



Sex Offender Registration and Notification In the United States Current Case Law and Issues — March 2019

Who Is Required to Register?

Nearly all registration requirements in the United States are initially triggered by a conviction of a criminal offense. Most jurisdictions limit their registration and notification systems to persons convicted of sex offenses and nonparental kidnapping of a minor. Some states also include other offenders in their registration and notification systems, or have separate offender registries for nonsexual offenses.¹

‘Conviction’

When a person is found guilty and sentenced for a sex offense, SORNA requires that the person be subject to sex offender registration and notification requirements. However, certain findings other than guilty can also trigger a registration requirement. Withheld adjudications have been held to require registration under SORNA.² In some jurisdictions, registration is required when a person has been civilly committed, received a withheld adjudication, found “Not Guilty by Reason of Insanity” or incompetent to stand trial, or when ordered to register by a probation officer.³ In addition, some jurisdictions require registration even if an offender has been pardoned for the underlying offense,⁴ had their underlying complaint dismissed and pleas vacated under a special statutory procedure,⁵ had their conviction for a sex offense vacated on double jeopardy grounds,⁶ and, in some jurisdictions, an offender can remain on the public registry website even if that offender no longer has any meaningful ties to the jurisdiction.⁷

‘Sex Offenders’

Federal courts have interpreted SORNA as directly imposing a duty on a person to attempt to register if they meet the federal definition of “sex offender.”⁸ SORNA’s standards call for jurisdictions to register all persons who have been convicted of a tribal, territory, military, federal or state sex offense.⁹ In addition, certain foreign sex offense convictions will also trigger a registration requirement under SORNA.¹⁰ In practice, a jurisdiction generally will not register an offender unless **that jurisdiction’s laws** require that the offender be registered.¹¹ At least one state has concluded that if a person has **ever** been required to register as a sex offender pursuant to federal law, that person is required to register in the state.¹² In addition, at least one state imposes the registration requirements of the **originating** state, even if the receiving state’s requirements are less stringent.¹³

Kidnapping

The inclusion of kidnapping offenses in sex offender registration systems is a legacy of the first federal legislation regarding sex offender registration in 1994.¹⁴ Inclusion of kidnapping offenses in a jurisdiction’s sex offender registry has been largely upheld by the courts.¹⁵

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'Catch-All' Provisions

When jurisdictions specifically outline the offenses that require registration, there is little question as to who is required to register. Many jurisdictions also include catch-all provisions, which, in varying forms, require any person convicted of an offense that is “by its nature a sex offense” to register. One court concluded that the state need only prove by “clear and convincing” evidence that an offender engaged in sexual contact to qualify under its catch-all registration provision,¹⁶ while another held that such proof must meet the “beyond a reasonable doubt” standard.¹⁷

Comparable Convictions from Other Jurisdictions

A more difficult situation arises when a convicted sex offender moves from one jurisdiction to another, and the new jurisdiction has to make a determination as to whether the person is required to register there. Most jurisdictions require registration if a person was convicted of an out-of-state offense that is “comparable,” “similar” or “substantially similar” to one or more of the receiving jurisdiction’s registerable offenses.¹⁸ When a state’s registration system treats persons convicted of in-state offenses differently from those convicted out-of-state, equal protection problems may arise.¹⁹ On occasion, offenders have had their convictions expunged, but still might face registration requirements in other states; at least one state has issued an Attorney General opinion determining that “out-of-state offenders whose convictions have been expunged must register ...[so long as] they were required to register” in another jurisdiction as a sex offender.²⁰

While most states have a centralized process for determining whether an out-of-state offender is required to register, some do not. In one recent case, a state’s reliance on the determination of a local sheriff as to whether an out-of-state conviction was “substantially similar” to a registerable state offense was held to violate procedural due process, because those determinations could vary from sheriff to sheriff within the state.²¹

