

Virginia State Crime Commission

Sex Offender Registry

2009

SEX OFFENDER REGISTRY

During the 2009 Regular Session of the Virginia General Assembly, five different House bills were introduced which had as their subject matter modifications to Virginia's sex offender registry laws: House Bills 1898 (Watts), 1928 (Lewis), 1962 (Mathieson), 1963 (Mathieson), and 2274 (Poindexter). All five bills were passed by the House of Delegates and were referred to the Senate Courts of Justice Committee. The Committee unanimously passed by all five bills, and referred the subject matter of the bills to the Crime Commission for review, to determine whether these bills were required to bring Virginia's sex offender registry laws into compliance with the federal Adam Walsh Act.

The Adam Walsh Act, 42 U.S.C. 16901 *et seq.*, was enacted by Congress in 2006. It contains seven Titles, the first of which is known as the Sex Offender Registration and Notification Act, or "SORNA." SORNA requires that all fifty states maintain sex offender registries, and provides detailed requirements as to who must register, how long they must remain on the registry, what information must be provided to the registry, what information must be available to the public through the internet, and what verification processes the states must use to ensure the accuracy of the information. Two of the underlying goals of SORNA are to create greater uniformity for all of the states' registry laws, and to make it easier for states to share information and keep track of registered offenders who move from one state to another.

Strictly speaking, states cannot be forced to adopt the provisions of SORNA. However, SORNA specifies that states that do not comply with its requirements will be penalized by having a ten percent reduction in the amount of Byrne grant funding they receive. The Attorney General of the United States is given the authority to make the determination as to which states "substantially implement" the requirements of SORNA and which do not. To date, only Ohio has been deemed in compliance. On May 26, 2009, the Attorney General granted a one year waiver to all of the states to give them additional time to bring their registries into compliance. It is also possible for states to request an additional one year waiver to take effect when the current waiver expires on July 27, 2010. Along with the authority to determine which states will be subject to a reduction in their Byrne grant funding for failing to "substantially implement" SORNA,

the Attorney General may also expand certain provisions of SORNA, and is required to issue interpretive guidelines.

Many of the provisions of the five House bills are necessary if Virginia is to come into compliance with SORNA. There are also a number of additional statutory changes that must be made. Many of these changes carry a fiscal impact; the Virginia legislature will have to decide, as a matter of public policy, whether the costs to implement these many changes are worth the reduction in Byrne funding that otherwise might occur. Although it cannot be known for certain how much Byrne grant funding will be available to Virginia in the future (the amount provided for states varies from year to year, sometimes substantially), for the current fiscal year, Virginia is expected to receive around \$6,300,000. In 2008, Senate Bill 590 was introduced in an attempt to bring other aspects of Virginia's registry laws into compliance with SORNA. At that time, the preliminary fiscal impact statement from the Virginia Department of Planning and Budget was over twelve million dollars for 2009, and over eight and a half million dollars for every year thereafter.

HOUSE BILL 1898

House Bill 1898 would expand the amount of information that sex offenders would have to provide to the registry with the following:

- Any telephone number the registered offender uses, or intends to use.

This requirement is not found in the relevant section of SORNA, but is mandated by the United States Attorney General in the Final Guidelines, pursuant to his authority to require states to maintain additional information on offenders. It should be noted that the Final Guidelines recommend against, but do not prohibit, providing these phone numbers to the general public on the registry website.

- The immigration status information of the registered offender.

This requirement is not found in the relevant section of SORNA, but is mandated by the United States Attorney General in the Final Guidelines, pursuant to his authority to require states to maintain additional information on offenders.

It should be noted that the Final Guidelines specifically prohibit providing any travel or immigration document numbers on the public registry website.

- Information regarding any professional or occupational licenses held by the registered offender.

This requirement is not found in the relevant section of SORNA, but is mandated by the United States Attorney General in the Final Guidelines, pursuant to his authority to require states to maintain additional information on offenders.

- Information on “place of employment” must include all places and physical job site locations, including volunteer work.

The requirement of providing all physical job site locations is not precisely required by SORNA; the exact language of the federal statute is “name and address of any place where the sex offender is an employee or will be an employee.” The Final Guidelines provide further clarification by stating, “if the sex offender is employed but does not have a definite employment address, other information about where the sex offender works” should be provided. In such cases, the offender should give “whatever definiteness is possible under the circumstances, such as information about normal travel routes or the general area(s) in which the sex offender works.” The Final Guidelines make clear, however, that daily updates on work locations are not required; in these situations (e.g., employment as a day laborer or delivery driver), the offender should provide the information about employment location in more general terms. Therefore, if Virginia were to adopt this change, employing similar language might be preferable to the phrase “physical job site locations.” The inclusion of volunteer work order is required by both SORNA and the Final Guidelines.

- Vehicle registration information for all vehicles regularly used by the registered offender.

Currently, Virginia only requires vehicle registration information for vehicles owned by the registered sex offender. SORNA requires the offender to provide information on any vehicle “owned or

operated” by him. The Final Guidelines clarify this to mean “any vehicle that the sex offender regularly drives, either for personal use or in the course of employment.” It should be noted that at the present time, Virginia does not provide any vehicle information to the general public; the Final Guidelines mandate that this information be made available on the public registry website.

