NO. 17-5329

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RONALD W. PAUL,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DISTRICT COURT NO. 2:12-CR-00005

BRIEF OF APPELLANT RONALD W. PAUL

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STATEMENT REGARDING ORAL ARGUMENT

This case represents an attempt by the government to expand a federal criminal statute beyond where it has been applied before. This Court previously granted oral argument in this case, and oral argument is again appropriate due to the importance of the issues at hand.

STATEMENT OF JURISDICTION

The district court exercised jurisdiction under 18 U.S.C. § 3231, which provides it with jurisdiction over all federal crimes. This Court has jurisdiction under 28 U.S.C. § 1291, which provides it with jurisdiction over appeals from final orders of the district courts. This appeal is taken from the district court's judgment, which was entered on July 1, 2015 (R.128, Judgment, PageID#395-401), the district court's denial of related pretrial and trial-stage motions to dismiss (and other related orders) (*see, e.g.*, R.34, Order, PageID#73; R.37, Order, PageID#78; R.89, Order, PageID#294), and the district court's order sustaining Mr. Paul's conviction after his first appeal. (R.176, Order, PageID#1208.) Mr. Paul had previously filed a timely notice of appeal from his initial conviction on July 10, 2015 (R.131, Notice of Appeal, PageID#436), and he timely filed a notice of appeal from the district court's most recent order sustaining his conviction. (R.177. Notice of Appeal, PageID#1209.)

ISSUE PRESENTED

The Sex Offender Registration and Notification Act ("SORNA") creates a federal duty to register for *state* sex offenders who are required by state law to register as sex offenders in their states. Mr. Paul was convicted of a qualifying state sex offense, but he later prevailed in state post-conviction proceedings and then settled with the State of Tennessee for a sentence of "time served" and a judgment removing the requirement that he register as a sex offender. Did the district court err in determining that Mr. Paul had a federal duty to register as a sex offender when a valid state judgment relieved him of the state duty to register as a sex offender?

STATEMENT OF THE CASE[1]

I. Mr. Paul's state conviction, post-conviction efforts, and judgment

A. Mr. Paul was convicted of a Tennessee sex offense.

In 1996, Mr. Paul was convicted in Tennessee state court of three counts of rape, one count of aggravated sexual battery, and two counts of sexual battery. *See State v. Paul*, No. 01C01-9511-CC-00358, 1997 WL 578969, at *1 (Tenn. Crim. App. Sept. 19, 1997). He received an effective sentence of 32 years. *Id.* Mr. Paul pursued an appeal, *id.*, and later pursued post-conviction relief. *See generally Paul v. State*, 75 S.W.3d 926 (Tenn. Crim. App. June 29, 2001).

The post-conviction efforts were procedurally complex and resulted in several dismissals and remands (the specifics of which are irrelevant for the purposes of this appeal). *State v. Paul*, No. M2002-00810-CCA-R3-CD, 2003 WL 716269, at *1-2 (Tenn. Crim. App. March 3, 2003). Mr. Paul's underlying petition raised a claim of ineffective assistance of counsel due to the failure of his trial counsel—a divorce lawyer—to interview witnesses, prepare for trial, develop an informed strategy, and appropriately litigate a motion to suppress. *Id.* at *1.

B. Mr. Paul prevailed in his post-conviction efforts and negotiated an agreement relieving him of the duty to register as a sex offender.

Mr. Paul won his post-conviction proceedings, his judgment was vacated,

[1] The majority of the facts set forth herein are necessarily identical to the facts presented in the first appeal of this matter.

and the court ordered a new trial. While on appeal, the State agreed to voluntarily dismiss the appeal, and the parties reached a settlement. The trial and post-conviction judge, Judge John Gasaway, accepted the parties' negotiated settlement and entered a judgment reflecting that agreement.

The judgment is available in the record as Exhibit 1 to R.22, Mr. Paul's first motion to dismiss, and was later entered as Defense Exhibit 2 at trial (*see* R.112, Ex. List). The judgment memorializes the parties' intent that Mr. Paul (1) plead no contest to a single count of rape, (2) receive a punishment of "time served" (effectively 11 years and 11 months), (3) *not* receive community supervision for life, and (4) *not* be required to register as a sex offender. Accordingly, the judgment reflects that Mr. Paul pleaded nolo contendere to one count of class-B felony rape under Tenn. Code Ann. § 39-13-503. (R.22-1, Judgment, PageID#37.) It states a sentence length of 11 years 11 months. (*Id.*) Most importantly, the judgment includes a statement of "special conditions" that makes clear the intentions of the parties:

> All fines & costs waived. It is the intent of the parties that this sentence is effectively a "time served" sentence and the defendant is not subject to probation/parole status. Further, the defendant shall not be under community supervision for life pursuant to TCA 39-13-524 as this offense was committed on or after July 1, 1996; *nor shall defendant be required to comply w/ the sexual offender registry*. Counts 1 thru 5 are dismissed in settlement.

(*Id.* (emphasis added).) The judgment was entered on February 16, 2007, signed by

Judge Gasaway, and stamped with the seal of the Robertson County Circuit Court Clerk. (*Id.*)

II. Mr. Paul's post-release conduct

A. Despite the Tennessee judgment to the contrary, county sheriff officials required Mr. Paul to register as a sex offender, and Mr. Paul reluctantly complied for some time.

Notwithstanding the judgment absolving Mr. Paul of the obligation to register as a sex offender, officials in the Jackson County Sheriff's Department told Mr. Paul that he *did* have to register as a sex offender when he was released from prison. Ordinarily under Tennessee law, a sex offender who had a judgment of conviction for the crime of rape would be classified as a "violent sexual offender" and required to register four times per year for life. *See* Tenn. Code Ann. § 40-39-202(30) (defining "violent sexual offense" to include rape); *id.* § 40-39-204(b)(1) (requiring violent sexual offenders to report in March, June, September, and December).

Mr. Paul acceded to these demands, and he did register and pay the required fee on several occasions. The records custodian for the Tennessee Bureau of Investigation ("TBI") would later introduce at trial 12 separate sex-offender registration forms that Mr. Paul signed dating from August 2006 until December 2009. (R.139, Trial Tr., Stanfill, PageID#645-56.) Every one of the documents that Mr. Paul signed notified him of his purported duty to register as a sex offender.

(*Id.*) Only one—the last, dated December 31, 2009—informed Mr. Paul that he may also have a federal duty to register as a sex offender. (*Id.* PageID#655-56.)

Tennessee sex offenders living in Jackson County were required to register before a Jackson County jail administrator, an employee who was personally responsible for registering sex offenders. In trial testimony, each of the jail administrators who registered Mr. Paul testified that he repeatedly complained that he did not have to register in light of the judgment that absolved him of that duty. (*Id.*, Banks, PageID#665, 672-73; Harvey, PageID#680; Ryan, PageID#695; Gillihan, PageID#723.) Two of the jail administrators to whom Mr. Paul complained followed up on his complaints, contacting the TBI to determine Mr. Paul's status and believing that the TBI had sole discretion over which individuals were subject to the registration requirements. (*Id.*, Banks, PageID#665; Gillihan, PageID#699, 724.) Ms. Gillihan even told Mr. Paul that "whether or not he registered was a decision that was made by the TBI; that I was just the reporting agent." (*Id*., Gillihan, PageID#709.)

One of the jail administrators, Ms. Banks, admitted that there was no separate office or administrator for a *federal* sex offender registry. (*Id.*, Banks, PageID#670-71.) The only registration option was for offenders to register through her, the county jail administrator. (*Id.*)

B. Mr. Paul traveled to the Philippines and later married a woman there, but did not comply with all of Tennessee's registration "requirements."

In approximately October of 2012, the jail administrator in the Jackson County Sheriff's Office—Deborah Gillihan at that time—saw that Mr. Paul had not registered, and Ms. Gillihan contacted the next-of-kin that Mr. Paul had listed, his daughter, Deborah Hancock. (*Id.*, Gillihan, PageID#710-11.) Ms. Hancock informed Ms. Gillihan that Mr. Paul was in the Philippines, and Ms. Gillihan asked Ms. Hancock to tell Mr. Paul that he needed to send more information about his whereabouts. (*Id.* PageID#711-12.) Mr. Paul mailed Ms. Gillihan copies of his stamped passport demonstrating his travel, (*id.*), although providing such information would not have sufficed to meet Tennessee registration requirements.

Ms. Gillihan received more information about Mr. Paul's travels, and she spoke with U.S. Marshals to compare that information to available travel records. (*Id.* PageID#714.) Based on that comparison, Ms. Gillihan and the Marshals determined that Mr. Paul had traveled to the Philippines on several occasions between 2006 and 2012. (*Id.* PageID#716-22.)

Mr. Paul did not report any of his trips to the Philippines in a way that would have complied with Tennessee registration requirements, although he did stay in sporadic contact with the jail administrators, speaking with Ms. Gillihan by phone on at least one occasion and sending mail to other jail administrators regarding his

whereabouts. (*Id.* PageID#719, 725.)