Elements vs. Facts

Determinations of whether an offense is registerable under SORNA, or fits under one of these catch-all or comparable provisions, has led to a great deal of litigation.²² Some jurisdictions look at the elements of the offense of conviction, while others also look at the underlying facts.²³ Often, courts take an expansive view of which offenses trigger registration requirements; sometimes, however, the approach can be quite narrow.²⁴

Recidivists

In many states, as under SORNA’s requirements, an offender who has been convicted of more than one sex offense is subject to heightened registration requirements. One court has held that two (or more) offenses **do not** need to arise out of separate proceedings to trigger increased requirements.²⁵

¹ See Conn. Gen. Stat. § 54-280 (registry of persons convicted of offenses with a deadly weapon); *In re M.A.*, 43 N.E.3d 86 (Ill. 2015) (13-year-old added to Illinois' murderer and violent offender against youth registry); *State v. Brown*, 399 P.3d 872 (Kan. 2017) (describing Kansas' drug offender registry); Mont. Code § 46-23-502(13) (definition of "violent offense" for Montana's violent offender registry); *State v. Galloway*, 50 N.E.3d 1001 (Ohio Ct. App. 2015) (discussing Ohio's arson registry); *Bivens v. State*, 2018 Okla. Crim. App. LEXIS 34 (Oct. 11, 2018) (Oklahoma's methamphetamine registry); Ben Winslow, *Governor Signs More Bills into Law, Including 'White Collar Crime Registry,'* FOX 13 NOW (March 24, 2015), available at fox13now.com/2015/03/24/governor-signs-more-bills-into-law-including-white-collar-crime-registry/ (Utah).

² See *United States v. Bridges*, 901 F. Supp. 2d 677 (W.D. Va. 2012), *aff'd*, 741 F.3d 464 (4th Cir. 2014) (withheld adjudication in Florida registerable under SORNA); *People v. McCulley*, 2018 Colo. App. LEXIS 950 (June 28, 2018) (successful deferred judgment is considered a conviction); *Roe v. Replogle*, 408 S.W.3d 759 (Mo. 2013) (suspended imposition of sentence is a conviction under SORNA).

³ See *Mayo v. People*, 181 P.3d 1207 (Colo. App. 2008) (civil commitment triggered requirement to register); *Price v. State*, 43 So.3d 854 (Fla. Dist. Ct. App. 2010) (withheld adjudication); *State v. Cardona*, 986 N.E.2d 66 (Ill. 2013) (a finding of "not not guilty" for an incompetent defendant sufficient to require registration); *In re Kasckarow*, 32 N.E.3d 927 (N.Y. Ct. App. 2015) (nolo contendere plea and withheld adjudication in Florida registerable in New York); *Walters v. Cooper*, 739 S.E.2d 185 (N.C. Ct. App.) (prayer for judgment continued on a charge of sexual battery is a final conviction triggering requirement to register); *State v. Townsend*, 2017 Tenn. Crim. App. LEXIS 277 (April 13, 2017) (nolo contendere plea followed by diversion of sentencing is not a conviction triggering registration requirement). *But see* *United States v. Moore*, 449 Fed. Appx. 677 (9th Cir. 2011) (probation condition requiring registration for a tier I offender more than 15 years after the conviction was invalid).

⁴ *In re Edwards*, 720 S.E.2d 462 (S.C. 2011). *But see* *State v. Davis*, 814 S.E.2d 701 (Ga. 2018).

⁵ *People v. Hamdon*, 225 Cal. App. 4th 1065 (2014) (procedure under California Penal Code 1203.4a); *Witten v. State*, 145 So. 3d 625 (Miss. 2014) (procedure under California Penal Code 1203.4a).

⁶ *Montoya v. Driggers*, 320 P.3d 987 (N.M. 2014).

⁷ *Doe v. O'Donnell*, 924 N.Y.S.2d 684 (N.Y. App. Div. 2011). *But see* *Stallworth v. State*, 160 So.3d 1161 (Miss. 2015) (expungement of underlying conviction from Maryland entitles the defendant to relief from registration responsibilities in Mississippi).