- Information on “temporary lodging,” i.e., any place a registered offender stays for seven or more days when away from his residence.

This requirement is not found in the relevant section of SORNA, but is mandated by the United States Attorney General in the Final Guidelines, pursuant to his authority to require states to maintain additional information on offenders. The bill specifies that any change in temporary lodging must be reported by the offender, in person, within three days of establishing or changing the temporary lodging. A three business day deadline is mandated by the Final Guidelines, and while in person reporting is perfectly acceptable, it is not mandated. Only changes in name, residence, employment, or school attendance must be reported in person.

- An out-of-state registered offender who enters Virginia for an extended visit of seven days or longer must register in person.

Currently, Virginia requires out-of-state registered offenders who enter Virginia for an extended visit of thirty days or longer to register in person. Changing the time limit to seven days is not required by SORNA, nor by the Final Guidelines, which also set a limit of thirty days. Of course, Virginia would not be prohibited from making this change.

- An out-of-state registered offender who enters Virginia for employment for a period of time exceeding seven days must register in person.

Currently, Virginia requires out-of-state registered offenders who enter Virginia for employment for a period of time exceeding fourteen days to register in person. Changing the time limit to seven days is not required by SORNA, nor by the Final Guidelines. Of course, Virginia would not be prohibited from making this change.

HOUSE BILL 1928

House Bill 1928 clarifies an ambiguity in Virginia's current law as to how soon after a name change a registered offender must reregister in person. The current statute reads:

“(i) Any person required to register shall also reregister in person with the local law enforcement agency following any change of name, or any change of residence, whether within or without the Commonwealth. (ii) If his new residence is within the Commonwealth, the person shall register in person...within three days following his change in residence. (iii) If the new residence is located outside of the Commonwealth, the person shall register...within 10 days prior to his change of residence.”

Although the implication is that a change of name must also be reported within three days, if not ten days prior to the change, the statute does not specifically state this. House Bill 1928 makes clear that when a registered offender changes his name, he must provide this information, in person, within three days following the change. This is essentially required by SORNA, which states that “a sex offender shall, not later than 3 business days after each change of name... appear in person...and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry.”

House Bill 1928 also creates a requirement for registered offenders to reregister in person within three days following a significant change in appearance. This new requirement is not mentioned in either SORNA nor in the Final Guidelines. Enactment of this provision may result in problematic prosecutions for failure to comply, as the phrase “significant change in appearance” could lead to highly subjective interpretations.

HOUSE BILL 1962

House Bill 1962 would make any sentencing order that permits a convicted sex offender to remain off the registry, in violation of Virginia's laws, invalid and *void ab initio*. It also requires the Virginia State Police to notify the Executive Secretary of the Virginia Supreme Court and the chairmen of the House Courts of Justice Committee, the Senate Courts of Justice Committee, and the House Committee on Militia,

Police and Public Safety, that a void order was entered, along with the name of the judge who entered the order. While the requirements of this bill are outside the direct scope of SORNA, they are certainly within the spirit of the Act. SORNA requires that any person convicted of a qualifying sexual offense be placed on the sex offender registry, without exception.

HOUSE BILL 1963

House Bill 1963 would add a subsection to the statute that defines and lists all of the registerable offenses. The new subsection would state that if an offense requires registration only if the victim is a minor, is physically helpless, or is mentally incapacitated, neither the charging document nor the final order of conviction need to state the relevant condition. Furthermore, the relevant condition may be established by other information available to the Virginia State Police.

Existing law in Virginia does not require that a necessary condition for registration be specifically mentioned in a final conviction order or sentencing order. Instead, the requirement to register is triggered upon conviction for a qualifying offense, and if registration is only required if there are additional conditions, then the requirement to register will exist if those conditions were present during the commission of the offense. In other words, if a person meets all of the requirements to register, then he must register, regardless of what the sentencing order states. In that sense, House Bill 1963 is only restating existing law, and is mandated by SORNA, which similarly requires registration if a defendant is convicted of a qualifying offense that meets all the necessary requirements for registration.

The current law in Virginia is silent as to whether or not the Virginia State Police may establish or prove relevant facts that are not contained within a final order of conviction, if an individual challenges his inclusion on the registry. House Bill 1963 would make it clear that the Virginia State Police can do so. Allowing outside evidence, beyond what is contained in a sentencing order, to help determine if a defendant must be placed on the sex offender registry does not conflict with SORNA, and may even be required by SORNA in some situations.

HOUSE BILL 2274

House Bill 2274 would mandate that Virginia's public registry website include information on whether a registered offender is wanted for any criminal offense, not just for failing to register or reregister, as is the current law. The Virginia State Police already possess the authority to publish such information on the public registry website under certain circumstances; they may provide "such other information as [they] may from time to time determine is necessary to preserve public safety...." The bill would remove this discretion from the Virginia State Police, although it would allow them the option of not specifically listing the offense or offenses for which the registrant was wanted. This bill is required by SORNA, which mandates that information about arrest warrants issued for registered offenders be kept by the registry, and that all registry information, with a few exceptions, be made available to the general public via the Internet. One of the exceptions, though, is for any information that is exempted from public disclosure by the United States Attorney General. In the final guidelines, a list is given of all information that must be disclosed to the public on the public registry website; this list is deemed "exhaustive," and does not include information about outstanding warrants. Therefore, Virginia would not need to enact the provisions of House Bill 2274 in order to be deemed in compliance with SORNA, at least at the present time.

