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

REPLY OF APPELLANT RONALD W. PAUL

Isaiah S. Gant
Assistant Federal Public Defender
Andrew C. Brandon
Research and Writing Attorney
810 Broadway, Suite 200
Nashville, Tennessee 37203
(615) 736-5047
Attorneys for Ronald W. Paul

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cites **Page No.(s)**

Statutes

Statutes (continued) **Page No.(s)**

REPLY

Mr. Paul's principal brief demonstrated that SORNA is a confusing, poorly conceived statute that has troubled courts with the fact that the statute sets out to achieve one purpose (create a uniform federal sex-offender registry) but does something else entirely (conditions grants of federal money on states bringing their *state* registries into compliance with certain minimum standards). The resulting dual state/federal system has led to numerous legal and constitutional disputes in the relatively few years of the statute's existence. The facts of this case—which the Supreme Court recognized as one of a kind[1] in its opinion in *United States v. Kebodeaux*, 133 S. Ct. 2496 (2013)—strain the statute past the breaking point.

The government's response asserts that there is nothing confusing about SORNA. Rather, it is clear in its purpose, clear in its execution, and simple in its implementation. The government further asks the Court to ignore entirely the real-world application of SORNA, despite the fact that the statute does indeed exist and

[1] Perhaps two of a kind. The government has cited in a footnote to a district court opinion in *United States v. Guguen*, 218 F. Supp. 3d 111 (D. Me. 2016). That case addressed a supervised release violation for a defendant who had already pleaded guilty to a SORNA violation, and thus the case does not address actual SORNA liability, but rather whether the SORNA penalty provisions applied despite that defendant's lack of a state registration duty. Thus, while the legal analysis is not identical, the case does involve a prosecution for a somewhat similarly situated defendant. It does not address the various arguments raised in Mr. Paul's briefing.

operate in the real world. The government's response is incorrect and ahistorical, and Mr. Paul is entitled to relief.

A. The government erroneously asserts that SORNA's registration requirement is purely federal and has nothing to do with state registration requirements, despite the fact that the states provide the only place where a sex offender can register.

With SORNA, Congress outsourced the job of creating a federal sex-offender registry to the states. And yet the government devotes the majority of its response to claiming that the states have little to do with SORNA, when it is obvious that liability under SORNA is a dual state/federal function. That is, the statute itself makes clear that in order to be a "sex offender" under SORNA, you must have a "conviction" for a sex offense, 42 U.S.C. § 16911(a), and in the case of individuals punished as *state* sex offenders (the vast majority of all SORNA violations), that will be a *state* conviction. In short, for the vast majority of sex offenders, liability under SORNA is fundamentally tied to a state conviction. In the exceptionally limited context of this case, several questions arise: What happens when the only document memorializing that state conviction specifically tells the sex offender that he does not have to register as a sex offender? And what if the only place he can register is in the very state office that his judgment tells him he does not have to visit? And what if the only people who determine *whether* he must register are in state law enforcement, and even the federal law enforcement

officers ask the state officers if he has to register? And what if the state law enforcement officers answer incorrectly, as they did here?[2]

The government is incorrect in asserting that "the language and structure of SORNA . . . nowhere predicate[] the federal duty to register . . . on a violation of any state-law duty." (Gov't Br. at 20.) First, as discussed above, the obligation of a state sex offender is *entirely predicated* on the state conviction, which here relieves Mr. Paul of his duty to register as a sex offender. Second, the law expressly tells sex offenders to register in their "jurisdiction" (*e.g.*, 42 U.S.C. § 16913(a)), with "appropriate officials" in their jurisdiction (*e.g.*, § 16914(a)), or in a "sex offender registry" (*e.g.*, § 16912), *all* of which are defined as being created and maintained *by the individual states*. 42 U.S.C. § 16911(9)-(10). In other words, the statute itself explicitly states that any duty Mr. Paul had to register was a duty to register with the very people that his binding state-court judgment told him he did not have to register with. Even when describing exactly what the sex offender must do,

[2] For the second time on appeal, the government has declined to make an argument that Mr. Paul actually had a *state* duty to register. The government instead merely alludes to the possibility that there are "reasonable arguments" that Mr. Paul really had such a state duty (ignoring Mr. Paul's many pages of "reasonable arguments" to the contrary), and asserting that such arguments are immaterial. (Gov't Br. at 28.) At this point, the government has plainly waived any right to contest the validity of the state judgment in this case. *See United States v. Layne*, 192 F.3d 556, 566 (6th Cir. 1999) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.").

SORNA makes clear that it is a dual state/federal requirement. In § 16914, Congress unusually chose to structure a sex offender's duties parallel to the *state*'s duties, making subsection "(a)" describe seven categories of information that the "sex offender shall provide" to the state, while subsection "(b)" describes seven categories of information that "[t]he jurisdiction in which the sex offender registers" must be sure to include in the state registry.