⁸ 34 U.S.C. § 20911(1). The bulk of these cases have been appeals of convictions under 18 U.S.C. § 2250 and interpret the "initial registration" requirement contained in 34 U.S.C. § 20913. *See Carr v. United States*, 560 U.S. 438 (2010).

⁹ "Sex Offense" is defined in 34 U.S.C. § 20911(5)(A). For guidance on which persons convicted of UCMJ offenses are required to register, *see* *United States v. Jones*, 383 Fed. Appx. 885 (11th Cir. 2010) and the "Military Registration" section of this update.

¹⁰ 34 U.S.C. § 20911(5)(B). *See* *McCarty v. Roos*, 2014 U.S. Dist. LEXIS 48363 (D. Nev., Apr. 8 2014) (describing the standard for registering a Japanese conviction under SORNA); *Board of Examiners v. D'Agostino*, 130 A.D.3d 1449 (N.Y. App. Div. 2015) (Cambodian conviction registerable in New York).

¹¹ In other words, there will be situations where SORNA imposes a registration requirement directly on an offender, but the jurisdiction where that offender lives, works or attends school refuses to register him, because the jurisdiction's laws do not require registration for the offense of conviction. *See* *Dep't of Pub. Safety v. Doe*, 94 A.3d 791 (Md. 2014) (state is not required to register an offender if the state's laws do not require it).

¹² *Doe v. Toelke*, 389 S.W.3d 165 (Mo. 2012) ("the [state] registration requirements apply to any person who 'has been' required to register as a sex offender pursuant to federal law. Consequently, even if Doe presently is not required to register pursuant to SORNA, he 'has been' required to register as a sex offender and, therefore, is required to register [with the state]") (offender convicted in 1983 required to register, even though Missouri law only requires registration of persons convicted on or after January 1, 1995).

¹³ *Oulman v. Setter*, 2014 Minn. App. Unpub. LEXIS 842 (Aug. 4, 2014) (Colorado registration requirements imposed on offender who relocated to Minnesota).

¹⁴ *Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act*, Pub. L. No. 103-322, § 170101, 108 Stat. 2038 (1994).

¹⁵ See *Rainer v. State*, 690 S.E.2d 827 (Ga. 2010) (nonparental false imprisonment is registerable); *Commonwealth v. Thompson*, 548 S.W.3d 881 (Ky. 2018) (attempted kidnapping of a minor is registerable); *Moffitt v. Commonwealth*, 360 S.W.3d 247 (Ky. Ct. App. 2012) (citing the legislative history of the Wetterling Act to support registration for kidnapping); *People v. Knox*, 903 N.E.2d 1149 (N.Y. 2009) (nonparental kidnapping and unlawful imprisonment is registerable); *State v. Smith*, 780 N.W.2d 90 (Wisc. 2010) (nonparental false imprisonment is registerable).

¹⁶ *State v. Norman*, 824 N.W.2d 739 (Neb. 2013).

¹⁷ *In re K.B.*, 285 P.3d 389 (Kan. Ct. App. 2012).

¹⁸ See *Doe v. Board*, 925 N.E.2d 533 (Mass. 2010) (Maine conviction for unlawful sexual contact registerable in Massachusetts); *Skaggs v. Neb. State Patrol*, 804 N.W.2d 611 (Neb. 2011) (California conviction registerable in Nebraska); *Lozada v. South Carolina Law Enforcement Division*, 719 S.E.2d 258 (S.C. 2011) (Pennsylvania conviction for unlawful restraint registerable as kidnapping in South Carolina). *But see* *State v. Doe*, 425 P.3d 115 (Alaska 2018) (Washington and California convictions not registerable in Alaska); *State v. Frederick*, 251 P.3d 48 (Kan. 2011) (Minnesota adjudication for criminal sexual conduct not registerable in Kansas because it is not a conviction under Kansas law); *Doe v. Sex Offender Registry Board*, 11 N.E.3d 153 (Mass. App. Ct. 2014) (federal conviction for kidnapping of a minor not registerable in Massachusetts); *State v. Orr*, 304 P.3d 449 (N.M. Ct. App. 2013) (conviction for taking indecent liberties with children in North Carolina not registerable in New Mexico); *People v. Diaz*, 2017 N.Y. App. Div. LEXIS 2852 (April 13, 2017) (Virginia conviction for murder of a child, without any sexual conduct or motivation, did not require registration in New York); *Miller v. Gywn*, 2018 Tenn. App. LEXIS 283 (May 23, 2018) (Maryland conviction based on Alford plea registerable in Tennessee); *Dep't Pub. Safety v. Anonymous*, 382 S.W.3d 531 (Tex. App. 2012) (Massachusetts conviction for indecent assault and battery not registerable in Texas); *Ex parte Harbin*, 297 S.W.3d 283 (Tex. Crim. App. 2009) (California conviction for annoying or molesting a child not registerable in Texas); *State v. Howe*, 212 P.3d 565 (Wash. 2009) (California conviction for lewd acts upon a child not registerable in Washington); *State v. Werneth*, 197 P.3d 1195 (Wash. Ct. App. 2008) (Georgia conviction for child molestation not registerable in Washington).

