UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

NO. 14-7003

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

GARY JAMES NEEL,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
Hon. James H. Payne, District Judge
District Court Case No. CR-12-91-JHP

APPELLANT'S OPENING BRIEF

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ORAL ARGUMENT IS REQUESTED
(Attachments Submitted in Native PDF form)

June 12, 2014

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PRIOR OR RELATED APPEALS

No previous or related appeals exist.

STATEMENT OF JURISDICTION

The United States District Court for the Eastern District of Oklahoma had jurisdiction over this matter pursuant to 18 U.S.C. § 3231. Following a jury trial, Gary James Neel was convicted of failing to register and update his registration as a sex offender between the dates of September 5, 2012 and October 4, 2012, after having traveled in interstate commerce, pursuant to 18 U.S.C. § 2250(a), (a)(2)(B), and (a)(3). (Judgment in a Criminal Case, Doc. 105, filed 01/14/14, 1; Indictment, Doc. 2, filed 12/04/12). After sentencing, the judgment and commitment order was entered on the docket on January 14, 2014. (Judgment in a Criminal Case, Doc. 105, filed 01/14/14; Attachment A). The notice of appeal was timely filed on January 28, 2014. See Fed. R. App. P. 4(b). (Notice of Appeal, Doc. 108, filed 01/28/14). This Court's jurisdiction derives from 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF ISSUES

Issue I: **There was insufficient evidence to convict Mr. Neel of Count One because no reasonable jury could have found beyond a reasonable doubt that Mr. Neel failed to register or update his registration in the State of Colorado.**

Issue II: **The district court erred in denying Mr. Neel's motion to dismiss because SORNA, as applied in this case, infringes on state rights in violation of the Tenth Amendment of the U.S. Constitution.**

Issue III: **The district court erred in denying Mr. Neel's motion to dismiss. Congress violated the Non-Delegation Doctrine in giving the Attorney General the power to decide whether SORNA should be extended to those persons whose sex-offense convictions pre-date the act, and without providing an intelligible principle to make that decision. Thus, this prosecution, which is based on that improper delegation, is unconstitutional.**

Issue IV: **On its face and as applied to Mr. Neel, SORNA violates the Ex Post Facto Clause by increasing the punishment for a previous conviction.**

Issue V: **The sentence imposed in this case was procedurally unreasonable because the base offense level should have been 12.**

Issue VI: **The special condition of supervised release that Mr. Neel attempt to register as a sex offender every 90 days is unconstitutionally vague and should be vacated by this Court.**

STATEMENT OF THE CASE AND FACTS

A. Mr. Neel is convicted of a sex offense in 1998.

Mr. Neel was convicted and sentenced on September 8, 1998, of the New York state offense of Attempted Sexual Abuse in the First Degree, a class E felony. (Sentencing Memorandum - Attachment B, Doc. 98-2, filed 11/12/13, 2). The court sentenced him to 180 days in the county jail. (Sentencing Memorandum - Attachment B, Doc. 98-2, filed 11/12/13, 2). He was released from custody for the offense on October 5, 1998, and his initial date for offender registration purposes was October 10, 1998. (Sentencing Memorandum - Attachment B, Doc. 98-2, filed 11/12/13, 2). Under New York law at the time, he was required to register for a period of 10 years. See N.Y. Correct. Law § 168-h (1998 vers.).

B. SORNA is enacted in 2006.

SORNA was passed and enacted on July 27, 2006, as part of the Adam Walsh Child Protection and Safety Act and created the Federal crime of "failure to register," which is punishable by up to ten (10) years of imprisonment. 18 U.S.C. § 2250. SORNA also requires the creation of a nationwide sex offender registration system and classifies offenders into three categories. The statute itself did not specify whether the sex offender registration requirements applied retroactively. On February 28, 2007, the Office of the Attorney General issued a rule that declared the statute applicable to offenders whose convictions existed pre-implementation of SORNA. 28 C.F.R. § 72.3 (2007). At some point, Mr. Neel was advised that his registration term had increased from ten years to lifetime.

C. Procedural History of this case

The Indictment charged Mr. Neel with having failed to register and update his registration as a sex offender between the dates of September 5, 2012, and October 4, 2012, after having traveled in interstate commerce. (Indictment, Doc. 2, filed 12/04/12). The government alleged that Mr. Neel had moved to Colorado from Oklahoma for employment and that he had failed to update his information with the relevant offender registration authorities. (Transcript of Jury Trial, held 03/05/13, 16-17). At that point, Mr. Neel had been faithfully registering as a sex offender for approximately fourteen years. (Transcript of Jury Trial, held 03/05/13, 29).

Prior to trial, Mr. Neel filed a motion to dismiss the Indictment, alleging in part

that SORNA violates the Tenth Amendment, that the retroactivity of SORNA violates the Non-Delegation Doctrine, and that SORNA (as applied to Mr. Neel) violates the Ex Post Facto Clause of the U.S. Constitution. (Defendant's Motion to Dismiss and Memorandum Brief in Support Thereof, Doc. 27, filed 02/08/13). The district court denied that motion. (Order Denying Defendant's Motion to Dismiss, filed 02/21/13).

For the trial, the government issued subpoenas for several state employees who work in the state offender registration offices. The government issued a subpoena to Ryan Rotert. (Subpoena in a Criminal Case, Doc. 41, filed 02/12/13). The government issued a subpoena to Bonnie Yarbrough. (Subpoena in a Criminal Case, Doc. 85, filed 03/07/13). The government also issued subpoenas for Joyce Golding, Scott Burgess, and Dave Bourgeois, all state officers who ultimately testified in order to enforce the federal law at hand. (R. I, 5; Witness List, Doc. 81-1, filed 03/06/13).

At the jury trial, the government presented facts that Mr. Neel had registered as a sex offender in Wagoner County, Oklahoma, on August 31, 2012. (Transcript of Jury Trial, held 03/05/13, 46). The evidence also showed that Mr. Neel stayed at a motel in Denver, Colorado for approximately two weeks, starting September 9, 2012. (Transcript of Jury Trial, held 03/05/13, 100-02). The government sought to prove that Mr. Neel had moved to Colorado for employment and that he had failed to update his information with the relevant offender registration authorities. (Transcript of Jury Trial, held 03/05/13, 16-17).

To support its theory, the government called Dave Bourgeois, who testified that

Mr. Neel did not register with the offender registration unit for the Denver, Colorado Police Department. (Transcript of Jury Trial, held 03/05/13, 101). Mr. Bourgeois did not testify about whether Mr. Neel had registered with any other sex offender unit in the State of Colorado. (Transcript of Jury Trial, held 03/05/13, 107).

Nonetheless, the jury heard that Mr. Neel was arrested in the State of Colorado on October 4, 2012. (Transcript of Jury Trial, held 03/05/13, 81). The jury also heard a lot of information regarding Mr. Neel's alleged duties to register under state law. Additionally, the jury also heard that no person ever told Mr. Neel any federal requirements for registering as a sex offender. (Transcript of Jury Trial, held 03/05/13, 54).

The government also presented testimony of Detective Scott Burgess of the Aurora, Colorado Police Department, who testified that someone with Mr. Neel's name, conviction, and an Oklahoma phone number called the sex offender registration unit for Arapaho County, Colorado on September 11, 2012 (within three business days of the first motel receipt). (Transcript of Jury Trial, held 03/05/13, 87). This call record was also introduced as a defense exhibit. (Defendant/Appellant's Addendum of Exhibits, 1) (hereinafter "Addendum of Exhibits").

