

SORNA AND THE SEX OFFENDER'S DUTY TO REGISTER¹

I. INTRODUCTION AND SCOPE OF THIS PAPER.

The Sex Offender Registration and Notification Act (hereinafter referred to as SORNA) (this legislation is also known as the "Adam Walsh Act") was enacted on July 27, 2006. The impetus for this legislation was the pervasive problem of sex crimes perpetrated against children. The scope of SORNA is massive and this paper is limited to focusing on the sex offender's obligation to register after SORNA, the direct and collateral consequences of failing to register, as well as a discussion of the legal issues that courts have confronted to date in SORNA's failure to register context.

The legislation espouses clear congressional intent that the registration requirement applies to all sex offenders convicted after SORNA's effective date of July 27, 2006. The legislation also authorizes the Attorney General (hereinafter "AG") to promulgate regulations related to the registration of sex offenders. SORNA's direct federal law registration requirements took effect when SORNA was enacted and currently applies to all sex offenders who fall into the categories for which SORNA requires registration. 28 C.F.R. § 72.3 (2007).

1

Some of the ideas that appear herein were formulated by Amy Baron Evans, *Supplement to Adam Walsh Act - Part II--Sex Offender Registration and Notification Act*, (May 7, 2007).

Congress failed to explicitly signal whether SORNA retroactively applied to those sex offenders whose predicate convictions were entered before SORNA's enactment. Instead, Congress imbued the AG with the authority to specify how, if at all, SORNA applied to those individuals whose predicate convictions were entered before July 27, 2006. 42 U.S.C. § 16913(d). On February 28, 2007, the AG promulgated an interim rule which applied SORNA retroactively to anyone convicted of an offense listed in SORNA. 28 C.F.R. § 72.3 (2007).

II. DUTY TO REGISTER AND DIRECT CONSEQUENCES OF FAILING TO REGISTER--18 U.S.C. § 2250; USSG §§2 A3.5 & 2A3.6.

SORNA establishes a national sex offender registry and the statute, in part, mandates that a "sex offender" shall register, and keep the registration current, in each jurisdiction where he resides, is employed, or is a student. 42 U.S.C. § 16913(a). Initial registration shall be completed in the jurisdiction of conviction, if different from the offender's jurisdiction of residence, and any subsequent in-person update shall be completed in the offender's jurisdiction of residence. *Id.*

Under 42 U.S.C. § 16913(b), a "sex offender" is defined as any "individual who was convicted of a sex offense." The term "sex offense" means:

- (i) a criminal offense that has an element involving a sexual act or sexual contact with another;
- (ii) a criminal offense that is a specified offense against a minor;
- (iii) a Federal offense (including an offense

prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117 of Title 18; (iv) a military offense specified by the Secretary of Defense; or (v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

42 U.S.C. § 16911(5) (A).

SORNA contains a duty to notify provision for those sex offenders who are convicted or released from prison after the enactment of the legislation. SORNA authorizes the AG to promulgate regulations for those sex offenders who were convicted and/or released from custody before the enactment of the legislation. 42 U.S.C. § 16913(d). However, no guidance on the duty to notify past state or federal offenders was forthcoming in the AG's interim rule promulgated on February 28, 2007.

Shortly before release from custody, or if not in custody, immediately after sentencing, an "appropriate official" must (1) inform the defendant of and explain his obligations under SORNA; (2) require the 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;" and (3) ensure that the sex offender is registered. 42 U.S.C. § 16917(a). For those sex offenders who are not sentenced to prison, they must complete the registration process within three business days of the imposition of sentence. 42 U.S.C. § 16913(b).

For a sex offender who is in federal custody, the Bureau of Prisons (hereinafter "BOP") acts as the "appropriate official" and

has the duty to inform the sex offender prior to his release from the facility whereas the federal probation officer plays this role and has this obligation to individuals who are either on probation or supervised release. 18 U.S.C. § 4042(c)(3). It is a mandatory condition of federal probation and supervised release for sex offenders to comply with SORNA's registration requirements. 18 U.S.C. §§ 3563(a)(8) & 3583(d).

