From: no-reply@erulemaking.net
Sent: Wednesday, March 07, 2007 1:29 PM
To: OLPREGS
Subject: Public Submission

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Public Comments on Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act:========

Title: Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act
FR Document Number: E7-03063
Legacy Document ID:
RIN: 1105-AB22
Publish Date: 02/28/2007 00:00:00
Submitter Info:

First Name: Fred
Last Name: Lopez
Mailing Address:
City:
Country: United States
State or Province: CA
Postal Code:
Organization Name:

Comment Info: ==========

General Comment:You can not make this new registration requirement retroactive. The State of
California already has very strict registration requirements for sex offenders. California takes a better approach to the registration and notification requirements than what is proposed in this new law. Your method of evaluation for Tier levels is unconstitutional. You have not based it on any evaluation tools that are available. In California many of the offenders that are considered high risk will probably fall into the Tier I category and those that are only considered serious offenders will fall into your Tier III category. You can not be allowed to let this happen. It will be a huge flip flop for this State if the high risk offenders become Tier I and only have to register for 15 years. California Law already requires life time registration for all convicted sex offenders. Apply this new law only to those convicted after the bill was signed into law and I urge you to use an effective evaluation tool like the one used in Canada and many state here for setting a Tier level. You will violate the rights of those that here in California are not considered High Risk by subjecting them to a whole new set of rules after the fact.

Another thing you must look at is all the former offenders that have a spouse and children. We have to take their safety into consideration. They must be protected from vigilante attacks and from being taunted or harassed in school and on the streets. I understand that we have to protect our children but the majority of all child molestations are perpetrated by someone close to the child. This new law is too broad and too far reaching and will do nothing to prevent future attacks. The only thing I see this law doing is endangering the life of the former offender and his or her family.

From: no-reply@erulemaking.net
Sent: Tuesday, March 06, 2007 9:30 PM
To: OLPREGS
Subject: Public Submission

Follow Up Flag: Follow up
Flag Status: Completed

Please Do Not Reply This Email.

Public Comments on Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act:========

Title: Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act
FR Document Number: E7-03063
Legacy Document ID:
RIN: 1105-AB22
Publish Date: 02/28/2007 00:00:00
Submitter Info:

First Name: [redacted]
Last Name: [redacted]
Mailing Address:
City:
Country: United States
State or Province: CA
Postal Code:
Organization Name: United Against Oppression and Neglect

Comment Info: ==========

General Comment:his decision by the Attorney General to make this retroactive is terrible news.
We understand that our children need to be protected against possible sexual assaults. My oldest son was convicted over 10 years ago for having sex with a female party goer. He was not charged as nor is he a child molester. Under California law he is required to register every year and is only listed on the Megan's Law website by zip code. Under this new law he may be required to register every three months and have all of his information available on the internet. My son is married and has two beautiful young children he and his wife are raising. The possibility of his address being listed on the internet will put the safety of children in jeopardy. His wife and children have rights and you are violating them by changing his registration status. If his address was available to the public via the internet he would have never of gotten married, let alone have children. Please consider the safety of his wife and children. He is complying with the registration laws in California and he and his family should not be further scrutinized. He has been a wonderful, loving and caring Dad. He realizes the error in judgment he made 10 years ago and is dealing, or trying to, with all of the new laws that are sweeping our Nation. Posting my son's home address and work address is not in the interest in public safety. No one is looking at the ramifications this will have on, not only my grandchildren and daughter-in-law, the spouses and children of all registered sex offenders that fall under this catagory. We keep coming up with irrational laws without first having proof that any of these steps will help protect our children. Let's help protect my grandchildren and the sanctity of the family by not allowing this law to be applied retroactively.

