

No. 10-6549

IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER 2010 TERM

BILLY JOE REYNOLDS,  
Petitioner

v.

UNITED STATES OF AMERICA,  
Respondent

ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

**PETITIONER'S REPLY MEMORANDUM**

LISA B. FREELAND  
Federal Public Defender

CANDACE CAIN  
Assistant Federal Public Defender  
Counsel for Petitioner,  
Billy Joe Reynolds

1500 Liberty Center  
1001 Liberty Avenue  
Pittsburgh, Pennsylvania 15222  
412-644-6565

**TABLE OF CONTENTS**

Table of Authorities . . . . . ii

Statutory Provisions Involved (Pertinent Parts):

Administrative Procedures Act (APA) . . . . . 1

Sex Offender Registration  
and Notification Act (SORNA) . . . . . 2

SORNA's Criminal Provision at 18 U.S.C. § 2250 . . . . . 4

Reply to Solicitor General's Argument:

1. Carr v. United States, \_\_ U.S. \_\_, 130 S.Ct. 2229 (2010) and the text of SORNA Contradict the Government's Argument That the Interim Rule did not Apply to Mr. Reynolds Because His Registration as a Sex Offender Pursuant to a State's System of Registration, Before Enactment of SORNA, Constitutes "Initial Registration" Under SORNA . . . . . 5

2. Contrary to The Government's Claim That This Case Presents an Unimportant Issue, the Question of Whether the Interim Rule is Valid Affects Every Person Charged with Violating SORNA Before August 1, 2008 Who Was Convicted of a Sex Offense Prior to July 27, 2006 as well as Others, Which Warrants this Court's Review . . . . . 6

3. The Government's Insistence that SORNA Applies "of Its Own Force" to All Sex Offenders, No Matter When Convicted, is Not Supported by the Text of the Statute or Logic . . . . . 8

Conclusion . . . . . 10

Certificate of Service . . . . . 11

**TABLE OF AUTHORITIES**

**CASES:**

Carr v. United States	
___ U.S. ___, 130 S.Ct. 2229 (2010)	5,7,8
United States v. Cain	
583 F.3d 408 (6th Cir. 2010)	7
United States v. Utesch	
596 F.3d 302 (6th Cir. 2010)	7,9

**STATUTES:**

18 U.S.C. § 2250(a)	5
42 U.S.C. § 16901	5,6
42 U.S.C. § 16913(b)	5,6
42 U.S.C. § 16913(d)	5,6,7,9

**RULE:**

28 CFR § 72.3 (Interim Rule)	5,6,7,8,9
------------------------------	-----------

**MISCELLANEOUS:**

Title 42, Chapter 151, Subchapter I of the United States Code	9
--	---

**STATUTORY PROVISIONS INVOLVED**

**Administrative Procedures Act (APA), in Pertinent Part:**

5 U.S.C. § 553. Rule making

\* \* \*

- (b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include -
- (1) a statement of the time, place, and nature of the public rule making proceedings;
  - (2) reference to the legal authority under which the rule is proposed; and
  - (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply -

\* \* \*

- (B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

\* \* \*

- (d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except -

\* \* \*

- (3) as otherwise provided by the agency for good cause found and published with the rule.

5 U.S.C. §§ 553(b)(3)(B) and (d)(3).

**Sex Offender Registration and Notification Act (SORNA), in  
Pertinent Part:**

CHAPTER I - CHILD PROTECTION AND SAFETY

SUBCHAPTER I - SEX OFFENDER REGISTRATION AND NOTIFICATION

\* \* \*

Part A - Sex Offender Registration and Notification

\* \* \*

42 U.S.C. § 16913. Registry requirements for sex offenders

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration

The sex offender shall initially register -

- (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or
- (2) not later than 3 business dates after being sentence for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b) of this section

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

42 U.S.C. §§ 16913(a)-(e).

**Criminal Provision of the Sex Offender Registration and Notification Act (SORNA), in Pertinent Part:**

18 U.S.C. § 2250. Failure to register

(a) In general.--Whoever--

(1) is required to register under the Sex Offender Registration and Notification Act;

(2) (A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

(b) Affirmative defense.--In a prosecution for a violation under subsection (a), it is an affirmative defense that--