Once registered, sex offenders must verify their information in person at regular intervals, depending on the severity of the sex offense for which they were convicted. The severity of the predicate conviction also determines the sex offender's placement in a three-tier system. The least serious offenders are placed in tier I² and are required to appear in person once a year to update their information, and remain on the registry for fifteen years. Tier II³ offenders must appear in person every six months to update

2

A tier I "sex offender" is a "sex offender" other than a Tier II or Tier III "sex offender." See 42 U.S.C. § 16911(2).

3

A tier II "sex offender" is a "sex offender" other than a Tier III "sex offender" whose offense is punishable by imprisonment for more than one year and-- (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 18 U.S.C. § 1591); (ii) coercion and enticement (as described in 18 U.S.C. § 2422(b)); (iii) transportation with intent to engage in criminal sexual activity (as described in 18 U.S.C. § 2423(a)); (iv) abusive sexual contact (as described in 18 U.S.C. § 2244); (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

their information and remain on the registry for twenty-five years. The most serious offenders, placed in tier III⁴, remain on the registry for life and are required to appear in person every three months to verify their information.

The federal crime of failing to register is codified at 18 U.S.C. § 2250. The statute provides:

(a) In general.--Whoever--

- (1) is required to register under the Sex Offender Registration and Notification Act;
- (2) (A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
- (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

offender. See 42 U.S.C. § 16911(3).

4

A tier III "sex offender" is a sex offender whose offense is punishable by imprisonment for more than one year and-- (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 18 U.S.C. §§ 2421 and 2242) whether against an adult or minor; or (b) abusive sexual contact (as described in 18 U.S.C. § 2242) against a minor under the age of 13; (c) "involves kidnaping of a minor" (unless committed by a parent or guardian); or (d) occurs after the offender becomes tier II sex offender. 42 U.S.C. § 16911(4).

shall be fined under this title or imprisoned not more than 10 years, or both.

(b) Affirmative defense.--In a prosecution for a violation under subsection (a), it is an affirmative defense that--

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

(c) Crime of violence.--

- (1) **In general.**--An individual described in subsection (a) who commits a crime of violence under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States shall be imprisoned for not less than 5 years and not more than 30 years.
- (2) **Additional punishment.**--The punishment provided in paragraph (1) shall be in addition and consecutive to the punishment provided for the violation described in subsection (a).

As is clearly evident from the statute, any sex offender who knowingly fails to register or update his information faces up to ten years in prison. Moreover, if an unregistered sex offender commits a crime of violence, he will receive a sentence of at least five years and up to thirty years in prison. This sentence must run consecutively to any other sentence imposed.

After a person has been charged and arrested for failing to register as a sex offender, it is important to note that SORNA modified the Bail Reform Act of 1984 by adding failure to register

to the list of offenses for which the court must hold a hearing, upon motion of the government, to determine whether there are conditions of release that will reasonably assure the person's appearance and the safety of the community. 18 U.S.C. § 3142(f)(1)(E). If a defendant charged with failure to register is released on bond, the pretrial release order must contain a condition of electronic monitoring. 18 U.S.C. § 3142(c)(1).

After conviction for violating § 2250, it is important to note that the Sentencing Commission promulgated two new sentencing guidelines to punish those who knowingly failed to register. These guidelines provide:

USSG § 2A3.5 Failure to Register as a Sex Offender

(a) Base Offense Level (apply the greatest):

- (1) **16**, if the defendant was required to register as a Tier III offender;
- (2) **14**, if the defendant was required to register as a Tier II offender; or
- (3) **12**, if the defendant was required to register as a Tier I offender.

(b) Specific Offense Characteristics:

(1) (Apply the greatest):

If, while in a failure to register status, the defendant committed:

- (A) a sex offense against someone other than a minor increase by **6** levels;
- (B) a felony offense against a minor not otherwise covered by subdivision (C), increase by **6** levels; or

(C) a sex offense against a minor, increase by **8** levels.

