IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 14-7003

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

v.

GARY JAMES NEEL,
Defendant/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
THE HONORABLE JAMES H. PAYNE, CHIEF U.S. DISTRICT JUDGE
CASE NO. CR-12-91-JHP

BRIEF OF PLAINTIFF/APPELLEE

ORAL ARGUMENT IS NOT REQUESTED

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PRIOR OR RELATED APPEALS

There are no prior or related appeals.

STATEMENT OF JURISDICTION

Pursuant to 18 U.S.C. § 3231, the district court had subject matter jurisdiction because Defendant/Appellant's offense occurred within the Eastern District of Oklahoma. (*Indictment*, ROA at 12).[1]

Pursuant to 28 U.S.C. § 1291, courts of appeals "shall have jurisdiction of appeals from all final decisions of the district courts of the United States." Additionally, court of appeals have jurisdiction to review sentences pursuant to 18 U.S.C. § 3742. The district court sentenced Defendant/Appellant on January 10, 2014, and judgment was entered January 14, 2014. (*Minute Sheet-Sentencing*, ROA at 234; *Judgment*, ROA at 236). Defendant/Appellant filed his notice of appeal on January 28, 2014. (*Notice of Appeal*, ROA at 242). *See* Fed.R.App.P. 4(b)(1)(A) providing that notice of appeal must be filed within 14 days of the entry of judgment.

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[1] References to the record on appeal ("ROA") will be made by providing the document title followed by the page number(s) where the cited material appears in the consecutively paginated record, e.g. "*Motion*, ROA. at X"; the PSR will be cited by paragraph number, e.g. "*PSR* ¶ X"; and the transcripts of court hearings will be cited by abbreviated title and "Tr." followed by the page number, e.g. "Trial. Tr. at X".

Defendant/Appellant's Opening Brief will be referenced as "*Def. Bf.*"

Trial exhibits will be referenced as "Govt. Ex." and "Def. Ex." These trial exhibits were previously submitted to the Court pursuant to 10th Cir. R. 10.3(D)(5) in Defendant/ Appellant's Addendum of Exhibits.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Government presented sufficient evidence for the jury to find Defendant guilty beyond a reasonable doubt of failing to register or update his registration as a sex offender?

2. Whether the district court properly concluded as a matter of law that SORNA does not infringe on Tenth Amendment states' rights?

3. Whether the district court properly concluded as a matter of law that SORNA properly delegated to the Attorney General the power to decide if SORNA should apply retroactively to pre-Act offenders?

4. Whether the district court properly concluded as a matter of law that SORNA is not a violation of the ex post facto clause, and is therefore constitutional both facially and as applied to Defendant?

5. Whether the district court properly calculated Defendant's offense level, where his prior conviction for Attempted Sexual Abuse in the First Degree was punishable by more than a year in prison, making him a Tier III sex offender?

6. Whether the district court's special condition of supervised release requiring Defendant to attempt to register as a sex offender every 90 days is unconstitutionally vague?

COMBINED STATEMENT OF THE CASE AND THE FACTS

On December 4, 2012, an Eastern District of Oklahoma federal Grand Jury indicted Defendant/Appellant Gary James Neel (hereafter "Defendant") with one count of Failure to Register as a Sex Offender, in violation of 18 U.S.C. §§ 2250(a)(1), 2250(a)(2)(B) and 2250(a)(3). (*Indictment*, ROA at 12). Defendant entered a not guilty plea at his arraignment. (*Minute Sheet – Arraignment*, ROA at 13).

Defendant later moved to dismiss the charge, arguing that the Sex Offender Registration and Notification Act ("SORNA"), 42 U.S.C. §§ 16913, et seq. and its enforcement provision, 18 U.S.C. § 2250, are unconstitutional facially and as applied to him. (*Motion to Dismiss*, ROA at 23-45). The Government filed a written response. (*Response*, ROA at 67-81). Thereafter, the district court denied Defendant's motion. (*Order*, ROA at 82-84).

The Trial

The Government tried the case to a jury on March 5-6, 2013. (*Minute Sheets*- Jury Trial, ROA at 144, 147-50; Trial Tr. 1-176). The parties stipulated that "Defendant currently is and, at the time of the alleged offense, was a 'sex offender' under the Sex Offender Registration and Notification Act (Adam Walsh

Act) with a prior conviction for a 'sex offense' from the state of New York in 1998." (Trial Tr. at 22)[2] The Government then presented its witnesses.

Joyce Golding testified that in December 1998, she worked for the Oklahoma Department of Corrections as a Probation and Parole Officer on their Sex Offender Team. (Trial Tr. at 24). Both she and Defendant signed a Notice of Duty to Register for the Oklahoma Sex Offenders Act on December 11, 1998. (Id. at 25-26; Govt. Ex. 2). While she did not have a recollection of meeting with Defendant specifically, she testified that she followed the same procedure with each individual who came to register. (Trial Tr. at 26-28, 30) Her practice was to go through the notice of duty to register form paragraph by paragraph with the sex offender, reading each requirement and asking him if he had any questions. (Id. at 27-28). After she made sure the offender understood his duty to register, the sex offender would sign the form. She would then make a copy of the form for the offender to keep and would file the original in their records. (Id. at 26). One of the requirements of registration is that the sex offender must "notify the Department of Corrections in writing no later than three (3) business days before a change of address" and that if the sex offender "change[s] addresses to another state, [he] must register the new address with the Department of Corrections and with a

[2] Defendant entered into this stipulation pursuant to ***Old Chief v. United States***, 519 U.S. 172 (1997) and reserved the right to appeal his sex offender status as argued in the motion to dismiss. (*Notice of Preservation*, ROA at 132-33).

designated law enforcement agency in the new state no later than ten (10) days prior to establishing residence whether temporary or permanent." (Govt. Ex. 2 at ¶ 3).

Next, Ryann Rotert testified that she has worked for the Wagoner County Sheriff's Department in their Sex Offender Registration Unit since 2010. (Trial Tr. at 34-35). Ms. Rotert testified that the Oklahoma Department of Corrections ("DOC") maintains a state-wide sex offender registry in Oklahoma City. (Id. at 36). When sex offenders come to the Sheriff's Office to register or update their information, she processes them locally and then sends the information to the DOC to update the state-wide registry. (Id. at 36). The offender is given a copy of the completed sex offender registration paperwork for his records, a copy is retained for the Sheriff's Office's local file, and the original is sent to the state registry. (Id. at 38).

Ms. Rotert was familiar with Defendant from his coming to the Sheriff's Office to register. (Trial Tr. at 36, 38). She was personally aware of Defendant coming in on approximately ten occasions during which she either registered him personally or witnessed him register with the previous head of the Sex Offender Registration Unit. (Id. at 36-37, 44). As the records custodian for the Wagoner County Sheriff's Office, Ms. Rotert also testified to the contents of Defendant's file in the Sex Offender Registration Unit there. (Trial Tr. at 38-47; Govt. Ex. 3).

The documents in that file indicate that Defendant registered or updated his information and signed notices of his duty to register on approximately twenty different occasions. (Trial Tr. at 41; Govt. Ex. 3). Each duty to register contains a paragraph that states:

> If I move to another state, I must appear in person and register the new address with the DOC and with a designated law enforcement agency in the new state no later than ten (10) days prior to establishing residence whether temporary or permanent. If I enter another state to participate in any type of full-time or part-time employment with or without compensation for more than fourteen (14) cumulative days in any sixty day period or an aggregate period exceeding thirty (30) days within a calendar year, or enroll as a full-time or part-time student, I must register as a sex offender in that state.

(Govt. Ex. 3, ¶ 4 of each Notice of Duty to Register). More recent forms also include a requirement that "I must notify the DOC and local law enforcement agency in person no later than three (3) business days prior to abandoning or moving from the address of the previous registration." (Govt. Ex. 3 at 191). Defendant initialed each paragraph of each notice of duty to register form, including his most recent registration form. Each of those forms contained specific paragraphs setting forth his registration obligations if he moves. (Trial Tr. at 40-43; Govt. Ex. 3, generally and specifically at 191-94). Ms. Rotert recalled two occasions where Defendant notified the Wagoner County Sheriff's Office of a change of address. (Trial Tr. at 45). Defendant's most recent registration with Wagoner County was on August 31, 2012. (Trial Tr. at 46; Govt. Ex. 3 at 191-94).

Ms. Rotert testified that she learned Defendant was no longer at the address on that registration. (Trial Tr. at 46-47). However, he never advised the Wagoner County Sheriff's Office of his abandonment of that address or submitted any additional information after the August 31, 2012 registration. (Trial Tr. at 46-47, 59).

