

EX POST FACTO LAWS

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I. Definition

A. Generally

Simply stated, an ex post facto law is one that retroactively criminalizes conduct. Black’s Law Dictionary 701 (10th ed. 2014); *State v. Singleton*, 386 N.C. 183, 209 (2024).

Included within the definition of ex post facto is any law that: (1) makes an action criminal which was done before the passing of the law and which was innocent when done, (2) aggravates a crime or makes it greater than when it was committed, (3) allows imposition of a different or greater punishment than was permitted when the crime was committed, or (4) alters the legal rules of evidence to permit different or less testimony to convict the offender than was required at the time the offense was committed. *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (quoting *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.)); *State v. Ramseur*, 374 N.C. 658, 667 (2020); *State v. Wiley*, 355 N.C. 592, 625 (2002); *State v. Vance*, 328 N.C. 613, 620 (1991).

B. Two Critical Elements

There are two critical elements of an ex post facto law:

- (1) that it is applied to events occurring before its creation, and
- (2) that it disadvantages the offender affected by it. *Weaver v. Graham*, 450 U.S. 24, 29 (1981); *State v. James*, 371 N.C. 77, 98 (2018); *State v. Barnes*, 345 N.C. 184, 233 (1997); *State v. Williams*, 226 N.C. App. 393, 397 (2013).

II. Sources. Both the state and federal constitutions forbid the enactment of ex post facto laws. *State v. Ramseur*, 374 N.C. 658, 666, (2020); *State v. Vance*, 328 N.C. 613, 620 (1991). Both the state and federal ex post facto constitutional provisions are evaluated under the same definition. *State v. Bowditch*, 364 N.C. 335, 341 (2010); *State v. Whitaker*, 364 N.C. 404, 406 (2010); *State v. Wiley*, 355 N.C. 592, 625 (2002).

A. Federal Constitution: Ex Post Facto Clauses

With regard to federal law, no ex post facto law shall be passed. U.S. Const. Art. I. § 9; *State v. Threadgill*, 227 N.C. App. 175, 182 n.5 (2013) (noting Article I, § 9 limits the power of the federal government). Further, no state shall pass any ex post facto law. U.S. Const. Art. I. § 10.

The Ex Post Facto Clause applies only to actions of the legislature, not judicial actions. *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001); *State v. Rivens*, 299 N.C. 385, 392 (1980); *State v. Wright*, 206 N.C. App. 239, 244 (2010); *Price v. Beck*, 153 N.C. App. 763, 768, (2002).

B. Federal Constitution: Due Process Clause

Though the Ex Post Facto Clause applies only to legislative enactments, the Fifth and Fourteenth Amendments likewise forbid the retrospective application of an unforeseeable judicial modification of criminal law to the detriment of the defendant. *Marks v. United States*, 430 U.S. 188, 191–92 (1977); *Bouie v. City of Columbia*, 378 U.S. 347, 355 (1964); *State v. Barnes*, 345 N.C. 184, 234 (1997); *State v. Vance*, 328 N.C. 613, 620 (1991). Judicial alteration must not be given retroactive effect only where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue. *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001).

C. State Constitution

Retrospective laws, punishing acts committed before the existence of such laws and by them only declared criminal, are oppressive, unjust, and incompatible with liberty, and therefore no ex post facto law shall be enacted. No law taxing retrospectively sales, purchases, or other acts previously done shall be enacted. N.C. Const. Art. I, § 16.

Like its federal counterpart, the state constitutional provision applies to legislative and not judicial action. *State v. Rivens*, 299 N.C. 385, 392 (1980). Further, North Carolina's Ex Post Facto Clause does not prohibit all forms of retroactive laws. Rather, the plain language of the Ex Post Facto Clause specifies only two restrictions on retroactive legislation: retroactive criminal laws and retroactive tax laws. *McKinney v. Goins*, 387 N.C. 35, 52 (2025). The criminal provision dates from the 1776 constitution, whereas the tax provision first appeared in the 1868 constitution. *McKinney*, 387 N.C. at 53; see also *Coley v. State*, 360 N.C. 493, 496 (2006).

D. Statute

Several state statutes codify ex post facto protections.

