

To: New Jersey Law Revision Commission
From: Adrian Altunkara, Brian Ashnault, and Micaela Itona
Re: Definition of Conviction
Date: March 3, 2017

MEMORANDUM

Executive Summary

The case of *In re J.S.*¹ the Appellate Division considered whether the term “conviction” as used in N.J.S. 2C:7-2(f), refers to a plea of guilty, or to the entry of a judgment of conviction for purposes of when defendant could terminate his registration and community notification and community-supervision-for-life obligations. The Court determined that “conviction”, in that section of the statute, referred to the judgment of conviction and its imposition of registration requirements, rather than to the plea of guilty. In doing so, the Court suggested that “exacting precision in drafting statutes would obviate the need for judicial interpretation” and noted that the issue on appeal was “an important matter of public interest and capable repetition warranting our review.”²

The Commission asked Staff to compile research regarding sex offender registration systems on a federal and state level to assess the position of New Jersey’s sex offender regulatory framework relative to federal and state law. This supplemental research did not lead to changes in the Draft Tentative Report regarding conviction, which is submitted for the Commission’s consideration this month. Further, it does not appear as though defining conviction as proposed would conflict with any of the existing provisions of federal law or impair the interplay of the laws of the various states. Since several Commissioners had expressed an interest in this information, however, it is provided by way of background material.

I. Federal Mandate of Sex Offender Registration and Notification Systems

Pursuant to Title 1 of the Adam Walsh Child Protection and Safety Act of 2006, all states are required to establish a system of registration, monitoring, and tracking of sex offenders following their release into the community.³ The act is also known as the Sex Offender Registration and Notification Act (SORNA), with the majority of the provisions codified at 42

¹ *In re J.S.*, 444 N.J. Super. 303 (App. Div. 2016).

² *Id.* at 313-314.

³ 42 U.S.C.A. § 16901 (West); Summary of State Registration Laws Concerning Temporary and Permanent Residency by Adults, (2017), <http://all4consolaws.org/wp-content/uploads/2017/01/Summary-of-State-Registration-Laws-Concerning-Short.pdf> (last visited Mar 3 2017); NATIONAL SEX OFFENDER SITE LIST, UNITED STATES DEPARTMENT OF JUSTICE NATIONAL SEX OFFENDER PUBLIC WEBSITE, <https://www.nsopw.gov/en-US/Registry/allregistries> (last visited Mar 3, 2017).

U.S.C. §16911 et seq. SORNA aims to close potential gaps and loopholes that existed under prior laws, and to strengthen the nationwide network of sex offender registrations.⁴

SORNA establishes a national baseline for sex offender registration and notification programs. In other words, the Act generally constitutes a set of minimum national standards and sets a floor, not a ceiling, for the registration programs of the states.⁵ For example, a jurisdiction may have a system that requires registration by broader classes of convicted sex offenders than those identified in SORNA.⁶

A. Purposes of (SORNA)

Sex offender registration and notification programs are important for public safety purposes. Sex offender registration is a system for monitoring and tracking sex offenders following their release into the community. The registration provides important information about convicted sex offenders to local and federal authorities and the public, such as offender's name, current location and past offenses. Currently, the means of public notification includes sex offender websites in all states, the District of Columbia, and some territories. Within a specified timeframe, each jurisdiction is required to comply with the federal standards outlined in the Sex Offender Registration and Notification Act (SORNA). Jurisdictions include all 50 states, the District of Columbia, the principal U.S. territories, and federally recognized Indian tribes.

B. Failure to Register

Section 2250 of Title 18, United States Code, makes it a federal offense for sex offenders required to register pursuant to the Sex Offender Registration and Notification Act (SORNA), to knowingly fail to register or update a registration as required.⁷ State convicted sex offenders may also be prosecuted under this statute if the sex offender knowingly fails to register or update a registration as required, and engages in interstate travel, foreign travel, or enters, leaves, or resides on an Indian reservation.⁸

A sex offender who fails to properly register may face fines and up to 10 years in prison.⁹ Furthermore, if a sex offender knowingly fails to update or register as required and commits a violent federal crime, he or she may face up to 30 years in prison under this statute.¹⁰

⁴ *Id.* (“In order to protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below, Congress in this Act establishes a comprehensive national system for the registration of those offenders.”)