There was no evidence from either party as to whether Mr. Neel appeared in person at any other law enforcement office located in the "jurisdiction" of Colorado - there was just the evidence that he had not done so with the police departments in Denver or Aurora. Nonetheless, the jury convicted Mr. Neel of failing to register and

update his registration as a sex offender. (Verdict Form, Doc. 82, filed 03/06/13).

E. Sentencing Proceedings

The initial Presentence Invstigation Report ("PSR") stated that the offense of conviction carries a base offense level of 16 based on the allegation that Mr. Neel was a "tier III" sex offender under SORNA. (PSR, Doc. 94, filed 08/26/13, 7). Mr. Neel filed an objection to the PSR, noting in part that he was a "tier I" offender, requiring an offense level of 12, because his prior offense was not punishable by imprisonment for more than one year. (PSR, Doc. 94, filed 08/26/13, 12-13). The final PSR concluded that the offense level of 16 was appropriate. (PSR, Doc. 94, filed 08/26/13, 21-22).

At some point after the trial, the State of Oklahoma determined that Mr. Neel did not actually have a legal duty to register as a sex offender under state law. (Sentencing Memorandum - Attachment A, Doc. 98-1, filed 11/12/13, 2) (email from Bonnie Yarbrough). According to the State of Oklahoma, it was unconstitutional for Mr. Neel to be forced to register as a sex offender past his initial ten-year term of registration. (Sentencing Memorandum - Attachment A, Doc. 98-1, filed 11/12/13, 2). See also Starkey v. Oklahoma Dep't of Corr., 2013 OK 43, 305 P.3d 1004, 1030 (2013).

Prior to sentencing, in his sentencing memorandum, Mr. Neel renewed his argument that his base offense level should be 12 instead of 16. (Sentencing Memorandum, Doc. 98, filed 11/12/13, 5-8). Mr. Neel made this argument again at the sentencing hearing. (Transcript of Sentencing, held 01/10/14, 3-6). Nonetheless, the district court ruled that Mr. Neel's duty to register under federal law was as a Tier III

sex offender and set the base offense level at 16. (Transcript of Sentencing, held 01/10/14, 6). The court sentenced Mr. Neel to a prison term of 24 months and ordered a five-year term of supervised release. (Judgment in a Criminal Case, Doc. 105, filed 01/14/14, 2-3).

As a condition of supervised release, the court ordered Mr. Neel to comply with the federal sex offender statutes. (Judgment in a Criminal Case, Doc. 105, filed 01/14/14, 4). Mr. Neel argued that any duty to register would violate the Tenth Amendment because Oklahoma had determined that Mr. Neel no longer had to register (or that it would violate his due process rights, as the condition would be impossible with which to comply). (Sentencing Memorandum, Doc. 98, filed 11/12/13, 11-12; Transcript of Sentencing, held 01/10/14, 8-9). In response, the court ordered Mr. Neel to try to register every 90 days with the State of Oklahoma. (Transcript of Sentencing, held 01/10/14, 19-20). Upon questions about the specifics of the condition, the district court indicated "I know I'm out there," but nonetheless ordered Mr. Neel to try to register with the state every 90 days and report the result back to the U.S. Probation officer. (Transcript of Sentencing, held 01/10/14, 10-12). Ultimately, Mr. Neel argued that the condition was void for vagueness and violated the Tenth Amendment. (Transcript of Sentencing, held 01/10/14, 24).

The judgment and commitment order, which set forth the sentence and the special conditions of supervised release, was entered on the docket on January 14, 2014. (Judgment in a Criminal Case, Doc. 105, filed 01/14/14; Attachment A). Mr. Neel

subsequently appealed to this Court. (Notice of Appeal, Doc. 108, filed 01/28/14). He now asks this Court to reverse his conviction based on insufficient evidence, or alternatively to vacate his conviction for the constitutional reasons stated herein. He also asks this Court to reverse the sentence imposed by the district court and remand for resentencing consistent with the arguments set forth below.

SUMMARY OF THE ARGUMENTS

1. No reasonable jury could have found that Mr. Neel failed to register or update his registration in the State of Colorado, because the government only presented evidence that he failed to register in two of Colorado's 64 counties. Under federal law, a person is only required to register in a "jurisdiction," which means the state. See 42 U.S.C. § 16913(c); 42 U.S.C. § 16911(10)(A). Thus, there was insufficient evidence at trial that Mr. Neel failed to register or update his registration as a sex offender in the jurisdiction of Colorado, because there was no evidence presented regarding the other 62 counties. For this reason, this Court should reverse Mr. Neel's conviction based on insufficiency of the evidence.

2. In this case, the government commandeered the assistance of the Oklahoma and Colorado state sex offender officers in violation of the Tenth Amendment of the U.S. Constitution. There are no federal officers that enforce the federal sex offender statutes. It is handled entirely at the local level. And for the trial in this case, state officials were commandeered to testify at the trial in this case, via subpoena. Because this commandeering of state officials is necessary to enforce the federal sex offender

statutes, the process violates the Tenth Amendment and Mr. Neel's conviction should be vacated by this Court.

3. In 42 U.S.C. § 16913(d), Congress granted the Attorney General the discretion to prosecute for failure to register or update registration under SORNA offenders whose convictions predate the enactment of SORNA. Mr. Neel is one such offender. This grant of unfettered discretion to the Attorney General to specify whether SORNA and its criminal penalties should apply to hundreds of thousands of people convicted of sex offenses before its enactment violates the non-delegation doctrine. There is simply no meaningful guidance in SORNA as to the decision that Congress gave the Attorney General to make, and thus the statutory scheme violates the non-delegation doctrine set forth in U.S. Const. Art. I §§ 1 and 8.

4. Because SORNA, through the Attorney General's order, retroactively increased the term of registration for Mr. Neel, this law violates the Ex Post Facto Clause by increasing the punishment for a previous conviction. Although this Court has previously rejected this claim, there have been several state court decisions to the contrary in recent years. In light of this growing consensus of the ex post facto problem with the retroactive application of sex offender laws, this Court should revisit and reverse its holding on this matter. For these reasons, Mr. Neel's duty to register under SORNA was an unconstitutional one, and this Court should vacate his conviction.

5. The sentence imposed in this case was procedurally unreasonable because the base offense level should have been 12. Mr. Neel's prior New York offense was not an

" offense . . . punishable by imprisonment for more than 1 year" because the court in that case gave a determinate sentence under NY Penal § 70.00(4) (1998), which could not exceed one year of jail, based on the nature of that offense and Mr. Neel's lack of criminal history. Thus, without using hypothetical aggravating factors or criminal history, the prior offense made Mr. Neel a tier I sex offender, as the term is used in 42 U.S.C. § 16911, and Mr. Neel's should have been sentenced using a base offense level of 12, pursuant to U.S.S.G. § 2A3.5(a).

6. The special condition of supervised release that Mr. Neel attempt to register as a sex offender every 90 days is unconstitutionally void for vagueness, in violation of his due process rights, because the condition is not sufficiently clear to inform Mr. Neel of what conduct will result in his return to prison. When questioned by defense counsel, the district court could not articulate exactly how Mr. Neel was to comply with the condition and even noted that the issue was "hazy." Given the uncertainty with how the condition will be enforced, it is void for vagueness and should be vacated by this Court.

