

Defending the SORNA Prosecution

By Carl Folsom, III
AFPD, E.D. OK

Supreme Court Review of Pre-SORNA State Systems:

Smith v. Doe, 538 U.S. 84 (2003): Court held Alaska registration system's application to pre-enactment convictions did not violate Ex Post Facto Clause.

Conn. D.P.S. v. Doe, 538 U.S. 1 (2003): Court held covered individuals had no Due Process right to a hearing before being required to register.

Sex Offender Registration and Notification Act (SORNA)

Purpose

42 U.S.C. § 16901

- ❖ To protect the public from sex offenders and offenders against children; and
- ❖ To establish a comprehensive national system for the registration of sex offenders and offenders against children.

Legislative History

- ❖ Concern sex offenders under Wetterling Act systems were going missing.

SORNA

Criminal Provision - 18 U.S.C. § 2250(a)

❖ Defendant Required to Register under SORNA

❖ Defendant either:

❖ Has a prior federal conviction, or

❖ Traveled in Interstate Commerce; and

❖ Defendant knowingly failed to register or update information as required by SORNA

SORNA

Affirmative Defense – 18 U.S.C. § 2250(b)

- ❖ uncontrollable circumstances prevented the individual from complying;
- ❖ the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and
- ❖ the individual complied as soon as such circumstance ceased to exist.

SORNA – Penalties for Failing to Register/Update

Maximum sentence – **18 U.S.C. § 2250(a)**

- 10 years prison,
- fine of \$250,000, and
- Supervised release: 5 years to life

-18 U.S.C. 3583(k).

Mandatory consecutive sentence (for crime of violence)

-18 U.S.C. 2250(c):

- Consecutive sentence of 5 years to 30 years prison for the commission of a federal crime of violence when the offender has also violated § 2250.

SORNA - Registration Requirement

Who Must Register:

42 U.S.C. § 16913(a): A sex offender shall register.

...

42 U.S.C. § 16911(1):

The term “sex offender” means an individual who was convicted of a sex offense.

SORNA – Who has to register?

What is a “Sex Offense”:

- ❖ **42 U.S.C. § 16911(5):**
 - ❖ **A criminal offense that has an element involving a sexual act or sexual contact with another;**
 - ❖ **A criminal offense that is a specified offense against a minor;**
 - ❖ **A specified Federal offense**
 - ❖ **A specified violation of the UCMJ**
 - ❖ **An attempt or conspiracy to commit one of the above**

SORNA – Who has to register?

What is a Specified Offense Against a Minor:

42 U.S.C. § 16911(7): an offense against a minor that involves:

- ❖ kidnapping;**
- ❖ false imprisonment;**
- ❖ Use in a sexual performance;**
- ❖ Solicitation to practice prostitution;**
- ❖ Video voyeurism as described in 18 U.S.C. 1801;**
- ❖ Child Pornography offenses;**
- ❖ Criminal sexual conduct involving a minor,**
- ❖ Any conduct that by its nature is a sex offense against a minor.**

SORNA – Who has to register?

Consensual Sex Exception

❖ 42 U.S.C. § 16911(5)(c):

❖ An offense involving “consensual sexual conduct” is not a sex offense if:

❖ The victim was an adult (unless adult was under custodial authority of the offender); or

❖ The victim was at least 13 years old and the offender was not more than 4 years older than the victim.

SORNA – Who has to register?

Categories of Sex Offenders:

❖ 42 U.S.C. § 16915(a):

Tier I: 15 years registration

Tier II: 25 years registration

Tier III: lifetime registration

❖ 42 U.S.C. § 16915(b): The registration term can be reduced with a “clean record” and other conditions (such as completion of sex offender treatment)

SORNA – Who has to register?

- Tier II and Tier III sex offenses:

Both state: “a sex offender whose offense is punishable by imprisonment for more than 1 year and . . .”

(So I hope you paid attention to Melody’s presentation)

SORNA – Who has to register?

42 U.S.C. § 16911(4): Tier III sex offender

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

- **(i)** aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or
- **(ii)** abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

OR

Continued....

SORNA – Who has to register?

42 U.S.C. § 16911(4): Tier III sex offender

(B) involves kidnapping of a minor (unless committed by a parent or guardian); OR

(C) occurs after the offender becomes a tier II sex offender.

SORNA – Who has to register?