⁵ The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 128, 38032 (July 2, 2008)

⁶ *Id.* at 38033

⁷ The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 128, 38064 (July 2, 2008)

⁸ *Id.*

⁹ *Id.* at 38069

¹⁰ U.S. DEP'T OF JUSTICE, CITIZEN'S GUIDE TO U.S. FEDERAL LAW ON SEX OFFENDER REGISTRATION, <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-sex-offender-registration> (July 6, 2015).

SORNA requires that when a jurisdiction has information that a sex offender may have absconded, the jurisdiction take certain actions to investigate and notify various law enforcement agencies.¹¹ Although not specifically enumerated in state code, if a sex offender fails to report for registration in New Jersey, then the registering law enforcement agency will attempt to locate the sex offender.¹² If unsuccessful, the registering agency will apply under to the Superior Court for a summons for failing to register.¹³ Once the summons is issued, the information is entered into the NCIC system, notifying all law enforcement about the outstanding warrant.¹⁴ In the event of out-of-state absconders, the U.S. Marshalls are notified and New Jersey's sex offender registry flags that the sex offender has failed to register.¹⁵

C. Child Exploitation and Obscenity Section's Role in Registration Compliance

The CEO Section (Child Exploitation and Obscenity) of the Department of Justice (DOJ) works with the High Technology Investigative Unit (HTIU), the Federal Bureau of Investigation (FBI) and United States Attorney's Offices around the country to investigate and prosecute sex offenders who fail to register pursuant to the Sex Offender Registration and Notification Act (SORNA).¹⁶ In addition, CEOS attorneys conduct trainings to educate law enforcement officials, investigators, prosecutors, and others about the national sex offender registration system.¹⁷ Moreover, CEOS designs, implements, and supports strategies, legislative proposals, and policy initiatives relating to the enforcement of SORNA.¹⁸

D. Definition of "Conviction" under SORNA

A sex offender is "convicted" for SORNA purposes if the sex offender has been subject to penal consequences based on the conviction, however it may be styled.¹⁹ The sealing of a criminal record or other action that limits the publicity or availability of conviction information,

¹¹ The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 128, 30869 (July 2, 2008)

¹² U.S. DEP'T OF JUSTICE, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, SORNA SUBSTANTIAL IMPLEMENTATION REVIEW STATE OF NEW JERSEY, 9 (July 2016), available at <https://www.smart.gov/pdfs/sorna/newjersey-hny.pdf>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ U.S. DEP'T OF JUSTICE, SEX OFFENDER REGISTRATION AND NOTIFICATION ACT, <https://www.justice.gov/criminal-ceos/sex-offender-registration-and-notification-act-sorna> (June 3, 2015).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 128, 38050 (July 2, 2008); *See also Id.* at 38040 ("SORNA's requirements remain applicable if a jurisdiction has a procedure under which certain sex offense convictions (e.g., those of young adult sex offenders who satisfy certain criteria) are referred to as something other than 'convictions' or are nominally 'vacated' or 'set aside,' but the sex offender remains subject to penal consequences based on the conviction. The issue raised by...comments is whether individual jurisdictions have a free hand to stipulate that the dispositions of criminal cases do not constitute 'convictions' for purposes of SORNA. Such an approach would be inconsistent with SORNA's purpose to establish a 'comprehensive national system for the registration of [sex] offenders.'")

but does not deprive the conviction of continuing legal validity, does not change its status as a conviction for purposes of SORNA.²⁰

“Convictions” for SORNA purposes include convictions of juveniles who are prosecuted as adults.²¹ It does not include juvenile delinquency adjudications, except under the circumstances specified in 42 U.S.C. § 16911(8), which stipulate juvenile registration only if the juvenile was at least 14 years old at the time of the offense and was adjudicated delinquent for committing (or attempting or conspiring to commit) a sexual act with another by force, by the threat of serious violence, or by rendering unconscious or drugging the victim.²²

SORNA requires that when an offender is incarcerated within the jurisdiction, registration must occur before release from imprisonment for the registration offense.²³ Similarly, when an offender is sentenced within the jurisdiction, but not incarcerated, SORNA requires that registration occur within three business days of sentencing.²⁴

II. History of National Registry Laws

Prior to 1994, few states required convicted sex offenders to register addresses with local law enforcement. In 1994, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Act was enacted, requiring states to implement a sex-offender registration program.²⁵ Congress amended the Wetterling Act in 1996 with the enactment of the federal version of Megan’s Law.²⁶ Megan’s Law required all states to conduct community notification and required the creation of internet sites containing state sex offender information but did not establish specific forms and methods.