ARGUMENT

Issue I: There was insufficient evidence to convict Mr. Neel of Count One because no reasonable jury could have found beyond a reasonable doubt that Mr. Neel failed to register or update his registration in the State of Colorado.

At the close of the government's case in chief at the trial, defense counsel moved for judgment of acquittal under Fed. R. Crim. P. 29. (Transcript of Jury Trial, held 03/05/13, 112-13). This Court reviews the record for sufficiency of the evidence de novo. United States v. Nelson, 383 F.3d 1227, 1229 (10th Cir. 2004). Evidence is

sufficient to support a conviction if a reasonable jury could find the defendant guilty beyond a reasonable doubt, given the direct and circumstantial evidence, along with reasonable inferences therefrom, taken in a light most favorable to the government. Id. In this case, no reasonable jury could have found that Mr. Neel failed to register or update his registration in the State of Colorado.

The government charged Mr. Neel with failing to register or update his sex offender registration under the Sex Offender Registration and Notification Act (SORNA), pursuant to 18 U.S.C. §§ 2250(a)(1), (a)(2)(B), and (a)(3). (Indictment, Doc. 2, filed 12/04/12). The duty to register or update registration is an essential element of the offense and stems from 42 U.S.C. §§ 16913(a) and (c). (Instructions to the Jury, Doc. 83, filed 03/06/13, 8) (Instruction No. 4). At trial, the government alleged that Mr. Neel established a residence and obtained employment in Colorado without updating his registration information with local authorities. (Government's Trial Brief, Doc. 64, filed 02/22/13, 2-3; Transcript of Jury Trial, held 03/05/13, 16-17).

Under 42 U.S.C. § 16913(a), "[a] sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." The statute further states that in order to keep the registration current, "[a] sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person **in at least 1 jurisdiction** involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the

sex offender registry." 42 U.S.C. § 16913(c) (emphasis added). Relevant to this case, the term "jurisdiction" means "[a] State." (Instructions to the Jury, Doc. 83, filed 03/06/13, 9) (Instruction No. 5). See also 42 U.S.C. § 16911(10)(A).

At trial, the government presented evidence that Mr. Neel stayed at a motel in Denver, Colorado for approximately two weeks, starting September 9, 2012. (Transcript of Jury Trial, held 03/05/13, 100-02; Addendum of Exhibits, 5-8). The government also presented evidence that Mr. Neel had applied for a temporary job with Beacon Printing, located in Denver, Colorado, on September 7, 2012. (Transcript of Jury Trial, held 03/05/13, 71-75). The evidence showed that Mr. Neel starting working in the temporary position on September 14, 2012, and that he worked until he was arrested there on October 4, 2012. (Transcript of Jury Trial, held 03/05/13, 75-77).

To support the alleged failure to update the registration information, the government called Dave Bourgeois, an officer in the Denver Police Department, who testified that Mr. Neel did not register with the offender registration unit in Denver, Colorado. (Transcript of Jury Trial, held 03/05/13, 101). Mr. Bourgeois did not testify about whether Mr. Neel had registered with any other sex offender unit in the State of Colorado. (Transcript of Jury Trial, held 03/05/13, 101, 107).

The government also presented testimony of Detective Scott Burgess of the Aurora, Colorado Police Department, who testified that someone with Mr. Neel's name, conviction, and an Oklahoma phone number called the sex offender registration unit for Aurora, Colorado on September 11, 2012. (Transcript of Jury Trial, held 03/05/13, 87).

This call record was also introduced as a defense exhibit. (Addendum of Exhibits, 1). But there was no evidence from either party as to whether Mr. Neel appeared in person at any other law enforcement office located in the "jurisdiction" of Colorado - there was just the evidence that he had not done so with the police departments in Denver or Aurora, Colorado. Nonetheless, the jury convicted Mr. Neel of failing to register and update his registration as a sex offender. (Verdict Form, Doc. 82, filed 03/06/13).

Under 42 U.S.C. § 16913(c), Mr. Neel could have registered or updated his registration information in either the jurisdiction where he was a resident or the jurisdiction where he was an employee and been in compliance with federal law. The government presented circumstantial evidence that Mr. Neel was residing in Colorado and that he was an employee in Colorado. But the government only presented evidence that Mr. Neel failed to register in Denver, Colorado and Aurora, Colorado.

Although Colorado law might require registration in a specific county, SORNA only requires registration in a "jurisdiction," which in this case was the State of Colorado. See 42 U.S.C. § 16913(c) (allowing the offender to update any change in registration in any "jurisdiction" where he is either an employee, resident, or student); 42 U.S.C. § 16911(10)(A) (defining "jurisdiction" as "A state"). (Instructions to the Jury, Doc. 83, filed 03/06/13, 9) (Instruction No. 5). According to the website for the Judicial Branch of the State of Colorado, Colorado has 64 counties. See http://www.courts.state.co.us/Courts/County/Choose.cfm, obtained online 06/11/14. Thus, Mr. Neel could have appeared in person at any one of the other 62 counties in

Colorado to update his registration under federal law. There was no testimony about any other counties or municipalities in Colorado. And the officers who did testify stated that they did not know about the procedures in any other city or county in Colorado. (Transcript of Jury Trial, held 03/05/13, 107) .

Even when the evidence is construed in favor of the government, no reasonable jury could have found that Mr. Neel failed to register or update his registration in the State of Colorado, because the government only presented evidence that he failed to register in two of Colorado's 64 counties. Thus, there was insufficient evidence that Mr. Neel failed to register or update his registration as a sex offender in the jurisdiction of Colorado. For this reason, this Court should reverse Mr. Neel's conviction based on insufficiency of the evidence.

Issue II: The district court erred in denying Mr. Neel's motion to dismiss because SORNA, as applied in this case, infringes on state rights in violation of the Tenth Amendment of the U.S. Constitution.

This issue involves a question of constitutional law, which this Court reviews de novo. United States v. Morgan, 748 F.3d 1024, 1030-31 (10th Cir. 2014) (de novo review of as-applied Commerce Clause challenge to kidnapping statute).

A. Procedural Facts

Prior to trial, Mr. Neel filed a motion to dismiss the Indictment, alleging in part that SORNA violates the Tenth Amendment of the U.S. Constitution. (Defendant's Motion to Dismiss and Memorandum Brief in Support Thereof, Doc. 27, filed 02/08/13). The district court denied that motion. (Order Denying Defendant's Motion

to Dismiss, filed 02/21/13).

For the trial, the government issued subpoenas for several state employees who work in the state offender registration offices. The government issued a subpoena to Ryan Rotert. (Subpoena in a Criminal Case, Doc. 41, filed 02/12/13). The government issued a subpoena to Bonnie Yarbrough. (Subpoena in a Criminal Case, Doc. 85, filed 03/07/13). Both witnesses were employed with the State of Oklahoma in the field of sex offender registration. (Witness List, Doc. 81-1, filed 03/06/13). The government also issued subpoenas for Joyce Golding, Scott Burgess, and Dave Bourgeois, all state officers who ultimately testified in order to enforce the federal law at hand. (R. I, 5; Witness List, Doc. 81-1, filed 03/06/13).

