the public peril. . . . J Leg Med 21:187–222, 2000)

Federal Sex Offender Registration and Notification Act (SORNA) and Intrastate Violations of the Registration Requirement

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It Is Valid to Apply the Federal Sex Offender Registration and Notification Act (SORNA) to Intrastate Sex Offender Violators

In *United States v. Kebodeaux*, 634 F.3d 293 (5th Cir. 2011), the Fifth Circuit Court of Appeals upheld the conviction and sentencing of a federally adjudged sex offender for moving within the state of Texas in violation of the registration requirements of the federal Sex Offender Registration and Notification Act (SORNA; 18 U.S.C § 2250(a) and 42 U.S.C § 16913 (2006)). The defendant appealed his conviction, arguing that the domain of Congress is to regulate interstate commerce, not intrastate activities.

Facts of the Case

In 1999, Anthony Kebodeaux, a 21-year-old member of the United States Air Force, was convicted under article 120 of the Uniform Code of Military Justice of carnal knowledge with a child (sex with a 15-year-old girl), sentenced to three months of confinement, and given a bad-conduct discharge.

In 2006, Congress passed SORNA with § 16913(a) requiring a sex offender to "register and keep the registration current at any jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student" and § 16913(c) requiring that the registration be updated no later than three days after a change in status. The Act is also known as the Adam Walsh Child Protection and Safety Act.

On August 8, 2007, Mr. Kebodeaux registered as a sex offender in El Paso, Texas, in compliance with SORNA. On January 24, 2008, El Paso police were unable to locate Mr. Kebodeaux at the address he had provided. On March 12, 2008, Mr. Kebodeaux was found in San Antonio, Texas, and arrested. On April 2, 2008, a federal grand jury indicted Mr. Kebodeaux on one count of violating SORNA 18 USC § 2250(a).

The Federal Government charged that Mr. Kebodeaux, a federal sex offender by reason of his conviction under the Uniform Code of Military Justice, had violated SORNA § 2250(a)(2)(A) when he moved intrastate and did not update his registration. He was convicted and sentenced to 12 months and one day in prison with a five-year term of supervised release. Mr. Kebodeaux's appeal focused exclusively on the constitutionality of SORNA § 2250(a)(2)(A) regarding his conviction for failing to update his registration after an intrastate relocation, asserting that this section of SORNA was an invalid attempt by Congress to regulate intrastate activities.

Ruling and Reasoning

The court of appeals ruled that Mr. Kebodeaux's argument was without merit because § 2250(a)(2)(A) is an integral part of SORNA, rather than a stand-alone provision, and upheld his conviction. SORNA gave the states primary responsibility for maintaining the SORNA requirement that sex offenders update their registration after an intrastate move. Failure to register properly remained a federal offense enforced by the federal government. Had Congress not criminalized federal sex offenders' nonregistration after an intrastate relocation, there would be no deterrence to their undocumented intrastate movements.

In *Carr v. United States*, 130 S.Ct. 2229 (2010), the U.S. Supreme Court explained that SORNA was passed to address the deficiencies in prior laws that permitted sex offenders to avoid the sex offender registration system. The Court said that SORNA's sections work together to further the joint state-federal goals of comprehensive identification and registration of all state and federal sex offenders and punishing those who do not update their registrations.

Mr. Kebodeaux claimed that there was no federal authority over his intrastate movement and registration because the federal government has jurisdiction only in interstate commerce. The court of appeals

noted that the Necessary and Proper Clause provides Congress the authority to enact "comprehensive legislation to regulate the interstate market," even when that "regulation ensnares some purely intrastate activity" (*Kebodeaux*, p 296, quoting *Gonzales v. Raich*). In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Supreme Court held that the Necessary and Proper Clause empowers Congress to regulate an intrastate activity if the interstate regulatory scheme would be undercut without the regulation of the intrastate activity.

Discussion

The road to SORNA, enacted in 2006, begins in the early 1990s when states began to pass sex offender registration laws. By 1993, approximately 24 states had passed sex offender registration laws, which became known as Megan's laws (see *Smith v. Doe*, 538 U.S. 84, p 89 (2003); 139 Cong. Rec. 31,251 (1993) (statement of Rep. Ramstad)).

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), Pub. L. No. 103-322, § 170101, 108 Stat. 2038 (42 U.S.C. § 14071) encouraging states, as a condition of receiving federal funding, to adopt sex offender registration laws with minimum standards.

In 1996, Congress took further steps to strengthen the national effort to ensure registration of sex offenders by directing the FBI to create a national sex offender database requiring lifetime registration for certain offenders and passing the Pam Lychner Sexual Offender Tracking and Identification Act of 1996 (42 U.S.C. § 14072), which made sex offenders who failed to register subject to penalties of up to 1 year in prison (for the first offense) and up to 10 years (for a second or subsequent offense).

In 2005, Congress was concerned about loopholes and deficiencies in the various registration and notification statutes around the country, estimating that about 100,000 sex offenders were missing as a result of moving between states. On July 27, 2006, Congress responded to these concerns by enacting the Sex Offender Registration and Notification Act (SORNA) which defined federal sex offenders, discussed their registration requirements and made lack of proper registration a federal crime. Congress delegated to the Attorney General the power to determine who would be required to register under SORNA.