In short, the dual state/federal nature of SORNA is so deeply embedded in its statutory language that the government's current claims to the contrary appear to ignore the obvious: a sex offender can only register in a *state* registry.

The government likewise takes issue with Mr. Paul's contention that all of the caselaw holding that SORNA creates a separate federal duty "presuppose[s] that a defendant prosecuted under § 2250 necessarily violated a state-law registration requirement." (Gov't Br. at 25-26.) But the simple fact is, the caselaw *does* presuppose this. This is true of all of the cases that the government cites for the *opposite* proposition. *See United States v. Felts*, 674 F.3d 599, 602 (6th Cir. 2012) ("Felts . . . moved to Florida, and then to San Juan, Puerto Rico, without notifying the registration authorities in his home state of Tennessee."); *United States v. Trent*, 654 F.3d 574, 576-77 (6th Cir. 2011) (explaining that Mr. Trent was obligated to register as a sex offender under state law in Kentucky, Indiana, and Ohio, and violated state law in *each* of those states); *United States v. Harper*,

502 F. App'x 447, 449-450 (6th Cir. 2012) (describing Mr. Harper's obligations under "a Minnesota law enacted in 1993 that applied to all such offenders then in custody or on parole" and his subsequent violation of that law and the laws of Florida, Arizona, North Carolina, and Ohio). It is hardly controversial to state that this caselaw "presupposes" a violation of state law: the Supreme Court in *Kebodeaux* acknowledged that literally *every* case tried prior to this one actually did presuppose that fact.

Further, in claiming that SORNA does not "predicate[] the federal duty to register . . . on a violation of any state-law duty," the government ignores the fact that the very U.S. Marshal who ensured Mr. Paul's arrest predicated Mr. Paul's federal duty to register *entirely* on a violation of state-law duty: he determined whether Mr. Paul was obligated to register under federal law by asking the Tennessee Bureau of Investigation whether Mr. Paul was obligated to register under state law. (R.139, Trial Tr., Magnon, PageID#752.) The same is true of the jail administrators who facilitated Mr. Paul's grudging registrations, all of whom agreed that "whether or not he registered was a decision that was made by the TBI." (*Id*., Gillihan, PageID#709; *see also id*. Banks, PageID#665.) The government briefly asserts that the fact that "individuals required under SORNA to register may do so at a state facility does not transform that federal registration requirement into a state-law obligation" (Gov't Br. at 21), a dramatic

understatement in light of the fact that there is no other place in which to register besides a state facility. Indeed, the government does not even respond to the undisputed fact that state and even *federal* officials in this case believed that the *Tennessee* Bureau of Investigation is the sole arbiter of liability under SORNA, which strongly suggests that SORNA itself creates a close connection between state and federal law.

B. The government has chosen the wrong hypothetical to demonstrate the confusion that SORNA engenders.

To further demonstrate that SORNA creates no state/federal confusion, the government inadvertently demonstrates the opposite by providing a counterfactual hypothetical. (Gov't Br. at 26.) The hypothetical posits that Tennessee law required a shorter registration period for Tier II sex offenders than SORNA does, suggesting that Mr. Paul's reading of SORNA would allow such an offender to register for less time than the federal standard, thereby "allow[ing] a state to hamstring the more stringent federal registration requirement." (*Id.*)

This hypothetical demonstrates Mr. Paul's own point, but it does not do so forcefully enough. Let's take a better one: imagine that a state legislature decided to abolish its state sex-offender registry altogether. This is not too hard to imagine because the government has repeatedly argued that states are entirely free to disregard SORNA, noting for example that "a given state may decide whether to

implement SORNA, with the only consequence being the loss of federal funds." (Gov't Br. at 22.) What would happen then?

The government cannot answer this question, because the government has refused to acknowledge that SORNA is actually implemented at the state level. But it is clear that if there is no state registry, then there is no registration. As discussed above, SORNA requires sex offenders to register in their "jurisdictions," which the statute defines as their "state." 42 U.S.C. §§ 16911(9)-(10), 16912, 16914(a). There would be no place to register because Congress has refused to create one. Would that eliminate the "federal duty" to register? In the government's ideal reading of the statute, it would not, and the government would have the right to round up all of the sex offenders who "failed" to register (due to the impossibility of doing so) and imprison them for several years. But in the real world—the one the government does not acknowledge—punishing someone for failing to comply with a statute that is impossible to comply with would raise all of the statutory and constitutional problems raised in this case.