B. Standing

In Bond v. United States, 131 S. Ct. 2355 (2011), the U.S. Supreme Court held that a defendant has prudential standing to challenge the statute of conviction as violating the Tenth Amendment of the U.S. Constitution. The Bond decision was inconsistent with this Court's previous case law on the subject. See, e.g., United States v. Parker, 362 F.3d 1279 (10th Cir. 2004) (defendant lacked standing to assert Tenth Amendment challenge). Nonetheless, under Bond, Mr. Neel has standing to challenge the constitutionality of SORNA under the Tenth Amendment. See Bond, 131 S. Ct. at 2365 ("Just as it is appropriate for an individual, in a proper case, to invoke separation-of-powers or checks-and-balances constraints, so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism.").

C. The administration and enforcement of SORNA in this case relies on Oklahoma state employees, even though Oklahoma has not created a SORNA-compliant offender registry. Thus, as applicable here, SORNA violates the Tenth Amendment.

By forcing state officials to enforce and administer a federal regulatory system, SORNA violates the Tenth Amendment and principles of federalism. See Bond, 131 S. Ct. at 2365. The registration requirements in 42 U.S.C. §§ 16913 and 16916, which impose a federal obligation on offenders to register in individual state-created and state-run sex offense registries, are an unconstitutional encroachment of federal power on state sovereignty. As described above, in order to violate 18 U.S.C. § 2250, a defendant must first be required to register under SORNA.

Here, SORNA seemingly requires federal sex offenders to register in state-run registries; this violates the Tenth Amendment. The Tenth Amendment provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X. The Tenth Amendment has been applied to uphold the principles of federalism by limiting the power the federal government may exercise over state activities. For example, the Tenth Amendment prohibits the federal government from commandeering state officials into enacting or administering federal law. Printz v. United States, 521 U.S. 898, 935 (1997).

According to the Office of SMART, "[i]n the United States, sex offender

registration is conducted at the local level and the federal government does not have a system for registering sex offenders." SMART, Sex Offender Registration and Notification in the United States: Current Case Law and Issues, at http://www.smart.gov/caselaw/handbook_august2013.pdf (obtained online Sept. 23, 2013) (Sentencing Memorandum - Attachment D, Doc. 98-4, filed 11/12/13, 5). Thus, there are no federal employees that can administer an offender registry or properly enforce it when an offender fails to register.

Although SORNA offers the states financial incentives to create SORNA-compliant registries, 42 U.S.C. § 16925, Oklahoma has not created one. See http://www.ojp.usdoj.gov/smart/sorna.htm (last visited 06/11/14). Thus, if SORNA registration requirements are in effect in Oklahoma, then state officials have been forced to register individuals and administer federal law pursuant to SORNA. (Sentencing Memorandum - Attachment D, Doc. 98-4, filed 11/12/13, 5) (acknowledging that "sex offender registration itself is not directly administered by the federal government"). This means that state officials have been commandeered to administer a SORNA system before their respective states have actually chosen to implement SORNA. In fact, in this case,

SORNA does not establish or create a federal sex offender registry. Instead, SORNA legislation is designed to co-opt the various state sex offender registration systems throughout the nation to make them uniform in terms of registration essentials. In this respect, SORNA resembles the law struck down in Printz v. United States, 521

U.S. 898 (1997). There, the Court ruled that it was unconstitutional to require state officers to conduct background checks on gun purchasers to execute federal laws. Id. at 935.

In Printz, the Supreme Court struck down a law requiring local law enforcement officials to conduct background checks of prospective handgun purchasers. The Court held, "[t]he Federal Government may neither issue directives requiring the states to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." 521 U.S. at 935; see also New York v. United States, 505 U.S. 144, 180 (1992) (holding Congress did not have the power to compel the states to enact a federal program regulating the disposal of toxic waste). Like the background checks in Printz, under SORNA, state officers in Oklahoma are required to register sex offenders, or to assist in any federal prosecutions, in the manner prescribed by federal law even though Oklahoma has not adopted a SORNA-compliant registry.

Just as Congress has no power to compel local law enforcement to conduct federally mandated background checks, it has no power to compel local law enforcement to accept registrations from federally-mandated sex offenders or to force said state officers come to court to testify as necessary witnesses for the enforcement of the federal sex offender registry scheme. See also United States v. Snyder, 852 F.2d 471, 475 (9th Cir. 1988) ("the federal government has no constitutional authority to interfere with a state's exercise of its police power except to the extent the state's action

intrudes on any of the spheres in which the federal government itself enjoys the power to regulate").

In this case, the government commandeered the assistance of the Oklahoma and Colorado state sex offender officers. The government issued a subpoena to Ryan Rotert, commanding her appearance. (Subpoena in a Criminal Case, Doc. 41, filed 02/12/13). And the government issued a subpoena to Bonnie Yarbrough, commanding her appearance. (Subpoena in a Criminal Case, Doc. 85, filed 03/07/13). Both witnesses were employed with the State of Oklahoma in the field of sex offender registration. (Witness List, Doc. 81-1, filed 03/06/13). The government also issued subpoenas for Joyce Golding, Scott Burgess, and Dave Bourgeois, all state officers who ultimately testified in order to enforce the federal law at hand. (R. I, 5; Witness List, Doc. 81-1, filed 03/06/13).

SORNA gives states the option of whether they want to adopt its provisions at the threat of losing federal funds. See 42 U.S.C. § 16925. But even though Oklahoma apparently has not given in to this financial coercion, the federal government is nonetheless forcing state officials to administer and enforce federal statutes. This includes requesting state officials to check whether certain offenders are registered under state law and then subpoenaing those state employees to testify at any federal trial. This process occurred in this case, as both Oklahoma and Colorado state officials testified at the trial under subpoena of the federal government.

Once again, according to the Office of SMART, the federal government does not

have a system for registering sex offenders and must rely on state employees to do so. (Sentencing Memorandum - Attachment D, Doc. 98-4, filed 11/12/13, 5) (acknowledging that "sex offender registration itself is not directly administered by the federal government"). And the government apparently must rely on state employees for any SORNA prosecution. Id. But once again, Oklahoma and Colorado has not adopted a SORNA-compliant registry scheme. See http://www.ojp.usdoj.gov/smart/sorna.htm (last visited 06/11/14). And in this case in particular, the State of Oklahoma has even subsequently determined that Mr. Neel was not even required to register after 2008. (Sentencing Memorandum - Attachment A, Doc. 98-1, filed 11/12/13, 2). See also Starkey v. Oklahoma Dep't of Corr., 2013 OK 43, 305 P.3d 1004, 1030 (2013). He has been taken off the registry, because he no longer has a state duty to register.

Under these circumstances, the actions of the federal government in commandeering state employees to administer and enforce SORNA (by subpoena and by other means) violates the Tenth Amendment of the U.S. Constitution. See Printz, 521 U.S. at 935. Accordingly, this Court should reverse the district court on this issue and vacate Mr. Neel's conviction.

Issue III: The district court erred in denying Mr. Neel's motion to dismiss. Congress violated the Non-Delegation Doctrine in giving the Attorney General the power to decide whether SORNA should be extended to those persons whose sex-offense convictions pre-date the act, and without providing an intelligible principle to make that decision. Thus, this prosecution, which is based on that improper delegation, is unconstitutional.

This issue involves a question of constitutional law, which this Court reviews de

novo. United States v. Morgan, 748 F.3d 1024, 1030-31 (10th Cir. 2014) (de novo review of as-applied Commerce Clause challenge to kidnapping statute).