In February 2007, the Attorney General specified that "the requirements of SORNA apply to all sex offenders, including sex offenders convicted of the offense for which registration is required before the enactment of that Act" (28 C.F.R. § 72.3). In the preamble to the rule, the Attorney General explained that "considered facially, SORNA requires all sex offenders who were convicted of sex offenses in its registration categories to register in relevant jurisdictions, with no exception for sex offenders whose convictions predate the enactment of SORNA" (72 Fed. Reg., at 8894, 8896). The interim rule, however, served the purpose of "confirming SORNA's applicability" to "sex offenders with predicate convictions predating SORNA." (72 Fed. Reg. at 8896).

SORNA did not violate the sex offender's *ex post facto* rights because it was not designed to punish sex offenders for the crimes that they committed and for which they had already served their punishment. SORNA was enacted to criminalize the failure to meet a civil standard (i.e., the requirement for certain sex offenders to register).

SORNA did not delegate to the states the responsibility of prosecuting federal sex offenders for failing to update their registration after in-state address changes. SORNA makes this a federal offense under § 2250(a)(2)(A), to be enforced by the federal government.

Mr. Kebodeaux argued that the Constitution does not permit Congress to regulate intrastate activities. The court of appeals wrote that the Necessary and Proper Clause, sometimes called the "elastic clause," allows Congress "to make all laws which shall be necessary and proper for carrying into execution the [enumerated] powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof" (U.S. Const. art. I, § 8, cl 18). It grants Congress the powers that are implied in the Constitution, but that are not explicitly stated. As such, it permits regulation of intrastate activities when the regulation of the intrastate activity is rationally related to the original goals of SORNA.

The court of appeals referenced the *United States. v. Comstock*, 130 S. Ct. 1949 (2010) decision, in which the Supreme Court upheld a federal civil commitment statute that "authorizes the Department of Justice to detain a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released" (18 U.S.C § 4248). The

Court said that the Necessary and Proper Clause was reasonably adapted to effectuating an enumerated power of the U.S. Constitution.

Using a rationale that echoed *Comstock*, the court of appeals found that the Necessary and Proper Clause permits regulation of intrastate registration requirements of federal sex offenders because it is a rational adaptation that upholds the validity of SORNA.

Competence to Proceed *Pro Se*

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Competency to Waive Counsel Should Be Based on the Traditional Standard of *Dusky v. United States* for Those Who Are Clearly Competent, Reserving the Standard of *Indiana v. Edwards* for Those Defendants Proceeding *Pro Se*, Who Are Borderline Competent

In *State v. Lane*, 707 S.E.2d 210 (N.C. 2011), the Supreme Court of North Carolina held that a defendant may waive his constitutional right to counsel if the defendant does so knowingly and voluntarily.

Facts of the Case

In May 2002, a five-year-old girl, Precious Ebony Whitfield, while at her step-grandmother's house, went with a friend, Michael, for a bicycle ride in the neighborhood. They visited Mr. Eric Glenn Lane, an adult who lived nearby, to play on his swing set and to see various pets inside his home.

The children left Mr. Lane's house and returned to Michael's home. Several hours later, Precious left to return to her step-grandmother's home. When Precious did not return home, the family filed a report with the police. A police search commenced that included, over a period of three days, interviewing Mr. Lane on four separate occasions. During each of these interviews, Mr. Lane denied any contact with Precious after the children's initial visit to his home. During the fifth interview, Mr. Lane ultimately confessed to murdering Precious.

Mr. Lane revealed that he had been drinking beer all afternoon when Precious and Michael first visited him. Precious then returned without Michael to Mr. Lane's home to look at his pets. They began playing on the floor, which included Mr. Lane's tickling Precious. The next recollection Mr. Lane reported was waking up on top of Precious with his underpants down and finding Precious with her shorts down. Believing that she was dead, he placed her body in a trash bag, wrapped the bag with duct tape, covered it with a tarp, and then carried it on his scooter to a river where he placed it at the water's edge.

In March 2004, before the start of Mr. Lane's capital trial, there was a motion by his defense counsel to assess his competency to stand trial. Mr. Lane was subsequently sent to Dorothea Dix Hospital for three months and was found competent to stand trial. In October 2004, shortly before the trial was to begin, Mr. Lane's counsel indicated that he was planning to use a "mental retardation" defense. At approximately the same time, Mr. Lane sent a letter to the trial judge expressing his unhappiness with his attorneys and his desire to proceed *pro se*; a week later, Mr. Lane changed his mind about proceeding *pro se*. Because of the judge's concern regarding Mr. Lane's competence, he ordered Mr. Lane to return to Dorothea Dix Hospital for a second evaluation. On October 13, 2004, following the second evaluation, the court again found Mr. Lane competent to stand trial.

In November 2004, Mr. Lane once again informed the judge that he wished to proceed *pro se*. As a result of this request, the judge had Mr. Lane return to Dorothea Dix Hospital for a third competency evaluation. During his *pro se* competency hearing, expert witnesses differed in their opinion of Mr. Lane's competence to proceed *pro se*. One expert witness (Dr. Robert Rollins) found Mr. Lane competent to proceed *pro se.* He noted that even if "it was questionable that [defendant] is acting with a reasonable degree of rational understanding" and the decision to proceed *pro se* was not "reasonable or rational," due to Mr. Lane's "understanding and appreciating the consequences of the decision, comprehending the nature of the charges and proceedings and range of permissible punishments, in my opinion he's competent" (*Lane*, p 221). The other expert (Dr. Claudia Coleman) opined that Mr. Lane was incompetent to proceed *pro se.* It was noted that she had limited contact with him during the evaluation. The judge