(2) If the defendant voluntarily (A) corrected the failure to register; or (B) attempted to register but was prevented from registering by uncontrollable circumstances and the defendant did not contribute to the creation of those circumstances, decrease by **3** levels.

Commentary

Statutory Provision: 18 U.S.C. § 2250(a).

Application Notes:

1. Definitions.— For purposes of this guideline:

"Minor" means (A) an individual who had not attained the age of 18 years; (B) an individual, whether fictitious or not, who a law enforcement officer represented to a participant (i) had not attained the age of 18 years; and (ii) could be provided for the purposes of engaging in sexually explicit conduct; or (C) an undercover law enforcement officer who represented to a participant that the officer had not attained the age of 18 years.

"Sex offense" has the meaning given that term in 42 U.S.C. § 16911(5).

"Tier I offender", "tier II offender", and "tier III offender" have the meaning given those terms in 42 U.S.C. § 16911(2), (3) and (4), respectively.

2. Application of Subsection (b) (2).—

(A) In General.—In order for subsection (b) (2) to apply, the defendant's voluntary attempt to register or to correct the failure to register must have occurred prior to the time the defendant knew or reasonably should have known a jurisdiction had detected the failure to register.

(B) Interaction with Subsection (b) (1).—Do not apply subsection (b) (2) if subsection (b) (1) also applies.

USSG § 2A3.6 Aggravated Offenses Relating to Registration as a Sex Offender

If the defendant was convicted under:

- (a) 18 U.S.C. § 2250(c), the guideline sentence is the minimum term of imprisonment required by statute; or
- (b) 18 U.S.C. § 2260A, the guideline sentence is the term of imprisonment required by statute.

Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) shall not apply to any count of conviction covered by this guideline.

Commentary

Statutory Provisions: 18 U.S.C. §§ 2250(c), 2260A.

Application Notes:

1. In General. Section 2250(c) of title 18, United States Code, provides a mandatory minimum term of five years' imprisonment and a statutory maximum term of 30 years' imprisonment. The statute also requires a sentence to be imposed consecutively to any sentence imposed for a conviction under 18 U.S.C. § 2250(a). Section 2260A of title 18, United States Code, provides a term of imprisonment of 10 years that is required to be imposed consecutively to any sentence imposed for an offense enumerated under that section.
2. Inapplicability of Chapters Three and Four. Do not apply Chapters Three (Adjustments) and Four (Criminal History and Criminal Livelihood) to any offense sentenced under this guideline. Such offenses are excluded from application of those chapters because the guideline sentence for each offense is determined only by the relevant statute. See §§ 3D1.1 (Procedure for Determining Offense Level on Multiple Counts) and 5G1.2 (Sentencing on Multiple Counts of Conviction).
3. Inapplicability of Chapter Two Enhancement. If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic that is based on the same conduct as the conduct comprising the conviction under 18 U.S.C. § 2250(c) or

2260A.

4. *Upward Departure.*-- In a case in which the guideline sentence is determined under subsection (a), a sentence above the minimum term required by 18 U.S.C. § 2250(c) is an upward departure from the guideline sentence. A departure may be warranted, for example, in a case involving a sex offense committed against a minor or if the offense resulted in serious bodily injury to a minor.

III. COLLATERAL CONSEQUENCES TO CONVICTION FOR FAILING TO REGISTER.

(A) Sex Offender Management And Treatment Programs.

After SORNA, the BOP is required to make available "appropriate treatment to sex offenders who are in need of and suitable for treatment." This mandate led the BOP to formulate both sex offender management and sex offender treatment programs. See 18 U.S.C. § 3621(f)(1). The objectives of these two programs are not the same.

