

SORNA—Basic History and Provisions

BY LORI MCPHERSON

THE SEX OFFENDER Registration and Notification Act (SORNA) is found in title I of the Adam Walsh Child Protection and Safety Act of 2006, and is designed to create a seamless system of sex offender registration and notification across the country. The 50 States, five principal U.S. Territories and the District of Columbia are required to implement SORNA by the required deadline, or face a 10 percent reduction of their funding under the Byrne/JAG grant program.¹ Of the federally-recognized Indian tribes that were eligible to opt-in to SORNA, approximately 195 have elected to become SORNA-implementing jurisdictions and must implement SORNA in a timely manner, or face delegation of their sex offender registration, notification and enforcement efforts to the States in which they are located.²

STATUS OF IMPLEMENTATION AND UPCOMING DEADLINES

Five jurisdictions have substantially implemented SORNA: Delaware, Florida, Ohio, the Confederated Tribes of the Umatilla Indian Reservation, and the Confederated Tribes and Bands of the Yakama Nation. Numerous additional jurisdictions are actively working with the Department of Justice's Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and

Tracking (SMART) to substantially implement SORNA's provisions. The current implementation deadline is July 26, 2011.³

HOW SORNA IMPACTS THE LOCAL PROSECUTOR

How could SORNA impact the local prosecutor? Whether or not your jurisdiction intends to implement SORNA, the local practitioner should be aware of the implications of SORNA on both their open and closed cases.

NOTICE OF REGISTRATION OBLIGATIONS

Generally speaking, persons convicted of sex offenses are ordered to register as a sex offender in the course of their sentencing proceeding. The actual "notice form" explaining a sex offender's detailed registration responsibilities might come from a jurisdiction's courts system, probation and parole officers, corrections officials, or other law enforcement agents. It is this "notice form," usually acknowledged and signed by the sex offender, which forms the basis of any future failure to register prosecution.⁴

In light of SORNA, what kind of notice should the

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prosecutor ensure that the convicted sex offender receives? SORNA itself requires that any implementing jurisdiction provide the following notice to a person required to register as a sex offender:

An appropriate official shall, shortly before release of the sex offender from custody, or, if the sex offender is not in custody, immediately after the sentencing of the sex offender, for the offense giving rise to the duty to register—

- (1) inform the sex offender of the duties of a sex offender under [the jurisdiction’s registration and notification system as well as SORNA] and explain those duties; [and]
- (2) require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement[.]

One of the benefits to the local prosecutor of following such a notice procedure is that any such notified sex offender who travels in interstate commerce and thereafter fails to register would be subject to the enforcement provisions of the federal failure to register statute, 18 U.S.C. §2250. The U.S. Marshals Service is tasked with enforcement of 18 U.S.C. §2250, and hundreds of §2250 cases have been prosecuted on the federal level. As with any other failure to register prosecution, the viability of these cases can hinge on whether or not a sex offender has been given proper notice of their duty to register under the applicable law. In the case of the non-compliant sex offender, proper due process notice under SORNA as described above will effectuate this possible enforcement capacity. In the case of a compliant sex offender, it will ensure the safety of the community and assist law enforcement beyond the borders of the jurisdiction in which the prosecutor serves by providing that offender notice of their registration responsibilities should they choose to relocate to another jurisdiction for their residence, work, or school.

FILE REVIEW

If your jurisdiction substantially implements SORNA, in what ways might you be required to review your closed files? Whether or not your jurisdiction substantially implements SORNA, what actions should you take with your current sex offense prosecutions?