A. Procedural Facts

Prior to trial, Mr. Neel filed a motion to dismiss the Indictment, alleging in part that SORNA violates the non-delegation doctrine of Article I, sections 1 and 8 of the U.S. Constitution. (Defendant's Motion to Dismiss and Memorandum Brief in Support Thereof, Doc. 27, filed 02/08/13, 14-19). The district court denied that motion, concluding that this claim was without merit. (Order Denying Defendant's Motion to Dismiss, filed 02/21/13, 2-3).

B. Argument

When Congress enacted SORNA, it did not require those who had already been convicted of a sex offense (like Mr. Neel) to register as a matter of federal law. Likewise, Congress did not create any federal crime involving the failure of such people to register as a sex offender. Congress instead, in 42 U.S.C. § 16913(d), left it to the Executive Branch to decide whether people like Mr. Neel should be subject to SORNA and to criminal prosecution for not abiding by the statute. See Reynolds v. United States, 132 S. Ct. 975 (2012) (holding that SORNA does not require pre-Act offenders to register before the Attorney General validly specifies that the Act's registration provisions apply to them) (overruling United States v. Hinckley, 550 F.3d 926 [10th Cir. 2008]).

This delegation of power to the Executive Branch was not valid. Under Article I,

§ 1 of the Constitution, "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States." One of the most basic of those powers is the power to define what is and is not a crime. In declining itself to bring Mr. Neel and hundreds of thousands of others within the reach of SORNA, and instead leaving that basic decision about what is a criminal offense to the Attorney General, without any meaningful standards to guide his decision, Congress impermissibly ceded a core legislative power.

The principle of separation of powers predates the Constitution. Loving v. United States, 517 U.S. 748, 756 (1996). Not only that, but it "underlies our tripartite system of Government." Mistretta v. United States, 488 U.S. 361, 371 (1989). "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787." Buckley v. Valeo, 424 U.S. 1, 124 (1976) (per curiam). "The very structure of the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . . ." INS v. Chadha, 462 U.S. 919, 946 (1983). The Supreme Court "consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." Mistretta, 488 U.S. at 380.

While the authority to legislate or make law is entrusted to Congress under U.S. Const. Art. I §§ 1 and 8, SORNA delegates to the Attorney General the authority to legislate or determine the act's retrospective reach. See 42 U.S.C. § 16913(d).

However, "the integrity and maintenance of the system of government ordained by the Constitution" require that Congress generally cannot delegate its legislative power to another branch of government. Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892).

Under SORNA, the Attorney General is vested with the authority to "specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply" with the initial registration requirements. 42 U.S.C. § 16913(d). In addition, the Attorney General has the authority to "prescribe rules for the notification of sex offenders who cannot be registered" upon release from custody or after sentencing for the offense giving rise to the duty to register. Id. § 16917(b).

The retroactive reach of a statute is a traditional legislative function that cannot be delegated to the executive branch. Retrospective legislation is disfavored, and, in those limited circumstances where it is permitted, a legislative policy judgment should be manifest. See Landgraf v. USI Film Prods., 511 U.S. 244, 271 (1994) (discussing the presumption against retroactive effect and emphasizing the need for clear language requiring retroactivity). See also Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 755 (5th Cir. 2001) ("No function cuts more to the heart of the Executive's constitutional duty to take care that the laws are faithfully executed than criminal prosecution.").

In 42 U.S.C. § 16913(d), Congress granted the Attorney General the discretion to prosecute for failure to register or update registration under SORNA offenders whose convictions predate the enactment of SORNA. This grant of unfettered discretion to the Attorney General to specify whether SORNA and its criminal penalties should apply to hundreds of thousands of people convicted of sex offenses before its enactment violates the non-delegation doctrine.

There are as many as 500,000 people who were convicted of sex offenses before SORNA was passed. Hinckley, 550 F.3d at 947 & n.7. The power Congress gave to the Attorney General in 42 U.S.C. § 16913(d) was therefore a substantial one. It was the power to decide whether to subject a very large class of people -- or some or none of the class -- to a registration requirement, and to related criminal penalties associated with registration violations. It was the power to establish a crime as to all those pre-Act offenders whom the Attorney General might decide to sweep within the reach of SORNA.

There is some support for the view that, independent of whether any guidance was given the Attorney General, this improperly delegated legislative power is contrary to the constitutional command that it is for Congress alone to legislate. U.S. Const., Art. I, § 1. Congress did not "legislate[] in broad terms, leaving a certain degree of discretion to executive or judicial actors." See United States v. Touby, 500 U.S. 160, 165 (1991). Instead of calling for the exercise of executive power in connection with a statute, it made "a pure delegation of legislative power" by allowing the Attorney

General to decide who was covered by SORNA. See Mistretta, 488 U.S. at 420 (Scalia, dissenting) (delegation to Sentencing Commission to issue guidelines that set binding sentencing ranges). No standards should be able to save such a delegation. Id.

But even if the delegation is viewed in the former terms, it can only be valid if Congress provided meaningful guidance to the Attorney General as to how to exercise the discretion given. That is, the delegation is valid only if Congress "lays down by legislative act an intelligible principle by which the person or body authorized to [act] is directed to conform." Touby, 500 U.S. at 165 (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 [1928]) (brackets by Court in Touby).

There is no such intelligible principle in the statute here. SORNA does not spell out any factors that the Attorney General should consider in deciding whether, or how, or to what degree, to exercise this power. The statute does not identify what might appropriately be thought to bear on the momentous decision of who should be subject to SORNA and open to prosecution for violating it.

Instead, there is only the very broad declaration of the purpose with which Congress itself acted. 42 U.S.C. § 16901. The purpose consists of just a single sentence. Congress there explained that it was enacting SORNA to protect the public from "sex offenders and offenders against children." Id. The entire sentence reads as follows:

> In order to protect the public from sex offenders and offenders against children, and in response to the viscous attacks by violent predators against the victims listed below, Congress in this chapter establishes a

comprehensive national system for the registration of those offenders:

Id. (list of children attacked omitted).

If this declaration of purpose did not prompt Congress to reach all those with a sex-offense conviction that predates SORNA, it could not meaningfully guide the Attorney General in who among this vast class to subject to SORNA and its criminal penalties. The declaration of purpose would suggest that all should be included. Congress's failure to take this easy step counsels strongly in the opposite directions. As Judge Gorsuch of this Court has observed, the failure to include those with sex-offense convictions that pre-date SORNA is "manifestly irreconcilable" with the declaration of purpose. Hinckley, 550 F.3d at 945 (Gorsuch, J., concurring) (relying on this as a reason to read statute as by its terms covering such offenders). And Congress gave the Attorney General no principle by which to resolve this blatant conflict.

Nor did Congress give the Attorney General any guidance about how to make any more nuanced decision regarding the reach of SORNA for those persons with a pre-existing conviction for a sex offense. Congress did not say a word about what factors might guide that decision if, as its own failure to act with respect to the class strongly suggested, the decision were not (or not necessarily) an all-or-nothing one.

Of course, there could be concerns that might prompt differential treatment of those with pre-existing convictions of a sex offense, and those who sustained one after SORNA became law. For example, SORNA calls for notice to be given to those convicted of sex offenses. The notice is to be given on the offender's release from

custody or at the time of sentencing, 42 U.S.C. § 16917(a), with the Attorney General "to prescribe rules for the notification of those" sex offenders who cannot be notified in that way, id., § 16917(b). Most of those with pre-existing convictions, including Mr. Neel, would fall in the latter category. But the statute is utterly silent as to how (if at all) the Attorney General is to factor such considerations into his exercise of discretion.