From: no-reply@erulemaking.net
Sent: Monday, April 30, 2007 12:10 PM
To: OLPREGS
Subject: Public Submission

Follow Up Flag: Follow up
Flag Status: Red

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Public Comments on Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act:========

Title: Office of the Attorney General; Applicability of the Sex Offender Registration and Notification Act
FR Document Number: E7-03063
Legacy Document ID:
RIN: 1105-AB22
Publish Date: 02/28/2007 00:00:00
Submitter Info:

First Name: Cathy
Last Name: Morton
Mailing Address: [redacted]
City: [redacted]
Country: [redacted]
State or Province: [redacted]
Postal Code: [redacted]
Organization Name: SOHopeful

Comment Info: ==========

General Comment:OAG Docket No. 117
This act does not tier sex offenders, so the young consensual sex, non-violent, age difference, girlfriend/boyfriend teenagers are not destroyed for life. When stated as a sexually violent offense, which our State describes as anyone who is convicted of sexual assault of a child, indecency, etc., this includes the consensual sex teenagers right along with a 50 yrs old who rapes a 5 yr old as a violent offense. Just how the laws are worded destroyes more young lives for a future along with their families and future families.

From: April Myers [redacted]
Sent: Tuesday, May 01, 2007 4:23 PM
To: OLPREGS
Subject: OAG Docket No. 117

Follow Up Flag: Follow up
Flag Status: Completed

Attachments: OAG Docket No. 117.doc

This is being entered one day late because of the courts involvement in a capital case. Please accept our comments.

May 1, 2007

David J. Karp
Senior Counsel
Office of Legal Policy, Room 4509
Main Justice Building
950 Pennsylvania Avenue, NW
Washington, DC 20530

RE: OAG Docket No. 117

Dear Senior Counsel Karp:

I write to express concern concerning the Part 72 – Sex Offender Registration and Notification Interim Rule promulgated by the Attorney General and published in the Federal Register February 28, 2007, Volume 72, No. 39, page 8894 et sec.

I do not wish to dispute the merits of the law that make the registration requirements of SORNA applicable to certain adjudicated delinquents. I do have concerns, however, about the broad scope of this law as applies to such juveniles and perhaps generally to sex offender registration requirements.

First – registration requirements should not apply to any juvenile, who although adjudicated delinquent of a registration type offense has had his/her adjudication record expunged under applicable law. Further, upon Expungement of the juvenile record registration requirements should cease.

Second – registration requirements should not apply to juveniles adjudicated delinquent prior to the effective date of the Adam Walsh Child Protection and Safety Act who have been released from court supervision and any other applicable registration requirement as of the act's effective date. SORNA registration requirements should not apply to any person who prior to the act's effective date has completed their sentence, supervision and mandatory registration requirements that applied to the individual as of the time of original conviction. It would not appear that inclusion of such individuals is

required in order to compile a "comprehensive" list of sex offenders. Having followed the registration requirements without committing additional offenses and having completed all sentence requirements would be a sufficient basis to remove the individual from being considered a threat to public safety, which is the main purpose of SORNA. Instead, requiring compliance with SORNA by all of those who have completed all of their legal requirements, including satisfactory registration compliance for the required term, prior to the effective date of the Adam Walsh Act becomes a punitive additional sanction.

Please be assured I do not dispute the intent of SORNA nor its usefulness, however, making it apply to the offenders above referenced is going beyond the scope and purpose of the Adam Walsh Child Protection and Safety Act.

Yours Truly,

William S. Kieser

cc: James E. Anderson, Executive Director-Juvenile Court Judges' Commission, Room 401, Finance Building, Harrisburg, PA 17120-0018
Honorable Arthur G. Grim, Chairman-Juvenile Court Judges Commission, Berks County Courthouse, 633 Court Street, Reading, PA 19601

State of Utah

JON M. HUNTSMAN, JR.
Governor

GARY R. HERBERT
Lieutenant Governor

Department of Human Services

LISA-MICHELE CHURCH
Executive Director

Division of Juvenile Justice Services

DAN MALDONADO
Director

April 4, 2007

David J. Karp
Senior Counsel
Office of Legal Policy
Room 4509
Main Justice Building
950 Pennsylvania Avenue
N.W. Washington, D.C. 20530

Dear Mr. Karp,

Thank you for the opportunity to comment on the Retroactive Sex Offender Registration interim rule OAG Docket No. 117. As the Director of the Division of Juvenile Justice Services (Department of Human Services, State of Utah), I would like to add my voice to those expressing concerns regarding retroactivity as applied to juvenile sex offenders.

