

STATE OF MICHIGAN
DEPARTMENT OF ATTORNEY GENERAL



P.O. Box 30212
LANSING, MICHIGAN 48909

October , 2021

Cheri Bruinsma
Executive Director
Prosecuting Attorneys Coordinating Council of Michigan
116 W Ottawa Street, Ste 200
Lansing, Michigan 48933

Re: *Does II v. Snyder* (No. 16-13137, E.D. Mich.) and Amended Final Judgment

Dear Ms. Bruinsma:

On August 26, 2021, the federal district court in the *Does II v. Snyder* case issued an amended final judgment regarding the old version of the Michigan Sex Offenders Registration Act (SORA) that was in effect until March 24, 2021. (See Attachment 1, Amended Final Judgment, referring to the “old SORA.”) Consistent with the Court’s order requiring notice to prosecutors, I ask that you provide a copy of this letter and attachments to all county prosecutors in the State of Michigan for distribution to their offices.

This letter, and the attachments, summarize the Court’s decision. The Court’s amended final judgment governs only the conduct of registrants that occurred *before* March 24, 2021, outlining which provisions of the old SORA are and are not enforceable. There are three key points about this amended final judgment:

First, the amended final judgment does not affect the enforcement of the new, revised SORA, which applies to the conduct of the registrants for actions *taken on or after March 24, 2021*. The Court’s ruling was limited to the old SORA, and accordingly the new SORA, which took effect on March 24, 2021, is enforceable, including both the amended and unamended sections. (See Amended Final Judgment, p 2 n 1.) I anticipate that registrants may raise challenges to the new statute in defending against prosecutions for new SORA violations, but the courts have not yet considered any constitutional challenges to the new SORA. The new SORA requires registrants who committed their registrable sex offenses before July 1, 2011 to continue to comply with SORA. Importantly, any violation of the new SORA must be “willful,” see MCL 28.729(1)–(7). As noted in my March 24, 2021 letter to PACC, the Michigan State Police mailed non-incarcerated registrants a notice of their obligations on March 24, 2021, consistent with the new SORA, MCL 28.725a(1). As required by the amended final judgment, the Michigan State Police will send a second notice to registrants regarding the old SORA. (See Attachment 2, Notice to Registrants.)

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Second, consistent with Rule 65 of the federal rules of civil procedure and *Platinum Sports Ltd v Snyder*, 715 F3d 615, 619 (CA 6, 2013), the amended final judgment contemplates that its injunction applies to the Attorney General and all county prosecutors.

Third, for conduct that occurred *before March 24, 2021*, the following rules from the amended final judgment govern which provisions of the old SORA are enforceable against which registrants:

- the old SORA is null and void for all registrants whose registrable sex offense was committed before July 1, 2011 (based on the offense date, not conviction date) and who have committed no registrable offense since then; the old SORA cannot be enforced against these registrants at all for any SORA violation before March 24, 2021; (see Amended Final Judgment, ¶¶ 2–3);
- the old SORA cannot be enforced against any registrant who may have violated the old SORA from February 14, 2020 until the effective date of the new SORA, which is March 24, 2021, regarding the old SORA's registration, verification, school zone, and fee provisions; this limitation is based on the district court's April 6, 2020 interim order suspending SORA enforcement during the pandemic; that order has now been terminated; (see Amended Final Judgment, ¶ 6);
- the following ten provisions of the old SORA cannot be enforced against any registrant for conduct that occurred before March 24, 2021 because the Court enjoined the enforcement of these provisions as unconstitutional, finding that they are vague, violate due process, or violate the First Amendment:

Provisions Void for Vagueness:

- the prohibition on working within a student safety zone, Mich. Comp. Laws §§ 28.733–734;
- the prohibition on loitering within a student safety zone, Mich. Comp. Laws §§ 28.733–734;
- the prohibition on residing within a student safety zone, Mich. Comp. Laws §§ 28.733, 28.735;
- the requirement to report “[a]ll telephone numbers . . . routinely used by the individual,” Mich. Comp. Laws § 28.727(1)(h);

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- the requirement to report “[t]he license plate number, registration number, and description of any motor vehicle, aircraft, or vessel . . . regularly operated by the individual,” Mich. Comp. Laws § 28.727(1)(j).

Provisions Void for Strict Liability:

- under the Due Process Clause of the U.S. Constitution, SORA must be interpreted as incorporating a knowledge requirement.

Provisions Void under the First Amendment:

- the requirement to “report in person and notify the registering authority . . . immediately after . . . [t]he individual . . . establishes any electronic mail or instant message address, or any other designations used in internet communications or postings,” Mich. Comp. Laws § 28.725(1)(f);
- the requirement to report “[a]ll telephone numbers . . . routinely used by the individual, Mich. Comp. Laws § 28.727(1)(h);
- the requirement to report “[a]ll electronic mail addresses and instant message addresses . . . routinely used by the individual,” Mich. Comp. Laws § 28.727(1)(i);
- the retroactive incorporation of the lifetime registration’s requirement to report “[a]ll electronic mail addresses and instant message addresses assigned to the individual . . . and all login names or other identifiers used by the individual when using any electronic mail address or instant messaging system,” Mich. Comp. Laws § 28.727(1)(i). (See Amended Final Judgment, ¶ 4.)

