN. Ch. 22c, § 37 (West 1994); MICH. COMP. LAWS ANN. §§ 28.721 to 28.732 (West 1994 & Supp. 1997); MINN. STAT. ANN. § 243.166 (West Supp. 1998); MISS. CODE ANN. §§ 45-33-1 to 45-33-19 (Supp. 1997); MO. ANN. STAT. §§ 589.400 to 589.425 (West Supp. 1998); MONT. CODE ANN. §§ 46-23-501 to 46-23-511 (1997); NEB. REV. STAT. §§ 29-4001 to 29-4013 (Supp. 1996); NEV. REV. STAT. ANN. §§ 179D.350 to 179D.490 (Michie Supp. 1998); N.H. REV. STAT. ANN. §§ 651-B:1 to 651-B:9 (Supp. 1997); N.J. STAT. ANN. §§ 2C:7-1 to 2C:7-11 (West 1995 & Supp. 1997); N.M. STAT. ANN. §§ 29-11A-1 to 29-11A-8 (Michie 1997); N.Y. CORRECT. LAW §§ 168 to 168-v (McKinney Supp. 1997); N.C. GEN. STAT. §§ 14-208.5 to 14-208.25 (Supp. 1997); N.D. CENT. CODE § 12.1-32-15 (1997); OHIO REV. CODE ANN. §§ 2950.01 to 2950.99 (Anderson 1996 & Supp. 1997); OKLA. STAT. ANN. tit. 57, §§ 581 to 588 (West Supp. 1998); OR. REV. STAT. §§ 181.594 to 181.605 (1997); PA. STAT. ANN. tit. 42, §§ 9791 to 9799.5 (West Supp. 1996); R.I. GEN. LAWS §§ 11-37.1-1 to 11-37.1-19 (Supp. 1997); S.C. CODE ANN. §§ 23-3-400 to 23-3-490 (Law Co-op Supp. 1997); S.D. CODIFIED LAWS §§ 22-22-31 to 22-22-41 (Michie Supp. 1997); TENN. CODE ANN. §§ 40-39-101 to 40-39-110 (1997); TEX. CODE CRIM. P. ANN. art. 62.01 to 62.12 (West Supp. 1998); UTAH CODE ANN. § 77-27-21.5 (Supp. 1997); VT. STAT. ANN. tit. 13 §§ 5401 to 5413 (Supp. 1997); VA. CODE ANN. §§ 19.2-298.1 to 19.2-298.3, 19.2-390.1 (Michie 1995 & Supp. 1996); WASH. REV. CODE ANN. §§ 9A.44.130 to 9A.44.140, 4.24.550 (West Supp. 1998); W. VA. CODE §§ 61-8F-1 to 61-8F-10 (1997); WIS. STAT. ANN. §§ 301.45 to 301.46 (West Supp. 1997); WYO. STAT. ANN. §§ 7-19-301 to 306 (Michie 1997).

States which do not institute a sex offender registration program in compliance with the criteria set forth in 42 U.S.C.A. § 14071 forfeit a portion of the federal drug control grants allocated to them under 42 U.S.C.A. § 3756. *See* 42 U.S.C.A. § 14071(g)(2)(A) (Supp. 1998). States had until September 13, 1997 to implement their programs. *Id.* § 14071(g)(1).

23. *See* State v. Young, 542 P.2d 20, 22 (Ariz. 1975); *In re* B.G.M., 929 S.W.2d 604, 606-07 (Tex. App. 1996); State v. Ward, 869 P.2d 1062, 1076 (Wash. 1994); Johnson v. State, 922 P.2d 1384, 1387 (Wyo. 1996); *see also* Doe v. Poritz, 662 A.2d 367, 406 n.18 (N.J. 1995) (supporting the conclusion that registration is a collateral consequence of conviction).

represents a definite, immediate and largely automatic effect on the range of the defendant's punishment."[24] Hence, the general reasoning of these cases is that the requirement to register is largely regulatory or remedial, and not punitive in purpose.[25] In addition, many cases utilize this same reasoning in determining the constitutionality of the retroactive application of registration and notification laws under state and the federal Ex Post Facto Clauses.[26] These cases have generally found that the statutory design or the legislative intent behind sex offender registration laws is to aid law enforcement[27] in the purpose of protecting children and the public at large.[28]

---

24. *Ward*, 869 P.2d at 1075 (citing State v. Barton, 609 P.2d 1353, 1356 (Wash. 1980)).

25. *See B.G.M.*, 929 S.W.2d at 606-07; *Johnson*, 922 P.2d at 1387.

26. The Ex Post Facto Clause prohibits: 1) every law which criminalizes and punishes an action which was innocent when the action was committed; 2) every law which aggravates a crime, or makes it greater, than when it was committed; 3) every law which inflicts greater punishment than prescribed by law when the crime was committed; 4) every law that alters the legal rules of evidence required at the time of the offense in order to convict the offender. *See* Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798).

The following are ex post facto cases discussing only the registration provisions as non-punitive: Artway v. Attorney General, 81 F.3d 1235, 1253-67 (3d Cir. 1996), *rehearing denied*, 83 F.3d 594 (3d Cir. 1996) [hereinafter Artway II] (finding challenges to public notification provisions unripe); Doe v. Gregoire, 960 F. Supp. 1478, 1482-87 (W.D. Wash. 1997); Doe v. Pataki, 940 F. Supp. 603, 629-30 (S.D.N.Y. 1996), *reversed in part*, 120 F.3d 1263 (2d Cir. 1997) [hereinafter Pataki II]; Artway v. Attorney General, 876 F. Supp. 666, 671-77, 688 (D.N.J. 1995), *vacated in part*, 81 F.3d 1235 (3d Cir. 1996) [hereinafter Artway I]; Rowe v. Burton, 884 F. Supp. 1372, 1375-81 (D. Alaska 1994); People v. Taylor, 561 N.E.2d 393, 394 (Ill. App. Ct. 1990); State v. Myers, 923 P.2d 1024, 1041-43 (Kan. 1996), *cert. denied*, 117 S. Ct. 2508 (1997).

