**THE INFORMATIONAL CORRLINKS NEWSLETTER (ICON) # 76**

**FEB. 2022 – SORNA RULE CHANGE**

ICoN provides legal, treatment, activism news & practical info for incarcerated SOs. Send inquiries in separate CorrLinks email (iamthefallen1@yahoo.com) or to Derek Logue, 2211 CR 400, Tobias NE 68453. Our focus is SO laws; I don’t advise or assist on appeals, sentencing issues, non-SO news, & services like people-finding, penpals & mail forwarding.

**LEGAL ROUNDUP**

*US v. Hunt*, No. 20-1009 (1st Cir. 2021): Hunt was civilly committed under the AWA in 2009, discharged from commitment in 2012 under certain conditions, including that he receive mental health treatment & remain under supervised probation. In 2018 Hunt moved for an unconditional discharge, which requires a showing that the committed individual would not be “sexually dangerous to others” if so released. The Dist Ct concluded that Hunt failed to make the required showing despite consistently compliant behavior. Appellant is now 75, partially paralyzed from a medical condition, & confined to a wheelchair. 1st Cir affirmed the Dist Ct’s judgment denying unconditional discharge holding that deference would be given to the Dist Ct’s determinations. Court noted “some concern” that the Dist Ct “gave seemingly little weight to [Appellant’s] physical impairments” but affirmed the ruling noting the difficulty of determining whether the Hunt’s “spotless record” was dependent in part on the conditions of supervision he sought to remove.

*People v. Edwards*, No. 20-01300 (NY App. Div. 2021): Edwards challenges an order determining that he is a Lvl 2 risk pursuant to SORA, arguing the lower court erred in refusing to grant him a reduced risk level where he established that he had not reoffended for 7 years between release from prison & his SORA hearing, despite being unsupervised. The App Ct ruled in favor of Edwards, noting “the fact that defendant was at liberty while unsupervised for an extended period of time without any reoffending conduct is a mitigating factor not adequately taken into account by the guidelines.”

*Commonwealth v. Santana*, No. 23 MAP 2021 (Pa. 2021): Santana was convicted of rape in NY in 1983, prior to the enactment of an SOR in NY or PA. Santana moved to PA & was later arrested for FTR. One day after Santana pleaded guilty for the FTR, the PA Sup Ct ruled retroactive application of SORNA violated the state & federal ex post facto clauses (*Commonwealth v. Muniz*, 164 A.3d 1189 (Pa. 2017)). The lower court tossed out Santana’s FTR, the state appealed. The PA Sup Ct affirmed the holding of the Superior Ct’s en banc panel, & held that (1) retroactive application of SORNA to defendant was punitive, supporting a finding that such application amounted to an unconstitutional ex post facto law, & (2) the federal constitution does not require a defendant asserting a claim of an unconstitutional ex post facto law to prove that he was in fact disadvantaged by the retroactively-applied law.

*Pierre v. Vasquez*, et al., No. 20-51032 (5th Cir. 2022): A TX man was convicted in Fed Ct in AZ of 18 USC § 2421 (knowingly attempting to transport a person across state lines for prostitution); he was not required to register, But the TX SOR Board stated Vasquez would be required to register 15 yrs even though offense was not a registry offense in TX. A US Dist Ct upheld TX’s SOR Board decision. The 5th Cir’s unpublished opinion reversed the decision of the Dist Ct & remanded the case, noting that the Dist Ct erred in evaluating whether Appellant could identify a “liberty interest” where the relevant question is whether Pierre’s alleged injury is “concrete,” “particularized,” & “actual or imminent.” The Court concluded that the damaging reputational consequences of bearing the SO label are a “concrete” form of injury sufficient to support standing, that the harm is “particularized” to Pierre, & that the injury is “imminent” based on TX’s continued efforts to require Pierre to register; Appellant has a sufficient “personal stake” to satisfy the injury-in-fact requirement of standing.

*Koch v. Village of Hartland*, No. 21-cv-00503 (ED WI 2021): Koch challenged a municipal ordinance which prohibited “designated offenders” from living in town until the saturation level for designated offenders reached a factor of 1.1 or lower. The Ct dismissed the case, stating that it was bound to follow 7th Cir precedent, *US v. Leach*, 639 F.3d 769 (7th Cir. 2011) & *Vasquez v. Foxx*, 895 F.3d 515 (7th Cir. 2018) concluding under that precedent the Ordinance did not apply retroactively because it only applied to conduct occurring after enactment, i.e., the Ordinance only applies to Koch because he now desires to move to Hartland.

**DECIPHERING THE SORNA RULE CHANGES**

The new SORNA rules that are set to be enforced is what could be described in the current term “hot mess” (i.e., a person or thing that is spectacularly unsuccessful or disordered, especially one that is a source of peculiar fascination). It is unlikely I can cover this in its entirety but I’ll try.

The AG was given authority to make SORNA rules, upheld in the recent Gundy ruling & other past rulings. The Federal Register (FR, the congressional rules report) says about the new rules:

“While this rule does not make new policy, as discussed above, it is expected to have a number of benefits. The rule will facilitate enforcement of SORNA's registration requirements through prosecution of noncompliant SOs under 18 USC §2250. By providing a comprehensive articulation of SORNA's registration requirements in regulations addressed to SOs, it will provide a more secure basis for prosecution ofSOs who engage in knowing violations of any of SORNA's requirements. It will also resolve a number of specific concerns that have arisen in past litigation or could be expected to arise in future litigation, if not clarified & resolved by this rule. For example, as discussed below, the amendment of §72.3 in the rule will ensure that its application of SORNA's requirements to SOs with pre-SORNA convictions is given effect consistently, resolving an issue resulting from the decision in *US v. DeJarnette,* 741 F.3d 971 (9th Cir. 2013). Beyond the benefits to effective enforcement of SORNA's requirements, the rule will benefit SOs by providing a clear & comprehensive statement of their registration obligations under SORNA. This statement will make it easier for SOs to determine what they are required to do & thus facilitate compliance.”