Mr. Paul's daughter, Deborah Hancock, later testified that when Mr. Paul was in the United States, he lived with her or with his mother (Ms. Hancock's grandmother). (*Id.*, Hancock, PageID#729.) Ms. Hancock understood that her father was staying with a woman in the Philippines—whom he ultimately married—and intended to move there permanently. (*Id.* PageID#734.) She understood that her father had returned to the United States on several occasions to wrap up his affairs and sell certain property before moving permanently. (*Id.*) For example, during one return trip, Mr. Paul registered a vehicle he owned at the Jackson County Clerk's Office. (*Id.*, Stafford, PageID#738-40.)

In 2011, Tennessee authorities issued warrants for Mr. Paul's arrest. Mr. Paul returned to the United States in April 2012 and had a meeting with deputy U.S. Marshal Marty Magnon at the Jackson County courthouse. (*Id.*, Magnon, PageID#748.) Mr. Paul informed Mr. Magnon that he had returned in order to clear up the warrants against him. (*Id.* PageID#757.) He stated that he resided in the Philippines and that he was not required to register as a sex offender. (*Id.* PageID#752.) Mr. Paul informed Mr. Magnon that he had returned on various occasions to sell certain items because his wife had cancer and he needed to pay her medical bills. (*Id.* PageID#758.)

Mr. Magnon investigated Mr. Paul's claim that he did not have to register as

a sex offender. To do so, Mr. Magnon contacted the registering agent at the TBI who opined that Mr. Paul did have to register. (*Id.* PageID#752.) He also spoke with the TBI's head legal counsel regarding sex-offender registration who opined that the court order relieving Mr. Paul of his duty to register as a sex offender was contrary to the law. (*Id.* PageID#762-64.)

The federal government indicted Mr. Paul for failure to register as a sex offender on May 16, 2012. (R.1, Indictment, PageID#1.)

III. The federal prosecution against Mr. Paul

A. Mr. Paul filed a motion to dismiss within three months of his indictment.

Shortly after his federal indictment, Mr. Paul filed a motion to dismiss the indictment against him. (R.22, Mot. to Dismiss, PageID#32-36.) He attached the Tennessee judgment against him, (R.22-1, Judgment, PageID#37), and argued that the judgment relieved him of both state *and* federal duties to register as a sex offender. In a supplemental brief, Mr. Paul submitted a then-recent Sixth Circuit case, *United States v. Starnes*, 501 F. App'x 379 (6th Cir. 2012), for the proposition that a state-court judgment is a binding order and "[a] law enforcement agency has no power to deliberately ignore a court order." (R.25, Mot. to Consider Supplemental Authority, PageID#40-41 (citing *Starnes*, 501 F. App'x at 379).) Mr. Paul would continue to rely on this authority throughout his defense.

The district court denied Mr. Paul's motion to dismiss. (R.34, Order,

PageID#73.) In a memorandum accompanying its order, the district court justified its denial with two conclusions: (1) SORNA itself creates a federal duty to register that is independent of any state duty to register (notwithstanding the fact that Congress chose to enact this federal duty by requiring sex offenders to comply with their state duties); and (2) in any event, Tennessee law does not create an exception to the sex-offender registration requirement, and thus Mr. Paul's Tennessee judgment was invalid. (R.33, Memorandum, PageID#63-66.) The court also distinguished *Starnes*, noting that unlike in *Starnes*, here "[t]he Tennessee judiciary lacked the authority to create an exception to a statute where the Tennessee legislature did not provide for any exceptions." (*Id.* PageID#66.) (Mr. Paul filed a motion to reconsider (R.35, Motion for Reconsideration, PageID#75-76), which the district court denied (R.37, Order, PageID#78-80).)

B. A first trial, in which both parties heavily litigated the significance of the state-court judgment, resulted in a mistrial.

Mr. Paul proceeded to a first trial. Prior to trial, the government filed several motions in limine. The first such motion—based on the district court's order denying Mr. Paul's motion to dismiss—requested that Mr. Paul be precluded "from arguing that he was not legally obligated to register as a sex offender." (R.40, Mot. in Limine, PageID#85.) Among other pretrial motions, Mr. Paul filed several proposed jury instructions citing to the *Starnes* decision for the proposition that (1) "[o]nly formal legal action by the sentencing judge, or by an appellate court with

appropriate jurisdiction, has the power to rescind a legally binding order," (R.45, Proposed Jury Instruction, PageID#98); and (2) "[a] law enforcement officer has no authority to disregard a binding court order simply because it disagrees with the sentencing judge's legal analysis[, and a] law enforcement agency has no power to deliberately ignore a court order." (R.46, Proposed Jury Instruction, PageID#100.) (*See also* R.47 through R.50, proposing jury instructions that would address similar issues.)

The district court granted the government's first motion in limine, thus precluding Mr. Paul from arguing to the jury that his Tennessee judgment relieved him of his obligation to register as a sex offender. (R.56, Order, PageID#131.)

The first trial resulted in a mistrial, for reasons that are unrelated to this appeal. (R.59, Minute Entry for proceedings, PageID#134.)

C. After the mistrial, the government filed a superseding indictment, and the parties again litigated Mr. Paul's motion to dismiss.

Following the mistrial, the government filed a superseding indictment, this time alleging three SORNA violations (rather than one) spanning different dates. (R.65, Superseding Indictment, PageID#194-95.)

Mr. Paul renewed his motion to dismiss the indictment against him, raising the same arguments regarding the state judgment relieving him of the duty to register. (R.80, Mot. to Dismiss, PageID#240-253.) In the intervening time between the first and second motions, the United States Supreme Court had

decided *United States v. Kebodeaux*, 133 S. Ct. 2496 (2013), which Mr. Paul cited for the proposition that this case was the first of its kind and therefore on shaky constitutional ground: "[A]s far as we can tell, while SORNA punishes violations of its requirements (instead of violations of state law), the Federal government has prosecuted a sex offender for violating SORNA only when that offender also violated state-registration requirements." *Id.* at 2505.

Once again, the district court denied Mr. Paul's motion. (R.89, Order, PageID#294.) However, the district court used different reasoning than in its original order denying Mr. Paul's first motion to dismiss. This time, the district court reasoned that the Tennessee judgment was "inconsequential to this action" because "SORNA creates a federal duty to register that is independent of the state duty to register." (R.88, Memorandum, PageID#287.) The court did not mention the *Kebodeaux* opinion or Mr. Paul's citation thereof.

D. The parties proceeded to a second trial, but still repeatedly disputed the role of the Tennessee judgment at various stages of the trial.

The parties once again proceeded to trial, and once again litigated the degree to which the jury would be allowed to consider the Tennessee judgment. The government again filed a motion in limine to "preclude defendant Ronald W. Paul from arguing that he was not legally obligated to register as a sex offender," incorporating the district court's order denying Mr. Paul's motion to dismiss.

(R.95, Mot. in Limine, PageID#301-02.) Mr. Paul again submitted a series of proposed jury instructions related to the *Starnes* opinion and standing for the proposition that law enforcement officers were not allowed to ignore the Tennessee judgment relieving Mr. Paul of the duty to register. (R.99, Proposed Jury Instructions, PageID#326-28.)

1. Day one of trial

On the first day of trial, the court granted—over Mr. Paul's objection—the government's motion in limine to preclude Mr. Paul from arguing that he was not legally obligated to register as a sex offender. (R.138, Trial Tr., Court, PageID#485-87.) The court allowed Mr. Paul to discuss the judgment and the facts surrounding it in order to (1) give context for why Mr. Paul behaved the way he did, and (2) allow Mr. Paul to argue that he did not have notice of his duty to register. (*Id.*) In other words, while Mr. Paul could not use the judgment as a legal defense to negate his duty to register, he could use it to demonstrate that he had no notice of that duty as required by the statute. Mr. Paul's trial strategy would conform to the district court's order. In light of that order, Mr. Paul agreed to a stipulation that Mr. Paul's prior conviction was "a qualifying sex offense that requires him to register under [SORNA]." (R.139, Trial Tr., Daughtery, PageID#660.)

In its opening statement, the government summarized SORNA's

requirements to the jury as follows: "The federal law is pretty simple. The federal law requires that you follow the state law." (*Id.* PageID#615.)

In an opening statement on Mr. Paul's behalf, Mr. Paul's counsel raised the issue of the Tennessee judgment and told the jury that during the trial they would see the testimony of the prosecutor and defense attorney who agreed to the judgment, and the judge who signed it. (*Id.*, Gant, PageID#627.) The government objected, citing to prior rulings of the district court. (*Id.*, Daughtery, PageID#627-34.) The district court overruled the government's objection, stating that "if . . . the defendant wants to explain what his understanding was, and presents . . . from both the prosecutor and the defense, that seems to me to fall within the range of admissible evidence." (*Id.*, Court, PageID#630, 633.)