SORNA does require that jurisdictions register certain sex offenders who were convicted prior to the jurisdiction’s substantial implementation of SORNA.⁵ The four categories of sex offenders required to be “recaptured” by a jurisdiction’s registration system are sex offenders that are:

- Presently required to register (such offenders will possibly need to be reclassified);
- Presently incarcerated;
- Presently on probation or parole; or
- Convicted of any new criminal offense.⁶

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might be obligated to register under SORNA’s provisions. Nevertheless, depending on your state’s statutes regarding the retroactive reach of its registration provisions, prosecutors may be permitted to review their old files to notify those offenders of their requirement to register, even in the absence of a mandate to do so. If you do so, be mindful of the principle of the “finality of court orders.” In a recent case out of Ohio where offenders were originally ordered by the court to comply with specific sex offender registration requirements, then subsequently required to register for a longer duration of time based on later legislative amendments to the registration statute, the Ohio Supreme Court held that such requirements were a violation of the separation of powers doctrine and could not be sustained.⁷

PLEA AGREEMENTS

The reach of your jurisdiction’s implementation of SORNA could also be impacted if a sex offender was

previously convicted and sentenced under the terms of plea agreements which did not call for sex offender registration (or only required state-level registration). For example, in *U.S. v. DeJarnette*, 2010 U.S. Dist. LEXIS 10181 (N.D. Cal. Feb. 6, 2010), the offender was only required to register if “required by the state to which the [offender] is released from custody.” Because of the failure to mention any federal sex offender requirement, the prosecution was deemed fundamentally unfair and the indictment for failure to register was dismissed.⁸ As previously mentioned, the local practitioner would be well-served to give a thorough SORNA notice in all cases which might require registration.⁹

In addition to SORNA’s possible impact on past and present plea agreements, prosecutors should also be prepared to anticipate how SORNA might affect the sex offenders whom they convict today.

ANTICIPATING FUTURE REGISTRATION REQUIREMENTS

There is no domestic federal office that directly registers sex offenders. What considerations should the prosecutor keep in mind in handling a case that might require sex offender registration under SORNA? What collateral consequences might be raised, and how might these impact sentencing arguments or negotiating plea agreements?

SORNA’S DIRECT APPLICABILITY TO SEX OFFENDERS

According to an interim regulation issued by the U.S. attorney general and most cases interpreting it, SORNA’s registration requirements apply directly to a sex offender.¹⁰ In other words, an offender required to register by SORNA has a duty to appear at the registering agency in a jurisdiction, and then it is up to that registering agency to decide whether or not the offender is required to register. Because of this, local prosecutors should familiarize themselves with the list of SORNA-registerable offenses and their prospective counterparts within a jurisdiction. For example, SORNA requires that any person convicted of a state-level equivalent of possession of child pornography register as a sex offender. Some states, however, do not require registration for such an offender. A prosecutor in such a state should consider providing a SORNA notification to such an offender,

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even if that offender would not be required to currently register within their jurisdiction.

There are multiple rationales for providing SORNA notice in such a case. First, if the jurisdiction does eventually implement SORNA, the offender will have already received proper notice and, most likely, will be required to register under the new law. Second, if the offender relocates, he or she will be on notice that they are subject to registration under SORNA in their new jurisdiction of residence, school attendance, or employment. Third, if the offender relocates and fails to register (assuming they would have been required to do so in the new jurisdiction), that offender would be subject to arrest and prosecution for a violation of 18 U.S.C. §2250. Finally, even if another jurisdiction also does not include possession of child pornography as a specifically-listed registration offense, many jurisdictions utilize a “catch-all” provision which might require registration—and the case for requiring registration might be bolstered by a SORNA notice provided by the convicting court.

JUVENILE ADJUDICATIONS

One of the most controversial portions of SORNA is its requirement that certain juveniles adjudicated delinquent in juvenile court register as sex offenders. The class of juveniles required to register under SORNA is indeed small: it includes only those who were 14 years of age or older at the time of the offense, and who were adjudicated delinquent of what would be, in essence, a forcible penetration offense.¹¹ The recent Proposed Supplemental Guidelines have limited the impact of this section even further, providing that any such adjudicated delinquent juvenile is exempt from posting on a jurisdiction’s public sex offender registry Web site.¹² This is a discretionary

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exemption that a jurisdiction may make, based on what conforms best to their public policy.

How, then, can a local practitioner tell if a juvenile would be eligible for registration under SORNA? Regardless of the recent changes to public disclosure (notification) requirements, the registration requirements remain the same. Practitioners should consider providing a SORNA notice to any juvenile that falls within the bounds of SORNA's registration requirements.