Then Joey Chapman testified that Defendant lived in a trailer behind Chapman's home in Wagoner, Oklahoma. (Trial Tr. at 60-63). Mr. Chapman and Defendant had an arrangement that rather than paying rent, Defendant would complete repairs to the trailer in exchange for Mr. Chapman's letting Defendant live there. (Id. at 65). Defendant's girlfriend, Lisa Manley, and her three children lived in the trailer with Defendant. (Id. at 62). On September 5, 2012, around 9:00 in the evening, Defendant knocked on Mr Chapman's door, handed him the keys to the trailer, and told Chapman he was moving to Houston. (Trial Tr. at 63-65). Defendant explained that he had been offered a printing job there and that the company had given him $1,000 travel advance, so they were moving immediately. (Id. at 64). When Defendant moved, he left furniture, clothing, housewares and food in the house. (Trial Tr. at 66-69). Defendant told Mr. Chapman he could keep what Defendant left in the trailer since Defendant had to leave so quickly and as payment for rent, since Defendant never completed the repairs he promised to make as part of their agreement. (Id. at 69)

Next, Terri Witt testified that she owns Beacon Printing, a commercial printing company in Denver Colorado. (Trial Tr. at 72). Defendant called Ms. Witt sometime in August 2012, inquiring about employment and telling her he was willing to move from Oklahoma if she had work available. (Id. at 73-75). She advised him to contact the Denver Indian Center Workforce Program, which places tribe members with local businesses where they can receive training that will enable them to get a job through the Department of Labor. (Id.).

On September 7, 2012, Defendant showed up at Beacon Printing in Denver. (Id. at 73-74). However, he had not yet registered with the Workforce Program, so Ms. Witt sent him there. (Id. at 75). The Workforce Program placed Defendant with Beacon Printing and he started work on September 14, 2012. (Id. at 76). At the end of the 30-day Workforce program, Defendant could have obtained a permanent position with Beacon if one were available and he were qualified or he could have been placed with another employer. (Id. at 76). Defendant indicated to Ms. Witt that he was interested in a permanent position with Beacon. (Id. at 77). Defendant did not inform Ms. Witt that he was a sex offender.[3] Ms. Witt testified that Defendant was "probably not" hirable because Colorado has a law preventing sex offenders from working on any projects for K through 12 schools and thus Beacon would lose business from some of its clients. (Id. at 78-79).

[3] Likewise, Defendant answered "No" on a job application with another potential employer when asked if he had ever been convicted of a felony. (Govt. Ex. 4 at 43-44).

While Defendant was not technically an employee of Beacon Printing, he worked there through a placement from the Denver Indian Center for a total of 17 business days from September 14, 2012 until his arrest on October 4, 2012. (Id. at 76-77, 83-84).

The next Government witness was Detective Scott Burgess of the Aurora, Colorado Police Department. He testified that he is one of three individuals who work in the Sex Offender Registration Unit. (Id at 86, 90-91). The Department has a sex offender registration hotline that either he or one of the other two detectives assigned to the unit answers. (Id. at 90). If the offender lives or works in Aurora, then the officer sets an appointment for the offender to come in. (Id. at 90-91). Detective Burgess testified that Beacon Printing is not in Aurora's jurisdiction. (Id. at 91).

According to Detective Burgess' handwritten phone log, Defendant called their hotline on September 11, 2012. (Id. at 86-87; Def. Ex. A). Detective Burgess has no specific recollection of speaking with Defendant. (Id. at 87-88). However, his call log indicates the offense as attempted sexual assault and from Oklahoma. (Id.). Under no circumstances would Detective Burgess have advised a caller not to register given this information. (Id. at 88, 97). Defendant did not register with Detective Burgess, and there is no record in the Aurora Police Department's files of him having registered with anyone else. (Id. at 93-94).

David Bourgeois, a Detective in the Denver, Colorado Police Department's Sex Offender Registration Unit, testified next. (Trial Tr. at 99). He described how sex offender information is taken locally and then entered into the Colorado statewide database and eventually the federal National Crime Information Center ("NCIC") database. (Id. at 103). The computer system used by the Denver Police Department is a live, web-based program so that updates are reflected immediately. (Id. at 106). After an offender registers with their office, the offender is given a copy of his registration paperwork as well as a separate form advising him of the due date of his next registration and a reminding him that he must report any change of address. (Id. at 109).

Detective Bourgeois testified that his office would register a sex offender if that offender lived in Denver, if he had recently moved to Denver, or if he were employed there for more than 14 days in a 30-day period. (Id. at 99-100). Detective Bourgeois confirmed that both Beacon Printing and the Super 8 Denver Motel are within his jurisdiction. (Id. at 100). A receipt from that motel indicates that Defendant had rented a room there from September 9 -22, 2012. (Id. at 100-102; Govt. Ex. 1). Moreover, Defendant listed the Super 8 address as his address on both the I-9 and W-4 forms he completed for Denver Indian Center Workforce on September 12, 2012. (Govt. Ex. 4 at 45, 48). He further certified on his "Self-Statement" to the Denver Indian Center that "we moved from out of state and are

staying in a hotel since Thursday the 6th." (Govt. Ex. 4 at 17). Detective Bourgeois testified that the Denver Police Department has no record of Defendant having registered with them as a sex offender. (Trial Tr. at 101, 105).

Defendant did not testify nor did he present any witnesses. However, at Defendant's request, the district court did take judicial notice of a September 2012 calendar. (Trial Tr. at 130, 134; Def. Ex. B). The district court denied Defendant's initial motion for judgment of acquittal (Trial Tr. at 117) as well as his renewed motion at the close of all the evidence. (Trial Tr. at 171).

The jury found Defendant guilty. (*Verdict Form*, ROA at 151; Trial Tr. at 172).

Sentencing

Thereafter, the United States Probation Office prepared a Pre-Sentence Investigation Report ("PSR"). The Probation Office determined Defendant to be a Tier III sex offender, and thus assigned a base offense level of 16 pursuant to U.S.S.G. § 2A3.5. (*PSR* at ¶12). Combined with Defendant's Category II criminal history (Id. at ¶25), this resulted in a recommended imprisonment range of 24 – 30 months. (Id. at ¶40). The district court sentenced Defendant to the bottom of that range, ordered a 5-year term of supervised release, and imposed a $100 mandatory special assessment. (*Judgment*, ROA at 236-241). The court imposed a special condition of supervision that Defendant

> shall register as a sex offender in the state in which he resides and keep such registration current in the jurisdiction in which he resides, works or attends school. If the state in which the defendant resides refuses to allow the defendant to register, the defendant shall inform the Probation Office every 90 days of his inability to register with accompanying documentation from the state registration authority.

(Id. at 239). Defendant appealed. (*Notice of Appeal*, ROA at 242).

He now challenges the sufficiency of the evidence supporting his conviction, raises numerous constitutional challenges to SORNA, contests the calculation of his base offense level and argues that the special condition of supervision requiring him to continually attempt to register as a sex offender is unconstitutionally vague.

SUMMARY OF THE ARGUMENT

Defendant challenges the sufficiency of the evidence, raises various constitutional challenges to SORNA and complains about the sentence imposed by the court below. None of these grounds merit reversal.

A review of the evidence indicates that ample proof was introduced to meet each element of the charged crime. Defendant knew he was required to inform the Oklahoma authorities that he was moving and that he was required to register in Colorado. He failed to update his registration as required. The jury here (and any other reasonable jury) could readily employ such evidence to find Defendant guilty beyond a reasonable doubt under SORNA.

Defendant's constitutional challenges have been rejected by other courts. No Tenth Amendment violation occurs because SORNA directs sex offenders, not state officers, to perform a certain action. Courts have not held that enforcing SORNA requires compelling state officers to act as its federal enforcement agents.

A vast majority of United States Courts of Appeals have concluded that SORNA does not violate the non-delegation doctrine by allowing the Attorney General to determine whether and how SORNA will be extended to those whose sex offenses or registration failures pre-date SORNA's enactment. This Court should follow suit.

This Circuit has already held that the SORNA does not violate the Ex Post Facto Clause and Defendant does not clear the hurdle posed by stare decisis to reach reconsideration of ***United States v. Lawrance***, 548 F. 3d 1329 (10th Cir. 2008) which continues to control and forecloses Defendant's argument.

As to Defendant's sentence, the district court did not abuse its discretion or apply the wrong legal standard in finding that Defendant was a Tier III offender, based upon his 1998 New York conviction for fondling a child. As a result, the district court correctly used a base offense level of 16 in calculating Defendant's sentence.

Finally, the special condition imposed on supervised release – that Defendant register or attempt to register every 90 days and provide proof of his attempts to his probation officer – was not unconstitutionally vague. A reasonable person can easily discern what must be done to avoid prison in the future.

Having failed to demonstrate any factual or legal reason by the trial court, Defendant's conviction and sentence should be affirmed.