2. Day two of trial

Throughout trial, the government presented the witnesses described in the factual summary above: various jail administrators, deputy U.S. Marshal Magnon, Mr. Paul's daughter, and a witness from the county clerk's office.

After the government closed its proof, the district court addressed certain concerns regarding Mr. Paul's proposed evidence in light of its prior rulings in the case. (*Id.* PageID#766-69.) Mr. Paul argued that presenting the two lawyers and the judge who could testify to the intent behind the Tennessee judgment would show the jury that he lacked notice regarding any alleged federal duty to register.

(*Id.*, Gant, PageID#768.) The government objected to any such witnesses. (*Id.*, Daughtery, PageID#768-69.) The district court did not believe that the judge's testimony would be necessary, but appeared willing to allow the lawyers to testify. (*Id.*, Court, PageID#769-70.) In light of this debate, the parties agreed to a stipulation for the convenience of the court and the trial: the defense would not present *any* testimony but would introduce the Tennessee judgment and the original plea agreement; in exchange, the government would agree to stipulate that both documents were true and correct copies and that the Tennessee judgment was entered pursuant to the plea agreement. (*Id.* PageID#292.) The parties so stipulated, and the defense rested as well. (*Id.*)

The district court denied Mr. Paul's Rule 29 motion for judgment of acquittal. (*Id.* PageID#776.) The court did, however, unexpectedly grant several of Mr. Paul's requests for jury instructions related to the Tennessee judgment, including the instructions that (1) a law enforcement agency has no power to deliberately ignore a court order, and (2) a court speaks through its orders. (*Id.* PageID#777.) In support of this ruling, the court cited the *Starnes* opinion, the same opinion that Mr. Paul had repeatedly cited. (*Id.*) The court noted that it was "revisit[ing] a prior ruling," (*id.*), which presumably referred to its first denial of Mr. Paul's motion to dismiss wherein the district court concluded that the Tennessee judgment was essentially invalid. The court noted that "[t]here's a

procedure under federal and state law to amend state court judgments," and "it's a precedent to say you can ignore a state court order. Not just an order but a judgment." (*Id.*)

The government objected to the court's reversal, suggesting that the attorneys and the judge whom Mr. Paul had proposed as witnesses would have agreed that the Tennessee judgment was invalid (a suggestion with which defense counsel strenuously disagreed). (*Id.*, Daughtery, PageID#778.) The court responded by stating that it would reopen the proof in the third day of trial in order to settle the dispute. (*Id.*, Court, PageID#779.)

3. Day three of trial

Having already stipulated to the existence of the judgment, the parties opted to proceed to closing arguments. (R.140, Trial Tr., PageID#787.) The government persisted in its objections to Mr. Paul's proposed jury instructions regarding the Tennessee judgment, and it filed a written opposition purporting to distinguish the *Starnes* opinion from the facts of Mr. Paul's case. (R.107, Gov't Opposition, PageID#353-56.)

Addressing the government's objections, the district court noted that "the proposition for which the Court is citing *Starnes* is really the fundamental proposition to me . . . that law enforcement cannot set aside a judgment . . . [and]

[a]n agency just can't say 'That's invalid.'" (R.140, Trial Tr., PageID#788.)

Referencing its prior orders on the subject, the court acknowledged that it had erred:

> I feel badly about this, you know. I don't write all of my opinions. The volume is such that you've got to rely on — I'm not sure who actually wrote this.
> . . . .
> And it got by me. And when I actually read *Starnes*, it really bothered me.
> . . . .
> I mean, that's why you have the law of the case doctrine. Law of the case doctrine is prior rulings control unless it would result in a manifest injustice.
> . . . .
> And so I feel it qualifies as a manifest injustice because it's such a fundamental rule of law that you can't unilaterally alter. You can go back and move it, like I do, I mean, I get motions to modify judgments. You know, this judgment is contrary to this, and file a motion to modify it.
>
> But to just say ignore a court judgment? I mean. . . .

(*Id.*, Court, PageID#789-90.)

Notwithstanding this changed outlook on the validity of the Tennessee judgment, the district court still agreed with the government that the judgment did not affect Mr. Paul's *federal* duty to register as a sex offender, noting that "[t]he state court could not displace federal law," which was what "gives rise to the duty to register," and concluding that "[h]e has a duty to register." (*Id.* PageID#792; 794.)

Ultimately, the district court gave two of Mr. Paul's requested instructions,

but modified them slightly to create the following instruction:

> A court speaks only through its orders, and only a court order could have rectified another court's prior judgment. Here, the question as to the validity or invalidity of the state court judgment does not go to the defendant's duty to register, but only to the question as to whether the defendant knowingly failed to register or update a registration as required under federal law.

(*Id.* PageID#875.) In light of that instruction, however, the court issued another instruction that the government requested. (*See id.* PageID#817 (discussing need for additional instruction).) The court's instruction ultimately stated:

> A sex offender is adequately notified of the duty to register under [SORNA] when he has notice of his duty to register, including from state officials. A state court's judgment does not impact federal registration law.

(*Id.* PageID#876.)

4. The verdict

Armed with the above jury instructions (among numerous others), the jury deliberated for three and a half hours. (*See id.* PageID#884-91.) Ultimately, the jury returned verdicts of guilty on all three counts. (*Id.* PageID#889-90.)

E. The district court gave Mr. Paul a minimally custodial sentence, in part because of the Tennessee judgment relieving him of the duty to report as a sex offender.

At sentencing, the district court imposed a sentence more lenient than the government's proposed guidelines-range sentence (Mr. Paul's range was 24-30 months). Although it acknowledged the severity of Mr. Paul's original conviction,

it also noted that "this man was a defendant who had a state court judgment telling him that the registration requirements under Tennessee law did not apply to him." (R.130, Sentencing Tr., Court, PageID#428.) The court recognized that "it would have been a fairly simple matter to go back to the state court and ask that the state court judge [] amend or modify the order that he entered, but apparently that was not done." (*Id.*) The court also acknowledged that Mr. Paul *did* in fact register on numerous occasions and even told Tennessee officials when he was in the Philippines, thus demonstrating that Mr. Paul was not attempting to evade detection so much as the burden of a reporting requirement he did not believe applied to him. (*Id.*) Finally, the court noted that although Mr. Paul's crime was very serious, there was no showing of any similar conduct in the 21 years since his original crime was alleged to have occurred. (*Id.* PageID#428-29.)

Accordingly, the district court sentenced Mr. Paul to time served, but with a condition of supervised release that Mr. Paul serve 14 months in a halfway house. (*Id.* PageID#429.)

F. Mr. Paul filed an initial appeal, and his conviction was vacated based on an intervening Supreme Court decision.

Mr. Paul filed a timely notice of appeal from the judgment of conviction. (R.131, Notice of Appeal, PageID#436.) In the briefing and at oral argument, the parties addressed the issue of whether he could be convicted of violating federal law when he had no *state* duty to register as a sex offender.

After oral argument, the Supreme Court issued its opinion in *Nichols v. United States*, 136 S. Ct. 1113 (2016), which held that SORNA does not require an offender to update his registration after giving up residence in the United States to move abroad. This Court ordered letter briefing on the impact of *Nichols*. (No.15-5754, R.27, Order.) After briefing, this Court remanded the case for "further proceedings in light of *Nichols*." (R.30, Judge Order, No.15-5754.)

G. On remand, Mr. Paul renewed his prior objections and raised additional concerns.

On remand, the parties and the district court debated the nature of the proceedings that were contemplated in this Court's remand. (*See generally* R.153, Tr. of Status Conf., PageID#917-931.) Mr. Paul argued that this Court's order should be read as having de facto vacated his convictions and requiring retrial on any counts not disposed of by *Nichols*. (R.156, Renewed Mot. to Dismiss, PageID#951-52.) Because the parties should be considered back at "square one," Mr. Paul (1) argued that *Nichols* mandated dismissal of at least Counts 1 and 2, and suggesting that it at least required a retrial on Count 3; (2) renewed his prior motions to dismiss, arguing that he had no federal duty to register as a sex offender due to the fact that he had no state duty to do so; and (3) argued that the government's use of SORNA to impose a federal/state registration mandate on Mr. Paul created an unavoidable *ex post facto* problem in light of *Does v. Snyder*, 834 F.3d 696 (6th Cir. 2016).

The district court interpreted this Court's remand as a limited one, and "evaluate[d] the parties' arguments as it would on a motion for judgment of acquittal under Federal Rule of Criminal Procedure 29." (R.175, Memorandum, PageID#1193.) It ruled that it would "not consider the non-*Nichols* issues raised by" Mr. Paul. (*Id.*) The court ruled that the evidence regarding Counts 1 and 2 did not support conviction. (*Id.* PageID#1203-05.) However, it ruled that the evidence supported conviction on Count 3. (*Id.* PageID#1206-07.) Accordingly, the district court vacated the convictions on Counts 1 and 2 and sustained the conviction on Count 3. (R.176, Order, PageID#1208.)

