ALAN WILSON
ATTORNEY GENERAL

July 7, 2011

Susan O. Porter, Esquire
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South Carolina Law Enforcement Division
P.O. Box 21398
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Dear Ms. Porter:

In a letter to this office, you reference that the South Carolina Law Enforcement Division ("SLED") is working to become compliant with the Federal Sex Offender Registration and Notification Act ("SORNA"). You explain that one of the requirements of SORNA is the classification of certain sex offenders into "Tier" categories, and you request assistance on the classification of certain offenses.

Law/Analysis

SORNA, codified at 42 U.S.C. §§16901 *et seq.*, was enacted in Title I of the Adam Walsh Child Protection and Safety Act, which was passed by Congress in 2006. SORNA establishes a national sex offender registry in order to "protect the public from sex offenders and offenders against children." §16901. SORNA requires states to adopt its standards for sex offender registration and notification, and to conform their preexisting sex offender registries to statutory requirements. SORNA specifies when a sex offender must initially register, and sets forth the sex offender's continuing obligation to keep the registration current. §§16912 - 16913. SORNA prescribes different registration requirements based on a released person's "Tier," or level of offense for which registration is required. A sex offender's classification determines the number of years the offender must remain registered after conviction and the frequency with which the offender's information is verified. §16915 provides that the full registration period is fifteen years for a Tier I sex offender; twenty-five years for a Tier II offender; and life for a Tier III offender. §16916 requires a sex offender to periodically verify the information about him maintained by the Registry. The verification is required annually if the offender is classified as a Tier I sex offender, every six months if a Tier II offender, or every three months if a Tier III offender. The consequences of failing to comply with SORNA's registration requirements are significant. A sex offender may be imprisoned for up to ten years for a knowing failure to comply with SORNA's requirements, and an individual convicted of a crime of violence after failing to comply with the registration requirements is subject to a mandatory minimum five years term of imprisonment. §2250(a), (c).

Section 16911 of SORNA provides the following definitions relevant to your question:

(1) Sex offender

The term "sex offender" means an individual who was convicted of a sex offense.

(2) Tier I sex offender

The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender

The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and --

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of Title 18);

(ii) coercion and enticement (as described in section 2422(b) of Title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of Title 18;

(iv) abusive sexual contact (as described in section 2244 of Title 18);

(B) involves --

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and –

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

(5) Amie Zyla expansion of sex offense definition

(A) Generally

Except as limited by subparagraph (B) or (C), the term "sex offense" means --

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv). . . .

(C) Offenses involving consensual sexual conduct

An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

(6) Criminal offense

The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators

The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of Title 18.

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

Under 18 U.S.C. §2241, "aggravated sexual abuse" is defined as follows:

(a) By force or threat. -- Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly causes another person to engage in a sexual act --

(1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so . . .

(b) By other means.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly --

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby --

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person

Section 2242 of Title 18 provides:

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly --

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is --

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so . . .

Section 2244 of Title 18 provides:

(a) Sexual conduct in circumstances where sexual acts are punished by this chapter. -- Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in

custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual contact with or by another person, if so to do would violate --

(1) subsection (a) or (b) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(2) section 2242 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both;

(3) subsection (a) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both;

(4) subsection (b) of section 2243 of this title had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than two years, or both; or

(5) subsection (c) of section 2241 of this title had the sexual contact been a sexual act, shall be fined under this title and imprisoned for any term of years or for life.

(b) In other circumstances. -- Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than two years, or both.

(c) Offenses involving young children.--If the sexual contact that violates this section (other than subsection (a)(5)) is with an individual who has not attained the age of 12 years, the maximum term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section

Finally, §2246 of Title 18 provides the following definitions:

. . . (2) the term "sexual act" means --

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however, slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
>
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;
>
> (3) the term "sexual contact" means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;
>
> (4) the term "serious bodily injury" means bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty; . . .