ARGUMENT AND AUTHORITIES

"Sex offenders are a serious threat in this Nation," in large part because "the victims of sexual assault are most often juveniles" and because "convicted sex offenders . . . are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." ***McKune v. Lite***, 536 U.S. 24, 32-33 (2002) (plurality opinion); *see* ***Smith v. Doe***, 538 U.S. 84, 103 (2003) (noting "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class"). Consequently, Congress has frequently enacted legislation to encourage and assist States in tracking sex offenders' addresses and making information about sex offenders available to the public "for its own safety." ***Id.*** at 99.

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). The Wetterling Act encouraged States, as a condition of receiving federal funding, to adopt sex-offender-registration laws meeting certain minimum standards. *See* ***Smith***, 538 U.S. at 89-90. By 1996, every State and the District of Columbia had enacted a sex-offender-registration law. ***Id.*** at 90.

In 1996, Congress bolstered the minimum federal standards by adding a mandatory community notification provision to the Wetterling Act. *See* Megan's

Law, Pub. L. No. 104-145, § 2, 110 Stat. 1345 (42 U.S.C. § 14071(e)). Congress also strengthened the national effort to ensure the registration of sex offenders by directing the FBI to create a national sex-offender database, requiring lifetime registration for certain offenders, and making the failure of certain persons to register a federal crime, subject to a penalty of imprisonment of up to one year (for a first offense) or ten years (for a second or subsequent offense). *See* Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, § 2, 110 Stat. 3093 (42 U.S.C. § 14072).

In 1997, Congress expanded that federal criminal penalty for failure to register to include persons who had been convicted of federal sex offenses (including those sentenced by court martial). Department of Justice Appropriations Act, 1998 (1998 Appropriations Act), Pub. L. No. 105-119, Tit. I, § 115(a)(2)(F) and (6)(C), 111 Stat. 2463-2464 (42 U.S.C. § 14071(b)(7), 14072(i) (Supp. Ill 1997)). As further amended in 1998, the federal criminal penalty applied to any individual convicted of specified federal or military sex offenses who "knowingly fail[ed] to register in any State in which the person resides, is employed, carries on a vocation, or is a student following release from prison or sentencing to probation." Department of Justice Appropriations Act, 1999, Pub. L. No. 105-277, Div. A, § 101(b) [Tit. I, § 123(3)], 112 Stat. 2681-73 (42 U.S.C. §§ 14072(i)(3) and (4)). Later statutes continued to enhance federal registration

and notification requirements.[4]

Despite those legislative efforts, Congress grew concerned about "loopholes and deficiencies" in the existing registration and notification statutes, which resulted in an estimated 100,000 sex offenders becoming "missing" or "lost." H.R. Rep. No. 218,109th Cong., 1st Sess. Pt. 1, at 20, 26 (2005) (*House Report*). On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (42 U.S.C. § 16901 *et seq.*). SORNA was intended to make "more uniform and effective" the "patchwork" of federal and state sex-offender registration systems that were already in effect. ***Reynolds v. United States***, 132 S.Ct. 975, 978 (2012). As ***Reynolds*** explained, SORNA "repeal[ed] several earlier federal laws that also (but less effectively) sought uniformity; [set] forth comprehensive registration-system standards; [made certain] federal funding contingent on States' bringing their systems into compliance with those standards; [and required] both state and federal sex offenders to register with relevant jurisdictions (and to keep registration information current)." ***Ibid.*** SORNA also "creat[ed] federal criminal sanctions applicable to those who violate the Act's registration requirements." ***Ibid.***

SORNA requires that every "sex offender shall register, and keep the

[4] *See* PROTECT Act, Pub. L. No. 108-21, §§ 604-605, 117 Stat. 688 (requiring, *inter alia*, States to make sex-offender-registry information available on the Internet); Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601, 114 Stat. 1537 (requiring sex offenders to provide notice concerning institutions of higher education at which they work or are students).

registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. §16913(a). A "sex offender," in turn, is defined as "an individual who was convicted of" an offense that falls within the statute's defined offenses. 42 U.S.C. §§16911(1) and (5)-(7). SORNA specifies, among other things, the kinds of information that must be collected as part of registration (42 U.S.C. § 16914), the length of time that offenders must remain registered (42 U.S.C. § 16915 (2006 & Supp. V 2011)), and the frequency with which a sex offender must appear and verify registry information (42 U.S.C. § 16916). SORNA requires States to adopt the specified federal standards or risk losing certain federal funds. 42 U.S.C. §§16912, 16925.

To enforce SORNA's registration requirements, Congress made noncompliance a federal crime in certain circumstances. As relevant here, SORNA makes it a federal crime when someone who is required to register as a sex offender knowingly fails to register (or to update a registration) and that person either

> (2)(A) is a sex offender as defined for the purposes of [SORNA] 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.

18 U.S.C. § 2250(a). In ***Carr v. United States***, 130 S. Ct. 2229 (2010), this Court

held that the interstate travel referred to in Subparagraph (B) must occur after SORNA became effective, but the Court also observed, with respect to Subparagraph (A), that "it is entirely reasonable for Congress to have assigned the Federal Government a special role in ensuring compliance with SORNA's registration requirements by federal sex offenders - persons who typically would have spent time under federal criminal supervision." ***Id.*** at 2238.

Sex offenders convicted before SORNA's July 2006 enactment were not required to register under SORNA until the Attorney General exercised his delegated authority under 42 U.S.C. § 16913(d) to "validly specif[y] that the Act's registration provisions apply to them." ***Reynolds***, 132 S. Ct. at 980. On February 28, 2007, the Attorney General issued an interim rule specifying that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to [SORNA's] enactment." 72 Fed. Reg. 8897 (codified at 28 C.F.R. § 72.3). On July 2, 2008, the Attorney General promulgated final guidelines for the States and other jurisdictions on matters of SORNA's implementation. *See* 73 Fed. Reg. 38,030. Those guidelines were issued after public notice and comment and reaffirmed SORNA's applicability to all sex offenders. Id. at 38,035-38,036, 38,046, 38,063. On December 29, 2010, the *Federal Register* published an Attorney General order finalizing the interim rule, with one clarifying change in an example to avoid any

possible inconsistency with the decision in ***Carr***. *See* 75 Fed. Reg. 81,849.

With this statutory backdrop in mind, the Government turns to Defendant's arguments on appeal.

I. THE GOVERNMENT PRESENTED SUFFICIENT EVIDENCE FOR THE JURY TO FIND DEFENDANT GUILTY BEYOND A REASONABLE DOUBT OF FAILING TO REGISTER OR UPDATE HIS REGISTRATION AS A SEX OFFENDER.

A. Standard of Review

"In reviewing the sufficiency of the evidence" the Tenth Circuit "reviews the record de novo to determine whether, viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the defendant guilty of the crime beyond a reasonable doubt." ***United States v. Forster***, 549 Fed. Appx. 757, 760 (10th Cir. 2013) (unpublished) (quoting ***United States v. Irvin***, 682 F.3d 1254, 1266 (10th Cir. 2012)). This standard requires the Court to "consider[] the entire record, including both direct and circumstantial evidence, together with the reasonable inferences to be drawn from it." ***Forster***, 549 Fed. Appx. at 760 (quoting ***United States v. Mendez***, 514 F.3d 1035, 1041 (10th Cir. 2008)).

B. The Law

SORNA requires a sex offender to "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." 42 U.S.C. §16913(a). Additionally, when an offender's registration information changes, he "shall, not later than 3 business after each change of name, residence, employment, or student

status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry." Id. at §16913(c). Jurisdiction is defined as "a state." Id. at §16911(1)(A).

To sustain Defendant's conviction for failure to register under 18 U.S.C. §2250, the Government must have proven that he "(1) is required to register under SORNA, (2) travel[ed] in interstate commerce, and (3) knowingly fail[ed] to register or update registration as required by SORNA." ***United States v. Husted***, 545 F.3d 1240, 1243 (10th Cir. 2008). *See also* ***United States v. Forster***, 549 Fed. Appx. 757, 760 (10th Cir. 2013).

C. Discussion

Applying those elements to the evidence presented at trial here, Defendant entered an ***Old Chief*** stipulation that he is a sex offender required to register under SORNA. (Trial Tr. at 22). Defendant had previously challenged SORNA on numerous constitutional grounds, and he preserved the right to reassert those arguments in this appeal. (*Notice of Preservation*, ROA at 132-33). The Government will contain its argument on this proposition to the evidence before the jury. However, Defendant's constitutional challenges to the registration requirement will be addressed later in Proposition VI at p. 52-53.

As to the interstate travel element, Defendant's landlord, Joey Chapman, testified that Defendant abandoned his residence in Wagoner County, Oklahoma on the evening of September 5, 2012, advising he had a job out of state and needed

to leave quickly. (Trial Tr. at 60-69). Though Defendant left furniture and personal effects in the trailer, he told Mr. Chapman that he could keep the items. (Id. at 69). From this testimony, the jury could conclude that Defendant had no intention of returning to the Wagoner residence.