After 1996, several pieces of legislation were passed to improve sex offender registries. Despite these efforts, many sex offenders still failed to comply with registry law. In response, Congress deemed it appropriate to pass the Adam Walsh Child Protection and Child Safety Act on July 27, 2006.²⁷ That Act:

- Covers states, territories, the District of Colombia, and Indian tribes.
- Authorized new programs and initiatives designed to combat crimes against children, expands sex offender registries, ensure sex offenders are held accountable for their crimes, prevents child pornography, and makes the Internet safer for children.

²⁰ *Id.* at 38050.

²¹ *Id.* at 38040

²² *Id.*

²³ *Id.* at 38062

²⁴ *Id.*

²⁵ U.S. DEP’T OF JUSTICE, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING; <https://www.smart.gov/legislation.htm> (last visited, March 3, 2017).

²⁶ *Id.*

²⁷ *Id.*

- Establishes the SMART office.
 - Administers national standards for sex offender registration and notification
 - Administers grant programs relating to sex offender registration
 - Cooperates with and provides technical assistance to states and other public and private entities
- Provides for a revised sex offender registration system, child and sex related amendments to federal criminal and procedure, child protective grant programs, and other initiatives designed to prevent and punish sex offenders and those who victimize children.

III. State Provisions for Sex Offender Registration and Compliance with SORNA

In accordance with New Jersey law, individuals who have been convicted, adjudicated delinquent, or found not guilty by reason of insanity for a sex offense must register under New Jersey's Megan's Law.²⁸ Individual registrants are assessed to determine whether they pose a relatively low, moderate, or high risk of re-offense, based on application of elements such as the characteristics of the sex offense or offenses they committed, their offense history, and other criteria such as response to treatment and community support.²⁹ Under New Jersey law, before community notification takes place, offenders receive a final classification order from the court following the opportunity for a hearing.³⁰

The duration of registration requirements and monitoring protocols mandate that an offender must be registered from 15 years to life, and updates for “compulsive or repeat” offenders are quarterly; all other update annually.³¹ Besides Megan’s Law, N.J.S. § 30:4-123.90 provides for the allocation of responsibility for a monitoring system to the Attorney General with some limitations among other policies.³²

The Department of Justice monitors each jurisdiction's compliance with SORNA, and regularly reports on how the law has been implemented.³³ Only 21 out of 50 states, excluding New Jersey, have substantially implemented SORNA as of 2016.³⁴ According to the July 2016

²⁸ NEW JERSEY ATT’Y GEN.’S OFFICE, GUIDELINES FOR LAW ENFORCEMENT FOR THE IMPLEMENTATION OF SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS, 6 (June 1998); N.J. Stat. § 2C:7-2.

²⁹ U.S. DEP’T OF JUSTICE, NEW JERSEY CONDITIONS OF USE, [https://www.nsopw.gov/\(X\(1\)S\(1qyaam30d15sq0luq31vrum2\)\)/en-us/Search/StandAloneConditions/NJ](https://www.nsopw.gov/(X(1)S(1qyaam30d15sq0luq31vrum2))/en-us/Search/StandAloneConditions/NJ).

³⁰ *Id.*

³¹ NEW JERSEY ATT’Y GEN.’S OFFICE, GUIDELINES FOR LAW ENFORCEMENT FOR THE IMPLEMENTATION OF SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS, 9 (June 1998), available at <http://www.nj.gov/oag/dcj/megan/meganguidelines-2-07.pdf>.

³² N.J. Stat. § 30:4-123.90 (2007).