42 U.S.C. § 16911(4): Tier II sex offender

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

- (i) sex trafficking (as described in section 1591 of Title 18);
- (ii) coercion and enticement (as described in section 2422(b) of Title 18);
- (iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of Title 18;
- (iv) abusive sexual contact (as described in section 2244 of Title 18)

OR

Continued....

SORNA – Who has to register?

42 U.S.C. § 16911(3): Tier II sex offender

(B) involves--

- **(i)** use of a minor in a sexual performance;
- **(ii)** solicitation of a minor to practice prostitution; or
- **(iii)** production or distribution of child pornography;

OR

(C) occurs after the offender becomes a tier I sex offender.

SORNA – Who has to register?

How do you determine if the prior offense is comparable to Tier II or Tier III offenses?

Answer: the **Categorical Approach**

SORNA – Who has to register?

Categorical Approach:

SMART Guidelines: Do not look beyond the elements – except as to the V’s age.

– 73 FR at 38031.

– When statute is ambiguous, agency guidelines are entitled to deference. See Chevron v. NRDC, 467 U.S. 837, 844 (1984).

Descamps v. U.S., 133 S. Ct. 2276, 2282 (2013): use categorical approach if statute for prior has indivisible elements

SORNA – Who has to register?

Register for Pre-SORNA convictions?

Delegation to the Attorney General

❖ 42 U.S.C. § 16912(b):

❖ Congress delegated authority to the Attorney General to issues guidelines and regulations to interpret and implement this title.

❖ the Interim Rule on February 28, 2007;

❖ Final Guidelines effective August 1, 2008

❖ the Final Rule on December 29, 2010;

❖ Supplemental Guidelines effective February 10, 2011.

SORNA – Who has to register?

Duty to Notify Sex Offenders of SORNA

❖ 42 U.S.C. § 16917:

- ❖ Congress required an “appropriate official” to notify a sex offender of his duty to register under SORNA prior to his release, and have the sex offender read and sign a form stating that he understands the requirement.**
- ❖ The Attorney General issued an Interim Rule on February 28, 2007 making SORNA applicable to all persons convicted at any time of a “sex offense.”**

SORNA – Register and Update?

- Where to Register?

42 U.S.C. § 16911(a) - A sex offender shall register, and keep the registration current, in each jurisdiction where:

- the offender resides,
- where the offender is an employee, and
- where the offender is a student.

For initial registration, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

SORNA – Register and Update?

- When to Register...

42 U.S.C. § 16913(b) - Initial Registration:

-prior to release from prison

-not later than 3 business days after being sentenced for that offense

SORNA – Register and Update?

- When/where to Update Registration Information:
- **42 U.S.C. § 16913(c):**

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry.

SORNA - Supreme Court Review

Carr v. United States, 130 S. Ct. 2229, 2242 (2010):

- ❖ The enforcement provision of Section 2250 does not apply to covered individuals whose travel predates the enactment of SORNA.
- ❖ Section 2250 requires proof that the elements were committed in a sequential order.

Reynolds v. United States, 132 S.Ct. 975 (2012):

- ❖ Congress delegated authority to the Attorney General to determine whether SORNA applies to individuals with pre-enactment convictions.
- ❖ Did not address whether the Interim Rule of February 28, 2007 was a valid rule
- ❖ On remand, the Third Circuit held the initial Interim Rule was not valid under the APA.

United States v. Kebodeaux, 133 S.Ct. 2496 (2013)

The registration requirements of SORNA, as applied to respondent Anthony Kebodeaux (who had been convicted of a pre-SORNA court-martial sex offense), fell within the scope of Congress's authority under the Necessary and Proper Clause.

Non-Indian Jurisdictions that have implemented SORNA

- Alabama
- Commonwealth of the Northern Mariana Islands
- Delaware
- Florida
- Guam
- Kansas
- Louisiana
- Maryland
- Michigan
- Mississippi
- Missouri
- Nevada
- Ohio
- Pennsylvania
- South Carolina
- South Dakota
- Tennessee
- U.S. Virgin Islands
- Wyoming

SORNA Defense Strategies

SORNA – Defense Strategies

Prior Conviction is Not an Offense Requiring Registration

- ❖ Request Bill of Particulars
- ❖ Obtain Records from Prior Conviction
- ❖ Categorical Approach
- ❖ Who Determines Jury or Judge

SORNA – Defense Strategies

The Prior Conviction Was Invalid

- ❖ Prior Conviction Was Expunged or Overturned
- ❖ Foreign Conviction Obtained Without Safeguards for Fundamental Fairness

-42 U.S.C. § 16911(5)(B)

SORNA – Defense Strategies

Prior Conviction Involves Consensual Conduct

Congress exempted individuals from registering with prior convictions involving consensual conduct where:

- ❖ the victim is an adult who was not under the defendant's custodial authority; and
- ❖ the victim was at least 13 and the defendant was not more than 4 years older.