Mr. Paul filed this appeal. (R.177, Notice of Appeal, PageID#1209.)

SUMMARY OF THE ARGUMENT

Ronald Paul and the State of Tennessee negotiated an agreement to settle his criminal case whereby he pleaded guilty to only one count and gave up his right to trial in exchange for (1) immediate release from prison, and (2) release from the requirement that he register as a sex offender. A valid, final judgment from a Tennessee circuit court memorializes this agreement. The government now claims that Mr. Paul should have registered as a sex offender, and the district court agreed. Both the government and the district court were wrong.

The Sex Offender Registration and Notification Act (SORNA) creates an unusual dual state/federal registration requirement. It requires states to create uniform sex offender registries, and requires offenders to register in their states. Courts, including the Sixth Circuit, have interpreted the registration requirement as creating a distinct "federal" requirement that is separate from the state-law requirement. In practice however, there is no place to register "federally," and state and federal law enforcement officers assume that the law only applies to offenders who are required to register by their state. As such, SORNA operates exactly how the government described the law to the jury in this case: "The federal law requires that you follow the state law."

Mr. Paul had no state-law requirement to register as a sex offender. He had a valid and final judgment from a court of competent jurisdiction that expressly

relieved him of that requirement. Both the federal government and the federal courts are required to give such orders full faith and credit, and the law precludes the government from collaterally attacking the Tennessee judgment in federal court.

Because Mr. Paul has no *state* duty to register, he has no federal duty. The Supreme Court itself has recognized that, until now, the government has never prosecuted an individual in circumstances such as this. The cases holding that SORNA creates a separate federal duty to register *presupposed* that sex offenders had a state duty as well, and they are therefore consistent with this interpretation. Likewise, SORNA would be unconstitutionally vague if interpreted to require an individual to disregard a valid state court judgment and nevertheless register with his state registry, and any such requirement would deprive the state court judgment of the full faith and credit it deserves. Because SORNA creates no federal registry, requiring states to register offenders who have no state duty to do so would effectively commandeer those state agencies in violation of the Tenth Amendment.

Finally, by precluding Mr. Paul from arguing that the Tennessee judgment relieved him of the federal duty to register, the district court violated Mr. Paul's Sixth Amendment right to present his best defense to a jury.

STANDARD OF REVIEW

Mr. Paul challenges a complicated series of orders from the district court during the prosecution of Mr. Paul, immediately prior to trial, and during trial. All of these orders address a common central legal question: Did the Tennessee judgment relieve Mr. Paul of the *federal* duty to register as a sex offender, and was Mr. Paul entitled to raise this as a legal defense? The specific orders include the district court's two denials of his motions to dismiss, (R.34; R.89), granting the government's motions in limine, (R.56; R.131), and the court's post-appeal order sustaining Mr. Paul's conviction on Count 3.

All of the above decisions were made on purely legal grounds, and they are therefore subject to the equivalent of de novo review. The denials of a motions to dismiss on legal grounds are subject to strict de novo review. *United States v. Philp*, 460 F.3d 729, 732 (6th Cir. 2006) (reviewing de novo district court's decision regarding motion to dismiss on legal grounds). The grants of the government's motions in limine are technically reviewed for abuse of discretion, but a district court necessarily abuses its discretion when it "improperly applies the law." *United States v. Gunter*, 551 F.3d 472, 483 (6th Cir. 2009).

ARGUMENT

Mr. Paul's valid Tennessee judgment—which relieved him of the duty to register as a sex offender in the state—relieved him of his federal duty to register; SORNA itself presumes that a sex offender has a *state* obligation to register, and in its various rulings denying Mr. Paul the right to rely on that fact, the district court failed to give the Tennessee judgment the full faith and credit it deserved.

"The federal law is pretty simple. The federal law requires that you follow the state law." That is how the government explained to the jury how SORNA works. (R.139, Trial Tr., Daughtery, PageID#615.) The government's representation to the jury comports with how the Supreme Court views the practical effect of the law: "[A]s far as we can tell, while SORNA punishes violations of its requirements (instead of violations of state law), the Federal government has prosecuted a sex offender for violating SORNA *only when that offender also violated state-registration requirements*." *United States v. Kebodeaux*, 133 S. Ct. 2496, 2505 (2013) (emphasis added).

Despite its pronouncement to the jury, the government deliberately chose this case to demonstrate that the Supreme Court was wrong, and that SORNA *could* be used to prosecute a man whom a state court expressly relieved of the obligation to register as a sex offender in his own state, but who the government claimed still had to register under federal law. This Court should and must find that SORNA has some limitations, and that those limitations are most urgent when a federal court ignores a valid state-court judgment.

A. SORNA's background demonstrates that although it creates a "separate" federal registration requirement for state sex offenders, that requirement is effectively triggered by and coextensive with a *state* registration requirement.

The SORNA statute creates a dual state/federal registration requirement that is unusual in criminal law. This unusual dual structure has resulted in difficult implementation and interpretation of the statute. Under the unusual facts of Mr. Paul's case, this already tenuous structure topples.

1. The SORNA statute itself

The purpose of SORNA was to "creat[e] a national system for the registration of sex offenders." *United States v. Felts*, 674 F.3d 599, 602 (6th Cir. 2012). Contrary to this stated purpose, SORNA specifically did *not* create a "federal" system for the registration of sex offenders. Rather, Congress "directed all states and the District of Columbia to create local registries that comply with specific national standards." *Id.*

But SORNA is not simply an administrative law regarding state registration systems. It also creates requirements for individual sex offenders and harshly punishes the failure to register. SORNA broadly requires sex offenders to "register, and keep the registration current, in each jurisdiction where the offender resides." 42 U.S.C. § 16913(a). A sex offender who fails to register can be prosecuted under 18 U.S.C. § 2250(a). That criminal portion of SORNA makes an initial distinction that is important to this appeal: there are *state* sex offenders (i.e., offenders who

have been convicted of state sex offenses) and there are *federal* sex offenders. The vast majority of people subject to SORNA's requirements are state sex offenders, and they fall into the statute's first category, listed under § 2250(a)(1). A small minority of individuals subject to SORNA's requirements are federal sex offenders, defined under § 2250(a)(2)(A) as sex offenders who have committed federal crimes or committed offenses in the District of Columbia, Indian territories, or the territories of the United States. In other words, SORNA itself draws a sharp initial distinction between state sex offenders (like as the government accuses Mr. Paul) and federal sex offenders, a distinction that has practical and constitutional implications.

According to the Office of the Attorney General, SORNA mandates that state sex offenders provide "extensive registration information" and was intended to create a rigorous new registration regime among the states. Dept. of Justice, Nat'l Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030, 38044-45 (July 2, 2008); *see also* 42 U.S.C. § 16914(a) (describing the information sex offenders must provide). Despite creating these substantial and new reporting obligations and criminal sanctions for failure to register, Congress never created any mechanism to allow sex offenders to register. Rather, it explicitly required the *states* to create or update their registries, and it threatened non-cooperative states with the loss of ten percent of federal funds under the

Omnibus Crime and Safe Streets Act of 1968. 42 U.S.C. §§ 16914(b), 16924, 16925(a).

Tennessee has "implemented" SORNA by either passing or updating registration laws that are now codified at Tenn. Code Ann. §§ 40-39-201 *et seq.* A Tennessee sex offender who is required to register under Tennessee law must do so by using Tennessee's registry.

2. Caselaw interpretation of SORNA

This dual state/federal structure has caused no small measure of confusion regarding the precise nature of SORNA's criminal liability. Whereas § 2250(a)(3) punishes offenders who knowingly fail to register "as required by [SORNA]," courts have wrestled with whether SORNA requires state sex offenders to (1) register under the *state's* laws (which SORNA presumes the states to have updated, as required by § 6924); or (2) register under an independent federal duty as prescribed by § 16914(a). Both approaches had drawbacks. The former created confusion when the government began prosecuting individuals for "SORNA" violations in states that had yet to implement SORNA, and it threatened to stretch the limits of the Commerce Clause by purportedly requiring purely state offenders to take intra-state actions under state law. *See United States v. Waybright*, 561 F. Supp. 2d 1154, 1164 (D. Mont. 2008) (finding SORNA's registration requirement to be untenable under the Commerce Clause because § 16913 "has nothing to do

with commerce or any sort of economic enterprise; it regulates purely local, non-economic activity"); *see also Kebodeaux*, 133 S. Ct. at 2510-16 (Thomas, J., dissenting) (arguing that SORNA cannot be justified based on the Commerce Clause because "Congress may not regulate noneconomic activity, such as sex crimes, based on the effect it might have on interstate commerce"). The latter created potential confusion in light of the fact that there is no way to register "federally," and that a federal duty to register under a state regime once again implicated the problems in the former interpretation.

