

SORA Update

October 26, 2021

Miriam Aukerman, ACLU Senior Staff Attorney

Jessica Zimbelman, SADO Managing Attorney

Federal litigation: *Does I*

- Eastern District 2015 decisions:
 - Exclusion zones and certain in-person reporting unconstitutionally vague
 - Certain in-person reporting violated First Amendment
 - No strict liability for violating SORA
- 6th Circuit 2016 decision: retroactive application of 2006 and 2011 amendments was ex post facto punishment

Federal Litigation: *Does II*

- But the State continued to enforce → *Does II* class action
- February 2020 decision and August 2021 final judgment
- Permanent injunction:
 - No liability at all under old statute if registrable offense before 7/1/2011 because cannot sever unconstitutional provisions.
 - Post 2011 registrants: not liable for violations under certain provisions of old statute; no strict liability.

Federal Litigation: Interim Order Suspending Enforcement During Pandemic

- SORA enforcement suspended during pandemic
- Order in effect from Feb. 14, 2020 to March 24, 2021
- No liability for **any** registrant for registration, verification, school zone or fee violations

People v Betts

- July 27, 2021
- 2011 SORA is punishment
- If registerable offense occurred before 7/1/11, SORA is ex post facto punishment

Why is it punishment?

- Geographic exclusion zones: effectively banish a person from a community
- Public internet registry: shaming and ostracism
- Resembles parole: “significant amount of supervision by the state on registrants”

Why is it punishment?

- Onerous burdens: exclusion zones; in-person reporting
- Promotes deterrence
- Retributive: no individualized determination of the dangerousness of each registrant; registration is based on the offense alone

Why is it punishment?

- SORA's efficacy is unclear and its restraints are therefore excessive:
 - Duration based on offense not risk
 - Remain on registry long beyond sentence, probation, treatment
 - Geographic exclusion zones even if offense not against a child; most offenses against children are by someone they know
 - In-person reporting even if no information had changed

Remedy

- Cannot sever
- Cannot revive an earlier version
- “2011 SORA may not be retroactively applied to registrants whose criminal acts subjecting them to registration occurred before the enactment of the 2011 SORA amendments.”

THE KICKER

- The Legislature enacted a new SORA to allegedly comply with the federal litigation
- Effective 3/24/21
- ***Spoiler alert.* It's still punishment and still unconstitutional.**

2021 SORA

- The good:
 - Eliminates geographic exclusion zones
 - Allows for expunged convictions to discontinue registration
 - HYTA not considered a conviction for SORA purposes unless revoked/discharged unsuccessfully
 - Pre-2011: do not have to register email or internet identifiers
 - Violations must be willful

2021 SORA

- The unconstitutional, punitive bad:
 - Remains offense based with no individualized assessment of risk
 - Long registration periods – most registrants on for life
 - Even more extensive reporting requirements that are even harder to understand; many are immediate and in-person
 - Highly stigmatizing public website; contains vast amount of information which can now include email/internet
 - No ability to petition for removal
 - Annual fee

How do I advise my client?
What can I do?

Any advice is dependent on the date the underlying registerable offense was **committed**, and the date the SORA compliance violation was committed.

Prosecutions for violating old SORA

- Registerable offense occurred before 7/1/2011:
 - Cannot be prosecuted for any compliance offense under old statute
 - Trial court: ask that the prosecution be dismissed pursuant to *Betts* and *Does II*
 - Direct appeal: file notice of supplemental authority and ask for the conviction to be vacated
 - Conviction final: Motion for Relief from Judgment: MCR 6.500
 - PSIR

Prosecutions for violating old SORA

- Registerable offense occurred after 7/1/11
 - Not liable for:
 - Most violations between 2/14/20 and 3/24/21 (Covid-related)
 - Violating the geographic exclusion zones
 - Failing to report “routinely used” phone numbers, vehicles, emails, or instant messenger usernames
 - Failing to report internet information in-person within three days and certain other internet requirements
- Can only be prosecuted for knowing (willful) violations of 2011 SORA

Prosecutions for violating old SORA

- Registerable offense occurred after 7/1/11 and SORA compliance violation involves an unconstitutional provision or conduct between 2/14/20 and 3/24/21
 - Trial court: ask that the prosecution be dismissed pursuant to *Does II*
 - Direct appeal: file notice of supplemental authority and ask for the conviction to be vacated
 - Conviction final: Motion for Relief from Judgment: MCR 6.500

Prosecutions under SORA 2021

- *Does I, Does II, and Betts* all involved old SORA
 - Important implications for SORA 2021, but constitutionality of new law yet to be litigated
- Regardless of registrable offense date, could be prosecuted pending challenges to SORA 2021
 - *Does III* coming soon; discourage other civil litigation
 - Look for sample pleadings for criminal cases by the end of October

Prosecutions under SORA 2021

- Insist that prosecution prove willfulness
 - Very confusing requirements
 - Notice sent by state was incomprehensible
 - State has no records of whether your client received mailing about new law
- Incorporate any beneficial registry terms (e.g. no/private registry, shorter term) in plea agreements¹⁸

Prosecutions under SORA 2021: Registrable Offense Before 7/1/11

- Challenge SORA 2021 as:
 - Ex post facto punishment
 - Cruel/unusual punishment
 - Disproportionate/inaccurate sentence based on no risk assessment
 - Due process
 - Ground in federal **and** state constitutions

Prosecutions under SORA 2021: Registrable Offense After 7/1/11

- Challenge 2021 SORA as:
 - Cruel/unusual punishment
 - Disproportionate/inaccurate sentence based on no risk assessment
 - Due process
 - Ground in federal **and** state constitutions

Prosecutions under SORA 2021: Confusion Around Interim Order

- Interim Order in *Does II* barred most prosecutions during pandemic
- After new law, mass confusion about whether interim order still in effect
 - Interim order still posted on MSP website and some police won't allow registration
 - Final *Does II* judgment in August 2021 made clear that interim order only lasted till 3/24/2021, but no notice yet to *Does II* class
- Argue cannot be strictly liable and prosecution must prove willfulness