Adult and juvenile sex offenders differ in a number of ways. Most juvenile sex offenders are not sexual predators. They generally have fewer victims and typically engage in less serious and aggressive sexual behaviors than adult offenders.

Juvenile offenders generally commit a wider range of sexual behaviors than adult offenders. Juvenile offenders do not exhibit the same deviant arousal patterns as adult offenders that increase the likelihood for a positive response to treatment interventions.

Most juvenile offenders do not exhibit the same long-term tendencies to continue sexually re-offending. Juvenile offenders are more responsive to treatment and research indicates the recidivism rates are low when compared to the rates for adult sex offenders.

Most adolescent sex offenders can be safely managed and treated in the community. Placement and living arrangements should be made on an individualized case-by-case basis. Those deemed at high risk to continue sexually re-offending can be identified and placed in custodial placement for treatment. Many of the youth this rule targets are already safely residing within the community and will unnecessarily have their lives disrupted in order to relocate and comply with the requirements specified in the Adam Walsh Act.

The sheer magnitude of this interim rule is enormous. The resources, both technological and personnel, that need to be allocated to this project are substantial. It will take a lot of effort to locate offenders who have been released into the community for several years. Again, as the offense patterns and risk levels are so drastically different between adult and juvenile sex offenders, I do not think that there are any

significant safety benefits to be cost effectively gained by retroactively including these offenders to the requirements of the Adam Walsh Act.

I am concerned about how the requirements of this rule will affect those youth who have had their juvenile offense record legally expunged. Many juvenile offenders have completed treatment and expunged their juvenile records as they age to adulthood and reside in the community.

In sum, I feel that it is not in anyone's best interest to retroactively apply the draconian and socially stigmatizing requirements of this interim rule to juvenile sex offenders who have successfully completed treatment and re-entered their communities. I therefore, respectfully add my voice to those that urge you to exempt juvenile offenders from retroactive applicability.

Thank you for allowing me the opportunity to express my viewpoint regarding this issue.

Sincerely,

Dan Maldonado
Director, Division of Juvenile Justice Services

cc: Lisa-Michele Church

The Registration and Community Notification of Adult Sexual Offenders

Adopted by the ATSA Executive Board of Directors on October 5, 2005

NOTE: THIS PAPER DOES NOT ADDRESS ISSUES OF NOTIFICATION OF YOUTHFUL SEX OFFENDERS DUE TO THE VAST DIFFERENCES BETWEEN ADULTS AND JUVENILES. A SEPARATE INFORMATION STATEMENT ON THIS TOPIC IS UNDER DEVELOPMENT.

History

In 1994, following the 1989 abduction of an 11 year old boy in Minnesota, a federal law was passed mandating sex offenders to register with local law enforcement agencies so that their current whereabouts are known ("Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act," 1994). In 1996, President Clinton signed "Megan's Law," which requires states to disseminate information to the public about sex offenders who live in close proximity. The goal of community notification is to increase the public's ability to protect itself by warning potential victims if a convicted sex offender lives nearby, and to decrease the incidence of recidivistic sexual violence. Currently, about half of the states assign offenders to risk levels and notify the public differentially according to the offender's threat to public safety. The balance of the states employ broad community notification, publicizing the location of all sex offenders without regard for risk assessment.

Community notification statutes have been challenged on issues related to rights to privacy as well as their constitutionality. In the fall of 2002, the U.S. Supreme Court heard two cases challenging Megan's Law. The Court upheld the constitutionality of a Connecticut statute allowing sex offenders to be identified on an Internet registry without first holding a hearing to determine their dangerousness to the community ("Connecticut Dept. of Public Safety v. Doe," 2003). The case was a victory for the 23 states that have broad notification policies. In an Alaska case, the Court ruled that registration and notification of offenders sentenced before the law went into effect did not constitute ex post facto punishment ("Smith v. Doe," 2003). Immediately following the Court's rulings, the Wetterling Act was once again modified under the PROTECT amendment, and now mandates all 50 states to develop and maintain Internet websites containing sex offender registration information ("Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act," 2003).The Association for the Treatment of Sexual Abusers has developed a set of recommendations we believe help assure the original goal of registration and notification - enhanced community safety - are met in an effective manner.