PRIOR TRIBAL CONVICTIONS

The system of criminal justice in federally-recognized Indian tribes is varied and complex. In some locations, offenders are not afforded defense counsel—or if they are, that “counsel” is not actually an attorney. It may come as a surprise to many, but the 6th Amendment Right to Counsel does not apply in tribal courts.¹³ Because of this, if a sex offender convicted in tribal court is required to register in your jurisdiction, their underlying conviction might be subject to a collateral challenge that would relieve them of a duty to register—or prevent a prosecution for failure to register.

The impact of this disparity was demonstrated in a non-sex offender case, *United States v. Cavanaugh*.¹⁴ In this recidivist domestic violence prosecution, the government sought to admit prior domestic assault convictions that were secured in tribal court, where the defendant was convicted and sentenced without counsel. The court found that the admission of those prior convictions violated Cavanaugh's right to counsel and due process under the U.S. Constitution. The Court here held that “tribal convictions introduced in a federal court to prove an essential element of a federal crime must be in compliance with the U.S. Constitution.”¹⁵

FEDERALLY ASSISTED HOUSING PROGRAMS

Persons “subject to a lifetime registration requirement under a State sex offender registration program” are prohibited from admission into federally assisted housing.¹⁶ As part of the screening process for entry into these programs, a Housing Authority is required to “perform criminal history background checks...to determine whether any household member is subject to a lifetime sex offender registration requirement in the State where the housing is located and in other States where the household members are known to have resided.”¹⁷

If a local prosecutor is handling a case where an offender's family participates in federally assisted housing programs (such as Section 8), he or she should be aware

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of the possible immediate or future impact of a lifetime registration requirement—whether under their own laws, another jurisdiction's laws, or SORNA. If a sex offender will be released back into the community, a prohibition on accessing federally assisted housing programs could negatively affect the offender's ability to reenter the community. For offenders who are participants in these programs at the time the registration requirement arises, one court has recently held that a termination of benefits is not authorized.¹⁸

IMMIGRATION

Any person convicted of a “specified offense against a minor,”¹⁹ as defined by SORNA, is prohibited from filing a family-based immigrant petition.²⁰ Finally, spouses and fiancées of U.S. citizens convicted of a SORNA-defined “specified offense against a minor” are no longer eligible for “K” nonimmigrant status.²¹ For prosecutors handling cases involving either non-citizens, or citizens seeking to bring their families, spouses or fiancées to reside in the United States, a sex offense conviction could have tremendous consequences.

The significance of this collateral consequence has been recently demonstrated. One of the last things any local prosecutor wants is to have a sex offense case returned to their desk, years after the fact, because of a successful claim of Ineffective Assistance of Counsel. In the recent case of *Padilla v. Kentucky*,²² the United States Supreme Court held that counsel for a defendant is

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“constitutionally deficient” if they do not inform a client whether his plea carries a risk of deportation.²³ Under the amendments of the Adam Walsh Act, a conviction for a violation of 18 U.S.C. §2250 is a deportable offense.²⁴ In addition, a person is subject to deportation if they are convicted of rape, a crime which has violence as an element (e.g. forcible sodomy), sexual abuse of a minor, aggravated sexual abuse, sexual abuse, any offense relating to child pornography, child sexual exploitation, transportation or travel to engage in illegal sexual conduct with a minor, or sex trafficking of children.²⁵

The local practitioner would be well served to make it a standard part of any plea colloquy to recite the possible immigration consequences of a sex offense conviction, in order to avoid any habeas issues in the future. Based on the holding in *Padilla*, a recent case out of Georgia held that a failure to advise an offender of their registration requirements fulfilled the prejudice prong of an ineffective assistance of counsel claim.²⁶

POSSIBLE LIMITATIONS ON INTERNET USE

The Keeping the Internet Devoid of Sexual Predators Act (KIDS Act) was passed in October of 2008, and provides for the creation of a database to be housed at the FBI where social networking Web sites may run their e-mail address databases against the e-mail addresses previously submitted by registered sex offenders as part of their registration process.²⁷ Under SORNA, sex offenders are required to register approximately 20 items of information, including their “internet identifiers.”²⁸ In addition, some states prohibit or limit the use of the Internet for registered sex offenders, or utilize such limitations as a condition of probation. For sex offenders who will seek to utilize the Internet (either presently or in the future) these potential limitations or restrictions could be viewed as significant ones.