Additionally, Terri Witt testified that Defendant appeared in person at her business, Beacon Printing, in Denver, Colorado on September 7, 2012, inquiring about a job. (Id. at 73-74). After registering with the Denver Indian Center Workforce Program, Defendant was placed with Beacon and began working on September 14, 2012. (Id. at 76). Defendant worked a total of 17 days from that time until his arrest on October 4, 2012. (Id. at 76-77, 83-84). The Workforce Program was temporary; however, Defendant had expressed an interest in a permanent position with Beacon. (Id. at 77).

Ms. Witt's testimony is corroborated by documents Defendant himself completed for the Workforce Program. In a form dated and signed September 11, 2012, Defendant stated "we moved from out of state [and] are staying in a hotel since Thursday [September] 6th." (Govt. Ex. 4 at 17). Moreover, the address Defendant listed on his I-9 and W-4 forms for Denver Indian Center matches a receipt in his name showing that he rented a room at the Super 8 Denver motel from September 9, 2012 through September 22, 2012. (Govt. Ex. 4 at 45, 48; Govt. Ex. 1). The Government presented sufficient evidence for the jury to conclude beyond a reasonable doubt that Defendant traveled in interstate commerce.

Defendant contests the final element: that he knowingly failed to register or update his registration. Defendant was advised of his duty to register in Oklahoma

as early as December 11, 1998 as evidenced by his signature on a Notice of Duty to Register on that date. (Govt. Ex. 2). Ryann Rotert, the Records Custodian for the Wagoner County Sheriff's Office, testified that since that time Defendant regularly came in to update his registration and to notify of address changes. (Govt. Ex. 3). She estimated that he updated his registration approximately twenty times with Wagoner County, and she either personally registered him or witnessed him register on half of those occasions. (Trial Tr. at 36-37, 41, 44). Each time he was provided a copy of the registration paperwork which reminded him of his continuing obligation to update his information if his address, employment or school status changed. Ms. Rotert testified that Defendant last registered with the Wagoner County Sheriff's Office on August 31, 2012. (Trial Tr. at 46; Govt. Ex. 3 at 191-94). Defendant never advised Wagoner County he had moved from the address listed on that registration. (Trial Tr. at 46-47, 59)

Similarly, Detective David Bourgeois of the Denver Police Department testified that Denver County has no record of Defendant registering as a sex offender with his office. (Id. at 101, 105). Detective Bourgeois confirmed that both Beacon Printing and the Super 8 Denver are within his jurisdiction. (Id. at 100).

Detective Scott Burgess of the Police Department in neighboring Aurora County did have a notation on his handwritten phone log that a "Gary Neal" from Oklahoma had called the sex offender registration hotline on September 11, 2012.[5] (Trial Tr. at 86-86; Def. Ex. A). Detective Burgess testified there is no record of

[5] This call is insufficient to fulfill Defendant's obligation to register, as 42 U.S.C. §16913(c) requires that the sex offender register in person.

Defendant's having registered in Aurora. (Id. at 93-94). Furthermore, with the information from his notes, Detective Burgess would not have advised a sex offender not to register. (Id. at 88, 97).

Defendant's primary argument is that because SORNA defines "jurisdiction" as "a state," the testimony of the detectives in Denver and Aurora was insufficient to establish that Defendant failed to register in Colorado. In Defendant's view, the Government would be required to provide records custodians from every county in the state to testify that Defendant did not register there in order to sustain a conviction for failure to register. Not only is this argument unsupported by citation to case law, it is also unduly burdensome on the Government and it contravenes common sense. The standard for a criminal conviction is beyond a reasonable doubt, not beyond all doubt, and juries are allowed to make reasonable inferences from the evidence. It is reasonable to infer that if Defendant were going to fulfill his duty to register, he would do so in the county where he was living and working at the time rather than in a random county with which he has had no apparent connection.

Furthermore, Defendant completely ignores the fact that he failed to advise Oklahoma that he was abandoning the address listed on his most recent registration there. In ***United States v. Murphy***, 664 F.3d 798 (10th Cir. 2011), the Tenth Circuit recognized the role of the jurisdiction a sex offender leaves in relation to the new jurisdiction to which the offender travels. There, the sex offender abandoned his residence in Utah and fled to Belize in hopes of avoiding extradition. ***Id.*** at 800. Since Belize has no sex offender registry, Murphy argued he had no obligations under SORNA. The Tenth Circuit disagreed, holding "[f]or

SORNA purposes, a sex offender continues to reside in a state after a change in residence or employment, both of which trigger reporting obligations, even if the offender eventually leaves the state." ***Id.*** at 799. "When someone changes residences – whether by leaving his home, moving into a new dwelling, becoming homeless, or other means" the Court continued, "he has a reporting obligation. . . he must report the change – even if he has yet to establish a new residence." ***Id.*** at 801. In reaching this conclusion, the Tenth Circuit noted "Congress's goal in enacting SORNA . . . to ensure that sex offenders could not avoid registration requirements by moving out of state." ***Id.*** at 802-803.

While Colorado, unlike Belize, is a SORNA jurisdiction, the rationale of ***Murphy*** applies. Indeed, the Court specifically set forth a sex offender's registration requirements when moving from one SORNA jurisdiction to another:

> [R]egistering in a new SORNA jurisdiction can satisfy the obligation of registering in a former state, so long as it occurs within three days of terminating the prior residence. *See* §16913(c). But if it takes more than three days to relocate to a new home or job, then the sex offender must register twice –within three days of abandoning his former residence, and within three days of establishing the new one.

Id. at 803. Here, Defendant did neither. Oklahoma remains "a 'jurisdiction involved' under SORNA because it was [Defendant's] current jurisdiction when the reporting obligation arose." ***Id.*** at 804. The jury was presented sufficient evidence through Ms. Rotert's testimony that Defendant did not advise Oklahoma he was abandoning his Wagoner County residence and leaving the state. Moreover, each of the witnesses responsible for registering sex offenders (Rotert-Trial Tr. at 36 ad Bourgeois – Id. at 103) testified that after the information is taken

at the local level, it is then uploaded to the state and national sex offender registries. Given that the local sex offender registration offices are connected in this way, the jury could have reasonably inferred from that evidence that had Defendant registered in either Colorado or Oklahoma, that registration would have appeared in the records of either or both states when the records custodians searched for Defendant.

Accordingly, the jury was presented sufficient evidence to find beyond a reasonable doubt that Defendant failed to register as a sex offender and update his registration, because he neither advised Oklahoma of his leaving the state nor registered with Colorado upon his arrival there.

II. THE DISTRICT COURT PROPERLY CONCLUDED AS A MATTER OF LAW THAT SORNA DOES NOT INFRINGE ON TENTH AMENDMENT STATES' RIGHTS.

A. Standard of Review

This Court reviews constitutional challenges de novo. ***United States v. Angelos***, 433 F.3d 738, 754 (10th Cir. 2006).

B. Discussion

Defendant argues that SORNA violates the Tenth Amendment by "forcing state officials to enforce and administer a federal regulatory scheme," citing ***Bond v. United States***, 131 S. Ct. 2355, 2365 (2011). (*Def. Bf.* at 16). While ***Bond*** does hold that a convict has prudential standing to challenge a conviction on Tenth Amendment grounds, the case does not involve the SORNA statutory scheme.

Defendant asserts that states like Oklahoma have been "commandeered" to

administer a program and create a registry which is an "unconstitutional encroachment of federal power on state sovereignty." (*Def. Bf.* at 16-17). Defendant seeks to equate the federal government's order that local law enforcement conduct handgun background checks, which was rejected in ***Printz v. United States***, 521 U.S. 898 (1997), with the budgetary incentives offered to support SORNA-compliant state registries. His analogy fails for two reasons. First, SORNA does not order state officials to do anything – sex offenders are ordered to register. State compliance is encouraged through federal funding mechanisms. *See* 42 U.S.C. §16925. Second, a federal court's compelling of testimony by witnesses cannot be equated with Congress compelling state law enforcement agencies to police the firearms market by conducting background checks for every handgun purchase.

Numerous circuit and district court jurists have rejected similar challenges. The Ninth Circuit recently collected several of these decisions:

> Again, we join every other court of appeals that has considered the question in holding that SORNA does not violate the Tenth Amendment's anti-commandeering principle and adopt the other circuits' reasoning for doing so. *See United States v. Felts*, 674 F.3d 599, 606–08 (6th Cir.2012); *United States v. Johnson*, 632 F.3d 912, 920 (5th Cir.2011); *Kennedy v. Allera*, 612 F.3d 261, 269 (4th Cir.2010). SORNA does not compel states or state officials to comply with its requirements; rather, Congress engaged in a constitutionally valid exercise of its spending power by conditioning the receipt of certain federal funds on the implementation of SORNA. *See* 42 U.S.C. §§ 16924, 16925(a); ***Felts***, 674 F.3d at 608 ("Congress through SORNA has not commandeered Tennessee, nor compelled the state to

> comply with its requirements. Congress has simply placed conditions on the receipt of federal funds. A state is free to keep its existing sex-offender registry in place (and risk losing funding) or adhere to SORNA's requirements (and maintain funding).”); *Johnson*, 632 F.3d at 920 (“While SORNA orders sex offenders traveling interstate to register and keep their registration current, SORNA does not *require* the States to comply with its directives. Instead, the statute allows jurisdictions to decide whether to implement its provisions or lose ten percent of their federal funding otherwise allocated for criminal justice assistance.”(citations omitted)); *Kennedy*, 612 F.3d at 269 (“[W]hile SORNA imposes a duty *on the sex offender* to register, it nowhere imposes a requirement *on the State* to accept such registration.”).