In an opinion dated May 30, 2008, we provided a comprehensive list of applicable sex offenses in South Carolina and classified them as either Tier II or Tier III federal offenses. Specifically, you ask this office to advise SLED regarding the additional South Carolina offenses listed below. Based upon our reading of SORNA and South Carolina law, and in light of our prior opinion, we advise as follows:

Spousal sexual battery

S.C. Code Ann. §16-3-615 (A) defines the offense of spousal sexual battery as follows:

> [s]exual battery, as defined in Section 16-3-651(h), when accomplished through use of aggravated force, defined as the use or the threat of use of a weapon or the use or threat of use of physical force or physical violence of a high and aggravated nature, by one spouse against the other spouse if they are living together, constitutes the felony of spousal sexual battery and, upon conviction, a person must be imprisoned not more than ten years.

A conviction under §16-3-615 requires a sexual battery as defined by §16-3-651 (h),[1] where the spouses are living together, and is accomplished through the use of aggravated force, as defined therein. This aggravated sexual abuse would classify as a Tier III offense stated above. See §16-3-652 (1) (a) ["A

[1]Section 16-3-651 (h) defines "sexual battery" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes."

person is guilty of criminal sexual conduct in the first degree if the actor engages in sexual battery with the victim and . . . the actor uses aggravated force to accomplish sexual battery"];[2] §16-3-653 (1) ["A person is guilty of criminal sexual conduct in the second degree if the actor uses aggravated coercion to accomplish sexual battery"].[3]

Criminal sexual conduct: where victim is spouse

Pursuant to §16-3-658:

> [a] person cannot be guilty of criminal sexual conduct under Sections 16-3-651 through 16-3-659.1 if the victim is the legal spouse unless the couple is living apart and the offending spouse's conduct constitutes criminal sexual conduct in the first degree or second degree as defined by Sections 16-3-652 and 16-3-653.

A conviction pursuant to this provision, where the victim is the legal spouse but the couple is living apart, and the offending spouse's conduct constitutes either first or second degree criminal sexual conduct as defined by §§16-3-652 and 653, which are Tier III offenses, would also classify as a Tier III offense stated above.

Incest, where victim is under 16 years of age

Section 16-15-20 provides:

> Any persons who shall have carnal intercourse with each other within the following degrees of relationship, to wit:
>
> (1) A man with his mother, grandmother, daughter, granddaughter, stepmother, sister, grandfather's wife, son's wife, grandson's wife, wife's mother, wife's grandmother, wife's daughter, wife's granddaughter, brother's daughter, sister's daughter, father's sister or mother's sister; or
>
> (2) A woman with her father, grandfather, son, grandson, stepfather, brother, grandmother's husband, daughter's husband, granddaughter's husband, husband's father, husband's grandfather, husband's son,

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[2]Section 16-3-651 (c) states that "aggravated force" means "that the actor uses physical force or physical violence of a high and aggravated nature to overcome the victim or includes the threat of the use of a deadly weapon].

[3]Section 16-3-651 (b) states that "aggravated coercion" means "that the actor threatens to use force or violence of a high and aggravated nature to overcome the victim or another person, if the victim reasonably believes that the actor has the present ability to carry out the threat, or threatens to retaliate in the future by the infliction of physical harm, kidnapping or extortion, under circumstances of aggravation, against the victim or any other person."

> husband's grandson, brother's son, sister's son, father's brother or mother's brother; . . .
>
> Shall be guilty of incest . . .

The gravamen of the crime of incest is intercourse between parties within the degree of relationship set out in the statute. William S. McAninch and W. Gaston Fairey, The Criminal Law of South Carolina 439 (3rd ed. 1996); see State v. Jarrell, 350 S.C. 90, 564 S.E.2d 362, 370 (Ct. App. 2002) [stating that incest is "sexual abuse relating to kinship between abuser and victim"].