A sex offender management program monitors sex offenders' mail, phone calls, and behavior for things the BOP deems inappropriate for someone convicted of a sex crime. A management program: (1) does not provide treatment or counseling; (2) does not count towards a lower security classification; and (3) does nothing to protect incarcerated sex offenders from the general prison population.

In contrast, a sex offender treatment program offers therapeutic help to incarcerated sex offenders. However, counsel must be aware that the sex offender treatment program requires participants to admit guilt as a precondition to entering the

program, something defendants with active appeals cannot do. Moreover, participants must admit other unadjudicated sexual misconduct in the course of treatment. The information gleaned from this program might be useful to the government in successfully applying another collateral consequence of SORNA—civil commitment of “sexually dangerous offenders.”

(B) Civil Commitment.

One of the aspects of SORNA about which all practitioners must be versed is the authorization of a civil commitment, pursuant to 18 U.S.C. § 4248, for dangerous sex offenders who cannot conform their behavior. SORNA also authorizes financial grants to states to operate civil commitment programs for sexually dangerous persons.

For any person who is in BOP custody, deemed incompetent, or against whom all criminal charges have been dismissed solely because of his mental condition, the AG and/or the Director of the BOP may certify that the person is a “sexually dangerous person.” 18 U.S.C. § 4248(a). Under SORNA, “sexually dangerous person” means a defendant who has engaged or attempted to engage in sexually violent conduct or child molestation and who is sexually dangerous to others. 18 U.S.C. § 4247(a)(5). Another important definition is “sexually dangerous to others;” this encompasses a person who suffers from a serious mental illness, abnormality, or disorder as a result of which he would have serious difficulty in

refraining from sexually violent conduct or child molestation if released. 18 U.S.C. § 4247(a)(6).

SORNA does not set forth any standards upon which the AG or the Director must base their certification of a person's sexual dangerousness. However, once a certificate has been filed, the defendant is entitled to an adversarial hearing, but must remain in the custody of either the AG or the BOP pending resolution of the issue. 18 U.S.C. §§ 4247(d)&4248(a)-(b).

A court is authorized to order the sex offender who is subject to civil commitment to submit to either a psychiatric or psychological assessment before the hearing. 18 U.S.C. § 4248(b). If, after the hearing, the court finds by clear and convincing evidence that the defendant is "sexually dangerous," the AG must either commit him to state custody for treatment or place him in a "suitable facility" until either the state agrees to take him or he no longer qualifies as "sexually dangerous." 18 U.S.C. § 4248(d).

This finding and the subsequent discharge from the civil commitment can be made only by order of the court and only when the director of the facility to which the defendant was committed certifies that he is no longer sexually dangerous. At the request of either the government or the court, a hearing on the matter must be held prior to discharge, after which the court can order the defendant discharged only upon a finding by a preponderance of the evidence that the person will not be sexually dangerous to others

if released. 18 U.S.C. § 4248(e)(1).

Alternatively, a person may be conditionally discharged under the same procedure subject to his compliance with a specific treatment regimen. However, the sex offender will be subject to arrest and evaluation following his release if there is probable cause to believe that he is not following the prescribed treatment regimen. 18 U.S.C. §§ 4248(e)(2)&(f).

SORNA also increases the time within which a person can be alleged to be incompetent. Whereas the pre-SORNA version of 18 U.S.C. § 4241 allowed competency to be raised at any time prior to sentencing, after SORNA, this issue can be raised at any time after the commencement of any term of probation or supervised release and prior to the completion of the sentence. This means that the government can wait until a defendant has finished serving his prison term to move for a competency or "sexually dangerous" determination. 18 U.S.C. § 4241(a).

Importantly, if charges against a defendant who has been committed to a facility are dismissed for reasons not related to his mental condition (*i.e.*, he was acquitted) and the director of the facility certifies that the defendant is "sexually dangerous," the state in which the person is domiciled or was tried has ten days to initiate state civil commitment proceedings. 18 U.S.C. § 4248(g). Otherwise, the person must be released. *Id.*

(C) Immigration Consequences.