United States v. Richardson, 754 F.3d 1143, 1146-47 (9th Cir. 2014) (rejecting SORNA challenges under the non-delegation doctrine, Tenth Amendment, Commerce Clause and Ex Post Facto Clause). *See also* ***United State. v. Guzman***, 591 F.3d 83 (2d Cir. 2010), as amended; and ***United States v. Smith***, 655 F.3d 839 (8th Cir. 2011). The Government has not located a single circuit which has adopted the interpretation of SORNA urged by Defendant.

This Circuit should join its sister Circuits and numerous district courts in holding that SORNA does not violate the Tenth Amendment and reject Defendant’s appeal.

III. THE DISTRICT COURT PROPERLY CONCLUDED AS A MATTER OF LAW THAT SORNA PROPERLY DELEGATED TO THE ATTORNEY GENERAL THE POWER TO DECIDE IF SORNA SHOULD APPLY RETROACTIVELY TO PRE-ACT OFFENDERS.

A. Standard of Review

This Court reviews constitutional challenges de novo. ***United States v. Angelos***, 433 F.3d 738, 754 (10th Cir. 2006).

B. Discussion

Defendant contends that § 16913(d) violates the non-delegation doctrine, which requires that Congress provide, at a minimum, an "intelligible principle" to guide the Attorney General in the exercise of delegated rulemaking authority. This Court should reject this claim.

Congress may constitutionally delegate its legislative power if it lays down by legislative act an intelligible principle to which the delegate must conform:

> The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const., Art. I, § 1. From this language the Court has derived the nondelegation doctrine: that Congress may not constitutionally delegate its legislative power to another branch of Government. "The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States*, 488 U.S. 361, 371, 109 S. Ct. 647, 654, 102 L. Ed. 2d 714 (1989).
>
> We have long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches. *Id*., at 372, 109 S. Ct., at 654. Thus, Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors. So long as Congress "lay[s] down by legislative act an

> intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S. Ct. 348, 352, 72 L. Ed. 624 (1928).

Touby v. United States, 500 U.S. 160, 164-65 (1991). Under this intelligible principle test, a delegation is "'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.'" ***Mistretta***, 488 U.S. at 372-73 (quoting ***American Power & Light Co. v. SEC***, 329 U.S. 90, 105 (1946).)

In applying these guideposts, this Court should conclude that Congress did not violate the non-delegation doctrine in delegating responsibility to the Attorney General to determine the applicability of SORNA's registration requirements for pre-Act offenders in 42 U.S.C. § 16913(d), which states that 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." In enacting SORNA, Congress laid out the general policy, the public agency to apply this policy, and the boundaries of the delegated authority, which is all that is required for the delegation to be constitutional.

First, SORNA contains a general policy goal to guide the Attorney General in applying the discretion delegated by the Act. The first section of SORNA makes clear that the Act's aim is to establish a comprehensive national sex offender registry in order to protect children and the public at large from sex

offenders. 42 U.S.C. § 16901. The Attorney General's discretion, established in § 16913(d), is governed by this general policy statement.

Second, Congress clearly delineated the delegated authority. Section 16913(d) unambiguously designates the Attorney General as the recipient of the delegation. 42 U.S.C. § 16913(d).

Finally, while § 16913(d) itself contains no limitations on the Attorney General's discretion, the Attorney General's discretion is still cabined by the legislative determinations that Congress made in other sections of SORNA, where Congress identified the crimes that require registration, 42 U.S.C. § 16911; where the offender must register, 42 U.S.C. § 16913(a); the time period in which registration must be completed, 42 U.S.C. § 16913(b); the method of registration, 42 U.S.C. § 16913(b)-(c); the information that sex offenders must provide in order to register, 42 U.S.C. § 16914(a); and the elements of the crime of failure to register, 18 U.S.C. § 2250. The Attorney General's authority is further confined by §16913(d) itself, which only authorizes the Attorney General to determine the specific question of whether SORNA's registration requirements apply to pre-SORNA sex offenders.

Because Congress laid down these intelligible principles to which the Attorney General must conform, § 16913(d) is not a forbidden delegation of legislative power. Although this Court has not yet confronted this issue directly,

see ***United States v. Rickett***, 535 Fed. Appx. 668, 676 n. 4 (10th Cir. 2013), every other court of appeals to have considered the question has concluded that Congress did not violate the Constitution when it delegated this implementation authority to the Attorney General. *See* ***United States v. Parks***, 698 F.3d 1, 7-8 (1st Cir. 2012), *cert. denied,* – — U.S. ——, 133 S. Ct. 2021 (2013) ("SORNA provided such [an intelligible] principle by specifying the regulatory policy that the registration system represents and by effectively delegating to the Attorney General the judgment whether this policy would be offset, in the case of pre-SORNA sexual offenders, by problems of administration, notice and the like for this discrete group of offenders—problems well suited to the Attorney General's on-the-ground assessment. All other circuits that have addressed the issue have rejected the delegation objection, which modern case law tends regularly to disfavor.") (emphasis added); ***United States v. Guzman***, 591 F.3d 83, 92-93 (2d Cir. 2010), *cert. denied*, —— U.S. ——, 130 S. Ct. 3487 (2010) ("A delegation is constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority. In other words, Congress needs to provide the delegated authority's recipient an "intelligible principle" to guide it. The Attorney General's authority under SORNA is highly circumscribed. SORNA includes specific provisions delineating what crimes require registration, 42 U.S.C. § 16911; where, when, and how an

offender must register, id. § 16913; what information is required of registrants, id. § 16914; and the elements and penalties for the federal crime of failure to register, 18 U.S.C. § 2250.") (internal quotations and citations omitted); ***United States v. Cooper***, 750 F.3d 263, 271 (3d Cir. 2014), *petition for cert. filed*, (U.S. Jul. 09, 2014) (No. 14-5174) ("Applying the intelligible principle test, we conclude that Congress did not violate the non-delegation doctrine in delegating responsibility to the Attorney General to determine the applicability of SORNA's registration requirements for pre-Act offenders in 42 U.S.C. § 16913(d). In enacting SORNA, Congress laid out the general policy, the public agency to apply this policy, and the boundaries of the delegated authority. This is all that is required under the modern nondelegation jurisprudence."); ***United States v. Whaley***, 577 F.3d 254, 263-64 (5th Cir. 2009) ("SORNA's statement of purpose, to 'establish[ ] a comprehensive national system' of sex offender registration to 'protect the public from sex offenders and offenders against children,' 42 U.S.C. § 16901, is an intelligible principle that guides the Attorney General in exercising his discretion.") (alteration in original)); ***United States v. Felts***, 674 F.3d 599, 606 (6th Cir. 2012) ("Congress's delegations under SORNA possess a suitable "intelligible principle" and are well within the outer limits of the Supreme Court's nondelegation precedents.") (internal quotations and alterations omitted); ***United States v. Goodwin***, 717 F.3d 511, 516 (7th Cir. 2013), *cert. denied*, —— U.S. ——, 134 S.

Ct. 334 (2013) ("SORNA directs the Attorney General to exercise his discretion in a manner consistent with the intelligible principle of 'protecting the public' from sex offenders and establishing a 'comprehensive' registry; the statute identifies the Attorney General as the official to exercise this delegated authority; and the Attorney General's authority is narrowly restricted to determining the applicability of SORNA to offenders whose crimes predate the statute's enactment."); ***United States v. Kuehl***, 706 F.3d 917, 920 (8th Cir. 2013) (concluding that SORNA's delegation of authority to the Attorney General under 42 U.S.C. § 16913(d) is constitutionally valid because Congress set forth an intelligible principle to guide in the exercise of that authority); ***United States v. Richardson***, 754 F.3d 1143, 1145-46 (9th Cir. 2014) ("[W]e hold that SORNA's delegation of authority to the Attorney General to determine the applicability of SORNA's registration requirements to pre-SORNA sex offenders is consistent with the requirements of the non-delegation doctrine."); ***United States v. Ambert***, 561 F.3d 1202, 1213 (11th Cir. 2009) ("We are satisfied that Congress has provided the Attorney General with "intelligible principles" in the Sex Offender Registration and Notification Act. Congress has undeniably provided the Attorney General with a policy framework in § 16901 to guide his exercise of discretion under § 16913(d); and it has made a series of legislative judgments in §§ 16911, 16913, 16914 and

2250 that constrict the Attorney General's discretion to a narrow and defined category.").