- More than ten days after judgment, a defendant may by Motion for Appropriate Relief (MAR) raise the claim that the acts charged in the criminal pleading did not at the time they were committed constitute a violation of criminal law. G.S. 15A-1415(b)(1).
- If an appellate court finds that the facts charged in a pleading were not at the time charged a crime, the judgment must be reversed and the charge must be dismissed. G.S. 15A-1447(b).

III. Application**A. Timing**

Murder. For purposes of the prohibition on ex post facto laws, the date of the murderous acts rather than the date of the victim's death is the date the murder was committed. *State v. Detter*, 298 N.C. 604, 638 (1979). Hence, if the murderous acts

were committed at a time when the maximum punishment for murder was life, it was an ex post facto violation to impose death. *Id.*; see also *State v. Robinson*, 335 N.C. 146, 150 (1993) (defendant was entitled to defense that existed at the time of the murderous acts).

Continuing Offense. The application of a statute is not considered retroactive when the crime charged is a continuing offense that continued past the date of enactment, even if the course of conduct began before enactment of the statute. *State v. Williams*, 226 N.C. App. 393, 398 (2013). Still, when a statute changes the quantum of proof required, a defendant may be entitled to a jury determination that the State has proven any criminal acts post-enactment. *Id.* at 401.

Statute of Limitations. A law that purports to allow for the prosecution of a crime for which the statute of limitations has already expired is an ex post facto violation. *Stogner v. California*, 539 U.S. 607, 621 (2003); *State v. Johnson*, 169 N.C. App. 301, 309 (2005).

B. Greater Punishment

The prohibition includes not only those laws that increase the maximum sentence but also those that make the range of punishments more severe. *Peugh v. United States*, 569 U.S. 530, 539, (2013); *State v. Ramseur*, 374 N.C. 658, 667 (2020). Hence, the General Assembly, having made the Racial Justice Act (RJA) (2009) retroactive, could not revive the former punishment attached to crimes already committed by making the RJA Repeal (2013) retroactive. *State v. Ramseur*, 374 N.C. 658, 667 (2020).

C. Alteration in Quantum of Proof

A law that allowed a defendant to be convicted based on the victim's testimony alone, without corroboration, which was less than the law required at the time the offense was committed, was an ex post facto violation. *Carmell v. Texas*, 529 U.S. 513, 531 (2000).

D. Judicial Modification of Criminal Law

Judicial abolishment of the year and a day rule (i.e., if the victim's death did not take place within a year and a day of receiving the wound, the law presumes that the wound was not the cause of death) could be given prospective effect only. *State v. Vance*, 328 N.C. 613, 621 (1991). But see *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001) (finding no due process violation in the Tennessee Supreme Court's retroactive abolishment of the year and a day rule, noting both the abolition of the rule in a "vast number" of other jurisdictions and its "tenuous foothold" in Tennessee).

Unprecedented methods of satisfying existing elements of felony murder generally do not constitute judicial modifications of criminal law. See *State v. Krider*, 138 N.C. App. 37, 47 (2000) (underlying felony of child abuse); cf. *State v. Cheeks*, 377 N.C. 528, 549 n.5 (2021) (decision finding malice inherent in the act of starvation was not ex post facto modification).

IV. Limitations

A. Retroactivity.

There is no ex post facto violation in laws criminalizing possession of a firearm by a felon, even if the prior felony conviction occurred prior to the enactment of the statute. See *State v. Whitaker*, 364 N.C. 404, 410 (2010); *State v. Johnson*, 169 N.C. App. 301, 304 (2005).

Statutes that enhance a sentence based on a defendant's prior convictions are not ex post facto laws. See *State v. Todd*, 313 N.C. 110, 117 (1985) (habitual felon status); *State v. Threadgill*, 227 N.C. App. 175, 182 (2013) (definition of prior conviction); *State v. McCree*, 160 N.C. App. 200, 203 (2003) (habitual misdemeanor assault); *State v. Carpenter*, 155 N.C. App. 35, 47, 573 S.E.2d 668, 676 (2002) (same); *State v. Smith*, 139 N.C. App. 209, 215 (2000) (same); *State v. Mason*, 126 N.C. App. 318, 324 (1997) (violent habitual felon status). The same is true of prior adjudications of juvenile delinquency. See *State v. Wiley*, 355 N.C. 592, 627 (2002); *State v. Taylor*, 128 N.C. App. 394, 398, aff'd per curiam, 349 N.C. 219 (1998).