The following are ex post facto cases discussing both registration and notification provisions as non-punitive: Russell v. Gregoire, 124 F.3d 1079, 1087-94 (9th Cir. 1997); Doe v. Pataki, 120 F.3d 1263, 1276-86 (2d Cir. 1997) [hereinafter Pataki III]; W.P. v. Poritz, 931 F. Supp. 1199, 1213-19 (D.N.J. 1996); State v. Noble, 829 P.2d 1217, 1221-24 (Ariz. 1992); State v. McCuin, 808 P.2d 332, 335-42 (Ariz. Ct. App. 1991), *vacated in part*, 829 P.2d 1217 (Ariz. 1992); People v. Starnes, 653 N.E.2d 4, 6-7 (Ill. App. Ct. 1995); State v. Pickens, 558 N.W.2d 396, 397-400 (Iowa 1997); State v. Manning, 532 N.W.2d 244, 247-49 (Minn. Ct. App. 1995); State v. Costello, 643 A.2d 531, 532-35 (N.H. 1994); Doe v. Poritz, 662 A.2d 367, 387-405 (N.J. 1995); People v. Afrika, 648 N.Y.S.2d 235, 238-41 (N.Y. Sup. Ct. 1996); Kitze v. Commonwealth, 475 S.E.2d 830, 832-34 (Va. Ct. App. 1996); *Ward*, 869 P.2d at 1067-74; State v. Taylor, 835 P.2d 245, 247-49 (Wash. Ct. App. 1992); Snyder v. State, 912 P.2d 1127, 1130-31 (Wyo. 1996).

Also notable are: Doe v. Kelley, 961 F. Supp. 1105, 1108-12 (W.D. Mich. 1997) (denying a sex offender's motion for a preliminary injunction to prevent retroactive application of a community notification statute); Doe v. Weld, 954 F. Supp. 425, 430-37 (D. Mass. 1996) (denying a sex offender's motion for a preliminary injunction to prevent retroactive application of a community notification statute); People v. Adams, 581 N.E.2d 637, 640-42 (Ill. 1991) (holding that sex offender registration was not punishment for purposes of the Eighth Amendment's "cruel and unusual punishment" clause).

27. *See Russell*, 124 F.3d at 1087; *Pataki III*, 120 F.3d at 1285; *Artway II*, 81 F.3d at 1265; *Gregoire*, 960 F. Supp. at 1484; *Weld*, 954 F. Supp. at 433; *Pataki II*, 940 F. Supp. at 629; *Noble*, 829 P.2d at 1223; *Adams*, 581 N.E.2d at 640; *Pickens*, 558 N.W.2d at 400; Opinion of the Justices of the Senate, 668 N.E.2d 738, 739 (Mass. 1996); *Manning*, 532 N.W.2d at 248; *Costello*, 643 A.2d at 533; *Poritz*, 662 A.2d at 374; *Afrika*, 648 N.Y.S.2d at 239; *Kitze*, 475 S.E.2d at 832; *Ward*, 869 P.2d at 1065; *Snyder*, 912 P.2d at 1131.

28. *See Russell*, 124 F.3d at 1087; *Pataki III*, 120 F.3d at 1285; *Artway II*, 81 F.3d at 1264; *Gregoire*, 960 F. Supp. at 1484; *Weld*, 954 F. Supp. at 433; *Burton*, 884 F. Supp. at 1376; *Adams*, 581 N.E.2d at 640; *Myers*, 923 P.2d at 1032; *Opinion of the Justices of the Senate*, 668 N.E.2d at 739; *Poritz*, 662 A.2d at 373-74; *Afrika*, 648 N.Y.S.2d at 238-39; *Kitze*, 475 S.E.2d at 832; *Ward*, 869 P.2d at

For example, the Washington Supreme Court in *State v. Ward*[29] heard a consolidated appeal by two appellants, including one who was seeking to overturn a conviction for failing to register as a sex offender and by another convicted sex offender petitioning under Washington's sex offender registration statute for relief from his duty to register.[30] The appellants contended that Washington's sex offender registration statute was not applicable to either of them because it was unconstitutional under the ex post facto, equal protection, and due process provisions of the United States and Washington Constitutions.[31]

In addressing the due process claim, the court held that sex offender registration is nonpunitive in nature and is a collateral consequence of a conviction, which does not impose a duty on a court to advise defendants prior to accepting a guilty plea.[32] The court also held that registration is not punishment in determining that retroactive application of the registration requirement does not violate the Ex Post Facto clause of the United States and Washington constitutions.[33]

In arriving at these conclusions, the court found that "registration alone imposes no significant additional burden on offenders."[34] The court supported this conclusion by noting that the state's sex offender registration law only requires offenders to provide information not already in the hands of the authorities.[35]

In addition, the court reasoned that the state's public disclosure of a registrant's information is limited to only relevant information necessary to protect the public to whom the offender may pose a threat.[36] Furthermore, the court found that the information released imposed no

---

1065; *Snyder*, 912 P.2d at 1131.

29. 869 P.2d 1062 (Wash. 1994).

30. *Ward*, 869 P.2d at 1065-66.

31. *Id.* at 1065.

32. *Id.* at 1076.

33. *Id.* at 1074.

34. *Id.* at 1069; *see also* Pataki II, 940 F. Supp. 603, 630 (S.D.N.Y. 1996) (holding that registration "does not impose a substantial affirmative disability or restraint"); *Burton*, 884 F. Supp. at 1378 (finding any affirmative restraint resulting from registration to be *de minimis*); State v. Manning, 532 N.W.2d 244, 248 (Minn. Ct. App. 1995) (holding that registration imposes no affirmative disability).

35. *Ward*, 869 P.2d at 1069.

36. *Id.* at 1070 (quoting WASH. REV. CODE ANN. § 4.22.550(1) (1990)); *see also* Artway II, 81 F.3d 1235, 1265 (3d Cir. 1996) (finding that disclosure is limited only to law enforcement); Doe v. Weld, 954 F. Supp. 425, 435 (D. Mass. 1996) (finding that the defendant's information would only be disclosed to those community members making a personal request); State v. Noble, 829 P.2d 1217, 1223 (Ariz. 1992) (finding that disclosure is limited to law enforcement, certain employers, and employees of government agencies); Doe v. Poritz, 662 A.2d 367, 422 (N.J. 1995) (finding that the level of disclosure is limited by a tier scheme dependent upon a finding of an offender's dangerousness).