Additionally, Defendant relies on Justice Scalia's dissenting opinion, 132 S. Ct. at 986, in ***Reynolds*** (which held that SORNA does not reach offenders who committed their crimes pre-SORNA, and traveled without proper notice before the Attorney General's interim rule took effect), to support his argument that Congress unconstitutionally delegated its power to the Attorney General in SORNA. (*Def. Bf.* at 28-29). As an initial matter, Justice Scalia's description of the statutory scheme is somewhat inaccurate. SORNA does not leave to the Attorney General's discretion "whether a criminal statute will . . . apply to certain individuals," 132 S. Ct. at 986, but instead gives the Attorney General authority to determine whether individuals are subject to regulatory requirements that, like many other such requirements, are enforceable by criminal sanctions. In addition, Justice Scalia recognized the canon that statutes should not be construed to raise constitutional doubts unless no reasonable alternative construction is possible. *See* ***Reynolds***, 132 S. Ct. at 986-87. In light of this canon, it is highly unlikely that the ***Reynolds*** majority would construe § 16913 as requiring a specification by the Attorney General if such a construction would render the statute unconstitutional under the nondelegation doctrine. *See* ***United States v. Stevenson***, 676 F.3d 557, 563 n.3 (6th Cir. 2012) (reading ***Reynolds*** as foreclosing non-delegation challenge).

Indeed, while not reaching the nondelegation issue, *id.* at 981-82, the Court suggested reasons that Congress might reasonably have delegated the authority at issue - in particular, so that the agency "charged with" implementing SORNA could examine the problems with registering pre-SORNA offenders and proceed accordingly. ***Reynolds***, 132 S.Ct. at 981.

Finally, Defendant also devotes considerable space to Judge Gorsuch's concurring opinion in ***United States v. Hinckley***, 550 F.3d 926, 948 (10th Cir. 2008). Yet, he bestows no mention on a recent unpublished Tenth Circuit case in which the panel, while aware of Justice Scalia's and Judge Gorsuch's misgivings, held that the application of SORNA was not plain error in light of the non-delegation principle. ***Rickett***, 535 Fed. Appx. at 676-677 n. 6. In ***Rickett***, this Court began its review by noting that the nondelegation doctrine is all but dead in American jurisprudence:

> Between 1789 and 1935—a period spanning 146 years of constitutional history—the Supreme Court "never struck down a challenged statute on delegation grounds." *Mistretta*, 488 U.S. at 373, 109 S.Ct. 647. Then, in 1935, the Court invalidated two statutes as unconstitutional delegations of legislative power. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542, 55 S.Ct. 837, 79 L.Ed. 1570 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430, 55 S.Ct. 241, 79 L.Ed. 446 (1935); *see also* 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 4.8(b), at 649 n. 17 (5th ed. 2012) ("The only time the Court clearly invalidated a statute for being an excessive delegation of legislative authority was 1935.").
>
> The doctrine went dormant thereafter, and the Supreme Court has

> since upheld, "without deviation, Congress' ability to delegate power under broad standards." *Mistretta*, 488 U.S. at 373, 109 S.Ct. 647; *see Whitman*, 531 U.S. at 474, 121 S.Ct. 903. Indeed, so dormant is the nondelegation doctrine that some have deemed it a "dead letter." *See* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L.Rev. 327, 329 (2002). Still, the Supreme Court has never expressly overruled *Schechter Poultry* or *Panama Refining;* so the doctrine, even if dead, has never received a proper burial.

Id. at 674-75.

After reviewing the unanimous view of numerous sister circuit courts, this Court denied plain error relief because "not only is it far from well-settled under the law of the Supreme Court and the Tenth Circuit that Mr. Rickett's nondelegation argument is legally viable, but there also is virtually no support for Mr. Rickett's position in other circuits." ***Id***. at 677.

Based on these authorities, this Court should affirm Defendant's conviction.

IV. THE DISTRICT COURT PROPERLY CONCLUDED AS A MATTER OF LAW THAT SORNA IS NOT A VIOLATION OF THE EX POST FACTO CLAUSE, AND IS THEREFORE, CONSTITUTIONAL BOTH FACIALLY AND AS APPLIED TO DEFENDANT.

A. Standard of Review

This Court reviews constitutional challenges and legal issues de novo. ***United States v. Angelos***, 433 F.3d 738, 754 (10th Cir. 2006); ***United States v. Patterson***, 561 F.3d 1170, 1172 (10th Cir. 2009).

B. Discussion

Defendant conceded below and in this forum that "[t]his Court has concluded that neither SORNA's registration requirements nor the criminal

penalties attached to non-compliance in 18 U.S.C. § 2250 violate the Ex Post Facto Clause. (*Def. Bf.* at 30) citing ***United States v. Lawrance***, 548 F.3d 1329, 1336 (10th Cir. 2008). He argues that this Court should revisit and reverse its holding in ***Lawrance*** based on six state court decisions. (*Def. Bf.* at 32). Defendant's invitation to revisit ***Lawrance*** should be rejected.

This panel cannot simply revisit and reverse Tenth Circuit precedent, even if a handful of state courts reached results which may appear inopposite. "Under the doctrine of *stare decisis*, this panel cannot overturn the decision of another panel of this court." ***United States v. Myers***, 200 F.3d 715, 720 (10th Cir. 2000). This panel is "bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." ***In re Smith***, 10 F.3d 723, 724 (10th Cir. 1993). "This precedent of prior panels . . . includes not only the very narrow holdings of those prior cases, but also the reasoning underlying those holdings, particularly when such reasoning articulates a point of law. ***Myers***, 200 F. 3d at 720. One panel may overrule law set forth in a prior panel's opinion only by circulating the new opinion and obtaining authorization from all active judges on the court. ***Id***. at 721, n. 3.

Because there has been no intervening Supreme Court decision on SORNA and the Ex Post Facto Clause which is "contrary" to this Court's decision in ***Lawrance***, or which invalidates the reasoning underlying the prior opinion, this

panel is not free to consider Defendant's request to overrule ***Lawrance*** without the approval of every active Tenth Circuit jurist. Such an arduous undertaking is plainly unwarranted in this matter.

Article I, Section 9, Clause 3 of the United States Constitution provides that "No Bill of Attainder or ex post facto Law shall be passed." The Ex Post Facto Clause prohibits, "[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action." ***Collins v. Youngblood***, 497 U.S. 37, 42 (1990) (quoting ***Calder v. Bull***, 3 U.S. (Dall.) 386 390 (1798). The clause "is aimed at laws that retroactively alter the definition of crimes or increase the punishment for criminal acts." ***California Dep't of Corrections v. Morales***, 514 U.S. 499, 504 (1995) (citing ***Collins v. Youngblood***, 497 U.S. at 43). "To fall within the ex post facto prohibition, a law must be retrospective -- that is, 'it must apply to events occurring before its enactment' -- and it 'must disadvantage the offender affected by it' by altering the definition of criminal conduct or increasing the punishment for the crime." ***Lance v. Mathis***, 519 U.S. 433, 441 (1997) (*quoting* ***Weaver v. Graham***, 450 U.S. 24, 31 (1981)). This clause does not apply to non-punitive, regulatory provisions. *See, e.g.*, ***Bankers Trust Co. v. Blodgett***, 260 U.S. 647, 652 (1923).

Non-penal laws, including sex offender registration laws, may be applied retroactively. In ***Smith v. Doe***, 538 U.S. 84 (2003), the Supreme Court considered

whether the requirements of the Alaska Sex Offender Registration Act violated the Ex Post Facto Clause of the U.S. Constitution. In ***Smith***, the plaintiffs in a civil action under 42 U.S.C. § 1983 challenged the constitutionality of Alaska's registration law (which applied to those convicted of sex offenses prior to its enactment) claiming the statute was designed to inflict further punishment on sex offenders, and therefore, was penal in nature. The Supreme Court rejected that claim. ***Id***. Citing the text of the statute, which described the high risk of recidivism among sex offenders and the need to publicize information about sex offenders so that the public is placed on notice, the Court held, "imposition of restrictive measures on sex offenders adjudged to be dangerous is 'a legitimate nonpunitive governmental objective and has been historically so regarded.'" ***Id.*** at 93 (citation omitted).

The ***Smith*** Court also considered whether, despite the stated intent of the law, "the statutory scheme is 'so punitive either in purpose or effect as to negate [the State's] intention' to deem it 'civil.'" ***Smith***, 538 U.S. at 92 (citation omitted). The Court observed, however, that "[b]ecause we 'ordinarily defer to the legislature's stated intent, only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.'" ***Id.*** (citations omitted).

Smith cited the factors enunciated in ***Kennedy v. Mendoza-Martinez***, 372 U.S. 144, 168-69 (1963), which are "neither exhaustive nor dispositive":

> The factors most relevant to our analysis are whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose.