ADDITIONAL AREAS WHERE VIRGINIA IS NOT IN COMPLIANCE WITH SORNA

A comparison of Virginia's sex offender registry laws with the provisions of SORNA and the Final Guidelines reveal a number of additional areas where Virginia is not in compliance:

- Virginia currently prohibits the retroactive application of certain offenses to require registration.
If committed before July 1, 2006, convictions under Virginia Code §§ 18.2-67.5:1, 18.2-374.1:1, or 18.2-91 with an intent to commit a felony listed in Virginia Code § 9.1-902, do not require registration. This is in violation of the Final Guidelines, as well as earlier released federal regulations, which require that offenses committed before the enactment of SORNA still result in registration.

- A first offense of failing to register or register is a Class 1 misdemeanor.

If an offender, who has not been convicted of a sexually violent offense, fails to register or reregister as required by law, he is guilty of a Class 1 misdemeanor for the first violation. (A second violation is a Class 6 felony, as is a first violation if the offender was convicted of a sexually violent offense). SORNA mandates that violations by offenders of the requirements of registration must "provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year." Because a Class 1 misdemeanor carries a maximum term of imprisonment of twelve months, Virginia does not satisfy this provision of SORNA.

- Abductions of a minor that do not involve an intent to extort money nor an intent to defile are eligible for removal from the registry after 15 years.

Anyone who is convicted of abduction of a minor in violation of Virginia Code §§ 18.2-47(A) or 18.2-48(i) must register as a sex offender. However, these offenses, for a first conviction, do not qualify as "sexually violent offenses," which means an offender can petition to have his name removed from the registry after 15 years. (If the offender was convicted of abduction of a minor with the intent to defile in violation of Virginia Code § 18.2-48(ii), or of a minor under the age of 16 for purposes of prostitution in violation of Virginia Code § 18.2-48(iii), that would qualify as a conviction for a "sexually violent offense," and the registry requirements would be for life). SORNA requires that any kidnapping offense involving a minor, unless committed by a parent or guardian, result in lifetime registration.

- Not all convictions for sexual battery result in registration.

Sexual battery in Virginia is a Class 1 misdemeanor. While some sexual battery offenses that involve minors or multiple convictions can result in registration, sexual battery by itself is not a registrable offense. SORNA requires that all sexual offenses, defined as any "criminal offense that has an element involving a sexual act or sexual contact with another," result in registration. If the sex-

ual offense involves a minor, it must result in registration for at least 25 years.

- A conviction for carnal knowledge where the offender is less than five years older than the victim is eligible for removal from the registry after 15 years.

Anyone convicted of carnal knowledge in violation of Virginia Code § 18.2-63 must register as a sex offender. If the difference in age between the offender and his victim was more than five years, it is deemed to be a “sexually violent offense,” and the registration is for life. Otherwise, the offender can petition to have his name removed from the registry after 15 years. SORNA requires that anyone convicted of a felony that involves consensual sexual contact with a victim between the ages of 13 and 16 be registered for at least 25 years, if the difference in age between the offender and the victim was more than four years. Therefore, under some circumstances, the length of required registration for a conviction of carnal knowledge under Virginia law might not suffice for the requirements of SORNA.

- Offenders who are on the registry for having committed a “sexually violent offense” are only subject to in person verifications of their address every six months.

Under Virginia’s registration laws, offenders convicted of a “sexually violent offense” are subject to semi-annual verification of their reported address by the Virginia State Police, as are all registered sex offenders. SORNA requires that an in person verification of the offender’s information be undertaken every three months if the offender was convicted of certain violent offenses.

- Juveniles over the age of fourteen are not automatically required to register as sex offenders upon being adjudicated delinquent of certain violent sex crimes.

In Virginia, juveniles who are not tried as adults, but are adjudicated delinquent of an offense that would require registration if committed by an adult, are only required to register if they are over the age of 13 at the time of the offense, the Commonwealth’s Attorney files a motion with the court requesting registration,

and the court finds that the circumstances of the offense justify registration. (Juveniles who are tried as adults for an offense that requires registration must register if convicted). SORNA requires that any juvenile 14 years of age or older at the time of the offense, who is adjudicated delinquent of an offense comparable to aggravated sexual abuse, be registered, without exception.

CONCLUSION

At its December 15 meeting, the Crime Commission considered the subject matter of House Bills 1898, 1928, 1962, 1963, and 2274, as well as the other areas in which Virginia’s sex offender registry laws currently do not comply with the requirements of the federal Sex Offender Registration and Notification Act. In light of the enormous costs of bringing Virginia fully into compliance, it was decided that no recommendation would be made as to the introduction of any legislation in this area of the law.