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## **Cases dismissed, but many still on list**

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David Dockens is serving a life sentence, even though he's never been convicted of a crime.

It isn't supposed to happen here; punishment without a finding of guilt is the sort of thing that occurs elsewhere. Still, it happened to Dockens, and he's not alone.

A three-month review by The Galveston County Daily News of Department of Public Safety and county criminal justice records found thousands of people in the same situation.

Dockens is one of about 85 people in Galveston County and more than 6,000 statewide who, because of a 1997 change in the Texas Code of Criminal Procedure, must register as sex offenders even though charges against them were dismissed. Without a criminal conviction on their records, their photographs, addresses and other information — even their height, weight and shoe size — are published on the DPS Web site. There are a plethora of licenses they can't hold and jobs they can't get, but most importantly, there is the stigma of being publicly labeled a sex offender.

### Changing The Rules

Dockens was 31 years old and involved in a contentious divorce in 1987 when his soon-to-be ex-wife made an allegation that he had sexually assaulted his 9-year-old stepdaughter. He hired a lawyer, who told him the case was highly defensible; there was no physical evidence, just his word against hers. Chances at trial were good, the lawyer said, but the district attorney had offered a deal. If Dockens pleaded guilty, he would get deferred adjudication, a postponement of the court ruling on his case. There would be no trial, and if there were no problems during the next 10 years the case would be dismissed.

There was no Internet in 1987, and no sex offender registration law. Faced with the gamble of a \$15,000 jury trial and a long delay in the divorce proceedings, Dockens opted to take the deal.

“They didn’t have much of a case,” said Dockens. “But there’s no way to guarantee what a jury will do, and how do you prove you didn’t do something? It seemed like the best thing to do.”

Prosecutors use plea bargains for various reasons: sometimes they don’t want a child to testify, sometimes it’s the prudent way to keep the wheels of justice turning, sometimes the case isn’t as strong as they’d like it to be. Dockens is sure that in his case, he was offered a deal because the state had no case. Nine years and 45 weeks passed without incident. Then, with only 49 days remaining until his case would be dismissed, the state changed the rules.

A new law took effect Sept. 1, 1997, that amended the Texas Code of Criminal Procedure, vastly broadening the requirements for sex offender registration. Among the changes was a clause that required anyone then on probation for a sexual offense to meet the registration requirements. Dockens — and an estimated 6,045 others — had agreed to deferred adjudication before that but had not yet completed the probationary period that would allow their cases to be dismissed.

Dockens said that if there had been a sex offender registration law in 1987 he wouldn’t have agreed to the plea bargain. “It’s wrong,” Dockens said. “You go through the court system and you think it’s going to be over, but it’s not.”

### An Unintended Consequence

When legislators passed Senate Bill 875 that year, cases such as Dockens’ weren’t even discussed. State Rep. Craig Eiland, a Galveston Democrat, was one of four lawmakers who sponsored the bill, which was authored by State Sen. Florence Shapiro, a conservative Republican from Plano.

“We never really addressed that possibility or that category of people who would be put in a situation like this,” said Eiland. “Oftentimes there’s unintended consequences, which we then have to go back and fix.”

### Defense, Prosecution Agree

Criminal lawyers on both sides of the dais agree there’s something wrong with the law. Tad Nelson spent three years as a prosecutor before becoming a criminal defense attorney in 1994. Nelson said what was a fair deal at the time turned sour.

“A lot of these people pled out and made arrangements both they and the district attorney thought were fair and it ended up being something else,” Nelson said. “It took away what they agreed to.”

Even First Assistant District Attorney Mohamed Ibrahim, a career prosecutor, said the law is unfair. “It certainly wasn’t something he signed up for when he waived his right to a jury trial,” Ibrahim said. “I think fair means being able to make an intelligent choice and that means being aware of all the possible consequences.”

All — including Dockens — agree that the question of fairness evaporates for people who entered a plea after Sept. 1, 1997. Those defendants knew that registration as a sex offender would be a consequence of their plea, even if the case were eventually dismissed.

### Unfair Isn’t Unconstitutional

The Texas Constitution includes a section that bans retroactive punishment, as does the U.S. Constitution. Technically known as an ex post facto clause, it prevents lawmakers from applying new, longer sentences after a defendant has been tried.

But the U.S. Supreme Court ruled in March that requiring someone to register as a sex offender is a public safeguard, not a punishment, and state courts have taken the same view. University of Houston Law Professor Irene Rosenberg, a specialist in criminal and constitutional law, said that unfair doesn’t equal unconstitutional.

“The unfairness here is in the retroactive application of that law,” Rosenberg said. “The statute suffers from bandwagoning. Somebody gets an idea to do something to fix a problem; other states jump on the bandwagon and do not think through the consequences of what the law is doing. I think that’s what happened here in Texas; the Legislature didn’t think the statute would create the kind of consequences applied to this group.”

### A Challenge From Nueces County

Although the courts are clear that sex offender registration doesn’t violate ex post facto rules, the issue has been tested only once when deferred adjudication and a case dismissal were involved.

Wade Kubas of Nueces County appealed a 2000 state district court ruling in which the court held that even though his case was dismissed and his probation terminated, he was still required to register as a sex offender.

Kubas successfully completed five years of probation under a deferred adjudication deal he agreed to in 1993. He argued that the order terminating his probation and releasing him from “all penalties and disabilities” included the requirement to register as a sex offender.