(Categorical Pretrial Defense or Trial Defense?)

SORNA – Defense Strategies

Defendant Never Established a Residence / The Term Residence is Void as Applied

- ❖ Registration requirement triggered upon establishing a new residence
- ❖ Residence based on term “resides,” which is defined as “the location of the individual’s home or other place where the individual habitually lives.
- ❖ Transient defendant may not have a home or other place where he habitually lives
 - 42 U.S.C. § 16911(13)

SORNA – Defense Strategies

The defendant traveled before SORNA was applicable to him.

Certainly applies for travel prior to February 28, 2007 - Carr v. United States, 130 S. Ct. 2229 (2010).

- ❖ Validity of Argument for post-February 28, 2007 travel depends on when the Attorney General issued a valid rule.

SORNA – Defense Strategies

Travel out of the country?

10th Circuit – you still have to register

United States v. Murphy, 664 F.3d 798 (10th Cir. 2011)

(“[w]hen an offender leaves a residence in a state, and then leaves the state entirely, that state remains a jurisdiction involved.”)

8th Circuit – no duty to register if you move out of country

United States v. Lunsford, 725 F.3d 859, 860 (8th Cir. 2013)

(SORNA does not extend registration requirements to Lunsford's situation)

SORNA – Defense Strategies

Duplicitous Indictment + 6th Amend. right to unanimous jury verdict + venue:

United States v. Pietrantonio, 637 F.3d 865, 870 (8th Cir. 2011) – Defendant moved from MN to NV to MA over time frame in Indictment

- this was a duplicitous indictment

- no unanimity instruction given at trial

- because no venue in MN for second move, conviction reversed on 6th Amend. grounds.

Statutory/Constitutional Challenges

Ex Post Facto Challenge

- ❖ Art. I, § 9, cl. 3 of the U.S. Constitution
- ❖ The 10th Cir. has rejected this argument based on Smith v. Doe, 538 U.S. 84, 106 (2003).
 - United States v. Lawrance, 548 F.3d 1329, 1332-36 (10th Cir. 2008).
- ❖ Make argument that SORNA is more punitive than Alaska law in Smith
 - ❖ Mendoza-Martinez factors

Good State Ex Post Facto Cases

Kansas Case:

- Doe v. Thompson and Denning, Shawnee County Case No. 12-C-168, Memorandum Decision and Order (July 15, 2013).
- This case is currently on appeal to the Kansas Supreme Court in Case No. 13-110318-S.
- Many other good state cases ...

Commerce Clause

- Commerce Clause delegates to Congress the power “[t]o regulate Commerce among the several States.” U.S. CONST. art. I, § 8, cl. 3.
- 10th Cir. has rejected this in United States v. Hinckley, 550 F.3d 926, 940 (10th Cir. 2008).
- But NFIB v. Sebelius, 132 S. Ct. 2566 (2012),
 - Argue that SORNA compels activity from offenders
 - Argue that travel does not have substantial effect on commerce to make the registration scheme constitutional

Tenth Amendment

- Defendants now have standing to argue 10th Amendment challenges to statutes.
 - Bond v. United States, 131 S. Ct. 2355 (2011).
- The feds cannot commandeer state officials into enacting or administering federal law. Printz v. United States, 521 U.S. 898, 935 (1997).
- The feds have no registration employees.
- This argument will be helped by all the state challenges!

Win a state issue – eliminate fed duty to register?

- 42 U.S.C. 16925(b): allows a jurisdiction leeway in not complying with SORNA if the decision is based on a ruling from the jurisdiction's highest court regarding the constitutionality of the offender registry.
- But see Doe v. Keathley, 290 S.W.3d 719 (Mo. 2009), ruling that prior state Ex Post Facto case does not eliminate federal duty to register.
- If no state duty to register, now you're commandeering employees from the state, right?
See Printz, 521 U.S. at 935 (10th Amend. case).

Due Process – No Notice of Duty

The defendant was unable to comply with SORNA because it has not been implemented in relevant state(s).