In an opinion dated February 17, 1999, we addressed the types of conduct which are included in the term "sexual intercourse" in context of the application of §44-23-1150, an offense discussed further below, and prior to the 2001 amendments to that statute. We stated that:

> [a] number of courts have construed the term "sexual intercourse" broadly to include a wide variety of sexual activity. For example, in Commonwealth v. Bucalis, 6 Mass. App. Ct. 59, 373 N.E.2d 221 (1978), the Court held that the term "sexual intercourse" encompassed the act of fellatio. The Court noted that the meaning of the language of a statute "may be measured by common understanding and practice." Further, the Court found that the "... term 'sexual intercourse' has commonly been employed to describe a variety of sexual conduct, including the act of fellatio." Id. at 226.
>
> The case of Commonwealth v. Fouse, 417 Pa. Super. 534, 512 A.2d 1067 (1992) is particularly instructive. There, for purposes of the incest statute, the term "sexual intercourse," which was not defined in the statute itself, was broadly construed to include oral and anal intercourse between father and son. The Court rejected the argument by the defendant that the statute was unconstitutionally vague inasmuch as it did not forewarn the defendant hat his conduct was included therein.
>
> Fouse adopted two separate arguments to support conviction. First, another statute did define "sexual intercourse" to include oral and anal sex and the Court concluded "that the definition of 'sexual intercourse' for purposes of the sexual offenses is equally applicable to the crime of incest." Secondly, the appellate court agreed with the trial court that a broad definition was the one which was commonly understood and the one which best furthered the purpose of the incest statute. Adopting the trial court's reasoning in this regard, the Court quoted from the trial court opinion as follows:
>
>> [f]irst of all, the definition of sexual intercourse found in Webster's Ninth New Collegiate Dictionary, (1987), includes 'intercourse involving genital contact between individuals other than the penetration of the vagina by the penis.' Furthermore, as has been previously stated, the purposes of the statute prohibiting incest, as construed by the Superior Court, are not only genetic integrity but also to protect children from

> parental sexual abuse and to promote the family unit. Therefore the Court should give to a statute a construction that would promote all of the purposes of the statute. Such a construction requires that this Court find that the crime of incest, as defined in Chapter 43 of the Crimes Code, includes anal and oral intercourse between a father and his sons.

612 A.2d at 1069.

We concluded in the opinion:

> it is [our]opinion that the term "sexual intercourse" for purposes of §44-23-1150, would be interpreted in light of its remedial purpose, to protect mental patients and prisoners, and thus would not be limited to penile-vaginal intercourse only, but would be broadly construed to encompass fellatio, cunnilingus, anal intercourse, etc.

In the case of a conviction for incest involving intercourse with a victim under the age of 16, this would classify as a Tier III offense stated above.[4] See §16-3-655 (A) ["A person is guilty of criminal sexual conduct with a minor in the first degree if (1) the actor engages in sexual battery with a victim who is less than eleven years of age; or (2) the actor engages in sexual battery with a victim who is less than sixteen years of age and the actor has previously been convicted of, pled guilty or *nolo contendere* to, or adjudicated delinquent for an offense listed in Section 23-3-430 (C) or has been ordered to be included in the sex offender registry pursuant to Section 23-3-430 (D)"]; §16-3-655 (B) (2) ["A person is guilty of criminal sexual conduct with a minor in the second degree if (1) the actor engages in sexual battery with a victim who is fourteen years of age or less but who is at least eleven years of age; or (2) the actor engages in sexual battery with a victim who is at least fourteen years of age but who is less than sixteen years of age and the actor is in a position of familial, custodial, or official authority to coerce the victim to submit . . ."].

Sexual misconduct with an inmate, patient, or offender

Section 44-23-1150 provides as follows:

> (A) As used in this section:
>
> (1) "Actor" means an employee, volunteer, agent, or contractor of a public entity that has statutory or contractual responsibility for inmates or patients confined in a prison, jail, or mental health facility. Actor includes individuals who supervise inmate labor details outside of an institution or who have supervisory responsibility for offenders on parole, probation, or other community supervision programs.

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[4]Any "sexual act" or, for that matter, "sexual contact," as defined by 18 U.S.C. §2246, against a minor under 13 years of age would classify as a Tier III offense.