Recommendations

The Association for the Treatment of Sexual Abusers (ATSA) believes that development and implementation of social policies should be based on research whenever possible. It should be noted that to date, few research studies about community notification have been conducted. The research that has been completed has not been able to conclude that community notification reduces recidivism or enhances community safety.

ATSA strongly supports sex offenders being held responsible for their actions. When sex offenders are living in the community, it is imperative they be monitored carefully through effective probationary supervision and treatment. In addition, U.S. federal law requires states to inform the public of the whereabouts of sex offenders. Therefore ATSA offers the following recommendations for implementation of Megan's law based on the research about the assessment and management of sex offenders:

1. Some sex offenders are highly dangerous and require more intensive supervision and treatment interventions.

2. Community notification practices should include an assessment of risk factors that have been associated with increased recidivism. Different notification strategies should be used according to the level of threat that an offender poses to a community. This is imperative so the citizenry can more effectively make informed decisions regarding the large number of identified sexual offenders. Broad notification can dilute the public's ability to identify and protect themselves from truly dangerous offenders.
3. ATSA strongly supports collaborative efforts between citizens, law enforcement, offenders, and treatment providers to render management, supervision, and rehabilitation services that promote community safety.
4. Community notification should always include educational efforts, including factual and research-based information about sexual violence and sexual perpetrators.
5. ATSA supports continued study into the impact of community notification and its effectiveness. Funding for research investigating the impact and effectiveness of sexual violence policies should be a priority.

Discussion

Community notification laws have received widespread support, largely due to the perception that the vast majority of sex offenders will repeat their crimes. Research studies by the US Dept. of Justice and the Canadian Government have found, however, that sexual offense recidivism rates are much lower than commonly believed, averaging in five year follow-up studies between 14 and 20%. Certain sub-groups, such as pedophiles who molest boys, and rapists of adult women, seem to present the greatest risk, with up to half of them reoffending over longer follow up periods. Although extensive media attention is paid to child abductions, such cases occur relatively rarely, and less than 1% of all sex crimes involve murder. Despite myths of "stranger danger," the vast majority (80-90%) of sexually abused children are molested by family members, close friends, or acquaintances. Early studies indicating that treatment was not successful in reducing recidivism have also led to a heightened fear of sex offenders, despite recent data suggesting that contemporary cognitive-behavioral treatments can reduce recidivism by as much as 40%.

Public safety can be enhanced, and limited resources used more efficiently, when, the most aggressive notification practices should be reserved for those offenders who are at highest risk to reoffend sexually and therefore require the most intensive interventions. The ability to predict sexual dangerousness has improved markedly over the past decade as a result of studies identifying risk factors for violent and sexual recidivism. Procedures and instruments for assessing risk have been developed and refined, and risk for sex offense recidivism can be estimated with moderate accuracy. By classifying offenders into risk groups based on the existence of known risk factors, communities may be able to identify more accurately those sex offenders who pose the greatest threat to public safety. At the same time, differential notification strategies can improve cost-effectiveness. Risk level systems might also decrease some of the negative effects of community notification on lower risk offenders. In fact, many states have decided that because the consequences of notification are so severe, they will only notify the public about offenders who pose a high risk to minimize disrupting the stability of low risk offenders in ways that may increase their risk. Given the serious implications of decisions based on risk assessments, these assessment tools should always be administered by skilled, trained, and supervised professionals.

The notification process provides an opportunity to inform and educate the general public and those associated with the offender. It can, when used effectively, allow the community to engage in prevention efforts that simultaneously include offender rehabilitation. But public notification without community involvement and education will not likely be helpful. The level of protection afforded by these laws is somewhat limited and unfortunately community notification does not guarantee protection from harm. After nearly a decade of implementation, there is still no research that suggests community notification decreases recidivistic sexual violence. Furthermore, studies that have investigated community notification's impact on stakeholders indicate that notification often results in increased anxiety for citizens. Law enforcement officers and probation agents report concerns about increased labor and expenditures. These resources can be more effectively utilized if there is a risk-based determination of need regarding the type of notification involved.