One of the conditions state laws must now comply with in order for a state to receive their entire share of federal drug control grants under 42 U.S.C.A. § 3756 is that law enforcement agencies must release relevant information to protect the public. *See* 42 U.S.C.A. § 14071(e) (1994 & Supp. 1997); 42 U.S.C.A. § 14071(g)(2)(A) (Supp. 1998). *Cf.* Bob Moen, *Local Police Unprepared for New Notification Law*, GRAND FORKS HERALD, Aug. 4, 1997, at 2A (describing the passage of a federal law as the reason for recent changes to the notification provisions of N.D. CENT. CODE § 12.1-32-15).

additional burden on the registrant since the records were already available to the public.[37] The court then reasoned *arguendo* that even if there is any public stigma on registrants, it is caused by the public's reaction to the information, not from any intentionally imposed "punitive effect" caused by the release of the information.[38]

The court was unpersuaded that registration would place a lifelong "badge of infamy" on registrants.[39] The court reasoned that no lifelong burden could come from a registration requirement which is imposed for a definite number of years after a conviction and can be relieved by a superior court upon a showing by an offender's petition that future registration no longer serves the statute's purpose.[40] The court also concluded that any additional focus a sex offender has in a police investigation of a sex crime is a result of the conviction, not registration.[41]

In sum, the court concluded that sex offender registration does not alter the standard of punishment.[42] Therefore, the court found that registration is a collateral consequence of a guilty plea.[43]

In *State v. Manning*,[44] the Minnesota Court of Appeals faced a similar challenge when it considered an appeal by a defendant convicted of violating his probation for failing to register as a sex offender.[45] The defendant contended he was not obligated to register on grounds that the retroactive application of the Minnesota registration statute was punishment in violation of the Ex Post Facto clauses of the United States and

37. *Ward*, 869 P.2d at 1069; *see also* Pataki III, 120 F.3d 1263, 1280 (2d Cir. 1997); *Artway II*, 81 F.3d at 1266-67; Doe v. Kelley, 961 F. Supp. 1105, 1109 (W.D. Mich. 1997) (determining that notification assists the public in getting information that could only be obtained through arduous research); *Noble*, 829 P.2d at 1222; People v. Adams, 581 N.E.2d 637, 641 (Ill. 1991); State v. Pickens, 558 N.W.2d 396, 399 (Iowa 1997); *Manning*, 532 N.W.2d at 248; *Poritz*, 662 A.2d at 407; People v. Afrika, 648 N.Y.S.2d 235, 240 (N.Y. Sup. Ct. 1996).

38. *Ward*, 869 P.2d at 1072; *see also Kelley*, 961 F. Supp. at 1111; *Burton*, 884 F. Supp. at 1379; *see also Pataki III*, 120 F.3d at 1281 (finding that any punitive effects an offender might feel flow from the underlying conviction, not registration).

39. *Ward*, 869 P.2d at 1073.

40. *Id.* at 1073-74.

41. *Id.* at 1073; *see also In re* Reed, 663 P.2d 216, 224 (Cal. 1983) (Richardson, J., dissenting) (attributing further police attention to other factors, like probation conditions); Snyder v. State, 912 P.2d 1127, 1131 (Wyo. 1996) (attributing an offender's prior conviction as the cause of any increased interest law enforcement has in an offender in any future sex crime investigations).

42. *Ward*, 869 P.2d at 1076; *see also* Pataki II, 940 F. Supp. 603, 630 (S.D.N.Y. 1996) (finding that registration is "essentially ministerial" and "does not restrain or inhibit a sex offender's activities in any significant way"); *Burton*, 884 F. Supp. at 1378 (finding that registration imposes no obligation to accept continuing supervision, submit to searches, perform community service, or live in a designated area). *But see* Kitze v. Commonwealth, 475 S.E.2d 830, 835 (Va. Ct. App. 1996) (Benton, J., dissenting) (concluding that registration is punitive since it deprives offenders of rights they previously enjoyed).

43. *Ward*, 869 P.2d at 1076.

44. 532 N.W.2d 244 (Minn. Ct. App. 1995).

45. State v. Manning, 532 N.W.2d 244, 249 (Minn. Ct. App. 1995).

Minnesota Constitutions.[46] The court held that Minnesota's sex offender registration statute is not punitive in nature and, therefore, does not violate the federal and state constitutional prohibitions against ex post facto laws.[47]

In doing so, the court found that the statute's requirement that registrants give notice when they relocate does not alone restrain their movements.[48] The court also noted that the registration requirement is limited to felony offenses.[49] The court further supported its reasoning by determining that registration has not historically been regarded as punishment.[50] Rather, registration is another method for law enforcement agencies to gain easy access to necessary information.[51]

The court also refuted the argument that registration burdens former sex offenders by subjecting them to questioning and investigation when sex crimes occur locally.[52] The court explained that sex offenders will continue to have due process protections as though there were no registration requirement in place.[53] In the end, the court concluded that the slight burden imposed by increased scrutiny when local sex crimes occur is not excessive in relation to the registration statute's regulatory purpose.[54]

---

46. *Id.* at 248.

47. *Id.* at 249.

48. *Id.* at 248; *see also* Russell v. Gregoire, 124 F.3d 1079, 1087 (9th Cir. 1997); State v. Noble, 829 P.2d 1217, 1222 (Ariz. 1992) (finding that registration does not "affirmatively inhibit or restrain" an offender's movements); State v. Myers, 923 P.2d 1024, 1041 (Kan. 1996); *Ward*, 869 P.2d at 1069 (finding that offenders can move freely "within their own community or from one community to another"); State v. Taylor, 835 P.2d 245, 249 (Wash. Ct. App. 1992). *But see Taylor*, 835 P.2d at 250 (Agid, J., dissenting) (concluding that an offender's constitutional right to travel and ability to choose where to live is adversely affected by registration).

49. *Manning*, 532 N.W.2d at 248; *see also Ward*, 869 P.2d at 1072 (distinguishing *In re* Reed, 663 P.2d 216, 216 (Cal. 1983) (criticizing a registration statute's broad application to non-felony crimes)); People v. Adams, 581 N.E.2d 637, 642 (Ill. 1991) (finding a registration statute to be narrowly tailored to protect children from child molesters).

50. *Manning*, 532 N.W.2d at 248 (citing Lambert v. California, 355 U.S. 225, 229 (1957)); *see also Russell*, 124 F.3d at 1089; Artway II, 81 F.3d 1235, 1265 (3d Cir. 1996); Pataki II, 940 F. Supp. 603, 630 (S.D.N.Y. 1996); Rowe v. Burton, 884 F. Supp. 1372, 1378 (D. Alaska 1994); *Adams*, 581 N.E.2d at 640; People v. Starnes, 653 N.E.2d 4, 6-7 (Ill. App. Ct. 1995); State v. Pickens, 558 N.W.2d 396, 400 (Iowa 1997); Kitze v. Commonwealth, 475 S.E.2d 830, 833 (Va. Ct. App. 1996); *Ward*, 869 P.2d at 1072.

51. *Manning*, 532 N.W.2d at 248; *see also Ward*, 869 P.2d at 1072 (finding that registration is a traditional governmental method used to gather information for law enforcement).

52. *Manning*, 532 N.W.2d at 248; *see also Ward*, 869 P.2d at 1073 (concluding that registration does not make prior sex offenders the focus of every sex crime investigation).