Id. (citation omitted). Applying those factors, the Court had little difficulty in concluding that Alaska's registration law was not punitive in effect. ***Id***. at 105. ("Respondents cannot show, much less by the clearest proof, that the effects of the law negate Alaska's intention to establish a civil regulatory scheme.").

The Tenth Circuit holds that prosecution under SORNA's failure to register provisions does not violate the Ex Post Facto Clause by retroactively increasing punishment for a defendant's past sex offenses but instead it penalizes him for his post- SORNA failure to register. ***Lawrance***, 548 F.3d at 1332-1333.

The Defendant acknowledges that the Tenth Circuit has ruled on this issue in ***Lawrance*** but sought to preserve his claim. To the extent that the Defendant is simply preserving the issue, the Government will respectfully refer the Court to ***Lawrance*** as binding precedent.

Based on ***Lawrance***, this Court should reject Appellant's Ex Post Facto challenge to SORNA.

V. THE DISTRICT COURT PROPERLY CALCULATED DEFENDANT'S OFFENSE LEVEL, BECAUSE HIS PRIOR CONVICTION FOR ATTEMPTED SEXUAL ABUSE IN THE FIRST DEGREE WAS PUNISHABLE BY MORE THAN A YEAR IN PRISON, MAKING HIM A TIER III SEX OFFENDER.

A. Standard of Review

In analyzing a district court's application of the Sentencing Guidelines, this Circuit reviews "factual findings for clear error and legal determinations de novo." ***United States v. Kristl***, 437 F.3d 1050, 1054 (10th Cir. 2006). When a defendant objects to a sentencing enhancement, the Government bears the burden of proving facts supporting the enhancement by a preponderance of the evidence. ***United States v. Garcia***, 635 F.3d 472, 478 (10th Cir. 2011).

B. The Law

According to 42 U.S.C. § 16911(4),

> 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.

C. The District Court's Ruling

The district court explained its finding that Defendant is a Tier III sex offender as follows:

> On September the 8th, 1998, the defendant was convicted of attempted sexual abuse, first E felony. The facts in that case were that the defendant put his hands down the pants of a nine-year-old victim and touched her vagina on three different occasions. In accordance with New York Penal Law, 70.00(4), when a -- quote, when a person other than a second or persistent felony offender is sentenced for a Class D or Class E felony, and the court having regard to the nature and circumstances of the crime, and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary, but that it would be unduly harsh to impose an indeterminate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less.
>
> The defendant was sentenced to a term of 180 days. However, the 1998 New York sentencing statute with regard to the convicted offense has a maximum punishment of four years, which the defendant faced for the convicted offense.
>
> The Court finds, by a preponderance of the evidence, that the defendant is appropriately classified as Tier III sex offender for the purposes of the guideline calculations in this case. The defendant's objection, therefore, is overruled.

(Sent. Tr. at 6-7).

D. Discussion

Defendant argues he is a "Tier I" sex offender pursuant to §16911 and his offense level should therefore have been 12, not 16, because his offense was not punishable by imprisonment for more than a year. He bases this logic on the belief that his 180-day sentence was capped at a possible one year maximum. His argument misconstrues New York sentencing statutes showing that Defendant was actually subject to a maximum sentence of four years. Only the New York

sentencing judge's discretion and mercy yielded the lenient sentence Defendant actually received on November 5, 1998.

In the federal system, the Tier Level and base offense level are derived from the potential punishment given the actual facts of the prior offense and the actual criminal history of the person at the time of the prior offense, not the actual sentence received from the prior sentencing judge. *See generally* ***Carachuri-Rosendo v. Holder***, 560 U. S. 563 (2010); ***United States v. Brooks***, 751 F. 3d 1204, 1213 (10th Cir. 2014).

Defendant was convicted of a violation of Attempted Sexual Abuse in the First Degree pursuant, to New York Penal Law § 130.65, which provided that a person is guilty of sexual abuse in the first degree when he subjects another person to sexual contact:

> 1. By forcible compulsion; or
>
> 2. When the other person is incapable of consent by reason of being physically helpless; or
>
> 3. When the other person is less than eleven years old.

Sexual abuse in the first degree was, at the time of Defendant's prior crime, a class D felony. Defendant's attempted violation of this class D felony provision constituted a class E felony under New York Penal Law Section 110.05 (6).

As to the available punishment for his 1998 attempted crime, New York Penal section 70.00 (2)(e) subjected Defendant to the following possible sentence:

> The maximum term of an indeterminate sentence shall be at least three years and the term shall be fixed as follows:
>
> (e) For a class E felony, the term shall be fixed by the court, and shall not exceed four years.

Therefore, the possible punishment range according to New York's sentencing scheme and New York Penal Law section 70.00 in 1998 was not less than 3 years nor more than 4 years

Yet, as part of its sentencing scheme, the 1998 New York statute permitted a lighter, determinate sentence if the sentencing court determined that the defendant was not a habitual offender and the court, as a matter of judicial discretion, found that certain mitigating factors merited relief:

> **(4) Alternative definite sentence for class D, E, and certain class C felonies.** When a person, other than a second or persistent felony offender, is sentenced for a class D or class E felony, or to a class C felony specified in article two hundred twenty or article two hundred twenty-one, and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less.

New York Penal Law 70.00 (4).

Defendant claims that his 180-days sentence or the "term of one year or less" language above makes him a Tier I offender instead of a Tier III offender and thus changes his guideline base offense level from 16 to 12. (*Def. Bf*. at 35, 37).

The conduct forming the basis for Defendant's 1998 conviction was the inappropriate fondling of a child's genitalia. (*PSR* at ¶23). It is important to note that the statute authorizing the lenient 180-day sentence clearly states that "the court **may** impose a definite sentence of imprisonment and fix a term of one year or less." New York Penal Law 70.00 (4) (*emphasis added).* The court was not **required** to grant such relief by New York's sentencing scheme.

Neither the Supreme Court's decision in ***Carachuri-Rosendo v. Holder***, 560 U. S. 563 (2010), nor this Court's recent opinion in ***United States v. Brooks***, 751 F. 3d 1204, 1213 (10th Cir. 2014) compels a different result. In ***Brooks***, this Court recognized that ***Carachuri-Rosendo*** abrogated this Court's prior holding in ***United States v. Hill***, 539 F.3d 1213, 1221 (10th Cir. 2008) which focused attention on the statutory crime itself rather than the individual defendant. ***Brooks***, 751 F.3d at 1205.

The ***Brooks*** panel recognized that in ***Carachuri-Rosendo***, a case in which a single Xanax tablet had been relied upon by the government as an "aggravated felony" under the Immigration and Nationality Act, that the Supreme Court identified several reasons to reject an uncharged recidivist aggravating factor:

> The Supreme Court then rejected the Government's "hypothetical approach" because it: (1) ignored the INA's text, which "indicates that we are to look at the conviction itself ... not to what might or could have been charged"; (2) would punish a defendant for recidivism without providing him notice or opportunity to contest said recidivism and would "denigrate the independent judgment of state prosecutors"

> who chose not to prove recidivism; (3) depends on a misreading of *Lopez v. Gonzales*, 549 U.S. 47, 127 S.Ct. 625, 166 L.Ed.2d 462 (2006), which did not go so far as to permit the reliance on a "hypothetical to a hypothetical"; (4) was inconsistent with common federal court practice, whereby the defendant "would *not*, in actuality, have faced any felony charge"; and (5) failed to construe an ambiguity in an immigration-related criminal statute in the noncitizen's favor. *Id.* at 575–81, 130 S.Ct. 2577. In conclusion, the Supreme Court stated: "The prosecutor in Carachuri–Rosendo's [Texas] case declined to charge him as a recidivist. He has, therefore, not been convicted of a felony punishable [by more than one year in prison] under the Controlled Substances Act." *Id.* at 582, 130 S.Ct. 2577.

Brooks, 751 F.3d at 1206-07, quoting ***Carachuri-Rosendo***, 560 U.S. at 582.

Acknowledging that ***Carachuri-Rosendo*** was not directly on point with the facts before this Circuit in ***Brooks*** or ***Hill***, this Court still concluded "the Supreme Court rejected the Government's "'hypothetical to a hypothetical' approach … doing so . . . in a manner entirely contradictory to our interpretation . . . in ***Hill***." 751 F. 3d at 1210. (interior citations omitted). Now, under ***Carachuri-Rosendo***, "a recidivist increase can *only* apply *to the extent that a particular defendant was found to be a recidivist.* ***Id***.