Courts split the difference, holding that SORNA creates a separate *federal* duty to register as a sex offender, but tying that federal duty to the state duty by determining that the government could still prosecute individuals in states that had not yet implemented SORNA, but only because there were pre-existing state registries that sex offenders could use to satisfy their federal obligations. *See, e.g.*, *United States v. Brown*, 586 F.3d 1342, 1349 (11th Cir. 2009) ("[E]very state and the District of Columbia had a sex offender registration law prior to 2006. An individual may therefore comply with SORNA's registration requirements by registering through the state's sex offender registry, even if that jurisdiction has not implemented SORNA's administrative procedures." (Internal citations omitted)). In other words, a *state* sex offender has a *federal* duty to register under SORNA in his state of residence, but he can do so only by complying with whatever *state*

registration process exists, regardless of whether that state process looks anything like SORNA. *See also Felts*, 674 F.3d at 604 ("Even assuming that Tennessee's registry in 2010 was not up to SORNA's standards, Felts still could have registered with it.").

The Supreme Court has since acknowledged this dual federal/state nature by both upholding the notion of a separate federal duty to register *and* recognizing that the only way to do so was through compliance with a state's laws: "[A]s far as we can tell, while SORNA punishes violations of its requirements (instead of violations of state law), the Federal Government has prosecuted a sex offender for violating SORNA *only when that offender also violated state-registration requirements*." *Kebodeaux*, 133 S. Ct. at 2505 (emphasis added). As discussed below, this interpretation of SORNA is based on a commonsense understanding of how the statute works in practice.

3. SORNA's application in the real world

Oddly, despite the fact that the government's prosecution of Mr. Paul is in direct opposition to the Supreme Court's understanding of SORNA in *Kebodeaux*, the facts that the government actually presented at trial demonstrate just how correct the Supreme Court was. Indeed, the real-world application of SORNA by the government, by federal agencies, and by the State of Tennessee comports precisely with the Supreme Court's interpretation.

The government's own interpretation—as made in a representation to the jury in its opening statement—correctly summarizes how SORNA operates in the real world: "The federal law is pretty simple. The federal law requires that you follow the state law." (R.139, Trial Tr., Daughtery, PageID#615.) This, in turn, comports with the Supreme Court's assumption in *Kebodeaux*: the government would never prosecute someone for violating a "federal" duty when they have not also violated a state registration duty.

All of the government's witnesses who worked at the state level testified in a manner consistent with this interpretation. The jail administrators to whom Mr. Paul reluctantly reported testified that the *Tennessee* Bureau of Investigation was solely responsible for determining whether an individual was obligated to register as a sex offender. (*Id.*, Banks, PageID#665; Gillihan, PageID#699, 724.) One witness specifically told Mr. Paul that "whether or not he registered was a decision that was made by the TBI; that I was just the reporting agent." (*Id*., Gillihan, PageID#709.) Another confirmed that there was no separate office or administrator for a *federal* sex offender registry—just the state registry. (*Id.*, Banks, PageID#670-71.)

Even the deputy U.S. Marshal who was in charge of tracking SORNA violations in the Middle District of Tennessee—the key *federal* officer in this case—confirmed that whether an individual must register as a sex offender is

determined solely by that person's *state*-law status. Mr. Magnon testified that the TBI made that sole determination, and when he had to determine whether Mr. Paul had violated SORNA, he called the TBI's legal counsel for the answer, not the U.S. Attorney's Office or some other federal authority. (R.139, Trial Tr., Magnon, PageID#752.) In practice then, any given state sex offender's legal status under SORNA is solely a function of his status under state law.

B. Under state law, Mr. Paul was not required to register as a sex offender, and the government cannot credibly argue that federal courts are permitted to deem a state-court judgment invalid.

As discussed above, the Supreme Court has correctly recognized that the federal government has never attempted to push the boundaries of SORNA as far as it does now. In an attempt to sidestep this fact, the government has implausibly claimed that Mr. Paul was actually obligated to register as a *Tennessee* sex offender, notwithstanding his valid court order to the contrary. In support of this contention, and throughout Mr. Paul's case in the district court, the government has repeatedly argued that Mr. Paul's state-court judgment was either invalid under *state* law, or that the district court was permitted to ignore the judgment entirely. Either result would be an extraordinary usurpation of state power by a federal court.[2]

[2] In the first appeal of this case, the government backed away from its original insistence that the Tennessee judgment was invalid, instead arguing that its validity was "immaterial." (No. 15-5754, R.16, at 23-24.) Based on undersigned counsel's

1. The Tennessee judgment is a valid, unchallenged judgment from a court of competent jurisdiction, and it embodies the very bargain that the State of Tennessee deliberately chose to enter into with Mr. Paul.

A deal is a deal. The Tennessee judgment in this case embodied the very deal into which Mr. Paul and the State of Tennessee voluntarily entered. Against almost insurmountable odds, Mr. Paul prevailed in his post-conviction petition asserting ineffective assistance of counsel, and his conviction was vacated. At that moment, *he was an innocent man*. The State had the option of retrying him, but it chose not to. Instead, it offered Mr. Paul a deal that was almost as good as simply dismissing the charges against him. It offered to allow him to (1) plead guilty to only one count (rather than all six in the original indictment), (2) receive *no* additional time beyond the 11 years he had already served (in contrast to the 37 years that his original sentence required), (3) receive no community supervision, and (4) never have to register as a sex offender. (R.22-1, Judgment, PageID#37.) In exchange for this deal, Mr. Paul gave up his right to go to trial, this time with a competent lawyer.

Let there be no mistake: this was a deal that the State of Tennessee believed was in its own best interest, and that a Tennessee circuit-court judge signed and

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recollection, the government in oral argument conceded that the Tennessee judgment was valid. Because there is no written record of this concession, and because the question is very much "material," Mr. Paul renews this argument.

entered. There is and can be no question that the Criminal Court of Robertson County has valid jurisdiction to enter a judgment with respect to a criminal matter, and that the Tennessee judgment is valid and final.

There are ways that a party can attack a valid, final Tennessee judgment. One such way is through an appeal. Needless to say, the State of Tennessee did not appeal the plea bargain that it specifically agreed to with respect to Mr. Paul. Nor did it pursue Tennessee post-conviction proceedings (nor could it).

Faced with this valid, final, unchallenged Tennessee judgment that runs contrary to the central premise of its prosecution, the *federal* government has repeatedly claimed that the state judgment itself is invalid and an "erroneous" order by the state judge. (R.27, Response to Mot. to Dismiss, PageID#44.) Based on this assumption, the same federal government has asserted that a *federal* court should be free to ignore any Tennessee judgment that the United States Attorney's Office considers to be invalid: "[I]t is clear that the state judge did not have the authority to waive a statutory state registration requirement, a duty that clearly applied to Paul at the time the judgment was executed on February 16, 2007." (*Id.* PageID#50-51.) As discussed below, the government has no standing or power to assert the invalidity of this order in federal court. But even if it did, it does not matter. There is no question that Tennessee courts would have to give credit to such a judgment, even if it were somehow "erroneous":

> A lawful order is one issued by a court with jurisdiction over both the subject matter of the case and the parties. *Vanvabry v. Staton*, 12 S.W. 786, 791 (1890); *Churchwell v. Callens*, 252 S.W.2d 131, 136-37 (1952). An order is not rendered void or unlawful simply because it is erroneous or subject to reversal on appeal. *Vanvabry*, 12 S.W at 791; *Churchwell*, 252 S.W.2d at 137. Erroneous orders must be followed until they are reversed.

Konvalinka v. Chattanooga-Hamilton County Hosp. Auth., 249 S.W.3d 346 (Tenn. 2008) (certain citations omitted).

In other words, there is simply no question that this unchallenged order was valid, binding, and lawful.

2. In light of the valid state-court judgment, Mr. Paul was not required to register as a sex offender at the state level, and the TBI had no right to require him to do so.

The TBI "got it wrong" when it told Mr. Paul that he was required to register as a sex offender. In fact, he had no such requirement under Tennessee law. Caselaw from this Court explicitly recognizes that no party in Tennessee—not the State or any of its agencies—had the right to ignore the valid Tennessee judgment or claim that it was entered erroneously. *United States v. Starnes*, 501 F. App'x 379, 386 (6th Cir. 2012). In *Starnes*, for example, the (federal) government claimed that a valid Ohio judgment releasing the defendant from the control of the Ohio Adult Parole Authority ("APA") should have been disregarded by the APA as "inaccurate." *Id.* at 385. This Court disagreed:

> Contrary to the government's suggestion, the APA had no authority to disregard a binding court order simply because it disagreed with the

> sentencing judge's legal analysis. A law enforcement agency has no power to deliberately ignore a court order. The APA may not grant unto itself the unique privilege to pick over court orders and to choose to enforce only those it deems worthy of enforcement. When a law enforcement agency acts as the APA did here, it not only erodes public confidence in law enforcement, it also undermines the rule of law itself.
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> . . . .
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> Only formal legal action by the sentencing judge, or by an appellate court with appropriate jurisdiction, had the power to rescind the legally binding order and to reinstate Defendant's parole.