53. *Manning*, 532 N.W.2d at 248; *see also Noble*, 829 P.2d at 1223 (finding that registration does not diminish an offender's right to be free from unconstitutional law enforcement practices); *Adams*, 581 N.E.2d at 641 (finding that an offender's constitutional safeguards remain in place under a registration requirement); *Ward*, 869 P.2d at 1073 (finding that formerly convicted sex offenders continue to enjoy due process and constitutional provisions afforded to every citizen); Snyder v. State, 912 P.2d 1127, 1131 (Wyo. 1996) (concluding that a "registrant would be afforded all the constitutional protections to which an accused is entitled").

54. *Manning*, 532 N.W.2d at 249; *see also* People v. Taylor, 561 N.E.2d 393, 394 (Ill. App. Ct.

Finally, in *Doe v. Poritz*,[55] the New Jersey Supreme Court upheld New Jersey's registration and notification laws against various statutory and constitutional attacks brought by a convicted sex offender.[56] In upholding the law's retroactive application against an ex post facto challenge, the court refuted the claim that sex offender registration and notification creates a deterrent.[57] The court reasoned that repetitive and compulsive offenders who were not deterred by the threat of long-term incarceration are not likely to be deterred by any disability associated with these laws.[58]

On the other hand, the court stated that even if any deterrent is created by sex offender registration and notification statutes, it is only an "inevitable consequence of the regulatory provisions."[59] Furthermore, the court found that even if this "inevitable" deterring impact is potentially severe, the statutes are still non-punitive because their underlying purpose and implementing provisions are remedial in nature.[60]

C. MINORITY VIEW: SEX OFFENDER REGISTRATION AS A DIRECT CONSEQUENCE

Prior to *Breiner*, California was the only state finding registration to be a direct consequence of which defendants must be informed prior to accepting a guilty plea.[61] In *In re Birch*,[62] the California Supreme Court found that sex offender registration was "unusual and onerous in nature" when it followed "inexorably" from a conviction for lewd and

---

1990) (concluding that any limitation registration imposes on sex offenders is made "insignificant" when weighed against the need to protect the public).

55. 662 A.2d 367 (N.J. 1995).

56. Doe v. Poritz, 662 A.2d 367, 423 (N.J. 1995).

57. *Id.* at 404.

58. *Id.*; *see also* Artway II, 81 F.3d 1235, 1267 (3d Cir. 1996) (finding that the registration's effects are not so "draconian" as to constitute "punishment in any way approaching incarceration"); *Adams*, 581 N.E.2d at 640-41 (finding that a registration requirement is "innocuous" compared to an "extended period of years in prison").

59. *Poritz*, 662 A.2d at 405; *see also* W.P. v. Poritz, 931 F. Supp. 1199, 1214 (D.N.J. 1996) (finding the deterrent purpose of notification to be a "necessary complement" to the remedial statutory operation of the law).

60. *Poritz*, 662 A.2d at 388. *See* People v. Afrika, 648 N.Y.S.2d 235, 240 (N.Y. App. Div. 1996); *In re* B.G.M., 929 S.W.2d 604, 606 (Tex. App. 1996); Kitze v. Commonwealth, 575 S.E.2d 830, 833 (Va. Ct. App. 1996); *see also Adams*, 581 N.E.2d at 641 (finding the fact that a registration statute makes no attempt to correct pedophile behavior to be a significant indicator of the statute's non-punitive intent).

61. *B.G.M.*, 929 S.W.2d at 606. *See* People v. McClellan, 862 P.2d 739, 745 (Cal. 1993) (concluding that an error does occur when a trial court fails to advise defendants of their duty to register); Bunnell v. Superior Court, 531 P.2d 1086, 1094 (Cal. 1975) (concluding that defendants should be advised of direct consequences of conviction, such as a registration requirement); *In re* Birch, 515 P.2d 12, 17 (Cal. 1973) (stating that a registration requirement is a "grave and direct consequence" of a guilty plea); People v. Cotton, 284 Cal. Rptr. 757, 763-64 (Cal. Ct. App. 1991) (finding that drug offender registration is a direct consequence of a conviction). *But see* People v. McVickers, 840 P.2d 955, 959 (Cal. 1992) (citing with approval State v. Noble, 829 P.2d 1217, 1224 (Ariz. 1992) (concluding that registration is a collateral consequence)).

62. 515 P.2d 12 (Cal. 1973).

dissolute conduct.[63] In concluding that the defendant needed to be advised of the registration requirement, the court noted that it could not believe a defendant would be aware of this "grave and direct consequences" of a guilty plea for a conviction arising from the conduct of "urinating in a parking lot at 1:30 in the morning."[64]

In reaching this conclusion, the court noted that registration subjects individuals to "continual police surveillance."[65] Furthermore, the court reasoned that while "the stigma of a short jail sentence should eventually fade," registration results in an "ignominious badge" that can remain for a lifetime.[66]

In *In re Reed*,[67] the California Supreme Court considered an appeal by a defendant convicted of soliciting "lewd and dissolute conduct" for engaging in a conversation with an undercover vice officer at urinals located in a public restroom and then briefly masturbating in the officer's presence.[68] The court held that mandatory sex offender registration for those convicted under a misdemeanor disorderly conduct statute, such as the one under which Reed was convicted, is unconstitutional under the California state constitutional prohibition against cruel and unusual punishment.[69] The court found that sex offender registration, as applied by the California registration statute, was an affirmative disability or restraint.[70] In particular, the court objected to the fact that registration was imposed for relatively minor offenses arising from conduct such as making a "gesture," a "flirtation," or "an invitation for sexual favors"

---

63. *In re* Birch, 515 P.2d 12, 16 (Cal. 1973).

64. *Id.* at 17; *see also* State v. McCuin, 808 P.2d 332, 342 (Ariz. Ct. App. 1991) (Claborne, J., dissenting) (objecting to the application of registration to crimes not considered aberrant and less likely to be repeated by an offender).

65. *Birch*, 515 P.2d at 17. *See also* State v. Taylor, 835 P.2d 245, 250 (Wash. Ct. App. 1992) (Agid, J., dissenting) (finding that registration informally subjects sex offenders to being "watched, investigated, questioned, and accused" by law enforcement); *Noble*, 829 P.2d at 1223 (finding that a deterrent effect is created because an offender's location is easily ascertained by law enforcement through registration); *In re* Reed, 663 P.2d 216, 218 n.5 (Cal. 1983) (paraphrasing the movie "Casablanca" by indicating that registration will lead to a rounding up of the usual suspects); Otto M. Kaus & Ronald E. Mallen, *The Misguided Hand of Counsel—Reflections on "Criminal Malpractice,"* 21 UCLA L. REV. 1191, 1222 (1974) (stating that registration's presumable purpose means "a series of command performance lineups").