The bottom line is that SORNA gives no meaningful guidance as to the decision that Congress gave the Attorney General to make. The only principle that Congress provided is one that suggested a result that Congress itself decided not to take.

On this issue, Judge Gorsuch forcefully explained the non-delegation problem here in his concurring opinion in Hinckley. The explanation came in the context of an argument that invoked the doctrine of constitutional avoidance, which counsels against a statutory reading that "raises problems of potential constitutional dimension." Hinckley, 550 F.3d at 948 (Gorsuch, J., concurring). The need to avoid such a constitutional problem, Judge Gorsuch argued, supported reading SORNA as covering all those with a sex-offense conviction that pre-dated the Act. Id. With the Supreme Court having now rejected that reading of SORNA in Reynolds, it is only by the Attorney General's use of delegated power that the members of this class can come within the ambit of SORNA. What Judge Gorsuch highlighted in his concurrence bears prominently on the invalidity of that delegation.

Judge Gorsuch described the delegation that occurred here as being of "unfettered, unguided discretion." Id. at 943 n.2; see also id. at 948 (describing

discretion as "unfettered"). He could not see "any discernible principle" that could guide the Attorney General in whom to include within SORNA. Id. What he described is a paradigm of a violation of the non-delegation doctrine:

> Without any discernible principle to guide him or her in the statute, the Attorney General could, willy nilly, a) require every single one of the estimated half million sex offenders in the nation to register under SORNA, b) through inaction, leave each of those half million offenders exempt from SORNA, c) do anything in between these two extremes, or d) change his or her mind on this question, making the statute variously prospective and retroactive, as administrative agencies are normally entitled to do when Congress delegates interpretive questions to them.

Id. (citation omitted).

Judge Gorsuch is not alone in coming to this conclusion. See United States v. Fuller, 627 F.3d 499, 511 (2d Cir. 2010) (Raggi, J., concurring), vacated and remanded for further consideration in light of Reynolds, 132 S. Ct. 975 (2012) (explaining that "[t]he Attorney General could simply flip a coin, and thereby make more than 500,000 persons convicted of sex offenses before July 27, 2006, subject to SORNA's registration requirements -- or not."); see also United States v. Juvenile Male, 590 F.3d 924, 929 (9th Cir. 2010) ("Congress gave the Attorney General no instruction regarding whether SORNA should apply retroactively"), vacated as moot on other grounds, 131 S.Ct. 2860 (2011).

In fact, in Reynolds, Justice Scalia, joined by Justice Ginsburg opined as follows:

> [I]t is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide -- with no statutory standard whatever governing his discretion – whether a criminal statute will or will not apply to certain individuals. That seems to me sailing close to the wind with

regard to the principle that legislative powers are nondelegable . . . .

Reynolds, 132 S.Ct. at 986 (Scalia, J., dissenting). Thus, even though the issue was not decided by the Court in Reynolds, two justices went out of their way to question the constitutionality of Congress' delegation of its power in SORNA.

As many have observed, there is simply no intelligible principle in SORNA that could aid the Attorney General in making the threshold, and monumental decision, of whom (if any) among the 500,000 whose sex-offense convictions were before SORNA's effective date would be included within the reach of its registration requirements and its related, criminal penalties. In short, the unfettered discretion given to the Attorney General runs afoul of the non-delegation doctrine. Because Mr. Neel was one of the thousands of persons whose sex offense pre-dated SORNA, this Court should vacate his conviction on these grounds.

Issue IV: On its face and as applied to Mr. Neel, SORNA violates the Ex Post Facto Clause by increasing the punishment for a previous conviction.

This issue involves a question of constitutional law, which this Court reviews de novo. United States v. Morgan, 748 F.3d 1024, 1030-31 (10th Cir. 2014) (de novo review of as-applied Commerce Clause challenge to kidnapping statute).

A. Procedural Facts

Prior to trial, Mr. Neel filed a motion to dismiss the Indictment, alleging in part that SORNA violates the Ex Post Facto Clause of the U.S. Constitution by increasing the punishment for a previous conviction. (Defendant's Motion to Dismiss and

Memorandum Brief in Support Thereof, Doc. 27, filed 02/08/13, 19-21). The district court denied that motion, finding that this Court had already ruled on the matter. (Order Denying Defendant's Motion to Dismiss, filed 02/21/13, 2).

B. Argument

This 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. United States v. Lawrance, 548 F.3d 1329, 1336 (10th Cir.2008). Thus, this argument is presented to preserve the issue for further review.

The application of the registration requirements of SORNA to Mr. Neel violates the Ex Post Facto Clause of the Constitution because it "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." Calder v. Bull, 3 U.S. (3 Dall.) 386, 391 (1798). Only statutory schemes that are punitive can violate the Ex Post Facto Clause. Smith v. Doe, 538 U.S. 84, 92 (2003). To determine whether a statutory scheme is punitive, courts must look to the identified legislative intent and the overall effect of the statutory scheme. Id. at 92-93. "[T]wo critical elements must be present for a criminal or penal law to be ex post facto: in must be retrospective, that is it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. [Citations omitted.]" Weaver v. Graham, 450 U.S. 24, 29 (1981).

Mr. Neel's original conviction is from New York state in 1998. For the conviction, his initial registration date was October 10, 1998. (Sentencing

Memorandum - Attachment B, Doc. 98-2, filed 11/12/13, 2). Under New York law at the time, he was required to register for a period of 10 years. See N.Y. Correct. Law § 168-h (1998 vers.). ((Defendant's Motion to Dismiss and Memorandum Brief in Support Thereof - Attachment, Doc. 27-1, filed 02/08/13). Under 42 U.S.C. § 16915(a), the minimum term of registration under SORNA is fifteen (15) years.

Any obligation created by SORNA that requires Mr. Neel to register for a period of time longer than the original 10-year term is retrospective and is a violation of Mr. Neel's rights under the Ex Post Facto Clause of the U.S. Constitution. See U.S. Const., Art. I, § 9, cl. 3. The application of SORNA undoubtedly "disadvantage[s] the offender affected by it." See Weaver, 450 U.S. at 29. This is because Mr. Neel would no longer have had a duty to register under the New York law in effect at the time of his sentencing.

While Smith considered whether it was punitive to list offenders on a registry, here the inquiry is whether prosecuting an offender under a new crime is prohibited by the Ex Post Facto Clause. Smith, 538 U.S. at 101-02. "A sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure . . . whether other constitutional objections can be raised to a mandatory reporting requirement and how this questions might be resolved, are concerns beyond the scope of this opinion." Id.

SORNA became law in 2006 and was implemented retroactively by the Attorney General. Under SORNA, depending on the registrant's classification, an individual must

report in person a minimum of one (1) to four (4) times a year. 42 U.S.C. § 16916. The individual must provide a wide range of personal information, including their address or placement of employment, under penalty of criminal prosecution. Id. at §§ 16913, 16914. And they are required to appear in person to update a change to any of that information within three business days of the change. Id. at § 16913(c).

These onerous requirements are akin to probation or supervised release. Because the mechanisms are excessive in comparison to the stated objective of public safety, the system is punitive rather than regulatory. See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963). In addition, SORNA was intended to be punitive, as the failure to register statute (18 U.S.C. § 2250[a]) creates a new federal crime and subjects offenders to a potential ten (10) year prison term.