Id. at 386 (internal citations omitted). *Starnes* thus holds that a state agency has no authority to disregard a final judicial order relieving an individual of a statutory duty regardless of that agency's conclusion (and the federal government's later challenge) that the order was "incorrect."

As in *Starnes*, Mr. Paul had a valid court order relieving him of a statutory duty: the duty to register as a sex offender. As in *Starnes*, a state law enforcement agency—the TBI—acted as though the order did not exist or was invalid. As in *Starnes*, that law enforcement agency was wrong, and in disregarding a valid order it "erode[d] public confidence in law enforcement [and] erode[d] the rule of law itself." *Id.* This valid, unchallenged order binds any and all state agencies, regardless of whether (as the government contends) it was entered erroneously. Mr. Paul was therefore not required to register with the Tennessee sex offender registry.

3. Parties are not permitted to collaterally attack state-court judgments in federal court, and the government has no standing to claim that the Tennessee judgment is somehow invalid.

As discussed above, the government has attempted to minimize the uniqueness of this case by arguing that the state-court judgment is invalid. In short, the government is claiming that it has the right *in federal court* to collaterally attack a *state court* judgment relating to a necessary predicate felony in its prosecution. This assertion is contrary to all Sixth Circuit precedent, and it would work chaos on the federal court system.

A party may not collaterally attack a predicate state-court felony during a trial. *United States v. Steverson*, 230 F.3d 221, 224-25 (2000); *see also United States v. Maggard*, 573 F.2d 926, 929 (6th Cir. 1978) ("[W]e do not believe that Congress or the Supreme Court has required or suggested that a court . . . must routinely retry the constitutional validity of the predicate offense."). Indeed, "proof of a defendant's prior felony convictions is admissible for purposes of proving a [federal violation requiring predicate felonies], even if the prior convictions are constitutionally deficient." *Id.* This is likewise true in sentencing proceedings. *United States v. Aguilar-Diaz*, 626 F.3d 265, 269 (6th Cir. 2010) ("[A] defendant cannot attack a state conviction used for any purpose in federal sentencing proceedings unless he identifies a statute providing for collateral attack . . . .").

The reason for this prohibition on late-stage collateral attacks is that "Congress and the Supreme Court have established an elaborate mechanism for post-conviction vindication of federal constitutional standards by exhaustion of state remedies and federal habeas corpus petitions." *Maggard*, 573 F.2d at 929. Thus, if a defendant "believes he has a valid claim that his state conviction is truly void in its entirety, he could pursue that claim through state channels for seeking post-conviction relief." *Aguilar-Diaz*, 626 F.3d at 270. Federal courts could entertain all such requests, but it would turn criminal trials and sentencing proceedings into quasi-habeas corpus proceedings, clogging the courts and wasting time. Defendants would love such an opportunity, while the government regularly opposes such attempts by defendants.

Now, however, the government requests that the Court undertake such an inquiry, and presumably create the precedent that would allow defendants across the country to do so as well. The government claims that Mr. Paul's judgment is invalid and, in fact, constitutionally deficient under a "separation of powers" theory. (R.27, Response to Mot. to Dismiss, PageID#48-50; *see also* Response to R.85, Renewed Mot. to Dismiss, PageID#265-66 ("Giving precedence to a judge's illegal order over a lawful statute clearly violates fundamental separation-of-powers principles.").) This is exactly the sort of claim that federal courts are prohibited from entertaining under Sixth Circuit precedent: the place to challenge

such state-court orders is in the state courts, and only after that in a federal habeas corpus proceeding or some other similar posture. Of course, despite its contention otherwise, the government has no standing to vindicate the rights of the legislative branch of the State of Tennessee as against the State's judicial branch,[3] and even if it had such standing then this Court would have to dismiss this quasi-habeas corpus petition for failure to exhaust state remedies, procedural default, and the statute of limitations bar.

The State of Tennessee's interests will not be harmed by this Court upholding the unchallenged judgment of one of Tennessee's courts, but those interests *are* harmed when the executive branch of the *federal* government asserts that state judgments are invalid, and they *will be* harmed by any ruling even suggesting that federal courts are free to ignore valid state-court judgments. In concluding otherwise, the district court deprived Mr. Paul of the benefit of his bargain and effectively upended the contract between Mr. Paul and the State of Tennessee.

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[3] All of the government's arguments in the district court suggested that this alleged "separation of powers" violation involved the judicial branch improperly entering the domain of the legislative branch. This argument deliberately obscures the fact that the judicial order merely embodied the agreement entered into by State prosecutors, who are part of Tennessee's *executive* branch. Further, the government's "separation of powers" argument is especially ironic in this context where the government seeks to eradicate the power of a state's court orders to bind federal courts under the Full Faith and Credit Clause, which, as discussed further below, is the ultimate usurpation of power in our federalist system.

Finally, it bears noting that the Tennessee judgment the federal executive branch now seeks to invalidate was also the result of a plea agreement to which all parties agreed. If the government were to successfully invalidate that judgment and unravel that plea agreement, then it would effectively vacate Mr. Paul's conviction, leaving him indisputably innocent of the SORNA conviction because he would have *no* predicate conviction and no obligation to register under either state or federal law.

4. No federal court is permitted to disregard the Tennessee judgment; rather, federal courts are constitutionally and statutorily required to give full faith and credit to state-court judgments.

Even if this Court were to agree with the government that the Tennessee judgment was somehow "erroneous" or "invalid," the Full Faith and Credit Clause of the U.S. Constitution provides that "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." U.S. Const. art. IV, § 1. The Full Faith and Credit statute, enacted to implement the Full Faith and Credit Clause, provides that the acts of the legislature of any state and the records and judicial proceedings of any court of any state "shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738. Accordingly, "[a] federal court is bound to give such [state] judgment the same force and effect as would a court of the state in which the

federal court is sitting." *Desjardins v. Desjardins*, 308 F.2d 111, 116 (6th Cir. 1962).

There is simply no question that the Tennessee judgment in this case was a valid, final judgment from a court with competent jurisdiction. As such, the district court was bound—and this Court *is* bound—to give that judgment the same force and effect as if the federal courts were courts in Tennessee. *Id.*

5. Mr. Paul did not "waive" any rights he had by registering on several occasions; it is impossible to "waive" a lack of an obligation.

The government has previously argued that Mr. Paul somehow waived his right *not* to register as a sex offender by complying with the TBI's orders that he register: "[T]he defendant, after being notified that he had to abide by the state's registration requirements, complied without protest or appeal, which effectively waived the defendant's right to later argue that he did not have to comply with the law." (R.27, Response to Mot. to Dismiss, PageID#43.) Besides being factually incorrect, this argument misconstrues the very concept of waiver.

"Waiver is the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993). One may "waive" a right, but one does not subsequently take on previously nonexistent obligations by complying with an erroneous order to do something. Although the government argued that Mr. Paul "waived" his "right to later argue that he did not have to

comply with the law," the government was really saying that by registering several times, Mr. Paul suddenly had an "obligation" to continue doing so. This is nonsensical. A Tennessee court of competent jurisdiction absolved Mr. Paul of the obligation to register, and he consistently protested that he had no obligation to do so. He only did so under threat of further criminal penalties.

C. Because Mr. Paul had a valid state-court judgment relieving him of the duty to register at the state level, he had no separate federal obligation to register as a sex offender.

Mr. Paul has demonstrated above that he possessed a valid Tennessee judgment expressly relieving him of the duty to register as a sex offender, and he has disposed of the government's prior arguments regarding the purported invalidity of that state-court judgment. Mr. Paul had no obligation to register at the state level. As such, Mr. Paul and this Court now find themselves in legal terra incognita. As the Supreme Court has noted, the government has *never* before prosecuted a state sex offender who had no obligation to register under state law; instead, it has "prosecut[ed] a sex offender for violating SORNA *only* when that offender also violated state-registration requirements." *United States v. Kebodeaux*, 133 S. Ct. at 2505 (emphasis added). Mr. Paul is the first.

Below, Mr. Paul offers several arguments why this Court should not travel into legal terra incognita at the government's bequest.

1. The structure and practical application of SORNA demonstrate that Mr. Paul was not required to register as a sex offender.