Victim advocacy groups have also noted that notification may create a negative impact on offenders' children and family members or lead to the inadvertent identification of victims. These possible consequences may discourage victims

from reporting sexual abuse by family members or acquaintances, ultimately interfering with the child protection system and decreasing the likelihood that victims will receive therapeutic intervention. Families of offenders can be negatively affected when community notification occurs, whether or not the offender returns to the home. Again, these unintended consequences can be mitigated when risk-based notification decisions are made.

Finally, notification can create the potential for vigilantism, despite the fact that all state notification laws warn citizens that such behavior will not be tolerated. Research suggests that about one-third to one-half of sex offenders subjected to community notification experience dire events such as the loss of a job or home threats or harassment, or property damage. Physical assault seems to occur in 5-16% of cases. About 19% of sex offenders report that these negative consequences have affected other members their households. There is also some initial indication that notification may interfere with its stated goal of enhancing public safety by exacerbating the stressors (e.g., isolation, disempowerment, shame, depression, anxiety, lack of social supports) that can trigger some sex offenders to relapse. Such dynamic factors have been associated with increased recidivism risk. Understandably, sex offenders inspire little sympathy from the public, but ostracizing them may inadvertently increase their danger.

In summary, prevention of sexual violence requires a well-planned, comprehensive, inter-disciplinary response. Prevention efforts must begin with developing clear goals and objectives, implementing strategies based on empirical research, and collecting and analyzing data on an ongoing basis. Emotionally charged reactions to sex crimes often lead to legislation that is not driven by data or science but rather by outrage and fear. Lawmakers and citizens should advocate for research-based social policies that both protect women and children and also support the habilitation of perpetrators to effectuate long-term community safety.

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Rio Grande Counseling Center

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1823 Fortview STE 101
Austin TX 78704
(512) 480-0205
fax (781)-846-5543

March 14, 2007

David J.Karp, Senior Counsel, Office of Legal Policy,
Room 4509, Main Justice Building, 950
Pennsylvania Avenue, NW., Washington, DC 20530.

Re: OAG Docket No. 117

Mr. Karp,

I am writing regarding the Sex Offender Registration and Notification Act and my concerns regarding this new law and the rules pertaining to this law. I am a Licensed Sex Offender Treatment Provider in the state of Texas and have treated sex offenders over the last 20 years.

Please consider the following:

- Eighty five percent of sexual offenses are committed by persons known to the victim. The majority are committed by family members within the home.
  - We need better education and prevention of sexual and physical violence
- There is no evidence that registration of sex offenders a) reduces safety in the community, b) reduces recidivism, or c) reduces sex crimes. It provides a false sense of security for the public and only identifies where sex offenders are residing.
- There is a marked difference between "sex offenders" and "sexual predators". "Sexual predators" are dangerous, high risk offenders that need extreme monitoring or incarceration (civil commitment).
  - Sexual predators should be registered because the public should know where they live and who they are so that they can avoid contact with them.
- "Sexual Offenders" are persons who have serious problems with social skills, relationships, sexual behavior and boundaries. They have a very good rate of rehabilitation, most are good citizens in other parts of their lives, many make significant changes in their lives to never re-offend. Most are not dangerous, and have a very low risk of recidivism (2 – 18 %) when they are involved in treatment.
  - Sexual offenders need treatment and intervention services
- Registration of sex offenders has a very strong impact on their families. Children are ridiculed and ostracized, families (where the offender is allowed to return to the home) have difficulty finding housing, attending religious services, and become very isolated. This creates a higher risk of re-offense for the offender.
  - We need to have better risk assessments to determine which offenders are dangerous and which need social services
- Juveniles with sexual behavior problems have a very low risk of re-offense. They should be allowed to rehabilitate, and given a chance to change their lives to be good productive citizens, not ostracized and labeled as perverted for the rest of their lives.
  - Juveniles should not be required to register unless it is determined they are a sexual predator

Please consider these issues as you develop rules for the Sex Offender Registration and Notification Act. We need laws that protect the public, not cost excessive amounts of money for rules that have no effect on public safety because of media scare tactic.