Because SORNA, through the Attorney General's order, retroactively increased the term of registration for Mr. Neel, this law violates the Ex Post Facto Clause by increasing the punishment for a previous conviction. In fact, a number of state courts have so held regarding the retroactive application of sex offender statutes. See Starkey v. Oklahoma Dep't of Corr., 2013 OK 43, 305 P.3d 1004, 1030 (2013); Doe v. Dep't of Pub. Safety & Corr. Servs., 430 Md. 535 (Md. 2013); State v. Williams, 952 N.E.2d 1108 (Ohio 2011); Maine v. Letalien, 985 A.2d 4 (Me. 2009); Wallace v. State, 905 N.E.2d 371 (Ind. 2009); Doe v. State, 189 P.3d 999 (Alaska 2008). In light of this growing consensus of the ex post facto problem with the retroactive application of sex offender laws, this Court should revisit and reverse its holding on this matter in

Lawrance. For these reasons, Mr. Neel's duty to register under SORNA was an unconstitutional one, and this Court should vacate his conviction.

Issue V: The sentence imposed in this case was procedurally unreasonable because the base offense level should have been 12.

This Court reviews a sentence for reasonableness, using a deferential abuse of discretion standard. See United States v. Smart, 518 F.3d 800, 803, 806 (10th Cir. 2008). The reasonableness review "includes both a procedural component, encompassing the method by which a sentence was calculated, as well as a substantive component, which relates to the length of the resulting sentence." Smart, 518 F.3d at 803 (internal quotation marks and citation omitted). In considering the district court's procedural application of the Guidelines, this Court reviews factual findings for clear error and legal determinations de novo. See United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006).

A. Procedural Facts

The initial Presentence Invstigation Report ("PSR") stated that the offense of conviction carries a base offense level of 16 based on the allegation that Mr. Neel was a "tier III" sex offender under SORNA. (PSR, Doc. 94, filed 08/26/13, 7). Mr. Neel filed an objection to the PSR, noting in part that he was a "tier I" offender, requiring an offense level of 12, because his prior offense was not punishable by imprisonment for more than one year. (PSR, Doc. 94, filed 08/26/13, 12-13). The final PSR concluded that the offense level of 16 was appropriate. (PSR, Doc. 94, filed 08/26/13, 21-22).

In his sentencing memorandum, Mr. Neel renewed his argument that his base offense level should be 12 instead of 16. (Sentencing Memorandum, Doc. 98, filed 11/12/13, 5-8). Mr. Neel made this argument again at the sentencing hearing. (Transcript of Sentencing, held 01/10/14, 3-6). Nonetheless, the district court ruled that Mr. Neel's duty to register under federal law was as a tier III sex offender and set the base offense level at 16. (Transcript of Sentencing, held 01/10/14, 6). The then court sentenced Mr. Neel to a prison term of 24 months and ordered a five-year term of supervised release. (Judgment in a Criminal Case, Doc. 105, filed 01/14/14, 2-3). Mr. Neel asks this Court to reverse the court's sentence as procedurally unreasonable.

B. The base offense level under U.S.S.G. § 2A3.5(a) should be 12.

The PSR stated that this offense is for a "Tier III" offense. (PSR, Doc. 94, filed 08/26/13, 4). However, this is not correct. Because Mr. Neel's prior New York offense was not an offense punishable by more than one year of imprisonment, Mr. Neel is a tier I offender and his base offense level should be 12. See U.S.S.G. § 2A3.5(a)(3); 42 U.S.C. § 16911.

Under 42 U.S.C. § 16911, tier II or tier III sex offender status applies only to a "sex offender whose offense is punishable by imprisonment for more than 1 year. . . ." In Mr. Neel's prior New York case, he was convicted of a New York class E felony offense and sentenced to 180 days in the county jail. (PSR, Doc. 94, filed 08/26/13, 5). The judge ordered a determinate sentence, and specifically found that the offense should not be punishable by more than one year in jail. See NY Penal § 70.00(4) (1998)

(Sentencing Memorandum - Attachment C, Doc. 98-3, filed 11/12/13).

Under the law at the time of Mr. Neel's prior offense, the New York judge could have given him an indeterminate sentence or the judge could give him a determinate sentence. See NY Penal § 70.00(4) (1998) (Sentencing Memorandum - Attachment C, Doc. 98-3, filed 11/12/13). For a class E felony, the judge could only give Mr. Neel a determinate sentence if he was a first-time offender and based on the "nature and circumstances of the crime and to the history and character of the defendant . . . ." NY Penal § 70.00(4) (1998) (Sentencing Memorandum - Attachment C, Doc. 98-3, filed 11/12/13). If the judge chose a determinative sentence under the facts of the case, the court could only give a sentence of "one year or less." NY Penal § 70.00(4) (1998) (Sentencing Memorandum - Attachment C, Doc. 98-3, filed 11/12/13). And again, the court could not give such a determinate sentence to a second-time felon or in any case where the nature and circumstances of the crime did not warrant it. See NY Penal § 70.00(4) (1998) (Sentencing Memorandum - Attachment C, Doc. 98-3, filed 11/12/13).

Whether an "offense is punishable by imprisonment for more than 1 year" should be determined by the possible sentence for the prior offense, based on the actual facts and criminal history that existed for offender at the time of the offense. See United States v. Brooks, 2014 WL 2443032 (10th Cir. June 2, 2014) (defendant's prior Kansas conviction for eluding police was not a felony for purposes of imposition of career offender enhancement; rejecting "hypothetical worst possible offender" test).

In Carachuri–Rosendo v. Holder, 130 S. Ct. 2577 (2010), the U.S. Supreme

Court clarified the definition of "aggravated felon" for immigration purposes. 8 U.S.C. § 1101(a)(43)(B) defines that term to include in part "illicit trafficking in a controlled substance . . . including a drug trafficking crime" as defined in 18 U.S.C. § 924(c), which, in turn, defines a "drug trafficking crime" as a "felony punishable under," inter alia, "the Controlled Substances Act (21 U.S.C. 801 et seq.)." For purposes of this analysis, the Supreme Court noted that a felony is a crime for which the "maximum term of imprisonment authorized" is "more than one year," citing 18 U.S.C. § 3559(a). Carachuri–Rosendo, 130 S. Ct. at 2581. Of course, this definition of a felony is similar to how 42 U.S.C. § 16911 distinguishes between offenses that are tier I offenses and those that are either tier II or tier III sex offenses.

Carachuri–Rosendo held that a second or subsequent conviction on a simple drug possession charge is not an "aggravated felony" for purposes of the Immigration and Nationality Act when the state conviction is not based on the fact of a prior conviction. Id. at 2586-90. In other words, the government cannot rely on a state misdemeanor drug possession conviction as an aggravated felony simply because the offense could have been charged as a felony. The Fourth Circuit made a similar ruling in United States v. Simmons, 649 F.3d 237 (4th Cir.2011) (en banc), holding that the government could not rely on a hypothetical criminal history enhancement or hypothetical aggravating factors to set the maximum term of imprisonment for a state prior conviction under the Controlled Substances Act. See also Brooks, 2014 WL 2443032.