³³ OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, SORNA IMPLEMENTATION STATUS (2016), <https://ojp.gov/smart/sorna-map.htm>.

³⁴ *Id.*; U.S. DEP’T OF JUSTICE, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, SORNA SUBSTANTIAL IMPLEMENTATION REVIEW STATE OF NEW JERSEY, 9 (July 2016), available at <https://www.smart.gov/pdfs/sorna/newjersey-hny.pdf>

SORNA substantial implementation review by the U.S. Department of Justice, New Jersey does not meet SORNA's initial registration requirements because New Jersey does not require offenders moving to the state to register immediately (within 3 days).³⁵ Additionally, New Jersey does not require 21 day advance notice of international travel, does not immediately notify the U.S. Marshals Service or other jurisdictions where the sex offender may be registered, and fails to update NCIC/NSOR as required by the SORNA supplemental guidelines.³⁶ Although mandated by SORNA, New Jersey does not provide notification to tribal jurisdictions, prosecutor's offices, probation agencies, or other agencies involved with criminal investigation, prosecution, or other supervisions functions, nor are agencies responsible for conducting background checks.³⁷ Accordingly, the S.M.A.R.T office under the Department of Justice concluded that New Jersey's sex offender registration and notification program is not in compliance with SORNA's requirements as of 2016.

IV. Movement of Sex Offender Registrants between Jurisdictions under SORNA.

SORNA applies to all 50 states and the District of Columbia, as well as to Native American tribes and nations and U.S. territories in the Pacific. The Department of Justice monitors each jurisdiction's compliance with SORNA, and regularly reports on how the law has been implemented. While each state defines for itself what types of crimes are considered sex offenses — as well as what the appropriate punishment is for each crime — SORNA categorizes those offenses into three "tiers" according to the length of prison term the law requires, aggravating circumstances, the age of the victim, and other factors. Each tier imposes certain reporting requirements on the offenders, regardless of the jurisdiction they move to.

- Tier III Offenses

This is the most serious of the three tiers under the Sex Offender Registration and Notification Act. A Tier III crime is one that is punishable by at least a year in prison and is accompanied by aggravated sexual abuse or abusive sexual contact when committed against a minor under 13 years old.³⁸ A crime can also fall into this category if it involved the kidnapping of a minor not accompanied by a parent or guardian, or if it was committed after the offender had committed a Tier II crime.³⁹ Offenders convicted of Tier III crimes

³⁵ U.S. DEP'T OF JUSTICE, OFFICE OF SEX OFFENDER SENTENCING, MONITORING, APPREHENDING, REGISTERING, AND TRACKING, SORNA SUBSTANTIAL IMPLEMENTATION REVIEW STATE OF NEW JERSEY, 5 (July 2016), available at <https://www.smart.gov/pdfs/sorna/newjersey-hny.pdf>.

³⁶ *Id.* at 5-6.

³⁷ *Id.* at 8.

³⁸ SORNA Tier Classification Definitions, UNIVERSITY OF NORTH CAROLINA https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/SORNA%20tier%20chart.pdf (last visited Mar 3 2017).

³⁹ *Id.*

have a lifetime reporting requirement, meaning that the offender must register with local authorities every time he or she changes address or moves to a different jurisdiction.⁴⁰

- Tier II Offenses

Like a Tier III offense, a crime is considered a Tier II offense if it's punishable by imprisonment for at least a year.⁴¹ However, a Tier II offense is one that involves sex trafficking, coercion or enticement, transporting another with intent to engage in criminal sexual activity, or abusive sexual activity with a minor of 13 years or older.⁴² It can also involve the use of a minor in a sexual performance, soliciting a minor to engage in prostitution, or producing or distributing child pornography.⁴³ Conviction of a Tier II crime carries a 25-year reporting requirement.⁴⁴

- Tier I Offenses

Tier I crimes are defined as those offenses that do not fall into the other two tiers. Tier I offenders must register for 10 years if they have a "clean record," meaning the offender must not be convicted of any subsequent offense punishable by a year or more in prison, or of any sexual offense, and must successfully complete any required parole period or sexual offender treatment program.⁴⁵ Otherwise, an offender must register for 15 years after release from prison.⁴⁶

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*