Respectfully,

Diana Garza Louis, LPC, LMFT, LSOTP, NCC[1]

[1] Council on Sex Offender Treatment, *Treatment of Sex Offenders - Recidivism Rates*
http://www.dshs.state.tx.us/csot/csot_trecidivism.shtm

Association for Treatment of Sex Abusers Managing Sex Offenders in the Community: A National Overview, 2003
http://www.atsa.com

From: [redacted]
Sent: Monday, April 30, 2007 3:18 PM
To: OLPREGS
Subject: OAG Docket No. 117

Follow Up Flag: Follow up
Flag Status: Red

Attachments: NACDL comments OAG 117.doc

Attn: Mr. David J. Karp, Senior Counsel
Office of Legal Policy

Attached please find the comments of the National Association of Criminal Defense Lawyers regarding the above-referenced regulation. Thank you for your attention to this matter.

Kyle O'Dowd, Legislative Director
National Association of Criminal Defense Lawyers
1150 18th Street, NW -- Suite 950
Washington, DC 20036
[redacted]
www.nacdl.org

National Association of Criminal Defense Lawyers

April 30, 2007

Via email: olpregs@usdoj.gov

Attn: Mr. David J. Karp, Senior Counsel
Office of Legal Policy
Room 4509, Main Justice Building
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Re: NACDL Comments on OAG Docket No. 117; the Attorney General's Interim Rule Applying the Provisions of the Adam Walsh Act (Pub. L. 109-248) Retrospectively to Offenders Whose Convictions Pre-Date The Enactment of the Legislation

I. Introduction

The National Association of Criminal Defense Lawyers ("NACDL") is a nationwide, non-profit, voluntary association of criminal defense lawyers founded in 1958 to improve the quality of representation of the accused and to advocate for the preservation of constitutional rights in criminal cases. The NACDL has a membership of more than 12,800 attorneys and 92 state, local and international affiliate organizations with another 35,000 members including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors and judges committed to preserving fairness within America's criminal justice system.

In these comments NACDL urges the Attorney General to repeal 28 CFR Part 72 because the regulation, as promulgated, violates the ex post facto clause of the Constitution, and will cause widespread confusion and instability in the efforts of many convicted sex offenders to comply with the law and maintain a non-offending lifestyle.

II. The Sex Offender Registration and Notification Act

Title I of the Adam Walsh Child Protection and Safety Act of 2006, Public Law 109-248, contains the Sex Offender Registration and Notification Act (SORNA). SORNA imposes direct registration requirements on convicted sex offenders subject to federal jurisdiction. See, SORNA § 111. The act also places certain community notification responsibilities on the states. See, SORNA § 121. SORNA expands the definition of the term "sex offense" to include offenses involving kidnapping and false imprisonment of children and solicitation of children to engage in sexual contact and prostitution. See, SORNA § 111 (7). Section 111 (8) of SORNA expands the definition of sex offender to include certain juveniles.

SORNA generally requires the states to conform their sex offender registration laws to the SORNA requirements at the risk of losing federal funding for certain programs. SORNA requires states to enact laws that make a failure to register an offense punishable by more than one year of incarceration - in other words - a felony in most jurisdictions. See, SORNA § 113 (d). SORNA also requires that all states maintain certain information in their registries to include photographs and DNA samples.

SORNA delegates to the Attorney General the authority to specify the applicability of the act to sex offenders convicted before the enactment and implementation of the act. See, SORNA § 113(d). On February 16, 2007, the Attorney General promulgated 28 CFR Part 72, an interim rule, which extends the provisions of SORNA to sex offenders whose convictions pre-dated the enactment of the act. The regulation was published in the Federal Register on February 28, 2007. 72 Fed. Reg. Vol. 39, 8894.