CONCLUSION

Federal law governing sex offender registration and notification may seem far afield from that which a local practitioner must be concerned. Nevertheless, SORNA’s provisions may reach into multiple areas of practice, and

the local practitioner is well advised to stay familiar with its terms. For additional information about SORNA and its implementation, see the Web site of the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering and Tracking at www.ojp.gov/smart.

¹ 42 U.S.C. §3750 *et. seq.*

² Only tribes located in non-‘PL-280’ states were eligible to opt-in as SORNA registration jurisdictions. 42 U.S.C. §16927(a)(2).

³ Federally-recognized Indian tribes that do not implement by the statutory deadline will be subject to an “involuntary delegation” under 42 U.S.C. §16927(a)(2)(C) upon a finding by the Attorney General that the tribe is not likely to become capable of implementing SORNA within a “reasonable amount of time.” *Id.* There are a small number of tribes that are subject to the deadline of July 26, 2010 because of their failure to request a one-year extension to July 26, 2011.

⁴ Jurisdictions would be required to capture an electronic copy of an offender’s notice form under the Proposed Supplemental Guidelines for Sex Offender Registration and Notification. 75 FR 27363, 27365 [hereinafter Proposed Supplemental Guidelines]. The Proposed Supplemental Guidelines were published on May 14, 2010.

⁵ 28 C.F.R. §72.3.

⁶ The Proposed Supplemental Guidelines would limit this category to those convicted of a new felony offense. 75 FR at 27366.

⁷ *State v. Bodyke*, 2010 Ohio LEXIS 1271 (June 3, 2010).

⁸ See also *U.S. v. Molina*, 2009 CCA LEXIS 346 (C.G. CCA Sept. 9, 2009)(mutual mistake voided plea agreement);

⁹ “SORNA Notice,” as used in this article, means a notice to an offender in conformity with that required by SORNA. 42 U.S.C. §16917.

¹⁰ See 28 CFR §72.3, 72 FR 8894 and cases interpreting same.

¹¹ 42 U.S.C. §16911(8); Final Guidelines, 73 FR at 38041.

¹² Proposed Supplemental Guidelines, 75 FR at 27363.

¹³ See 25 U.S.C. §1302(6), *Talton v. Mayes*, 163 U.S. 376 (1898). The recently passed Tribal Law and Order Act of 2010, H.R. 725, §234, would provide these Constitutional protections in certain circumstances.

¹⁴ 2009 U.S. Dist. LEXIS 123114 (D. N.D. Dec. 18, 2009).

¹⁵ *Id.* at 1076.

¹⁶ 42 U.S.C. §13663(a). This statute has not been amended to conform with SORNA’s language.

¹⁷ 24 C.F.R. 982.553(a)(2)(1).

¹⁸ *Miller v. McCormick*, 605 F.Supp.2d 296 (D. Me. 2009).

¹⁹ 42 U.S.C. §16911(7)

²⁰ 8 U.S.C. §1154(a)(viii).

²¹ 8 U.S.C. §1154(b)(i)(II).

²² 130 S.Ct. 1473 (2010)

²³ *Id.* at 1486-87.

²⁴ 8 U.S.C. §1227(a)(2)(A)(v).

²⁵ 8 U.S.C. §1227(2)(A)(iii), 8 U.S.C. §1101(a)(43). These provisions apply to attempts and conspiracies, as well, and likely would apply to any conviction at the state, territory, or tribal level, as well. See 4 U.S.C. §110(d). Counsel is cautioned to consult the applicable regulations, guidelines, and governing case law for the most recent interpretations of these provisions.

²⁶ *Taylor v. State*, 2010 Ga. App. LEXIS 673 (July 8, 2010).

²⁷ 42 USC §16915b.

²⁸ 42 USC §16915a(a); Final Guidelines for Sex Offender Registration [hereinafter Final Guidelines], 73 FR 38030, 38055 (published June 30, 2008); Proposed Supplemental Guidelines, 75 FR at 27364.