This hypothetical regarding states is significant because, contrary to the government's position, federal courts have *expressly* tied the federal duty to register under SORNA to the availability of a state registry. That is, when the circuit courts of appeals were faced with the question of whether an individual had a duty to register "under SORNA" before their state had implemented SORNA,

essentially all of the circuits answered that such an individual did have a duty *because* "every state and the District of Columbia had a sex offender registration law prior to 2006," and therefore an individual may "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." *United States v. Brown*, 586 F.3d 1342, 1349 (11th Cir. 2009); *see also Felts*, 674 F.3d at 604 (quoting the same language in *Brown*). Further, those same courts used the preexisting availability of non-SORNA registration requirements as a means of disposing of constitutional concerns that Mr. Paul has raised. *See United States v. Gould*, 568 F.3d 459, 468 (4th Cir. 2009) (rejecting a due-process notice claim because "[w]hen SORNA was enacted, every State had registration requirements for sex offenders"). The statute falls apart—both in the "federal requirement" to register and in its constitutional implications—where an individual has no ability to register.

To be clear, this is a problem in the statute's execution, not in the statute's purpose or the government's argument about that purpose. The problem with the government's argument is that it assumes that the statute is well conceived, well written, and well executed, when it plainly is not. Thus, if a state chose to opt out of sex-offender registration entirely, it absolutely would undermine SORNA's purpose, as the government suggests, but that is because Congress chose to draft

the statute in this way, abdicating its own duty to create a federal registry and outsourcing it to the states, while giving those same states the option not to comply.

Under the system that Congress chose to implement, the consequences for a disparity between what SORNA asks of a state and what those states actually do is supposed to fall on the states through the mechanism of reduced federal funding. 42 U.S.C. § 16925(a). In the government's hypothetical, for example, Congress would withhold funding from Tennessee for failing to impose the same punishment for Tier II sex offenders as SORNA imposes—Tennessee would not have "substantially implemented" SORNA. *Id.* But if Tennessee flatly refused to register those Tier II sex offenders after 15 years, then those sex offenders would be in the same place they would have been in Mr. Paul's hypothetical (above), because there would be no place to register at all. The later federal round-up of such offenders in a state where compliance was impossible would raise enormous constitutional concerns—including the Tenth Amendment and Due Process claims Mr. Paul has raised—and would call into question what it even means to "register" in a federal law that makes "registration" a state matter. Indeed, the only difference between Mr. Paul's case and the above two hypotheticals is that Tennessee officials erroneously believed that Mr. Paul was required to register under state law when he was not. (An error that the government has now all but conceded.)

C. The government does not adequately address Mr. Paul's constitutional arguments.

Rather than respond to Mr. Paul's constitutional arguments, the government has chosen to reword and recharacterize several of those arguments, then address the straw-arguments that the government has established. This Court should construe that failure as a waiver where appropriate, or as simply a concession of the merits of those arguments. Regardless, the response the government has made does not answer any of Mr. Paul's arguments, as demonstrated below.

1. Commandeering

The government's one-sentence response to Mr. Paul's commandeering argument is both a non-sequitur and legally incorrect. Mr. Paul's argument regarding commandeering asserted that (1) ordinarily the federal government is not permitted to tell state officials what to do, *Printz v. United States*, 521 U.S. 898, 935 (1997); (2) prior decisions of this Court have found no commandeering problem with SORNA because Congress merely conditioned federal funding on changing their own state laws to comply with the federal law, *Felts*, 674 F.3d at 607-08; but (3) under the unique facts of this case, there still is a commandeering problem because the government is now asserting that federal law can force a state agency to accept the registration of an individual who does not have a state requirement to register. (Paul Br. at 52-54.)

Here is the government's response:

> Similarly, Paul's Tenth Amendment commandeering argument lacks merit because county officials in Tennessee regularly register sex offenders who have no obligation to register under Tennessee law (because their sex offense conviction occurred in another jurisdiction) just as county officials in other states register sex offenders whose convictions arose under Tennessee law.

(Gov't Br. 30.) This one-sentence response does not address Mr. Paul's argument, and to the extent that it comes close, it simply misunderstands the law. Tennessee county officials "regularly register sex offenders" from other jurisdictions is not out of some deference or courtesy to federal authority, but rather because such offenders actually *have* an obligation to register under Tennessee law.

For example, Tennessee's registration statute, which is premised on a defendant's prior conviction, defines "conviction" as including "a conviction, whether upon a plea of guilty, a plea of nolo contendere or a finding of guilt by a jury or the court in any other state of the United States." Tenn. Code Ann. §§ 40-39-202(1), (19). The state law likewise defines "primary residence" as including a place where a person resides "for five (5) consecutive days," and "secondary residence" as a place where a person resides "for a period of fourteen (14) or more days in the aggregate during any calendar year that is not the person's primary residence," including for "a person whose primary residence is not in this state." *Id.* at §§ 40-39-202(12), (18). Thus, Tennessee law requires anyone with a non-Tennessee conviction to register if they spend five consecutive days in the state, or

if they spend an aggregate 14 days in any calendar year.