SORNA provides that any alien convicted of the federal crime of failing to register as a sex offender is "deportable." 8 U.S.C. § 1227(a)(2)(A)(v).

(D) DNA Collection.

DNA samples may be collected "as prescribed by the AG in regulation," from individuals who are "facing charges, or convicted." Failure to cooperate in such collection is a Class A misdemeanor. 42 U.S.C. § 14135a(a)(5)(A).

Because the broad DNA collection requirement applies to those "facing charges," it seemingly encompasses persons who are currently charged by indictment, information or complaint, but have not been arrested. The class of defendants who are "convicted" encompasses persons convicted of offenses that are not felonies, violations of chapter 109A, or crimes of violence.

At this juncture, the AG has not promulgated regulations to implement the broadened DNA collection power created under SORNA. Until a regulation is promulgated, it should be argued that this directive may not be exercised.

Be aware that DNA collection has been upheld against Fourth Amendment challenge because the individuals from whom samples were collected were already proven guilty of a crime, thus heightening the government's legitimate interest in monitoring them and diminishing their expectation of privacy. *United States v. Kincade*,

379 F.3d 813, 833-36 (9th Cir. 2004) (en banc). However, this rationale has not been applied to persons either "arrested" or "facing charges."

IV. SYNTHESIS OF ALL FEDERAL FAILURE TO REGISTER CASES DECIDED UP TO JUNE 15, 2007.

(A) Is The Defendant's Prior Conviction A "Sex Offense?"

In some cases, whether a defendant was required to register will be a simple question of determining whether he was convicted of violating one of the federal statutes enumerated in 42 U.S.C. § 16911(5) (A) (iii). However, in cases where the person was convicted of an offense "that has an element involving a sexual act or sexual contact with another," the answer may not be as straightforward. Some statutes can be violated with or without a sexual act or sexual contact. Additionally, where the offense is alleged to be one of the "specified offenses against a minor," 42 U.S.C. §§ 16911 (5) (A) (ii) & (7) (A)-(I), the offense may or may not qualify for a variety of legal or factual bases.

The most obvious way to determine if the conviction is a sex offense is to utilize the "categorical approach," in which the decision-maker may "look only to the fact of conviction and the statutory definition of the prior offense," and not to the particular facts underlying the conviction. *Shepard v. United States*, 544 U.S. 13, 17 (2005). On the other hand, it may be possible to show that the actual conduct was not a "sex offense" within the meaning of SORNA. The following hypothetical

illustrates this point: assume that a client was convicted of statutory rape when he was 18 as a result of his consensual sexual relationship with his 15 year-old girlfriend. The government might attempt to characterize this conviction as a "sex offense" because it constituted a "sex offense against a minor." 42 U.S.C. § 16911(7)(I). However, SORNA exempts from the definition of "sex offense" consensual conduct with a victim who was at least 13 years old at the time of the conduct and the difference in age between the defendant and victim was not more than four years. 42 U.S.C. § 16911 (5)(C). Consequently, the statutory rape conviction, in this hypothetical, would not be a "sex offense" within the ambit of SORNA.

(B) Is There A Duty To Register?

In *United States v. Bobby Smith*, 481 F.Supp.2d 846 (E.D. Mich. 2007), Bobby Smith was convicted of a state sex offense in New York in 1989 and released from prison in 2004. Prior to his release, Smith was apprised of his duty to register under New York law but he failed to comply.

Sometime in 2004, Smith moved to Detroit where he established residency. New York authorities learned of Smith's relocation in January 2006 at which time they immediately notified him of his obligation to register under New York law. Smith again ignored authorities and did not register in either New York or Michigan.

The federal statute in effect when Smith traveled in interstate commerce and failed to register in 2004 (42 U.S.C. § 14072(i)) was a misdemeanor with a maximum sentence of one year in prison. Nonetheless, Smith was indicted for violating §2250 between July 27, 2006 and December 20, 2006 and faced up to ten years in prison.