- ❖ Only 16 States have implemented SORNA (Damn you, KS!)
- ❖ If Defendant prosecuted in a state that has not implemented, argue that prosecution violates Due Process Clause because defendant could not have complied or received notice of duty to register.
- ❖ This issue has been rejected by the 10th Cir. in:
United States v. Hinckley, 550 F.3d 926, 939 (10th Cir. 2008) abrogated on other grounds by Reynolds v. United States, 132 S. Ct. 975 (2012).

Attorney General's Rule Violates the APA

Congress Delegated Authority to the Attorney General to Determine Whether SORNA applies to individuals with convictions predating SORNA's enactment or its implementation in a particular jurisdiction.

Attorney General's regulations:

- ❖ the Interim Rule on February 28, 2007;
- ❖ the Final Guidelines on August 1, 2008;
- ❖ the Final Rule on December 29, 2010; and
- ❖ the Supplemental Guidelines for Sex Offender Registration and Notification on January 11, 2011
 - See Reynolds – 3d Cir. Remand

NonDelegation Doctrine

- Congress generally cannot delegate its legislative power to another branch of government. See Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892).
 - U.S. Const. Art. I §§ 1 and 8
- Justice Scalia thinks Congress' delegation of whether a criminal statute applies is violation of nondelegation doctrine.
 - Reynolds v. United States, 132 S.Ct. 975, 986 (2012) (Scalia, J., dissenting).

Other Ideas:

- Attacking it as an Apprendi Issue
- Cruel and/or Unusual Punishment
- Double Jeopardy
- Statutory Scheme an Unreasonable seizure scheme?

Plea, Trial, or Conditional Plea?

Conditional Plea?

- Get your acceptance of responsibility reduction
 - 2-3 offense levels - U.S.S.G. § 3E1.1
- Preserve your legal issues
- But see Unreasonable/Lazy Prosecutors

Plea, Trial, or Conditional Plea?

Trial

- Preserve all your issues for appeal.
- But most-likely lose acceptance of responsibility
 - But see Application Note 2 to U.S.S.G. § 3E1.1
- Remember to reassert/prove up your pretrial issues
 - Tenth Amendment –
 - You are under subpoena, aren't you, Mr. State Employee?
 - #How-is-this-not-commandeering?

Regular Ol' Guilty Plea

- You may be able to still preserve facial challenges to SORNA
- United States v. Rickett, 2013 WL 4750781 (10th Cir. 2013) (unpublished):

“There is a circuit split on this issue, with the majority of circuits holding that facial challenges to the constitutionality of a statute are jurisdictional in nature and survive a valid guilty plea.” Id. at *3.

Sentencing

Offense Level

- Tier I offense – offense level 12
- Tier II offense – offense level 14
- Tier III – offense level 16

U.S. v. Hill issue

- In order to be a Tier II or Tier III offender, the prior sex offense must be:
 - one that “is punishable by imprisonment for more than 1 year”
 - 42 U.S.C. § 16911(3), (4).
- Tier I offense: Offense Level 12

Tier II or Tier III

- Is the offense comparable to or more severe the Tier II/Tier III offenses listed in **42 U.S.C. § 16911(3) & (4)**?
- SMART Guidelines: use “element” based approach in determining the Tier.
 - Unless the Victim’s age is at issue
- Descamps – is it a divisible set of elements?
 - If not – use categorical approach

Supervised Release

- But under 18 U.S.C. 3583(k), the statutorily allowed term of supervised release is 5 years to life.
- But the USSG advisory range for a class C felony is p to three years - U.S.S.G. § 5D1.2(a)(2).
- United States v. Goodwin, 717 F.3d 511, 520 (7th Cir. 2013) – the “Range is five years” (finding plain error)

SORNA is not a “sex offense”

- United States v. Goodwin, 717 F.3d 511, 520 (7th Cir. 2013) (finding plain error)
- U.S.S.G. § 5D1.2, Application Note 1 (defining sex offense as “an offense, perpetrated against a
- minor . . .”).
- If it is, the advisory range is life. See U.S.S.G. § 5D1.2(b)(2).

Special Conditions of Supervised Release

- Object if they are in the PSR
- Object to lack of notice at sentencing
- Object if the judge doesn't give a specific reason why a certain condition is needed
- Must be reasonably related to penalogical purposes in 18 U.S.C. § 3553
- special conditions “must be reasonably related to (1) the defendant’s offense, history and characteristics; (2) the need for adequate deterrence; (3) the need to protect the public from further crimes of the defendant; and (4) the need to provide the defendant with treatment. See 18 U.S.C. § 3553(a)(1)-(2).