66. *Birch*, 515 P.2d at 17. Under California's sex offender registration statute, registration could be imposed for the duration of the offender's life. *Id.* at 16-17.

67. 663 P.2d 216 (Cal. 1983).

68. *Reed*, 663 P.2d at 221. Although denied by Reed, the police officer claimed Reed solicited him during the conversation. *Id.*

69. *Id.* at 222. The impact of *Reed* as binding precedent in California has been sharply curtailed. *See* People v. Fioretti, 63 Cal. Rptr. 2d 367, 372 (Cal. Ct. App. 1997) (finding that *Reed's* holding is properly limited to the cruel and unusual punishment clause of the California Constitution and sex offender registration being applied to defendants convicted of a misdemeanor).

70. *Reed*, 663 P.2d at 218. The court did not find it dispositive in arriving at its decision in this case that registration has not "historically been regarded as punishment." *Id.* at 219. *But see Noble*, 829 P.2d at 1222 (citing *Birch*, 515 P.2d at 17, as supporting the proposition that sex offender registration has historically been viewed as punishment).

made in a "public place."[71] Therefore, the court concluded that the continued penalty inflicted by sex offender registration was disproportionate to the crime for which the defendant was convicted.[72]

Despite having decided *Birch* in 1973, California remained the only state to hold that registration is a direct consequence of a guilty plea which requires admonishment until *Breiner*.[73] All other states that had decided the issue of whether registrants need to be advised by trial court of their duty to register ruled the exact opposite.[74] Furthermore, despite *Birch's* finding that registration is punishment, courts have almost universally found that sex offender registration is not punishment in deciding constitutional challenges to registration statutes.[75] Consequently, there was little to indicate that even a plurality of the North Dakota Supreme Court would adopt the minority position in *Breiner*.

III. ANALYSIS

Writing for the plurality in *Breiner*, Justice Meschke explained that the North Dakota Rules of Criminal Procedure require trial courts to personally inform defendants who enter guilty pleas about the consequences of their plea to ensure that the plea has a factual basis and is voluntary.[76] The plurality also explained that a trial court need only advise defendants of the direct consequences of the plea, not those which can be characterized as collateral.[77]

The plurality noted that many appellate courts view the consequence of registration as a sexual offender to be collateral, so that a trial court's failure to advise defendants of the need to register does not constitute grounds for allowing a withdrawal of a guilty plea.[78] The plurality explained the reasoning behind the majority view as being that sex

---

71. *Reed*, 663 P.2d at 220.

72. *Id.* at 222. The court also questioned the effectiveness of the California registration statute as a law enforcement tool designed to aid criminal investigation. *Id.* at 219. *See also* April R. Bedarf, Note, *Examining Sex Offender Community Notification Laws*, 83 CAL. L. REV. 885, 899-903 (1995) (discussing problems with registration being used as a tool for law enforcement).

73. *See In re* B.G.M., 929 S.W.2d 604, 606 (Tex. App. 1996) (stating that California was the only state following the holding that registration constitutes a direct consequence of conviction).

74. *See supra* footnote 23 for a listing of cases holding that trial courts need not advise defendants of their duty to register prior to accepting a guilty plea.

75. *See supra* footnote 26 for a listing of cases finding that registration does not constitute punishment.

76. State v. Breiner, 562 N.W.2d 565, 567 (N.D. 1997). Justice Meschke delivered the plurality opinion with which Justice Maring concurred. *Id.* at 565.

77. *Id.* at 567 (citing State v. Dalman, 520 N.W.2d 860, 863 (N.D. 1994); Houle v. State, 482 N.W.2d 24, 30 (N.D. 1992)).

78. *Id.* (citing State v. Young, 542 P.2d 20, 22 (1975); *B.G.M.*, 929 S.W.2d 606-07; State v. Ward, 869 P.2d 1062, 1075 (Wash. 1994); Johnson v. State, 922 P.2d 1384, 1387 (Wyo. 1996); Licia A. Esposito, Annotation, *State Statutes or Ordinances Requiring Persons Previously Convicted of Crime to Register with Authorities*, 36 A.L.R. 5th 161, § 9 (1996)).

offender registration laws are "largely remedial, not punitive, and are designed to facilitate law enforcement and protect children."[79]

However, instead of adopting this view, the plurality was persuaded by California's minority rule holding sexual offender registration to be a direct consequence which requires sentencing courts to advise defendants of the registration requirement prior to accepting the guilty plea.[80] The plurality accepted the California Supreme Court's rationale that a registration requirement "imposes a grave, and even onerous, additional punishment, especially for misdemeanor offenses."[81] The plurality concluded that this reasoning corresponds with the statutory obligation of sentencing courts under North Dakota's registration law.[82]

The plurality explained that regardless of the remedial aspect of the law, the North Dakota Legislature "clearly imposed a duty on the sentencing court to inform a pleading defendant about the consequence of the conviction."[83] The plurality concluded that the statutory duty under the registration law must be stated on the record and corresponds with the procedural duties relating to advising defendants of possible

---

79. *Id.* In asserting that registration was remedial and non-punitive, the State of North Dakota analogized the need to register as a sex offender to the remedial nature of North Dakota's administrative procedures of suspending drivers' licenses after a conviction for driving under the influence. Brief for Appellee at 13, *Breiner*, 562 N.W.2d 565 (N.D. 1997) (No. 960298) (citing State v. Zimmerman, 539 N.W.2d 49, 56 (N.D. 1996)).

80. *Breiner*, 562 N.W.2d at 567 (citing People v. McClellan, 862 P.2d 739, 749 (Cal. 1993), and *In re* Birch, 515 P.2d 12, 16 (Cal. 1973)).

81. *Id.* The plurality opinion then quoted the following portion of *In re Birch*:

> [I]n view of the unusual and onerous nature of the sex registration requirement that follows inexorably from a conviction . . . the trial court's duty surely included an obligation to advise petitioner of this sanction prior to accepting his guilty plea.
>
> . . . .
>
> While petitioner possibly might have suspected that a guilty plea could result in a short jail sentence, we cannot believe that he was aware that as a consequence of urinating in a parking lot at 1:30 in the morning he would be required to register as a sex offender. Certainly counsel would have advised him of this grave and direct consequence of his guilty plea; in the absence of counsel the responsibility for such advice rested with the court. Without this advice, we conclude that petitioner's waiver of counsel and plea of guilty cannot be regarded as having been knowingly and intelligently made.

Id. (quoting *Birch*, 515 P.2d at 16-17).