The classification of a prior conviction may change, but there is no ex post facto violation so long as the prior conviction is counted based on the classification it had at the time the offense was committed for which the offender is then being sentenced. See *State v. Watkins*, 195 N.C. App. 215, 229 (2009); *State v. Wolfe*, 157 N.C. App. 22, 37 (2003); *State v. Mason*, 126 N.C. App. 318, 324 (1997).

B. Disadvantage.

The Ex Post Facto Clause does not prohibit the retroactive application of laws that are ameliorative in nature. *Dobbert v. Florida*, 432 U.S. 282, 294 (1977); *State v. Ramseur*, 374 N.C. 658, 668 (2020); *State v. McKoy*, 327 N.C. 31, 42 n.3 (1990). Hence, a new sentencing statute, enacted to address constitutional defects in an earlier sentencing statute, that preserves the availability of the same punishment does not result in an ex post facto violation. *State v. James*, 371 N.C. 77, 98 (2018); see also *State v. Seam*, 263 N.C. App. 355, 366 (2018), aff'd per curiam, 373 N.C. 529 (2020).

Application of new rules of evidence generally does not violate the Ex Post Facto Clause. *Carmell v. Texas*, 529 U.S. 513, 533 n. 23. Accordingly, there was no ex post facto violation in the admission of fingerprints against a juvenile, the taking of which was not authorized by statute at the time the fingerprints were taken. *Matter of Stedman*, 305 N.C. 92, 103 (1982); see also *State v. Funderburk*, 56 N.C. App. 119, 122 (1982) (no ex post facto violation in retroactive application of North Carolina Supreme Court's interpretation of statutory rule of evidence, G.S. 8-56).

C. Civil Statutes

The constitutional prohibition on ex post facto laws applies only to criminal statutes. *Carmell v. Texas*, 529 U.S. 513, 525 n. 14 (2000); *Collins v. Youngblood*, 497 U.S. 37, 41 (1990); cf. *In re Kivett*, 309 N.C. 635, 672, 309 S.E.2d 442, 463 (1983) ("only to criminal prosecutions."). Civil statutes, even if applied retroactively, do not implicate ex post facto protections. See *Purcell v. Friday Staffing*, 235 N.C. App. 342, 350 (2014); *Pitt Cnty. v. Dejavue, Inc.*, 185 N.C. App. 545, 558 (2007).

In determining whether a statute is criminal or civil, a court looks first at the intended purpose of the law. If the declared purpose was to enact a civil regulatory scheme, the court then determines whether the purpose or effect is so punitive as to negate any intent to deem the scheme civil. *Smith v. Doe*, 538 U.S. 84, 92 (2003); *Seling v. Young*, 531 U.S. 250, 261 (2001); *State v. Bowditch*, 364 N.C. 335, 341-42 (2010); *State v. Wagoner*, 199 N.C. App. 321, 323 (2009), aff'd per curiam, 364 N.C. 422 (2010); *State v. Whitaker*, 364 N.C. 404, 408 (2010); *State v. Hunt*, 221 N.C. App. 48, 54 (2012); *State v. Bare*, 197 N.C. App. 461, 465 (2009); *State v. White*, 162 N.C. App. 183, 192 (2004).

Sex offender registration and monitoring statutes create a civil regulatory scheme and consequently do not fall within the prohibition on ex post facto laws. *Smith v. Doe*, 538 U.S. 84, 89 (2003); *State v. Bowditch*, 364 N.C. 335, 352 (2010); *Matter of*

Bethea, 255 N.C. App. 749, 757 (2017); State v. Alldred, 245 N.C. App. 450, 451 (2016); In re Hall, 238 N.C. App. 322, 332 (2014); State v. Mills, 232 N.C. App. 460, 467 (2014); State v. Jones, 231 N.C. App. 123, 127 (2013); State v. Self, 217 N.C. App. 638, 640 (2011).

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