It is important to note that the revisions in the new SORA address all ten of these provisions. (See Attachment 3, federal district court opinion and order, dated June 21, 2021, p. 6).

Attachment 4 digests all the amended final judgment’s limitations on the application of the old SORA for conduct that occurred before March 24, 2021 into a single-page document.

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As noted, for prosecutions under the new SORA, any violation of the law must be willful. See MCL 28.729(1)–(7). There may have been confusion about whether the Court’s April 6, 2020 interim order suspending enforcement of the old SORA’s registration, verification, school zone, and fee provisions remained in effect after March 24, 2021. The State Defendants sought clarification from the Court about whether it remained in effect. While the amended final judgment clarifies that the interim order only suspended enforcement of the old SORA from February 14, 2020 until March 24, 2021, registrants may want to raise a defense to prosecution under the new SORA grounded in the assertion that confusion about the interim order means their failure to comply was not willful.

Finally, on July 27, 2021, the Michigan Supreme Court issued its decision in *People v Betts*, Case No. 148981, holding that the retroactive application of the old SORA violates the federal and state constitutional prohibitions on ex post facto laws for registrants whose registrable offenses occurred before the 2011 SORA amendments. (See Attachment 5, *Betts* Opinion.) Just like the federal district court’s amended final judgment, *Betts* addressed the old SORA, not the new SORA, and thus did not address the constitutionality of the new SORA.

Consistent with the amended final judgment, the district court has approved the content of this notice.

Sincerely,

s B. Eric Restuccia

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Attachments:

1. Amended Final Judgment in *Does II*
2. Notice to Registrants
3. Federal District Court’s June 21, 2021 Opinion and Order
4. Summary of Limitations on Application of Old SORA
5. *Betts* Opinion

**PROSECUTIONS FOR VIOLATIONS THAT OCCURRED
UNDER THE OLD SORA BEFORE MARCH 24, 2021
UNDER THE AMENDED FINAL JUDGMENT**

This summary has been approved by the Court in *Does II v. Snyder*.

A. Registrant – Registrable Sex Offense Occurred Before July 1, 2011

The old SORA is null and void for registrants whose registrable sex offenses occurred (based on offense date, not conviction date) before July 1, 2011, and thus the old SORA cannot be enforced against these registrants at all for any SORA violation before March 24, 2021. See Amended Final Judgment, ¶¶ 2–3.

B. Registrant – Registrable Sex Offense Occurred on or After July 1, 2011

- The old SORA cannot be enforced against any registrant for violations of the old SORA that occurred between February 14, 2020 and March 24, 2021 regarding the old SORA’s registration, verification, school zone, and fee provisions, under the federal district court’s April 6, 2020 interim order. See Amended Final Judgment, ¶ 6.
- The following nine provisions of the old SORA cannot be enforced against any registrant for conduct that occurred before March 24, 2021, because the Court enjoined the enforcement of these provisions as unconstitutional, finding that they are vague or violate the First Amendment under the Amended Final Judgment, ¶ 4:

Provisions Void for Vagueness:

- the prohibition on working within a student safety zone, MCL 28.733–734;
- the prohibition on loitering within a student safety zone, MCL 28.733–734;
- the prohibition on residing within a student safety zone, MCL 28.733, 28.735;
- the requirement to report “[a]ll telephone numbers . . . routinely used by the individual,” MCL 28.727(1)(h);
- the requirement to report “[t]he license plate number, registration number, and description of any motor vehicle, aircraft, or vessel . . . regularly operated by the individual,” MCL 28.727(1)(j).

Provisions Void under the First Amendment:

- the requirement to “report in person and notify the registering authority . . . immediately after . . . [t]he individual . . . establishes any electronic mail or instant message address, or any other designations used in internet communications or postings,” MCL 28.725(1)(f);
 - the requirement to report “[a]ll telephone numbers . . . routinely used by the individual,” MCL 28.727(1)(h);
 - the requirement to report “[a]ll electronic mail addresses and instant message addresses . . . routinely used by the individual,” MCL 28.727(1)(i);
 - the retroactive incorporation of the lifetime registration’s requirement to report “[a]ll electronic mail addresses and instant message addresses assigned to the individual . . . and all login names or other identifiers used by the individual when using any electronic mail address or instant messaging system,” MCL 28.727(1)(i).
- Under the Due Process Clause of the U.S. Constitution, the Court ruled that SORA must be interpreted as incorporating a knowledge requirement, such that any prosecution must be based on a willful violation. See Amended Final Judgment, ¶ 4.