82. *Id.*

83. *Id.* at 567. The plurality then quoted the following portion of N.D. CENT CODE § 12.1-32-15(2):

> After a person has pled guilty to or been found guilty of a crime against a child or an attempted crime against a child, or after a person has pled guilty or been found guilty as a sexual offender, the court shall impose, in addition to any penalty provided by law, a requirement that the person register, within ten days of coming into a county in which the person resides or is temporarily domiciled, with the chief of police of the city or the sheriff of the county if the person resides in an area other than a city. The court shall require a person to register by stating the requirement on the court records.

Id. at 567-68 (quoting N.D. CENT. CODE § 12.1-32-15(2) (Supp. 1995)). The North Dakota Legislature amended N.D. CENT. CODE § 12.1-32-15 in 1997. While the quoted text has not changed, the section quoted is now N.D. CENT. CODE § 12.1-32-15(3), not N.D. CENT. CODE § 12.1-32-15(2).

punishment under Rule 11 of the North Dakota Rules of Criminal Procedure.[84]

In this case, the plurality noted that the registration requirement was not stated on the record, nor was any record put forth that Breiner was informed of the registration requirement by his counsel.[85] The plurality then noted that an attorney has a duty to inform clients about relevant consequences of the charge and plea so defendants can make an informed decision.[86]

The plurality then remanded the case to the trial court for an evidentiary hearing on whether Breiner knew of the sex offender registration requirement prior to pleading guilty.[87] If Breiner did know, a failure to inform him was only harmless error and the withdrawal of the guilty plea could be appropriately denied.[88]

A. CHIEF JUSTICE VANDEWALLE'S CONCURRENCE

Chief Justice VandeWalle agreed with the plurality's conclusion that section 12.1-32-15(2) of the North Dakota Century Code imposes a duty on trial courts to state the registration requirement on the record, but only after a defendant has already pled or been found guilty.[89] Chief Justice VandeWalle found it conceivable, if not probable, that had Breiner been informed of the registration requirement by the sentencing court, he would have immediately moved to withdraw his guilty plea.[90] If that had happened, the trial court probably would have found the motion timely as a "fair and just reason" under Rule 32(d)(3) of the North Dakota Rules of Criminal Procedure.[91] However, the Chief Justice found it difficult to conclude that a withdrawal of a guilty plea to correct a "manifest injustice" was necessary because it stretched his imagination that any innocent person would plead guilty to a crime of this nature, even with a mild sentence, regardless of the registration requirement.[92]

Chief Justice VandeWalle stated that he was adhering to the court's position in *State v. Dalman*,[93] in which the court held that defendants need not be advised of collateral consequences of a guilty plea under the plain language of Rule 11(b) of the North Dakota Rules of Criminal

84. *Breiner*, 562 N.W.2d at 568.
85. *Id.*
86. *Id.* (citing Fargo v. Bommersbach, 511 N.W.2d 563, 566 (N.D. 1994)).
87. *Id.*
88. *Id.*
89. *Id.* (VandeWalle, C.J., concurring).
90. *Id.* at 570.
91. *Id.* The "fair and just reason" motion has a less serious burden for defendants to meet than the "manifest injustice" motion used by the plurality. *See* N.D. R. CRIM. P. 32(d)(3).
92. *Id.* at 568.
93. 520 N.W.2d 860 (N.D. 1994).

Procedure.[94] The Chief Justice concluded that failing to adhere to *Dalman* "opens the veritable can of worms to an unending list of arguments" of consequences defendants should be advised of prior to accepting a guilty plea.[95] However, the Chief Justice concluded that *Dalman* was distinguishable since the duty to advise defendants in this case came from section 12.1-32-15(2) of the North Dakota Century Code.[96]

Chief Justice VandeWalle was not particularly persuaded by the California decisions upon which the plurality relied.[97] The Chief Justice noted the differences between the facts in this case and the facts in *Birch*.[98] In *Birch*, the defendant appeared without counsel to plead guilty to a charge of lewd and dissolute conduct resulting from an incident where he "urinated facing a retaining wall which was approximately forty feet from a restaurant."[99] In this case, Breiner appeared *with* counsel to plead guilty to an offense involving a sexual act with a minor.[100]

Chief Justice VandeWalle also criticized the plurality's reliance upon *People v. McClellan*.[101] He noted that *McClellan* relied on *Bunnell v. Superior Court*.[102] The Chief Justice stated that *Bunnell's* statement about registration being a direct consequence of conviction is akin to dicta, since the issue of whether registration constitutes a direct consequence of conviction was not at issue in that case.[103]

On the other hand, Chief Justice VandeWalle described *McClellan* as being significant in that, unlike in Breiner's case, the California Supreme Court denied a defendant's request to withdraw his guilty plea.[104] The Chief Justice noted that the California Supreme Court did so on the

---

94. *Breiner*, 562 N.W.2d at 568 (VandeWalle, C.J., concurring).

95. *Id.*

96. *Breiner*, 562 N.W.2d at 568. In *Dalman*, the North Dakota Supreme Court held that trial courts do not need to advise defendants that deportation is a possible consequence of pleading guilty to an offense since deportation is a collateral consequence of conviction under Rule 11 of the North Dakota Rules of Criminal Procedure. State v. Dalman, 520 N.W.2d 860, 862-63 (N.D. 1992).

97. *Breiner*, 562 N.W.2d at 569.

98. *Id.* (citing *In re* Birch, 515 P.2d 12, 13 (Cal. 1973)).

99. *Id.* (quoting *Birch*, 515 P.2d at 13).

100. *Id.*

101. *Id.* at 569. In *McClellan*, the California Supreme Court found that a defendant had waived his claim of error by failing to object timely to the trial court's failure to advise him of his need to register as a sex offender. People v. McClellan, 862 P.2d 739, 746 (Cal. 1993). The court found the claim untimely since the defendant learned about his need to register at sentencing and could have objected to it at that time. *Id.*

102. *Breiner*, 562 N.W.2d at 569 (VandeWalle, C.J., concurring) (citing Bunnell v. Superior Court, 531 P.2d 1086, 1094 (1975)).

103. *Id.* Chief Justice VandeWalle noted that *Bunnell* was a murder case dealing with the issue of double jeopardy, and in assessing the consequences of a guilty plea, the court noted that a defendant's right to counsel, a jury trial, to confront and cross examine witnesses, and against self-incrimination must appear on the record. *Id.* The *Bunnell* court then stated that a defendant must be advised of direct consequences such as any registration requirement. *Id.* (citing *Bunnell*, 531 P.2d at 1094).