> (2) "Victim" means an inmate or patient who is confined in or lawfully or unlawfully absent from a prison, jail, or mental health facility, or who is an offender on parole, probation, or other community supervision programs. A victim is not capable of providing consent for sexual intercourse or sexual contact with an actor.
>
> (B) An actor is guilty of sexual misconduct when the actor, knowing that the victim is an inmate, offender, or patient voluntarily engages with the victim in an act of sexual intercourse, whether vaginal, oral, or anal, or other sexual contact for the purpose of sexual gratification.
>
> (C)(1) When the sexual misconduct involves an act of sexual intercourse, whether vaginal, oral, or anal, the actor is guilty of the felony of sexual misconduct, first degree and, upon conviction, must be imprisoned for not more than ten years.
>
> (2) When the sexual misconduct does not involve sexual intercourse but involves other sexual contact which is engaged in for sexual gratification, the actor is guilty of the felony of sexual misconduct, second degree and, upon conviction, must be imprisoned for not more than five years. The term sexual contact, as used in this subsection, refers to an intrusion of any part of a person's body or of any object into the "intimate parts", as defined in Section 16-3-651(d),[5] of another person's body, or to the fondling of the "intimate parts" of another person's body, which is done in a manner not required by professional duties, but instead is done to demonstrate affection, sexually stimulate that person or another person, or harass that person. . . .

Any conviction under this provision for misconduct involving sexual intercourse, or a "sexual act" as defined by 18 U.S.C. §2246, would classify as a Tier III offense stated above. A conviction under this provision for misconduct involving sexual contact where there is "an intrusion of any part of a person's body or of any object into the 'intimate parts' " as defined therein, or a "sexual act" as defined by 18 U.S.C. §2246, would classify as a Tier III offense. A conviction under this provision for misconduct involving sexual contact as defined therein, or "sexual contact" as defined by 18 U.S.C. §2246, and if the victim is under the age of 13, would classify as a Tier III offense.[6] A conviction under this provision for misconduct involving sexual contact where there is "fondling of the 'intimate parts' of another person's body" as defined therein, and a "sexual act" as defined by 18 U.S.C. §2246 , *i.e.*, naked genitalia, and if the victim is 13 to 15 years old, would classify as a Tier III offense. A conviction under this provision for misconduct involving sexual contact where there is "fondling of the 'intimate parts' of another person's body" as defined therein, or "sexual contact" as defined by 18 U.S.C. §2246, and the victim is 13 to 15 years old and the sexual contact is not of the naked genitalia, or the victim is 15 to 17

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[5]"Intimate parts" is defined in §16-3-651 (d) to include "the primary genital area, anus, groin, inner thighs, or buttocks of a male or female human being and the breasts of a female human being."

[6]See footnote 4, supra.

years old, would classify, at a minimum, as a Tier II offense. A conviction under this provision for misconduct involving sexual contact where there is "fondling of the 'intimate parts' of another person's body" as defined therein, or "sexual contact" as defined by 18 U.S.C. §2246, and the victim is an adult, would classify as a Tier II offense.

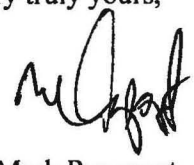
Conclusion

For purposes of classifying certain South Carolina sex offenses pursuant to SORNA requirements, we conclude the following would classify as Tier III offenses: spousal sexual battery [§16-3-615 (A)]; criminal sexual conduct, where the victim is a spouse [§16-3-658]; incest, where the victim is under 16 years of age [§16-15-20]; and sexual misconduct with an inmate, patient, or offender [§44-23-1150], depending upon the particular sexual misconduct involved and the age of the victim as set forth above.

Please be advised that this is our best effort to identify whether the above offenses are similar to the referenced federal offenses. As stated in our earlier opinion, we cannot provide an absolute answer applicable to all situations. Additionally, whether the United States Department of Justice, Office of Justice Program, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking ("SMART"), upon further review of the SLED Checklist of South Carolina offenses, will determine that SLED is in compliance with SORNA guidelines is beyond the scope of an opinion of this office.

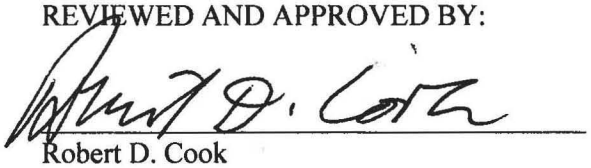
If you have any further questions, please advise.

Very truly yours,



N. Mark Rapoport
Senior Assistant Attorney General

REVIEWED AND APPROVED BY:



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