When the court disagreed, Kubas appealed. Corpus Christi attorney Grant Jones handled Kubas’ appeal, arguing the statute violated the state constitution’s stringent ex post facto clause.

“That was changing the rules in the middle of the game,” said Jones, who served as a district attorney for 10 years and a prosecutor for 18. “It’s obviously a violation of the spirit of the constitution.”

### Courts: It’s Not Punishment

Three justices of the 13th Court of Appeals didn’t see it that way, ruling in August 2002 that registering as a sex offender wasn’t punishment. Therefore, the court said, the ex post facto clause didn’t apply.

Dockens’ experience, however, suggests that registration as a sex offender carries numerous penalties. When the directors of Water Control and Improvement District No. 12 became aware of his status, they didn’t ask for details. They simply let him know that they no longer wanted him serving as chief of the Kemah Volunteer Fire Department, which the water district controls. Dockens resigned rather than wage a public battle to keep his job.

While he was fire chief, Dockens avoided school appearances and dodged situations that put him in close proximity to children other than his own.

His daughter suffered embarrassment like only an adolescent can when a fellow student working in the school office saw a “confidential” notification of Dockens’ status and spread the news throughout the campus.

Because he is a registered sex offender, state law prohibits him from holding a license to operate a day care center, a tanning salon or participating in dozens of other occupations regulated by the state.

The court’s contention, according to Justice Linda Reyna Yanez’s published opinion, is that the amendments to the sex offender registration statute were remedial, not punitive. The court held that since the amendments merely enveloped people who had not previously been required to register, they did not violate the constitution’s ex post facto clause. “Everybody knows it’s unfair,” Jones said. “I was hoping the Court of Criminal Appeals would use the retroactive clause to hold that you can’t change the rules in the middle of the game.”

But the Court of Criminal Appeals declined to hear the case and let the ruling stand. “It’s the closest thing to banishment we have,” said Jones. “Public humiliation is a violation of the due process clause of the United States Constitution. We’ve tried it in the past and it doesn’t work — it’s uncivilized. You’re treated as if you’re guilty. It emasculates the meaning of deferred adjudication.”

### Highest Court Agrees

The U.S. Supreme Court has yet to hear a sex offender registration argument with a set of facts such as those in the Dockens and Kubas cases, but the justices ruled in two cases this year that registration laws were not punitive. In a 6-3 decision, the court said that

Alaska's sex offender registration statute — which includes a publicly accessible Internet database much like Texas' — did not violate the U.S. Constitution's ex post facto clause.

“Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment,” Justice Anthony Kennedy wrote for the majority. “The purpose and the principal effect of notification are to inform the public for its own safety, not to humiliate the offender.”

Justice Ruth Bader Ginsberg drafted the dissenting opinion, in which she said, “however plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation.”

But appellate courts don't decide if a law is a good idea, or even if it's fair, said Rosenberg. They only decide if a law violates the Constitution.

David Crump, also a University of Houston law professor, said that if the law were to change it would have to be done by the Legislature.

“The courts have gone much further than this in holding things that look punitive as preventive,” said Crump, a former prosecutor. “Is it silly? Some of these things may be, but silly isn't necessarily unconstitutional. Our remedy is simple: we get the Legislature to change it.”

### A Political Quagmire

That might be easier said than done, especially in a climate where political futures aren't helped by any stand that appears soft on sex offenders. Janice Sager, spokeswoman for victims rights group Texans for Equal Justice, said her organization might lobby against a proposed change to the law.

“I think deferred adjudication for sex offenders is ludicrous to start with,” Sager said. “I find it hard to have sympathy for someone who doesn't like the fact that they have to register now.”

Eiland said he would consider authoring or sponsoring an amendment to the statute in the next legislative session, but was pessimistic about the chances of a blanket exemption gaining support.

“It would probably be very difficult to get it done,” he said. “The legislators would be very gun-shy about allowing anybody with a taint of being a sexual predator from being removed from that list.”

### Plan B

Eiland said that a more viable alternative would be to amend the statute so that state judges could exempt certain people from registering.

“For situations like that — where there was no finding of guilt — there should be a way for the court to review the situation,” Eiland said.

In 1997, there was. The law included a stipulation that allowed anyone required to register as a sex offender to petition the court for an exemption. The clause was repealed in 1999.

State District Court Judge Susan Criss said she would support an amendment that reinstated a judicial remedy. “Legislators pass laws in general,” she said. “Courts deal with individuals.”

Criss said the ability to petition the court for an exemption was originally included so there was a way to make exceptions when appropriate. “Maybe it shouldn’t have been taken out,” Criss said.

### No Remedy

Jones was more direct. “They need to go back and change the law, but it won’t happen because our elected officials don’t have the guts to do anything that would make life better for anyone accused of a sexual offense,” he said. “It would be a rare public official who would be willing to stand up and be counted on this. Generally, in our legal system, if you get screwed you’re supposed to have a remedy.”

David Dockens — and more than 6,000 other Texans whose cases were dismissed — has no remedy. “I have to do it the rest of my life,” Dockens said. “If I move, I have to let them know. The police have to know, the schools have to know. If there were ever a problem with a child in the area, they’d come here. They’d want to know where I was and what I was doing.”

It would be no different if there was a convicted robber in the area and the local convenience store was held up — except for one detail. “I don’t have a criminal record,” Dockens said.