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

\* \* \*

18 U.S.C.A. § 2250.

**REPLY TO SOLICITOR GENERAL'S ARGUMENT**

1. **Carr v. United States, \_\_ U.S. \_\_, 130 S.Ct. 2229 (2010) and the text of SORNA Contradict the Government's Argument That the Interim Rule did not Apply to Mr. Reynolds Because His Registration as a Sex Offender Pursuant to a State's System of Registration, Before Enactment of SORNA, Constitutes "Initial Registration" Under SORNA.**

The Solicitor General assumes in its brief in opposition, without citation to any authority, that registration under a particular state's registration law satisfies the "initial registration" requirement under the federal Sex Offender Registration and Notification Act (SORNA). Government Brief, pages 2-3. See 42 U.S.A. §§ 16913(b) and (d). The SORNA statute itself does not define "initial registration," and, in particular, does not equate registration as a sex offender within a state's registration system with "initial registration" under SORNA. See 42 U.S.C. § 16901 et seq. Yet, the government's argument that Mr. Reynolds has no standing under SORNA with respect to the Attorney General's Interim Rule depends upon this unsupported assumption. See Government Brief, pages 2-4, 6-8; Petition Appendix 1a, page 3.

To the contrary, as this Court recognized in Carr v. United States, \_\_ U.S. \_\_, 130 S.Ct. 2229 (2010), "[b]y its terms, the first element of [SORNA's criminal provision at 18 U.S.C.] § 2250(a) can only be satisfied when a person 'is required to register **under the Sex Offender Registration and Notification**



**Act.’”** 130 S.Ct. at 2235 (emphasis in original). The record below shows that Mr. Reynolds registered as a sex offender pursuant to the requirements of Missouri’s law in 2005. Government Brief in Opposition, page 4; App. 60.<sup>1</sup> However, SORNA was not enacted until July 27, 2006. 42 U.S.C. § 16901. Therefore, Mr. Reynolds could not have initially registered “under SORNA” because he first registered after his release from state prison, which was at least a year before SORNA’s enactment. 42 U.S.C. § 16913(b)(1). See 130 S.Ct. at 2236.

Mr. Reynolds has standing to contest the Attorney General’s Interim Rule because he is a sex offender convicted before July 27, 2006 who could not initially register under SORNA. See 42 U.S.C. § 16913(d). For that reason alone certiorari should be granted.

**2. Contrary to The Government’s Claim That This Case Presents an Unimportant Issue, the Question of Whether the Interim Rule is Valid Affects Every Person Charged with Violating SORNA Before August 1, 2008 Who Was Convicted of a Sex Offense Prior to July 27, 2006 as well as Others, Which Warrants this Court’s Review.**

The Solicitor General contends that this Court should deny the petition because the question whether the Attorney General’s Interim Rule (28 CFR § 72.3) is valid “is narrow, transitory,

---

<sup>1</sup> The Appendix filed in the United States Court of Appeals for the Third Circuit is cited as “App.” followed by the page number. The presentence report is cited as “PSR” followed by the paragraph or page number.

and of diminishing importance.” Government Brief, page 14. As held by the United States Court of Appeals for the Sixth Circuit in two recent decisions, the Interim Rule was not properly promulgated, is invalid, and cannot support a prosecution. See United States v. Cain, 583 F.3d 408, 419 (6th Cir. 2010) and United States v. Utesch, 596 F.3d 302, 310 (6th Cir. 2010).<sup>2</sup> The government did not offer any accounting for how many people would be affected by a ruling in Mr. Reynolds’ favor, but they appear to acknowledge that it is not likely to open a floodgate. Government’s Brief, page 14.

Nonetheless, the issue of the Interim Rule’s validity is important to Mr. Reynolds and untold others. As noted in Cain, the text of 42 U.S.C. § 16913(d) and the authority of the Attorney General to make rules, also apply to “offenders convicted after SORNA’s full implementation who are nonetheless somehow unable to comply with its initial registration requirements,” which expands the number of individuals affected by the Attorney General’s rules. See 583 F.3d at 415.