Bobby Smith moved to dismiss the indictment and argued that the express language of § 2250 made the statute inapplicable because the conduct punished in the statute is "travels" as opposed to "traveled" in interstate commerce. Consequently, the statute could not be used to reach his conduct because he "traveled" in interstate commerce before SORNA was enacted.

The district court found that Congress' choice of verb tense (*travels* versus *traveled*) illuminated Congress' intent as to the applicability of the statute. *Id.* at 851. Therefore, Bobby Smith was under no duty to register as a sex offender under SORNA. *Id.*

In *United States v. Marvin Smith*, 2007 WL 1725329 (S.D.W.Va. June 13, 2007), the defendant was convicted of a sex offense in 1995 and upon his release from state prison in 2005, he was apprised of his obligation to register as a sex offender under West Virginia law. Marvin Smith was charged with violating § 2250 on November 24, 2006, a time period after the enactment of SORNA but before the AG promulgated the interim rules on the statute's retroactive application.

Marvin Smith contended that he was not obligated to register because the AG did not promulgate an interim rule on the retroactive application of SORNA until after Smith was alleged to have violated § 2250. *Id.* at 3. The district court found that because the AG waited seven months after SORNA was enacted to promulgate an interim rule on retroactivity, the statute did not apply to offenders with convictions that pre-dated SORNA who also failed to register during this seven month window. *Id.*

In *United States v. Kapp*, 2007 WL 1536709 (M.D. Pa. 2007), the court consolidated the cases of Kapp and Duncan and ruled on their motions to dismiss. Both defendants were convicted of sex offenses and released from prison prior to SORNA's enactment and were charged with failing to register during the window of time between SORNA's enactment and the promulgation of the AG's interim rule on retroactivity. Chief Judge Kane ruled that there was no federal obligation to register for past offenders during this seven month window. *Id.* at *4, n. 9.

The court in *United States v. Hinen*, 2007 WL 1447853 (W.D. Va. 2007) reached a different conclusion. In *Hinen*, the defendant was convicted of a state sex offense in 2001, and he registered as a sex offender under Virginia law in September 2001. After completing his term of probation on July 26, 2006, Hinen moved out of state and failed to either register or update his information. Consequently, Hinen was indicted for failing to register as a sex

offender between August 1, 2006 and February 17, 2007.

Hinen maintained that he was under no obligation to register because his conviction predated SORNA and the AG's rule on the retroactive application was not promulgated until February 27, 2007. However, the district court read SORNA to require Hinen to register even before the interim rules were promulgated. *Hinen*, 2007 WL 1447853 at *6. The court concluded that the AG's interim rules applied only to those individuals who were unable to initially register and not to defendants who were able to register under his state's pre-SORNA law. *Id.*

(C) SORNA's "Knowingly" Mens Rea.

SORNA expressly requires a defendant to "knowingly" fail to either register or update registration. In *United States v. Markel*, 2007 WL 1100416 (W.D. Ark., April 11, 2007), the defendant contended that he was under no obligation to register as this obligation was not explained to him by the "appropriate official." However, the district court ruled that a defendant can violate SORNA by failing to register, failing to update a SORNA imposed registration obligation, or ignoring a registration obligation imposed by a state registration statute. *Id.* at *2.

If a person is on notice of his obligation to register as a sex offender under state law before SORNA was enacted, the court in *Markel* held that he would be presumed to be on notice of his obligation to comply with SORNA. *Id.* Because SORNA's registration

obligation is similar to that imposed by most state statutes, SORNA did not impair Markel's rights when he failed to register. *Id.* In the end, the court held that ignorance of the law is no defense in a registration context where the duty is "likely to be known." *Id.* The courts in *United States v. Madera*, 474 F. Supp. 2d 1257, 1264 (M.D. Fla. 2007); *United States v. Manning*, 2007 WL 624037 at *2 (W.D. Ark. Feb. 23, 2007); and *United States v. Mason*, 2007 WL 1521515 at *3 (M.D. Fla. 2007) reached the same conclusion.