As discussed above, SORNA's unusual state/federal structure creates what only appears to be a confusion in this case. On the one hand, federal law is well settled that the registration requirement in 42 U.S.C. § 16913(a) is a separate *federal* obligation. *Felts*, 674 F.3d at 604. On the other hand, that duty has literally *always* been premised on a state-court duty to register, as the Supreme Court has recognized in *Kebodeaux*. The government told the jury as much: "The federal law is pretty simple. The federal law requires that you follow the state law." (R.139, Trial Tr., Daughtery, PageID#615.) The government told the district court as much: "The government is not asking that the [Tennessee] judgment be disregard[ed] but rather maintains the position that defendant was required to register in the State of Tennessee, which obligates him to do so under federal law as well." (R.85, Response to Renewed Mot. to Dismiss, PageID#268.) The government's own witnesses at trial all acknowledged that there is no separate registry for one's "federal" obligations, and, most importantly, that the *only* agency that determines whether an individual must register as a sex offender is the TBI, a state law enforcement agency (that is, not anyone at the federal level). Indeed, even the deputy U.S. Marshal who investigated Mr. Paul's registration status

acknowledged that the TBI made the sole determination of whether Mr. Paul had to register. (R.139, Trial Tr., Magnon, PageID#752.)

As the Supreme Court has recognized, this is how the law is practiced throughout the country. The reason the federal government *never* indicts the Ron Pauls of the world who do not have an obligation to register at the state level is because that is precisely how SORNA is supposed to work. The state obligation is what triggers the federal obligation (at least for state sex offenders).

Despite its adoption of the notion that the federal duty to register is separate from the state duty, this Court's prior precedent does not contradict the commonsense interpretation that an individual who is *relieved* of the duty to register at the state level is also relieved of the federal duty. Indeed, cases such as *Felts* addressed only the question of whether an individual who *unquestionably had* a state duty to register was still required to register "under SORNA" in a state that had not fully implemented SORNA. *Felts*, 674 F.3d at 604. Its conclusion was entirely premised on the assumption that a defendant not only *could* register in the state registry but that he *must*, and that this fact was inextricably tied with SORNA's requirements. *Id.* at 605 ("Felts clearly did not comply with the Tennessee law in effect at the time, which was consistent with SORNA insofar as it provided for and required registration with a registry . . . ."); *see also United States v. Trent*, 654 F.3d 574 (6th Cir. 2011) (same). All other caselaw from this

circuit asserting this independent federal obligation addresses the same argument regarding pre-implementation registration. *See, e.g.*, *United States v. Harper*, 502 F. App'x 447, 450 (6th Cir. 2012) (concluding that "Harper's duty under SORNA was independent of state registration obligations" only in response to the argument that he did not have to register because Ohio had not substantially implemented SORNA, and citing to *Felts* for this proposition).

In light of the factual dissimilarity between this precedent and Mr. Paul's case, the general statement that "a federal duty to register exists separate from the state duty" should not be read to extend to the conclusion that "a federal duty to register arises even *absent* a state duty," or "even when a state judgment has explicitly relieved a defendant of the obligation to register under state law." These are remarkably different propositions, and the latter two plainly contradict the government's own interpretation of SORNA as represented to the jury and the district court in this case, and they contradict how this law is practiced around the country.

They also contradict the plain language of the SORNA statute. Although the statute's federal registration requirement is ostensibly "separate" from the state requirement, it is nevertheless phrased in such a way as to tie it directly to the state requirement: "A sex offender shall register, and keep the registration current, *in each jurisdiction where the offender resides* . . . ." 42 U.S.C. § 16913(a) (emphasis

added). In other words, the registration requirement presupposes that an individual is required to register as a sex offender in his state. This commonsense reading is *entirely consistent* with the *Felts* line of reasoning, which addressed only the question of whether an offender was required to register in a state that had not implemented SORNA, and answered "yes" only because those same offenders *were required to register in their states*.

Simply put, the government's explanation of SORNA to the jury was correct: "The federal law requires you to follow state law." Mr. Paul had no obligation to register as a sex offender in Tennessee, and thus he could not have had a federal duty to register. The district court's several orders to the contrary—especially its orders denying Mr. Paul's motions to dismiss—were entirely premised on the erroneous interpretation that *Felts* applies in a case like this. (*See, e.g.*, R.88, Memorandum, PageID#286-87 ("SORNA creates a federal duty to register that is distinct from a duty to register under a state sex offender registration law.").) This interpretation was erroneous and requires reversal.

2. If SORNA can be interpreted as creating a separate federal obligation for an individual who has been relieved of the duty to register at the state level, then it is unconstitutionally vague as applied to Mr. Paul.

SORNA's registration requirement applies to all "sex offenders," 42 U.S.C. § 16913(a), a term that is defined as "an individual who was convicted of a sex offense." *Id.* At § 16911(1). In other words, to determine whether an individual is

required to register as a sex offender, we look to his conviction. But what if that individual's *conviction* actually contains the following words: "nor shall defendant be required to comply w/ the sexual offender registry"? Any interpretation of SORNA as applying in such a case would violate basic due process by rendering SORNA unintelligible and depriving Mr. Paul of notice of his registration obligation.

"A statute is unconstitutionally vague and violates the Due Process Clause if it fails to define the offense with sufficient definiteness such that ordinary people can understand the prohibited conduct . . . ." *United States v. Blaszak*, 349 F.3d 881, 888 (6th Cir. 2003). "The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" *Johnson v. United States*, 135 S. Ct. 2551, 2556-57 (2015) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). The same is true of the non-criminal portions of SORNA's requirements. *Smith v. Doe*, 538 U.S. 84, 96 (2003) (concluding that it is only "logical to provide those persons subject to [a regulatory scheme] with a clear and unambiguous notice of the requirements and the penalties for noncompliance").

As applied to Mr. Paul's unique circumstances, SORNA is unconstitutionally vague. First, no "ordinary person" would read a conviction

expressly relieving him of the duty to register as a sex offender as *creating* a duty to register as a sex offender. Again, § 16911 SORNA says "look to your conviction" to see if you have to register, and if Mr. Paul had done so his conviction would have said "you don't have to register." Second, the complicated and legally problematic dual state/federal structure of SORNA provides precisely *no* guidance to Mr. Paul as to whether his valid state judgment relieving him of the duty to register nevertheless requires him to register "federally." This is especially true when there is no place he could go to register "federally." All he could do is go to his county sheriff's office, but his judgment specifically tells him he does not have to do that.

The Supreme Court has recognized that a statute's vagueness is especially pernicious where the statute is "so standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556. It is hard to imagine enforcement more "arbitrary" than this, where even the Supreme Court has recognized that this case is one of a kind. Mr. Paul is the *only* person who has ever been prosecuted in this way, and this is the only time the government has ever interpreted SORNA in this way. This nonsensical reading of SORNA, special for Mr. Paul, demonstrates that the statute fails to provide him notice of his "duty" and therefore violates his due process rights.

3. The government's proposed interpretation of SORNA would obviate the entire purpose of the Tennessee judgment, thereby failing to give it full faith and credit and violating the Tenth Amendment

The Tennessee judgment effectively says, "You, Mr. Paul, do not have to go to the Jackson County Sherriff's Office and register as a sex offender." The government believes that SORNA should be interpreted in a way that says, "You, Mr. Paul, *do* have to go to the Jackson County Sherriff's Office and register as a sex offender." At a most basic level, the government's interpretation would deprive Mr. Paul of the benefit of his bargain with the State of Tennessee. In doing so, it also effectively obliterates the valid, final, unchallenged state-court order relieving Mr. Paul of his duty to register. Again, there is *no difference* between the act that the judgment relieved Mr. Paul of doing and the act that the government now says he should have done. Accordingly, the government's interpretation of SORNA perfectly nullifies the order in the Tennessee judgment with respect to registration.

As discussed above, both the Full Faith and Credit Clause and the Full Faith and Credit Act ensure that "[a] federal court is bound to give such [state] judgment the same force and effect as would a court of the state in which the federal court is sitting." *Desjardins v. Desjardins*, 308 F.2d 111, 116 (6th Cir. 1962). In a series of orders, the district court determined that Mr. Paul was, in fact, obligated to register as a sex offender using the Tennessee registry. These orders gave neither force nor

effect to the state-court judgment that said Mr. Paul was not obligated to register as a sex offender using the Tennessee registry.

By the same logic, the government's interpretation of SORNA would violate the Tenth Amendment. That amendment makes clear that Congress's powers are limited and enumerated, while the states retain all *other* powers: "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. Under that system, "[f]or nearly two centuries it has been clear that, lacking a police power, Congress cannot punish felonies generally." *Bond v. United States*, 134 S. Ct. 2077, 2086 (2014) (internal quotations omitted).

While Congress's power to enact SORNA has been addressed in various cases before this Court, *see United States v. Coleman*, 675 F.3d 615, 619-21 (6th Cir. 2012) (upholding SORNA under the Commerce Clause), this case raises the question of whether Congress can effectively deprive states of the power to determine who must register in their state registries. SORNA is a federal law that effectively forces the states to create uniform laws regarding who must register in those states, and SORNA then punishes individuals for failing to register. It is hard to imagine a more quintessentially *state* duty than for a *state* court to determine whether a *state* offender must register in a *state* registry; that is, to determine

whether a state law (which Congress forced Tennessee to implement) applies to any given offender.