Applying this new standard, it is plain that Defendant's Tier III designation and Level 16 base offense level, grounded upon a possible four-year maximum sentence in 1998, survive. Defendant claims that only "hypothetical facts and hypothetical criminal history" would support the sentence imposed here. (*Def. Bf.* at 37). Yet, this is not a case in which the Government's position would render virtually all of New York's offenses felonies for federal purposes or "make a

mockery" of a state's "carefully crafted sentencing scheme." *See* ***Brooks***, 751 F.3d at 1212, n.6.[6]

Under New York's system in 1998, Defendant was not charged or sentenced as a recidivist or a persistent violent offender which would have resulted in a much more severe possible sentence. As charged, Defendant was subject to a three- to four-year indeterminate sentence unless a New York judge, in his or her discretion, found that the particular circumstances in the case justified a determinate sentence of one year or less. Even if the judge were inclined to grant leniency, Defendant would not have been eligible for such a reduction if he were a recidivist or a persistent violent felon, even if such aggravators were uncharged.

When Defendant walked into the New York courtroom in 1998, based on his particular circumstances and criminal history, he faced a four-year maximum sentence, not the "amount of time the worst imaginable recidivist could have received." 751 F.3d at 1213. The district court here was correct in imposing a Tier

[6] "The public purpose of our penal philosophy is to provide an appropriate response to particular crimes, including consideration of the consequences to the victim and the community, and to ensure public safety through the deterrent influence of the sentence, rehabilitation of the offender and confinement when required in the interest of public protection (Penal Law § 1.05). As such, the sentencing process requires, on an individual basis, a delicate balance of the numerous factors relating not only to the nature of the crime and the particular circumstances of the offender, but also the four principal objectives of our penal sanctions involving deterrence, rehabilitation, retribution and isolation of the offender where necessary for community safety (*People v. Farrar,* 52 N.Y.2d 302, 437 N.Y.S.2d 961, 419 N.E.2d 864)." ***People v. Mooney,***133 Misc.2d 313,506 N.Y.S. 2d 991, 992 (1996).

III designation and a base offense level of 16. Defendant's sentence should be affirmed.

VI. THE DISTRICT COURT'S SPECIAL CONDITION OF SUPERVISED RELEASE REQUIRING DEFENDANT TO ATTEMPT TO REGISTER EVERY 90 DAYS IS NOT UNCONSTITUTIONALLY VAGUE.

A. Standard of Review

"When the defendant objects to a special condition of supervised release at the time it is announced, this Court reviews for abuse of discretion." ***United States v. Dougan***, 684 F.3d 1030, 1034 (10th Cir. 2012) quoting ***United States v. Mike***, 632 F.3d 686, 692 (10th Cir. 2011)). Applying this standard, the Court "will not disturb the district court's ruling absent a distinct showing it was based on an erroneous conclusion of law or a clear error of judgment." ***Dougan***, 684 at 1034.

B. The Law

District courts have the authority to impose special conditions of supervised release so long as those conditions meet three criteria:

> First, they must be reasonably related to at least one of following: the nature and circumstances of the offense, the defendant's history and characteristics, the deterrence of criminal conduct, the protection of the public from further crimes of the defendant, and the defendant's educational, vocational, medical, or other correctional needs. See id. at 983–84; 18 U.S.C. § 3583(d)(1). Second, they must involve no greater deprivation of liberty than is reasonably necessary to achieve the purpose of deterring criminal activity, protecting the public, and promoting the defendant's rehabilitation. See 18 U.S.C. § 3583(d)(2). Third, they must be consistent with any pertinent policy statements issued by the Sentencing Commission.

Mike, 632 F.3d at 692 (relying on 18 U.S.C. § 3583(d)).

Due process requires that the conditions of supervised release be sufficiently clear to inform a released prisoner of what conduct will result in his or her return to prison. ***United States v. Simmons,*** 343 F.3d 72, 81 (2d Cir.2003).

C. The District Court's Ruling

The district court made the following remarks with respect to the special condition of supervision that Defendant attempt to register as a sex offender every 90 days:

> THE COURT: The Court notes in the sentencing memorandum counsel for the defendant objected to the defendant being required to register as a sex offender as a condition of supervised release. Counsel argues that since the State of Oklahoma has concluded that the defendant no longer has a duty to register under state law, that there is nowhere for Mr. Neel to register as there is no federal agency that accepts offender registration information.
>
> However, under the Sex Offender Notification Act, the defendant is required to register as a condition of supervised release. It is the opinion of this Court that, even if the state in which the defendant resides refuses to allow him to register, the defendant can remain in compliance with this condition by providing the probation office every -- at every 90 day increment documentation from the state registration authority of its inability to register the defendant. Therefore, the defendant's objection is overruled.
>
> MR. FOLSOM: Your Honor, so is your order that he's going to be required to go try to register –
>
> THE COURT: Yes.
>
> MR. FOLSOM: -- every 90 days?
>
> THE COURT: Yes.

> MR. FOLSOM: And with what -- just to get the specifics, SORNA requires him to register in a jurisdiction and it doesn't apply to a particular county or local area, so can he go to any state registry office or any state sheriff and register, or are you ordering that he go to the one that he –
>
> THE COURT: The key word, and I realize I'm out there, I'm not Congress and I'm not the state legislature and I'm not the Supreme Court even, that the state of the law is he should register. Now, I've suggested an alternative to register with the -- or to perhaps show that he's been rejected by the State of Oklahoma. I mean, if I were giving advice based on what's happened in court today, I might suggest that, you know, he try to register with the state and be -- at least have that information available. And if that's -- then the next line of protection perhaps would be to check in with the federal probation officer periodically as a form or substitute for registration.
>
> MR. FOLSOM: So he'll have to try to register once, and then, after that, report to the federal probation office?
>
> THE COURT: Well, I don't know what -- I can't anticipate what the State of Oklahoma is going to do. They may say we accept your registration, and that's it. I don't know. I think it's a hazy -- as you've helped me understand, it's a hazy area that perhaps your client and others may be faced with. And from a judge's point of view, I'm -- I've looked at the law, looked at your argument, and that's what my decision is.

(Sent. Tr. at 10-12). The court elaborated when it pronounced Defendant's sentence:

> You shall also comply with the following special conditions of supervised release. That is, the defendant shall register as a sex offender in the state in which he resides, and keep such registration current in the jurisdiction in which he resides, works, or attends school. If the state in which the defendant resides refuses to allow the defendant to register, the defendant shall inform the probation office every 90 days of their inability -- inability to register with accompanying documentation from the state registration authority.

(Id. at 19-20).

D. Discussion

Due process requires that a condition be sufficiently clear to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." ***Grayned v. City of Rockford***, 408 U.S. 104, 108 (1972). The Court's ruling, when read in a common-sense manner, makes it abundantly plain that Defendant must: (1) attempt to register in the state in which he resides; (2) keep such registration current in the jurisdiction in which he resides, works, or attends school; and (3) if the state in which the defendant resides refuses to allow him to register, he shall inform the probation office every 90 days of his efforts to register and provide document from the registration office that he attempted, but was not allowed, to register. (Sent. Tr. at 19-20).

Due process does not require that the imposed behavior be pleasant or easy, simply that the required behavior be reasonably discernable to a person of ordinary intelligence.

Defendant makes much of the State of Oklahoma's ruling in ***Starkey v. Oklahoma Dept. of Corr.***, 2013 OK 43, 305 P.3d 1004, 1030 (2013), and a subsequent email from the DOC telling him he is longer forced to register in Oklahoma. (*Def. Bf.* at 40-41).

First, there is no guarantee that Defendant will ever work or reside in Oklahoma upon his release. He had abandoned his Oklahoma residence at the time of the instant offense and made it plain that he was moving out of state.

Second, with all due respect to the Oklahoma Supreme Court, their opinion is not determinative on matters of federal law and sentencing. In ***Starkey***, the Oklahoma court held "the retroactive extension of its [the Oklahoma Sex Offender Registration Act (SORA)] registration period violates the prohibition on ex post facto laws provided in Article 2, § 15 of the Oklahoma Constitution." ***Id***. at 1030. *See also* ***Maynard v. Fallin***, __ Fed. Appx. __, 2014 WL 1677982 at n.3 (10th Cir. April 29, 2014). A state case interpreting a state constitutional provision can hardly be viewed as controlling authority when evaluating a federal provision under the federal Constitution.

Finally, even if ***Starkey*** bars his registration if he returns to Oklahoma, all Defendant need do is attempt to register and, if denied, provide such documentation to his probation officer every 90 days. The condition is clear and should be upheld.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that Defendant's conviction and sentence be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

The Government does not request oral argument.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). According to MS Word 2010, this brief contains 13,155 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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I, hereby certify that on August 14, 2014, I electronically transmitted the attached documents to the Clerk of Court using the ECF System for filing. A Notice of Electronic Filing will be sent via the Court's ECF system to the following counsel of record for Defendant:

Carl A. Folsom, III carl_folsom@fd.org

I hereby certify that I caused a true and correct copy of the foregoing document to be mailed via the United States Postal Service on August 14, 2014, to the following:

Not Applicable as Defendant Has Counsel

/s/Linda A. Epperley