In *Marvin Smith*, discussed in Section IV(B) of this paper, the district court held that SORNA contained a duty to notify provision that applied to past offenders as well as those offenders whose predicate sex offense convictions post-dated the enactment of the statute. *Marvin Smith*, 2007 WL 1725329 at *4. The court ruled that Marvin Smith did not "knowingly" violate SORNA's failure to register requirement because his omission occurred in the window of time between the enactment of SORNA and the AG's promulgation of rules on retroactivity. *Id.* Interestingly, the district court noted that Marvin Smith's registration under West Virginia's registration statute was not sufficient to notify him of any need to comply with SORNA. *Id.*

(D) *Ex Post Facto* Clause.

If SORNA'S registration requirements are applied to persons convicted of a predicate sex offense before the statute's effective date, there is a strong argument that this application violates the

Ex Post Facto Clause. U.S. Const. art. I, § 9. Not surprisingly, the cases that have considered this question have gone both ways.

(1) Retroactive Application of SORNA Does Not Violate *Ex Post Facto* Clause.

In *Madera*, the court ruled that the retroactive application of SORNA did not violate the *Ex Post Facto* Clause because the congressional intent behind the registration requirement was not punitive, but rather was intended to create a regulatory scheme that was "civil in nature." *Madera*, 474 F. Supp. 2d at 1262-64. The courts in *Markel*, 2007 WL 1100416 at *1-2; *Mason*, 2007 WL 1521515 at *4; *Hinen*, 2007 WL 1447853 at *10; and *Manning*, 2007 WL 624037 at *1-2 all adopted the rationale announced by the *Madera* court.

The court in *United States v. Templeton*, 2007 WL 445481 (W.D. Okla. Feb. 7, 2007) reached the same conclusion, albeit for different reasons. The court ruled that the retroactive application of SORNA did not "punish the defendant for an act that was not a crime when allegedly performed, does not increase the punishment for a crime committed before the law's enactment, and does not deprive a defendant of a defense available before its enactment. *Id.* at *5.

(2) Retroactive Application of SORNA Violates *Ex Post Facto* Clause.

In *Bobby Smith*, previously discussed in Section IV(B) of this paper, the court observed that the application of SORNA to Bobby

Smith's pre-SORNA conduct (*i.e.*, traveling in interstate commerce and failing to register) elevated the maximum penalty that he faced from one to ten years imprisonment. *Bobby Smith*, 481 F. Supp. 2d at 853. Additionally, the district court found that SORNA's duty to register was not a regulatory requirement; instead, it was clearly a punitive statute as evidenced by its placement within Title 18 and elevation to felony status. *Id.* Consequently, the application of SORNA to Bobby Smith violated the *Ex Post Facto* Clause. *Id.*

(E) NON-DELEGATION DOCTRINE.

Under the Constitution's non-delegation doctrine, Congress may not delegate its legislative power to another branch of government. A plain reading of SORNA reveals that Congress delegated its authority to the AG to determine whether the statute should be retroactively applied. However, all courts that have considered this issue in SORNA's context have quickly dispatched of it by finding that this delegation was constitutional. *Madera*, 474 F. Supp. 2d at 1261-62; *Mason*, 2007 WL 1521515 at *3; and *Hinen*, 2007 WL 1447853 at *8.

(F) COMMERCE CLAUSE.

Another constitutional argument that has been raised and universally rejected is that SORNA violates the Constitution's Commerce Clause. U.S. Const. art. I, §8, cl. 3. Although all courts have rejected this argument, their reasons are slightly

nuanced.