If SORNA can be read to nullify the State's exercise of its own police powers over its own citizens and its own sex offender registries, then it violates the Tenth Amendment.

4. An interpretation of SORNA that would allow the federal government to commandeer state registries for alleged "federal" obligations would likewise violate the Tenth Amendment.

There is no federal sex offender registry. It does not exist. If you walk into the Jackson County Sheriff's Office and try to register as a "federal" sex offender, the only thing you can do is register as a "state" sex offender. (R.139, Trial Tr., Banks, PageID#670-71.)

The Tenth Amendment prohibits the federal government from "commandeering" states, which, among other things, prevents the federal government from telling states and state officials what to do. *Printz v. United States*, 521 U.S. 898, 935 (1997). This Court has previously decided that the enactment of SORNA itself did not create a "commandeering" problem because SORNA is a valid exercise of Congress's authority under the Spending Clause, U.S. Const. art. I, § 8, cl. 1. *Felts*, 674 F.3d 599, 607-08 (6th Cir. 2012).

But Mr. Paul's case upsets this constitutional balancing act. Again, *Felts* was premised entirely on the assumption that Mr. Felts had a state duty to register, and

thus there was no commandeering problem in using money to induce the states to change their laws and then implement their *own* laws. What Mr. Paul's case involves, by contrast, is the federal government telling a Tennessee county sheriff's office that it *must* register a federal offender who has no obligation to register under state law. The *Printz* opinion itself demonstrates the problem. There, the Court invalidated a federal law requiring state law enforcement officials to conduct background checks of prospective handgun purchasers. The Court held that "[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." *Printz*, 521 U.S. at 935.

Mr. Paul has no state obligation to register, and his county sheriff's office has no obligation to register him as a sex offender. The government's interpretation of SORNA as creating a federal duty to register that is distinct from Mr. Paul's state duty to register would likewise force county officials to register offenders who have no state obligation to register. Such an interpretation would create a problem almost identical to the law in *Printz* that required state officers to conduct federal background checks.

"[A]s between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that

which will save the Act." *Rust v. Sullivan*, 500 U.S. 173, 190 (1991) (citing *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)). The government is asking a lot of the SORNA statute in this case. Fortunately, the commonsense reading of SORNA and the most constitutionally sound reading are the same: that SORNA allows the federal government to punish state offenders who fail to comply with state law.

5. The district court's orders preventing Mr. Paul from arguing that the Tennessee judgment relieved him of the federal duty to register impermissibly deprived Mr. Paul of his right to present a defense.

The first element that the government must prove beyond a reasonable doubt in a SORNA prosecution is that the accused is "required to register under [SORNA]." 18 U.S.C. § 2250(a)(1). At the trial of this case, the district court granted the government's motion in limine to "preclude defendant Ronald W. Paul from arguing that he was not legally obligated to register as a sex offender under either [SORNA] or under the law of the State of Tennessee SORNA or state law [*sic*]." (R.95, Mot. in Limine, PageID#301; R.103, Order, PageID#343.) This order effectively deprived Mr. Paul of the right to present his best defense. First, the jury should have heard Mr. Paul's argument that the State judgment relieved him of the duty to register federally. The Sixth Amendment requires "criminal convictions to rest upon a jury determination that the defendant is guilty of every element beyond a reasonable doubt." *United States v. Gaudin*, 515 U.S. 506, 510 (1995). The jury's "constitutional responsibility is not merely to determine facts, but to apply the law

to those facts and draw the ultimate conclusion of guilt or innocence." *Id.* at 514. And while a judge "must be permitted to instruct the jury on the law," in this case, as discussed above, the law is inherently informed by the unique and unprecedented facts regarding Mr. Paul's state-court judgment. Thus, even if the question raised in Element One of the offense is *ordinarily* a purely legal question, it is not in this case, and Mr. Paul had a basic Sixth Amendment right to have a jury make that determination.

Second, the district court's ruling arbitrarily prevented Mr. Paul from presenting his best legal defense. *See United States v. Scheffer*, 523 U.S. 303, 308 (1998) (noting that the "right to present a defense" may not be abridged by "arbitrary" rules). The court here effectively ruled that Mr. Paul could not raise *any* defense related to element one of the SORNA crime, which was Mr. Paul's best defense. Even if a court often has some interest in directing the jury toward a specific legal conclusion, the court's ruling was arbitrary in this case where (1) this was Mr. Paul's best legal defense, and he had argued it at every turn in this litigation; and (2) the law is uniquely unsettled in this area, a fact of which the district court was aware given that Mr. Paul had cited the Supreme Court's *Kebodeaux* opinion to the court. This arbitrary order left Mr. Paul without his best defense.

CONCLUSION

The government chose to indict a man for failing to register in his county sheriff's office despite the fact that he had a valid Tennessee judgment relieving him of such a duty. The Supreme Court has recognized that the government has never prosecuted an individual under such circumstances. The government should be held to a high standard when it attempts to expand the scope of a federal statute for the first time.

For his part, Mr. Paul reached a deal with the State of Tennessee. This Court has the opportunity to effectuate that deal for both parties and in doing so bring some order to an otherwise chaotic and constitutionally tenuous reading of a federal statute. Mr. Paul respectfully submits that this Court should vacate Mr. Paul's conviction and order that the indictment against him be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2017, a true and exact copy of the foregoing *Appellant's Principal Brief* has been forwarded by electronic filing to S. Carran Daughtrey, Assistant United States Attorney, 110 Ninth Avenue South, Suite A961, Nashville, TN 37203.

s/ Isaiah S. Gant
Isaiah S. Gant

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C), Federal Rules of Appellate Procedure, I certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) in that it contains 12,981 words. In certifying the number of words in the brief I have relied on the word count of the word-processing system used to prepare the brief.

s/ Isaiah S. Gant
Isaiah S. Gant

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Pursuant to Sixth Circuit Rules 10(d) and 11(b), the appellant, Ronald W. Paul, designates the following District Court documents as relevant to this appeal.

Description of Entry	Date Filed in District Court	Record Number	Page ID Number
Indictment	05/16/12	R.1	1-2
Motion to Dismiss the Indictment	08/03/12	R.22	32-36
Robertson County Judgment	08/03/12	R.22-1	37
Motion to Consider Supplemental Authority in Support of Motion to Dismiss	09/27/12	R.25	40-41
Government's Response to Motion to Dismiss Indictment	10/16/12	R.27	43-52
Memorandum in Support of Order	10/25/12	R.33	61-66
Order denying Motion to Dismiss	10/25/12	R.34	73
Order regarding Mot. for Reconsideration	11/13/12	R.37	78-80
Government's Motion in Limine #1	11/23/12	R.40	84-85
Proposed Jury Instruction No. 1	11/25/12	R. 45	98-99
Proposed Jury Instruction No. 2	11/25/12	R. 46	100-101
Proposed Jury Instruction No. 3	11/25/12	R.47	102-103
Proposed Jury Instruction No. 4	11/25/12	R.48	104-105
Proposed Jury Instruction No. 5	11/25/12	R.49	106-107
Government Proposed Jury Instruction	11/26/12	R.50	108-120

Description of Entry (cont.)	**Date Filed in District Court**	**Record Number**	**Page ID Number**
Order re Gov. Motion in Limine #1	11/27/12	R.56	131
Minute Entry for proceedings	11/27/12	R.59	134
Superseding Indictment	01/23/13	R. 65	194-196
Renewed Motion to Dismiss Indictment	11/13/13	R.80	240-253
Response in Opposition to Renewed Motion to Dismiss Indictment	12/13/13	R.85	259-270
Memorandum in Support of Order	03/04/14	R.88	284-288
Order denying Motion to Dismiss	03/04/14	R.89	294-295
Government's First Motion in Limine	04/30/15	R. 95	301-302
Proposed Jury Instructions	05/04/15	R.99	326-328
Order granting Docket Entries No 95-97	05/05/15	R.103	343
Government Opposition to Proposed Jury Instruction #1	05/06/15	R.107	353-356
Exhibit and Witness List	05/07/15	R.112	362-363
Judgment	07/01/15	R.128	395-401
Sentencing Transcript	07/02/15	R.130	405-435
Notice of Appeal	07/10/15	R.131	436
Transcript of Trial-Vol I	08/28/15	R.138	481-597
Transcript of Trial-Vol II	08/28/15	R.139	598-780
Transcript of Trial-Vol III	08/28/15	R.140	781-892

Description of Entry (cont.)	**Date Filed in District Court**	**Record Number**	**Page ID Number**
Transcript of Status Conference	09/16/16	R.153	916-931
Renewed Motion to Dismiss	10/21/16	R.156	935-992
Memorandum of the Court	03/13/17	R.175	1192-1207
Order	03/13/17	R.176	1208
Notice of Appeal	03/21/17	R.177	1209