104. *Id.*

grounds that the defendant's motion was untimely, since the defendant failed to object when he became aware of the registration requirement at the time of sentencing.[105] Chief Justice VandeWalle stated that the *McClellan* court found that the only evidence presented by the defendant was his own assertion on appeal that he would not have plead guilty had he known about the registration requirement.[106] Therefore, relying upon *McClellan,* the Chief Justice allowed withdrawal of the guilty plea since, had Breiner been informed of the registration requirement at sentencing, he would have probably motioned for and been granted an immediate withdrawal of his guilty plea by the trial court as a "fair and just" reason under Rule 32(d)(3) of the North Dakota Rules of Criminal Procedure.[107]

B. JUSTICE NEUMANN'S DISSENT

Justice Neumann contended that the "plain, unambiguous language" of section 12.1-32-15(2) of the North Dakota Century Code requires the trial court to impose a registration requirement on a sex offender as it would a sentence.[108] Under Justice Neumann's reasoning, the trial court in this case did not impose such a requirement on Breiner.[109] Therefore, Breiner complained of a consequence that did not apply to him.[110] Hence, Justice Neumann concluded that the trial court's decision to deny Breiner's motion to withdraw his guilty plea should be affirmed.[111]

C. JUSTICE SANDSTROM'S DISSENT

Justice Sandstrom dissented on the grounds that the majority view should be followed.[112] Justice Sandstrom found that no "manifest injustice" results from a trial court's failure to advise defendants at the time

105. *See id.* (citing *McClellan,* 862 P.2d at 746).

106. *Id.* Chief Justice VandeWalle also stated that the *McClellan* court noted that the prosecution did not have an opportunity to contest the assertion nor did the trial court have occasion to look into the veracity of the defendant's assertion. *Id.*

107. *Id.* at 570.

108. *Id.* (Neumann, J., dissenting). Chief Justice VandeWalle stated that he did not decide the issue of whether the trial court needed to impose the registration under section 12.1-32-15(2) of the North Dakota Century Code because neither Breiner nor the State raised it. *Id.* at 569-70 n.1 (VandeWalle, C.J., concurring).

109. *Id.* at 570 (Neumann, J., dissenting).

110. *See id.*

111. *Id.*

112. *Id.* (Sandstrom, J., dissenting). Justice Neumann joined Justice Sandstrom's dissent. *Id.*

they enter a guilty plea of their statutory duty to register as a sexual offender.[113] This is because "registration as a sex offender is a collateral, not a direct, consequence of conviction."[114]

Justice Sandstrom contended that the trial court's statutory duty under section 12.1-32-15(2) of the North Dakota Century Code "specifically attaches after, not before, a guilty plea or verdict."[115] Justice Sandstrom reasoned that the purpose of the law's requirement that defendants be advised of their duty to register is not for the defendant's benefit, but to promote compliance.[116] Therefore, Breiner should not be exempted from compliance with the law and had no cause to complain of a procedural irregularity.[117]

Justice Sandstrom specifically rejected the plurality's adoption of the minority view that sex offender registration is onerous by nature and follows directly from a conviction.[118] Justice Sandstrom noted that Breiner's conviction was a matter of public record.[119] Furthermore, Justice Sandstrom found that the purpose of having sex offenders advise law enforcement of their location is "remedial, protective, and a minimal burden."[120]

IV. IMPACT

The most obvious impact this decision will have is in the way trial courts in North Dakota will have to inform defendants pleading guilty to a "crime against a child,"[121] a sexual offense,[122] or an attempt at any of

---

113. *Id.*

114. *Id.* (quoting *Breiner*, 562 N.W.2d at 567). Justice Sandstrom quoted this from the plurality opinion and stated that this constituted a concession by the plurality that sex offender registration is a collateral consequence of conviction. *See id.* The validity of such a conclusion by Justice Sandstrom is debatable since the plurality explicitly stated that they were not adopting the view that registration is a collateral consequence of a conviction. *See Breiner*, 562 N.W.2d at 567.

115. *Id.* at 570 (Sandstrom, J., dissenting).

116. *Id.* (citing State v. Sundquist, 542 N.W.2d 90, 92 (N.D. 1996) (concluding that the purpose of North Dakota's Stalking Law requirement that a defendant be served with a copy of the law was to protect the individual who sought the protection order, not the defendant)).

117. *Id.* at 570.

118. *Id.*

119. *Id.*

120. *Id.* (citing State v. Manning, 532 N.W.2d 244, 248-49 (Minn. Ct. App. 1995)).

121. The following crimes, when committed against children, constitute a "crime against a child" under N.D. CENT. CODE § 12.1-32-15: Murder (§ 12.1-16-01), Manslaughter (§ 12.1-16-02), Negligent homicide (§ 12.1-16-03), Simple assault (§ 12.1-17-01), Assault (§ 12.1-17-01.1), Aggravated assault (§ 12.1-17-02), Reckless endangerment (§ 12.1-17-03), Terrorizing (§ 12.1-17-04), Menacing (§ 12.1-17-05), Criminal coercion (§ 12.1-17-06), Harassment (§ 12.1-17-07), Stalking (§ 12.1-17-07.1), Hazing (§ 12.1-17-10), Kidnapping (§ 12.1-18-01), Felonious restraint (§ 12.1-18-02), Unlawful imprisonment (§ 12.1-18-03), Promoting prostitution (§ 12.1-29-01), Facilitating prostitution (§ 12.1-29-02), Prostitution (§ 12.1-29-03), and equivalent ordinances. N.D. CENT. CODE § 12.1-32-15 (1997).

122. Crimes that are defined as sexual offenses under N.D. CENT. CODE § 12.1-32-15 are as follows: Gross sexual imposition (§ 12.1-20-03), Continuous sexual abuse of a child (§ 12.1-20-03.1), Sexual imposition (§ 12.1-20-04), Corruption or solicitation of minors (§ 12.1-20-05), Sexual abuse of

these crimes of their duty to register. Procedurally, trial courts are now responsible for executing the additional duty of notifying sex offenders of their duty to register prior to accepting their guilty plea, which is similar to those duties imposed upon the court by Rule 11 of the North Dakota Rules of Criminal Procedure.[123]

Defense attorneys counseling defendants who plead guilty to these crimes should also take note so as to advise their clients of their duty to register. While not at issue in this case, the plurality opinion noted that the record did not reflect whether Breiner's counsel had advised him of his duty to register prior to pleading guilty.[124] The plurality then reminded attorneys that they have "a duty to inform a client about relevant consequences of the charge and a plea so that the client can make an informed decision."[125]