¹⁹ See *Doe v. Pa. Bd. of Prob. & Parole*, 513 F.3d 95 (3d Cir. 2008) (Pennsylvania's disparate treatment of in-state and out-of-state offenders violated the Equal Protection Clause of the 14th Amendment).

²⁰ *Tenn. Att'y Gen. Op. 09-01* (Jan. 8, 2009), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2009/op09-001.pdf>.

²¹ *Meredith v. Stein*, 2018 U.S. Dist. LEXIS 190204 (E.D. N.C. Nov. 7, 2018).

²² See *United States v. Vanderhorst*, 688 Fed. Appx. 185 (4th Cir. 2017) (18 U.S.C. § 1592 registerable under SORNA even though it is not listed); *United States v. Schofield*, 802 F.3d 722 (5th Cir. 2015) (18 U.S.C. § 1470 registerable under SORNA, even though it is not listed); *United States v. Dodge*, 597 F.3d 1347 (11th Cir. 2010) (same); *United States v. Hahn*, 551 F.3d 977 (10th Cir. 2008) (probation conditions properly required registration in a fraud case when there was a prior state conviction for a sex offense); *United States v. Byun*, 539 F.3d 982 (9th Cir. 2008) (conviction for alien smuggling which had underlying facts of sex trafficking properly triggered registration); *United States v. Jensen*, 278 Fed. Appx. 548 (6th Cir. 2008) (conspiracy to commit sexual abuse is a registerable offense); *State v. Hall*, 294 P.3d 1235 (N.M. 2013) (California conviction for annoying or molesting children not registerable in New Mexico without evidence of actual conduct comparable to New Mexico offense, regardless of the elements of the offense). *But see* *United States v. Jimenez*, 275 Fed. Appx. 433 (5th Cir. 2008) (where only evidence of sexual misconduct was three unsubstantiated police reports, registration requirement was inappropriate); *State v. Coman*, 273 P.3d 701 (Kan. 2012) (bestiality is not a registerable offense); *State v. Haynes*, 760 N.W.2d 283 (Mich. Ct. App. 2008) (bestiality not registerable).

²³ See, e.g., *Doe v. Sex Offender Registry Bd.*, 925 N.E.2d 533 (Mass. 2010) (may not consider facts underlying the conviction); *Commonwealth v. Sampolski*, 89 A.3d 1287 (Pa. Super. Ct. 2014) (looking to the elements of the offense).

²⁴ See, e.g., *State v. Duran*, 967 A.2d 184 (Md. 2009) (determining that indecent exposure was not registerable because the lewdness element of the crime incorporated conduct that was not sexual in addition to that which could be sexual).

²⁵ *Ward v. State*, 288 P.3d 94 (Alaska 2012). *But see* *Commonwealth v. Wimer*, 99 N.E.3d 778 (Mass. 2018). SORNA's provisions for enhanced tiering of recidivists are found in 34 U.S.C. § 20911(3)(C) & § 20911(4)(C).