III. The Interim Rule Violates the Ex Post Facto Clause

28 CFR Part 72, as promulgated, mandates that the provisions of the Sex Offender Registration and Notification Act be applied retroactively to sex offenders whose convictions occurred before the enactment of SORNA and the Adam Walsh Child Protection and Safety Act of 2006. 28 CFR 72.3. The National Association of Criminal Defense Lawyers urges the Attorney General to re-draft the regulation. As written, the regulation violates the ex post facto provisions of Part, I, Article 9 of the Constitution.

The supplementary information provided by the Attorney General broadly states that applying SORNA to sex offenders whose convictions pre-dated the enactment of the Adam Walsh Act does not offend the ex post facto provision of the Constitution because it creates "registration and notification provisions that are intended to be non-punitive, regulatory measures adopted for public safety reasons." 72 Fed. Reg. Vol. 39, 8896. The Attorney General relies on *Smith v. Doe*, 538 U.S. 84 (2003) for this proposition. In *Smith* the Supreme Court upheld the provisions of the Alaska Sex Offender Registration Act (ASORA) against an ex post facto challenge. In fact SORNA is a federal statute that is punitive and therefore the ex post facto provision of Article I Section 9 of the Constitution does apply. SORNA goes well beyond the Alaska Sex Offender Registration Act that was considered by the Court in *Smith*.

a. The Extensive Community Notification Provisions of SORNA Publicly Disgrace and Humiliate the Registered Offender in His or Her Community

One consideration in determining whether a law is punitive is whether it is the type of law that our history and traditions consider to be punishment because it publicly disgraces the offender. Although ASORA and SORNA are similar in some respects, SORNA goes considerably beyond ASORA in its community notification requirements. SORNA requires that

an appropriate state official provide an offender's registration information to the Attorney General (for inclusion in the federal list) and to appropriate law enforcement and probation agencies. However, SORNA also requires the state to notify 1) "each school and public housing authority in the area in which the individual resides, is employed or is a student;" 2) "each jurisdiction where the sex offender resides, is an employee, or is a student and each jurisdiction from or to which a change of residence, employment, or student status occurs;" 3) "any agency responsible for conducting employment-related background checks under section 3 of the National Child Protection Act of 1993 (42 U.S.C. 5119a);" 4) "social service entities responsible for protecting minors in the child welfare system;" and, 5) "volunteer organizations in which contact with minors or other vulnerable individuals might occur." See, SORNA, § 121. These additional community notification measures render SORNA a punitive statute subject to ex post facto constitutional prohibition. In *Smith* the Court specifically addressed the shaming aspects of publication of registration information on the Internet. The Court described Internet publication as "more analogous to a visit to an official archive of criminal records than it is to a scheme forcing an offender to appear in public with some visible badge of past criminality." *Smith* at p. 99. SORNA provides far more public humiliation and shame than the mere review of criminal records at an archive. It requires the states to take affirmative actions to report the registration information throughout the community, even to those who might otherwise not seek such information. The SORNA requirements are far more akin to a scarlet letter or a wanted poster than they are to a trip to a central registry of government documents. SORNA is far more likely to inflict public disgrace than the provisions of the Alaska law considered by the Court in *Smith*. Our history and traditions consider such public disgrace and humiliation as punishment and thus invoke the requirements of the ex post facto clause. The interim rule violates the ex post facto

clause because it extends these punitive measures to individuals whose offenses pre-dated the enactment of the statute.

b. SORNA Imposes Affirmative Restraints and Disabilities on the Offender

Unlike the Alaska statute considered in Smith, SORNA requires the personal appearance of the sex offender between one and four times per year depending upon his or her tier classification. See, SORNA, § 116. The requirement of periodic in-person appearance and verification imposes significant restraint on individual liberty and is a hallmark of traditional supervisory punishment such as probation and parole. Such a restraint on liberty is one of the primary factors to be considered in determining whether a statute is punitive rather than merely regulatory. *See, Smith* at p. 101; *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168 (1963). The *Smith* court specifically noted that periodic updating of registration information under the Alaska scheme need not occur by personal visit and therefore did not create a restraint or disability. Id. SORNA, on the other hand, does specifically require periodic in-person appearance, verification of information and photographing. See, SORNA, § 116. This requirement imposes a substantial restraint and disability upon the individual subject to the act's requirements rendering the act to be a punitive measure subject to the ex post facto clause.