Both Carachuri–Rosendo and Brooks stand for the proposition that whether a

prior offense is an offense punishable by more than one year imprisonment depends on the actual facts of the prior offense and the actual criminal history of the defendant at the time of the offense. See Carachuri–Rosendo, 130 S. Ct. at 2586 (rejecting a "hypothetical approach" to determining whether previous conduct is "punishable as a felony").

In rejecting this claim, the district court stated that it was in the New York sentencing court's discretion whether to sentence Mr. Neel to up to four years imprisonment. (Transcript of Sentencing, held 01/10/14, 7). But this was not the case - not after the court ruled that the nature of that offense and the lack of criminal history by Mr. Neel warranted a determinate sentence. See NY Penal § 70.00(4) (1998) (Sentencing Memorandum - Attachment C, Doc. 98-3, filed 11/12/13). As noted above, the New York judge in Mr. Neel's prior case determined that the nature of that offense and the lack of criminal history by Mr. Neel warranted a determinate sentence. (Sentencing Memorandum - Attachment B, Doc. 98-2, filed 11/12/13). And under NY Penal § 70.00(4) (1998), once that decision was made, Mr. Neel's **maximum** sentence was one year in jail.

Unless this Court looks to hypothetical facts and hypothetical criminal history for Mr. Neel for that prior case, the prior New York offense was not an " offense . . . punishable by imprisonment for more than 1 year." Thus, the prior offense made Mr. Neel a tier I sex offender, as the term is used in 42 U.S.C. § 16911. For this reason, the sentence imposed in this case was procedurally unreasonable. Accordingly, this Court

should vacate Mr. Neel's sentence and remand for resentencing using a base offense level of 12, pursuant to U.S.S.G. § 2A3.5(a).

Issue VI: The special condition of supervised release that Mr. Neel attempt to register as a sex offender every 90 days is unconstitutionally vague and should be vacated by this Court.

When the defendant objects to a special condition of supervised release at the time it is announced, review is for abuse of discretion. See United States v. Mike, 632 F.3d 686, 691 (10th Cir 2011).

A. Procedural Facts

At some point after the jury trial, the State of Oklahoma determined that Mr. Neel did not actually have a legal duty to register as a sex offender under state law. (Sentencing Memorandum - Attachment A, Doc. 98-1, filed 11/12/13, 2) (email from Bonnie Yarbrough). According to the State of Oklahoma, it was unconstitutional for Mr. Neel to be forced to register as a sex offender past his initial ten-year term of registration. (Sentencing Memorandum - Attachment A, Doc. 98-1, filed 11/12/13, 2) (email from Bonnie Yarbrough). See also Starkey v. Oklahoma Dep't of Corr., 2013 OK 43, 305 P.3d 1004, 1030 (2013). Thus, in his sentencing memorandum, Mr. Neel argued that any federal requirement to register as a sex offender under 18 U.S.C. § 3583(d) would violate the Tenth Amendment of the U.S. Constitution or alternatively would be impossible to comply with and thus in violation of his due process rights. (Sentencing Memorandum - Attachment A, Doc. 98-1, filed 11/12/13, 11-12).

At the sentencing hearing, Mr. Neel renewed this argument. (Transcript of Sentencing, held 01/10/14, 8-9). In response, the district court ordered Mr. Neel to attempt to register every 90 days with the State of Oklahoma. (Transcript of Sentencing, held 01/10/14, 19-20; Judgment in a Criminal Case, Doc. 105, filed 01/14/14, 4). Upon questions about the specifics of the condition, such as where Mr. Neel would be required to attempt to register, the district court responded as follows:

> 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.

(Transcript of Sentencing, held 01/10/14, 11-12). The court later described the situation as "hazy." (Transcript of Sentencing, held 01/10/14, 12). Ultimately, Mr. Neel argued that the condition was void for vagueness. (Transcript of Sentencing, held 01/10/14, 24).

B. The condition is unconstitutionally void for vagueness.

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). Although the meaning of a condition "may be plain on its face, it can be unconstitutionally vague in application." United States v. Agnew, 931 F.2d 1397, 1403 (10th Cir.1991).

Under 18 U.S.C. § 3583(d), "[t]he court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act." But in this case, there is nowhere for Mr. Neel to register. According to the State of Oklahoma, it was unconstitutional for Mr. Neel to be forced to register as a sex offender past his initial ten-year term of registration. (Sentencing Memorandum - Attachment A, Doc. 98-1, filed 11/12/13, 2) (email from Bonnie Yarbrough). See also Starkey v. Oklahoma Dep't of Corr., 2013 OK 43, 305 P.3d 1004, 1030 (2013). And according to the Office of Sex Offender Sentencing Monitoring, Apprehending, Registering, and Tracking (SMART), "[i]n the United States, sex offender registration is conducted at the local level and the federal government does not have a system for registering sex offenders." SMART, Sex Offender Registration and Notification in the United States: Current Case Law and Issues, 1 (Aug. 2013), at http://www.smart.gov/caselaw/handbook_august2013.pdf (obtained online Sept. 23, 2013) (emphasis added) (Sentencing Memorandum - Attachment D, Doc. 98-4, filed 11/12/13, 5). In fact, according to the Department of Justice, the Office of SMART recognizes that a jurisdiction usually will not register an offender unless **that jurisdiction's laws** require that the offender be registered. (Sentencing Memorandum - Attachment D, Doc. 98-4, filed 11/12/13, 10). See also 18 U.S.C. § 2250(b) (providing an affirmative defense in SORNA prosecutions when "uncontrollable circumstances prevented the individual from complying").

Because the State of Oklahoma has stated that Mr. Neel no longer has a state duty to register as a sex offender, there is simply nowhere for Mr. Neel to register as a sex offender in Oklahoma. When the district court was pressed on the details of "attempting to register," the court could not explain how that condition would practically work and even described the situation as "hazy." (Transcript of Sentencing, held 01/10/14, 11-12).

A condition of supervised release may be unconstitutionally vague when the district court is not able to explain how it will be enforced. See United States v. Mike, 632 F.3d 686, 697 (10th Cir. 2011) (discussing United States v. Smyth, 213 Fed.Appx. 102, 107 [3d Cir. 2007] [unpublished]). That is the situation with this condition.

Under the circumstances, the condition of supervised release that Mr. Neel attempt to register every 90 days was unconstitutionally void for vagueness. There is no direction as where or how Mr. Neel is required to attempt to register. Thus, the condition is unconstitutional and should be vacated by this Court.

CONCLUSION

For the reasons stated above, Mr. Neel asks this Court to reverse his conviction for insufficient evidence, or alternatively, to vacate his conviction due to the unconstitutionality of the statute. Alternatively, this Court should vacate his sentence and remand for resentencing.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested. Counsel believes both the Court and parties will benefit in understanding the subtleties of the case facts if oral argument is had.

CERTIFICATE OF COMPLIANCE WITH WORD COUNT

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief contains 12,174 words. I relied on WordPerfect X6 software to obtain the count. I certify that this information is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

s/ Carl Folsom, III
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CERTIFICATE OF ELECTRONIC SUBMISSION COMPLIANCE

I hereby certify that:

1) Any necessary privacy redactions have been made to the brief.

2) Hard copies of the brief to be mailed to this Court are exact copies of the version submitted electronically.

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s/ Carl Folsom, III
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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2014, I electronically transmitted this brief, with attachments, in Native PDF format, to the Tenth Circuit Clerk using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants: Edward Snow and Linda A. Epperley, Assistant U.S. Attorneys, counsel for Appellee.

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