So they claim (in a condescending manner, particularly as it relates to “benefiting” RCs), but in reality SORNA rules are a set of minimum standards & thus rules still vary even within AWA states. (Example: AL & FL have lifetime reporting for all adult RCs & no tiered systems, while OH has the AWA 3-Tiered system.)

Florida Action Committee summarized some of the lowlights of this rule change, which I’ll list below. Keep in mind this is one summary of the rule changes, & note that some of these concepts already existed in SORNA before the proposed changes:

1. Bad: Federal SORNA requirements are independent of each State’s requirements. Last year’s *Willman v US*, No. 19-2405 (6th Cir 2021) held that SORNA applies even though something might not be a requirement in your State. If your state requires registration for 10 years, but SORNA requires 25, it’s 25. You may not be prosecuted in state court but can be prosecuted in federal court.

2. Bad: Ideally, the AG could have held that SORNA sets the standards (rather the minimum standards), but it’s up to the state to implement & enforce those standards. He didn’t. Technically, the same failure to register could constitute both a Federal & a State offense.

3. Bad: This rule already existed in SORNA (as upheld by the *Gundy* case) but was just reinforced by the AG: SOs must also provide ‘[a]ny other information required by the AG’.” Normally, when registry requirements change, it passes through the lawmaking process, you have some opportunity to present opposition or support, it’s debated in several committees, it’s voted on & finally it’s sent to the Governor where there’s one last shot of a veto, but the AG can change SORNA on a whim.

4. Good: AG reinforced a scienter requirement to registration violations (i.e., a standard of guilt that requires the person had knowledge that their action was illegal). In response to many people’s concern; he writes, “Section 72.8(a)(1)(iii) in this rule moots fair notice concerns by explaining that SOs are not held liable under 18 U.S.C. 2250 for violating registration requirements of which they are unaware.” This may be important in fighting FTR charges since federal & state laws conflict & leads to confusion.

5. Good: AG gave some leeway when it comes to Int’l Travel. Under IML, RCs are required to report intended int’l travel at least 21 days in advance. Under most interpretations, if your child was traveling outside the US & suffered a medical emergency, you were unable to travel to their hospital bedside because you didn’t anticipate the emergency three weeks in advance & give notice. AG recognized that exceptions to that requirement may be necessary & appropriate in certain circumstances. In these cases where a registrant “does not anticipate a trip abroad that far in advance 18 U.S.C. 2250(c) would excuse a SO’s failure to report the travel 21 days in advance”. Similarly, the AG excused violations where it is impossible to comply with a requirement.

There were over 700 comments sent to the Fed Reg during the “open comment period,” & some came from ICoN readers while many more were from anti-registry activists. While this sounds like a lot of opposition, it pales in comparison to other issues (by contrast, a Soc Sec rule proposal running at the same time had over 11k public statements). AG did respond to many comments:

“Having carefully considered all comments, the DOJ has concluded that the regulations in this rulemaking should be promulgated without change from the proposed rule, except for amendment of § 72.8(a)(1)(i)-(ii) to specify the circumstances in which SORNA violations may result in Federal criminal liability.”

The KS Public Def. Office argument is summarized as follows:

“Much of the proposed rule conflicts with SORNA’s text & purpose. As the DOJ knows, it cannot impose its own construction of unambiguous statutory text… In four ways, they purport to define crimes Congress never envisioned, punishing SOs in non-SORNA-compliant jurisdictions for the jurisdiction’s noncompliance, & otherwise permitting the prosecution of SOs who are in full compliance with SORNA’s registration requirements.”

1. “Proposed §72.3 is inconsistent with 34 U.S.C. §§ 20919, 20924, & 20927. Proposed §72.3 includes language requiring SOs to comply with SORNA in jurisdictions where compliance is impossible. But SORNA itself makes clear that Congress did not intend to hold SOs criminally liable in such circumstances.”

2. “Proposed § 72.7(d) conflicts with § 20913. Proposed § 72.7(d) requires a SO to inform a jurisdiction “if the SO will be commencing residence, employment, or school in another jurisdiction or outside of the US.” (Incl. advance notification of termination)… “Before a SO moves to another jurisdiction (or before a sex offender obtains employment in another jurisdiction or begins schooling in another jurisdiction), he must report that change prior to the change. This proposed rule runs directly contrary to § 20913.”

3. Third, proposed § 72.7(c) is inconsistent with § 20913(c). Under § 20913(c), a SO need only update his registration in “at least 1 jurisdiction involved,” not in one or more specific jurisdictions… Yet, proposed § 72.7(c) requires a sex offender to update the registration in a specific jurisdiction – “the jurisdictions in which [the changes] occur.”

4. “Proposed §§ 72.7(e) & 72.7(f) should be amended to permit the SO to inform any involved jurisdiction of changes in information or intended international travel.

5. “SORNA’s delegations to the Attorney General violate the nondelegation doctrine” (which was sadly upheld in *Gundy*)

If you want to read the SORNA rules yourself, the link is at:

https://www.federalregister.gov/documents/2021/12/08/2021-26420/registration-requirements-under-the-sex-offender-registration-&-notification-act

Link to the KS PD Office Statement: https://floridaactioncommittee.org/wp-content/uploads/2021/12/85-Fed.-Reg.-49332-FPD-Comment.pdf