U.S. Supreme Court Rules on SORNA Retroactivity

by Andrew J. Harris

On January 23, 2012, in a 7-2 decision, the United States Supreme Court issued its ruling in the case of **Reynolds v. United States** (Case # 10-6549), addressing the retroactive applicability of the federal "failure to register" law set forth in the 2006 Sex Offender Registration and Notification Act (SORNA). Reversing a prior decision by the U.S. Third Circuit, the Court held that SORNA did not permit the federal prosecution of individuals whose offense pre-dated the Act unless and until the U.S. Attorney General validly specifies that the Act's registration provisions apply to such individuals.

The plaintiff, Billy Joe Reynolds, was released from prison in 2005 after serving four years in a Missouri prison for criminal sexual conduct. Although Reynolds registered in Missouri following his release, he moved to Pennsylvania in 2007 and did not register with authorities. He was subsequently charged and convicted under SORNA's "failure to register" provisions, which make it a crime:

> for a person who is required to register under the Act and who travels in interstate commerce knowingly to fail to register or update a registration. (18 U.S.C. § 2250(a).)

Appeal Asserts Prosecution Not Permitted

Following his conviction, Reynolds was sentenced to 18 months in federal prison, and filed an appeal with the U.S. Third Circuit. Reynolds' appeal asserted that, while SORNA's authorizing legislation authorized the attorney general to specify the applicability of federal failure to register provisions to pre-Act offenders such as himself, the law itself did not permit such a prosecution in the absence of the attorney general's ruling.

Although SORNA had taken effect in July 2006, it was not until mid-2007 that the attorney general promulgated interim rules applying the registration requirements to "all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that act." Given that Reynolds' interstate travel occurred during this interim period, he claimed that the Act's registration requirements had not yet become applicable to him or to other offenders with pre-2006 convictions. The Third Circuit rejected this argument, ruling that offenders like Reynolds could be prosecuted even in the absence of any rule or regulation by the attorney general.

No Firm Basis for Determination

In reversing the Third Circuit decision, the Supreme Court concluded that, in the absence of attorney general guidelines, pre-Act offenders had no firm basis to determine whether and how SORNA applied to them. Writing on behalf of the majority, Justice Stephen Breyer wrote:

> Although a state pre-Act offender could not be prosecuted until he traveled interstate, there is no interstate requirement for a federal pre-Act offender. . .and to apply the Act to either of these pre-Act offenders from the date of enactment would require reading into the statute, silent on the point, some kind of unsaid equivalent. . . pre-Act offenders, aware of such complexities, lacunae, and difficulties, might, on their own, reach different conclusions about whether, or how, the new registration requirements applied to them. A ruling from the Attorney General, however, could diminish or eliminate those uncertainties, thereby helping to eliminate the very kind of vagueness and uncertainty that criminal law must seek to avoid.

In a dissenting opinion, Justice Antonin Scalia wrote:

> The issue is whether "specify the applicability" means that no pre-Act offenders need register unless the Attorney General says so, or rather that the Attorney General may excuse the unqualified requirement for pre-Act offenders. . .It is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals.

The **Reynolds** case represented the second time that the U.S. Supreme Court has addressed the issue of SORNA retroactivity. In 2010, the Court ruled in **Carr v. United States,** that federal prosecution under SORNA could not be applied to offenders whose interstate travel occurred prior to the law's passage. ■

Summary of Juvenile Sex Offender Registration Laws

A new report by Nicole Pittman and Quyen Nguyen provides a summary of statutory provisions and practices governing juvenile sex offender registration and notification. The report, based on a 50-state survey, is entitled, "A Snapshot of Juvenile Sex Offender Registration and Notification Laws: A Survey of the United States."

Among its findings, the report indicates that 35 states require youth to register or comply with community notification laws, and that in 19 of these states, youth registration information is publicly accessible via the Internet. The report further indicated that seven states provide for lifetime registration of juveniles.

The report includes the following:

- An assessment of the federal Sex Offender Registration and Notification Act and its effect on juveniles;
- Comparative charts addressing registration and notification laws as applied to juveniles; and
- Detailed factsheets summarizing JSORN provisions in each of the 50 states, Guam, and the District of Columbia.

The report may be accessed and downloaded from the National Juvenile Justice Network at *http://www.NJJN.org/uploads/digital_library/SNAPSHOT_web10-28.pdf.*