The extensive community notification provisions discussed above also serve to significantly and affirmatively cause restraint and disability on individual liberty. Such "outreach" efforts on the part of the government are likely to create a modern day equivalent of banishment which will substantially restrict the offender's ability to live and work in the community of his or her choice and to obtain and maintain employment.

SORNA goes well beyond the Alaska scheme that the Court upheld in *Smith*. SORNA imposes significant affirmative restraint and disabilities on the individual liberty of the offender

rendering the statute to be punitive and subject to the prohibitions of the ex post facto clause of the Constitution. The interim rule, in applying SORNA to persons whose offenses pre-dated the enactment of the statute, violates the ex post facto clause.

IV. Application of the Interim Rule Will Cause Widespread Confusion and May Tend to Destabilize Offenders Who Have Paid Their Debt to Society and Are Living Productive, Non-Offending Lifestyles

Sex offenders generally demonstrate lower rates of recidivism than other criminals. See, U.S. Department of Justice, Bureau of Justice Statistics, Recidivism of Sexual Offenders Released from Prison in 1994, November 2003; See also, Hanson R.K. and Morton Bourgon, R.K., Predictors of Sexual Recidivism: An Updated Meta-Analysis, Public Safety and Emergency Preparedness Canada (2004); Harris and Hanson, Sex Offender Recidivism: A Simple Question (2004); Hanson, R.K. and Bussiere, M., "Predicting Relapse: A Meta-Analysis of Sex Offender Recidivism Studies," Journal of Consulting and Clinical Psychology (1998). The interim rule renders SORNA applicable to all persons convicted of a sex offense without consideration of the age of that offense or the individual risk that any particular offender may pose to the community. Given sex offenders' lower rates of recidivism, this is bad policy. It exposes former offenders who have been law-abiding for years to the new requirements and public humiliation, disgrace and embarrassment. Former offenders, through the community notification provisions of SORNA, will be subjected to the likely loss of employment and housing despite their effective rehabilitative efforts and years of positive contributions to society. Secure employment, housing, and a supportive network of family and treatment are important factors in ensuring rehabilitation of an offender. Social science research demonstrates that sex offenders are more likely to re-offend in the absence of such stabilizing influences. See, Kruttschnitt, C., et al., "Predictors of Desistance among Sex Offenders: The Interaction of

Formal and Informal Social Controls," 17 Justice Quarterly 61 (2000). The retrospective application of SORNA to former offenders may disrupt substantial numbers of former offenders who have paid their debt to society and settled into law-abiding lifestyles. Rather than making society safer, retrospective application of SORNA makes society less safe.

It is important to recognize that SORNA does have a clean record reduction provision which permits some Tier I and Tier II offenders to decrease the time period of registration. See, SORNA, §115. However, the clean record provision would still require former offenders to register for a reduced period of time before exemption based upon a clean record. Neither the act nor the interim rule provide a mechanism for a former offender to demonstrate that he has already complied with the clean record requirements and therefore should not now be subject to the registration requirements. In short, former offenders get no credit for their rehabilitative efforts and law-abiding lifestyle, which in many cases has extended over many years. The interim rule is extremely unfair to such individuals. At the very least the interim rule should be amended to permit individuals with convictions that pre-date SORNA to avoid registration upon demonstrating that they have complied with the "clean record" provisions of the statute.

Finally, it is clear that the retroactive application of SORNA will cause significant confusion and enforcement problems in the states. Some states may have difficulty in identifying former offenders with old convictions. Former offenders will likely be confused as to the application of the new law in their individual situations. There will be significant problems with notifying former offenders who are no longer under the supervision of a probationary sentence or parole. If SORNA is to be applied retroactively, at all, it would be wise for the Attorney General to limit the retrospective application of SORNA only to offenders who remain under court, probation or parole supervision.

V. Conclusion

The interim rule 28 CFR 72.3 violates the ex post facto provisions of the Constitution and will tend to make society less safe. Therefore the rule should be repealed and the requirements of SORNA applicable only to those convicted after its enactment.

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