Another implication of this decision will be the possible expansion of the grounds for allowing withdrawal of guilty pleas for a trial court's failure to advise of a direct consequence under Rule 32 of the North Dakota Rules of Criminal Procedure. With *Breiner*, the plurality determined that "direct consequences" goes beyond those listed in Rule 11 of the North Dakota Rules of Criminal Procedure.[126] Exactly what other consequences, beyond those that the North Dakota Supreme Court has already decided, fall within this category was not addressed in the opinion. Only further case law will reveal whether these unanswered questions will open a "veritable can of worms" in the form of an "unending list of arguments" on what constitutes a direct consequence.[127]

The decision in *Breiner* may also raise the prospects of a successful challenge to the retroactive application of North Dakota's sex offender registration and notification law[128] on grounds that it is unconstitutional under the Ex Post Facto Clause of the North Dakota Constitution.[129] Commentators have suggested that adoption of the California approach, which holds registration to be punishment, would logically mean that sex offender notification would constitute punishment under an Ex Post

---

wards (§ 12.1-20-06), Sexual assault (§ 12.1-20-07), Incest (§ 12.1-20-11), Surreptitious intrusion [after second conviction or a requirement to register is imposed] (§ 12.1-22-03.1(2)), Use of a minor in a sexual performance (§ 12.1-27.2-02), Promoting or directing an obscene sexual performance by a minor (§ 12.1-27.2-03), Promoting a sexual performance by a minor (§ 12.1-27.2-04), Possession of certain materials prohibited [child pornography] (§ 12.1-27.2-04.1), and any equivalent ordinances.

123. *Breiner*, 562 N.W.2d at 568.

124. *Id.*

125. *Id.* (citing Fargo v. Bommersbach, 511 N.W.2d 563, 566 (N.D. 1994)); *see also* NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT Rule 1.4 (1996).

126. *See Breiner*, 562 N.W.2d at 568 (VandeWalle, C.J., concurring).

127. *Id.*

128. N.D. CENT. CODE § 12.1-32-15 (1997).

129. *See* N.D. CONST. art. I, § 18.

Facto Clause of a state constitution because of the greater burden notification imposes.[130] This is because a large part of the determination of whether a law may be applied retroactively under ex post facto analysis depends upon whether the law has the intent or the effect of being punitive.[131] While sex offender registration statutes have repeatedly withstood constitutional challenge on ex post facto grounds,[132] in *Breiner*, a plurality of the North Dakota Supreme Court has already stated that registration imposes a "grave, and even onerous, additional punishment."[133] This makes a successful ex post facto challenge to the retroactive application of the registration and notification law to sex offenders convicted ten years prior to August 1, 1995 seem more promising.[134] This is especially true now that North Dakota's notification provisions have been strengthened to require that "relevant and necessary registration information" must now be disclosed to the public deemed to be at risk.[135]

V. CONCLUSION

The persuasive impact that the divided decision in *Breiner* will have on the rest of the nation is questionable. Besides California, North Dakota is the only state to hold that registration is a direct consequence

---

130. Robin L. Deems, Note, *California's Sex Offender Notification Statute: A Constitutional Analysis*, 33 SAN DIEGO L. REV. 1195, 1208-09 (1996). *See also* Bedarf, *supra* note 72, at 919-20 (discussing *In re* Reed, 663 P.2d 216, 216-20 (Cal. 1983), as supporting the view that community notification constitutes punishment). *But see* People v. Fioretti, 63 Cal. Rptr. 2d 367, 372 (Cal. Ct. App. 1997) (finding that the holding of *Reed*, 663 P.2d at 222, is not susceptible to an interpretation that prevents the broad application of California's sex offender registration law under the Ex Post Facto Clause of the California Constitution).

131. *See generally* Trop v. Dulles, 356 U.S. 86 (1958); De Veau v. Braisted, 363 U.S. 144 (1960); Russell v. Gregoire, 124 F.3d 1079 (2d Cir. 1997); Artway II, 81 F.3d 1235 (3d Cir. 1996); Doe v. Poritz, 662 A.2d 367 (N.J. 1995).

132. *Russell*, 124 F.3d at 1089; People v. Afrika, 648 N.Y.S.2d 235, 239 (N.Y. Sup. Ct. 1995); *Poritz*, 662 A.2d at 387.

133. *Breiner*, 562 N.W.2d at 567.

134. In analyzing how a state's Ex Post Facto Clause could be used under the California approach to prohibit the retroactive application of sex offender notification laws, commentators rely upon the reasoning set forth by state and federal courts which have found that a violation of the Ex Post Facto Clause occurs when there is public disclosure or notification of the identity of previously convicted sex offenders. *See* Deems, *supra* note 130, at 1209-12; Bedarf, *supra* note 72, at 920-23. Cases which hold the retroactive application of notification or disclosure laws as violating the Ex Post Facto Clause include: Pataki II, 940 F. Supp. 603, 621-29 (S.D.N.Y. 1996); Artway I, 876 F. Supp. 666, 671-79, 685-92 (3d Cir. 1996); Rowe v. Burton, 884 F. Supp. 1372, 1376-81 (D. Alaska 1994); *Myers*, 923 P.2d at 1040-43; State v. Babin, 637 So. 2d 814, 823-25 (La. Ct. App. 1994); State v. Payne, 633 So. 2d 701, 702-03 (La. Ct. App. 1993). Also utilizing such reasoning are those cases issuing temporary restraining orders or temporary injunctions on enforcement of state laws requiring public notification or disclosure of sex offenders on ex post facto grounds. These cases include: Doe v. Gregoire, 960 F. Supp. 1478, 1480-87 (W.D. Wash. 1997); Roe v. Office of Adult Probation, 938 F. Supp. 1080, 1087-94 (D. Conn. 1996), *vacated* 125 F.3d 47 (2d Cir. 1997); Doe v. Pataki, 919 F. Supp. 691, 694-702 (S.D.N.Y. 1996); E.B. v. Poritz, 914 F. Supp. 85, 89-90 (D.N.J. 1996), *reversed*, 119 F.3d 1077 (3d Cir. 1997).

135. *Compare* N.D. CENT. CODE § 12.1-32-15(11) (1997) *with* N.D. CENT. CODE § 12.1-32-15(10) (Supp. 1995).

of a guilty plea which requires admonishment.[136] On the other hand, the number of states adopting the majority position or similar reasoning is substantial.[137] Only time will tell whether this plurality opinion by the North Dakota Supreme Court and it's wholesale adoption of the California position and reasoning will have any persuasive impact on other states.

Larry J. Richards

---

136. *See In re* B.G.M., 929 S.W.2d 604, 606 (Tex. App. 1996) (stating that California was the only state adhering to a holding that registration constitutes a direct consequence of conviction).

137. *See supra* footnotes 23 and 26 for a listing of cases adopting the minority approach or applying similar reasoning.