In *Madera*, the court held that the purpose behind SORNA is to protect the public from sex offenders. *Madera*, 474 F. Supp. 2d at 1265. As this is a legitimate governmental interest and the travel of sex offenders in interstate commerce "substantially affect interstate commerce," SORNA bears a "rational basis" to promoting this governmental interest. *Id.*

In *Templeton*, the court ruled that SORNA has a jurisdictional nexus--if a person has been convicted of a state sex offense and he travels in interstate or foreign commerce, registration is required. *Templeton*, 2007 WL 445481 at *4. This requirement falls within the ambit of "commerce" that Congress is empowered to regulate under the Commerce Clause. *Id.* Similarly, in *Mason*, the court ruled that Congress may regulate individuals or things that travel in interstate commerce without regard to the reason for their movement. *Mason*, 2007 WL 1521515 at *6. Because § 2250(a)(2) imposes registration requirements on sex offenders who travel in interstate or foreign commerce, the statute has the requisite jurisdictional nexus. *Id.*

In *Hinen*, the court held that SORNA has a jurisdictional element directly tied to the federal power to regulate persons who travel across state lines. *Hinen*, 2007 WL 1447853 at *10. Consequently, the government only gains jurisdiction where a person required to register under SORNA travels in interstate or foreign

commerce. Because of the presence of this jurisdictional element, the government is only obligated to prove a *de minimis* affect on interstate commerce. *Id.* at *11. This effect is easily established by the travel of a sex offender across state lines. *Id.*

(G) VENUE.

(1) "Continuing Offense."

There is a split in the courts on whether failing to register is a "continuing offense." In *Mason*, the court ruled that failing to register constitutes a continuing offense and may be prosecuted in any district from, through, or into which such person moves. *Mason*, 2007 WL 1521515 at *9.

In *Hinen*, the defendant was a registered sex offender under Virginia law, and he traveled to Tennessee where he failed to register. Nonetheless, *Hinen* was charged in district court in Virginia with violating § 2250(a)(2). *Hinen* moved to dismiss the indictment and alleged that venue was improper in Virginia.

The court ruled that § 2250 has no venue provision and the offense is a continuing offense because it has an element of interstate or foreign travel. *Hinen*, 2007 WL 1447853 at *12. Consequently, venue would be proper in Virginia, the state in which the travel originated and where *Hinen* originally resided or Tennessee, the place to which he changed his residency and failed to register. *Id.*

In contrast, in *Bobby Smith*, the court, in a different context, ruled that the failure to register offense is not a "continuing violation." Instead, the offense is complete after the sex offender travels in interstate commerce from one jurisdiction to another and fails to register within the requisite time period. *Bobby Smith*, 481 F. Supp. 2d at 852.

(H) DUE PROCESS.

All procedural and substantive due process challenges to SORNA have been rejected. In *Madera*, the court ruled that SORNA does not offend either procedural or substantive due process even though it: (1) does not provide for a hearing or petition process prior to placing an offender's name on the registry; and (2) does not afford a hearing to sex offenders prior to requiring them to register. *Madera*, 474 F. Supp.2d at 1264-65. The courts in *Mason* and *Hinen* followed this same analysis. *Mason*, 2007 WL 1521515 at *5 and *Hinen*, 2007 WL 1447853 at *8-9.

In *Templeton*, the court rejected Templeton's due process arguments after concluding that the Supreme Court has expressly held that not offering a sex offender a hearing to determine his current dangerousness prior to his name being published on a sex offender registry is not a violation of procedural due process. *Templeton*, 2007 WL 445481 at *5.

Additionally, counsel must be aware that circuit courts have expressly held that substantive due process does not invalidate sex

offender registration statutes. *Id.* See also, *Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005); *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004); *Gunderson v. Hvass*, 339 F.3d 639, 643 (8th Cir. 2003).

V. CONCLUSION.

Because of the breadth of SORNA as well as the size of the class of individuals that will fall within its reach, it is expected that failure to register cases will soon be a significant portion of all federal practitioners' caseloads. This paper is being completed in the relative infancy of the statute's life and it is hoped that the ideas and arguments that are addressed herein spawn more sophisticated and successful challenges to this otherwise oppressive statute.