As noted by this Court in Carr, the validity of the Attorney General’s Interim Rule has split the circuits. See

---

<sup>2</sup> The government did not seek certiorari from this Court in either Cain or Utesch. If the question of validity of the Interim Rule is to be reviewed, it will likely be when a person such as Mr. Reynolds seeks redress from this Court. Mr. Reynolds’ case is indistinguishable from that in Utesch where the Sixth Circuit held that “the interim rule did not make SORNA effective against Utesch or any other defendants convicted before SORNA’s enactment.” 596 F.3d at 310.

United States v. Carr, \_\_ U.S. \_\_, 130 S.Ct. 2234 n.2 (2010).

The government claims Mr. Reynolds' travel in September and October 2007, after the Interim Rule was issued, means that his case is not implicated by the circuit split. Government Brief, page 8. However, just a few pages later the government acknowledges that the issue of the validity of the Interim Rule affects people who violated SORNA as recently as August 1, 2008, long after the Interim Rule issued on February 28, 2007. Government's Brief, page 14. Therefore, Mr. Reynolds' case is well within the time frame of those affected by the circuit split he asks this Court to resolve.

**3. The Government's Insistence that SORNA Applies "of Its Own Force" to All Sex Offenders, No Matter When Convicted, is Not Supported by the Text of the Statute or Logic.**

The government characterizes SORNA as a statute that applies to all sex offenders, no matter when they were convicted, on the date it was enacted, of "its own force," and that the Interim Rule merely confirmed its application. See Government's Brief, pages 7, 8, 9, 10. However, the government's argument overlooks the fact that if SORNA automatically applied to all sex offenders on the date it was enacted, Congress would have had no reason to enact a provision that delegated authority to the Attorney General "to specify the applicability of the requirements of [SORNA] to sex offenders

convicted before July 27, 2006." See 42 U.S.C. § 16913(d).

The language in Section 16913(d) is obvious: "The Attorney General shall have the authority to specify the applicability of the requirements of **this subchapter** to sex offenders convicted before July 27, 2006." 42 U.S.C. § 16913(d) (emphasis added). The words "this subchapter" indisputably refer to Title 42, Chapter 151, Subchapter I of the United States Code. See pages 3 and 4 herein.

Therefore, contrary to the government's argument, SORNA did not apply of its own force, and Congress did not intend for it to apply of its own force. Instead, Congress delegated that task to the Attorney General, who improperly promulgated the Interim Rule. Furthermore, as stated in Utesch, "there was no properly promulgated regulation in place applying SORNA to [Mr. Reynolds] retroactively." See United States v. Utesch, 596 F.3d 302, 311 (6th Cir. 2010).<sup>3</sup> This Court should grant certiorari, vacate Mr. Reynolds' judgment and remand or accept his case for review.

---

<sup>3</sup> The defendant in Utesch and Mr. Reynolds were indicted in November 2007. See App. 20. The Utesch court held the final SORNA guidelines were not enacted until August 1, 2008. See United States v. Utesch, 596 F.3d 302, 311 (6th Cir. 2010).

**CONCLUSION**

For all of the foregoing reasons, and those stated in his petition for writ of certiorari, Petitioner Billy Joe Reynolds, respectfully requests that this Court grant the petition for writ of certiorari, and accept this case for review. In the alternative, Mr. Reynolds requests that his petition be granted, his sentence vacated and his case remanded.

Respectfully submitted,

---

CANDACE CAIN  
Assistant Federal Public Defender  
Counsel for Petitioner,  
Billy Joe Reynolds

Date: December 1, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Petitioner's Reply Memorandum was sent first-class United States Mail this 1st day of December, 2010, to the following:

Marcia M. Waldron, Clerk  
United States Court of Appeals  
for the Third Circuit  
21400 United States Courthouse  
Independence Mall West  
601 Market Street  
Philadelphia, Pennsylvania 19106-1790

Solicitor General of the United States  
Room 513  
United States Department of Justice  
10th and Constitution Avenues  
Washington, D.C. 20530

Donovan Cocas  
Assistant United States Attorney  
4000 United States Courthouse  
Pittsburgh, Pennsylvania 15219

Billy Joe Reynolds  
14819 South 980 West  
Goodlin, Indiana 47948

---

CANDACE CAIN  
Assistant Federal Public Defender  
Counsel for Petitioner,  
Billy Joe Reynolds