The government's one sentence simply fails to address Mr. Paul's argument in any meaningful way and misstates the law.

2. Due process—vagueness

The government likewise attempts to recharacterize Mr. Paul's as-applied Due Process argument regarding unconstitutional vagueness as a Due Process "notice" claim. (*See* Gov't Br. at 30-31.) To be clear, Mr. Paul previously raised notice as a factual issue at trial, arguing to the jury that the nature of the Tennessee judgment meant that he did not *knowingly* fail to register, as required by the statute. He adopted this strategy only after the district court ordered that he was not permitted to argue that the Tennessee judgment obviated his federal registration requirement. (R.138, Trial Tr., Court, PageID#485-97.) The legal argument that Mr. Paul raises now (and that he raised below in his motion to dismiss), is that any interpretation of SORNA as requiring Mr. Paul to register in a Tennessee jail despite a valid judgment relieving him of the duty to do just that would be unconstitutionally vague as applied to Mr. Paul. (Paul Br. at 47-49.)

The government answers that Mr. Paul's "argument confuses his conviction for rape under Tennessee law with a collateral consequence—having to register as a sex offender—that flows from that conviction." (Gov't Br. at 31.) But Mr. Paul does not confuse these two concepts: the facts of this case do. Mr. Paul's judgment

of conviction contains the following words: "nor shall defendant be required to comply w/ the sexual offender registry." (R.22-1, Judgment, PageID#37.) The government's citation to Black's Law Dictionary does not somehow erase those words from the very judgment of conviction that the government acknowledges forms the basis of Mr. Paul's registration requirement. (Gov't Br. at 31.) Nor does the fact that Mr. Paul was once allegedly given "actual notice" in a registration form that he signed notifying him of his "duty" to register. (*Id.* at 32.) Such "notice" only exacerbates the problem, because in order to verify the accuracy of that form, Mr. Paul was still required to look at a document that effectively said "you do not have to enter your county jailhouse and register as a sex offender" and somehow conclude that it actually meant "you *do* have to enter your county jailhouse and register as a sex offender."

This is the precise sort of contradictory language that, based on the unique facts of this case, "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). Any such interpretation is therefore unconstitutionally vague as applied to Mr. Paul.

D. Mr. Paul had a right to argue that the government had not met its burden of proof on SORNA's first element.

Mr. Paul argues in his principal brief that the district court erroneously precluded him from raising his best defense at trial through various orders that

prevented him from arguing to the jury that he was not obligated to register under SORNA, and thus the government could not prove that first element of a SORNA offense. The government's response to this argument is wrong on several levels.

First, the government erroneously claims that this argument is subject to plain-error review because Mr. Paul failed to object to a single statement by the district court on the first day of trial. (Gov't Br. at 33-34.) This Court has held that Mr. Paul did not need to renew his objection after the district repeatedly issued explicit orders rejecting that objection:

> [I]f the trial court has made an explicit and definitive ruling on the record of the evidentiary issues to be decided, and has not indicated that the ruling is conditioned upon any other circumstances or evidence, then counsel need not renew the objection at the time the evidence is offered (or would have been offered but for an exclusionary ruling) in order to preserve the error for appeal.

United States v. Brawner, 173 F.3d 966, 970 (1999). The reason for this commonsense rule is perfectly demonstrated by the facts of Mr. Paul's case: the federal rules of both criminal and civil procedure, along with "interpretive rulings of the Supreme Court and this [C]ourt" all "encourage, and in some cases require, parties and the court to utilize extensive pretrial procedures," including both motions in limine and, as here, motions to dismiss, "in order to narrow the issues remaining for trial and to minimize disruptions at trial." *Id.*

The government's assertion to the contrary ignores this rule, ignores the preceding *three years* of litigation on this very subject, and ignores the fact that the

district court had already issued an order—hotly contested by Mr. Paul—determining that Mr. Paul could not rely on the Tennessee judgment as a defense to SORNA's first element. (R.89, Order, PageID#294; R.88, Memorandum, PageID#287.) The government's subsequent motion in limine to preclude Mr. Paul from making this argument was a formality at that point, and simply incorporated the very same district court order. (R.95, Mot. in Limine, PageID#301-02.) In addressing this argument on the first day of trial, the district court told defense counsel that the court's previous order had already concluded that such evidence would be inadmissible, to which defense counsel stated that he understood that he would be precluded from raising such a defense based on that order but would be allowed to use the order to explain Mr. Paul's actions. (R.138, Trial Tr., Gant, PageID#486.) Based on the fact that the district court had already ruled on the matter and had already dismissed defense counsel's many objections, defense counsel did not specifically object to the grant of the government's motion in limine. (*Id.*) The parties continued to debate this issue throughout trial, just as they had throughout the three years preceding it. Mr. Paul raised *continuous* objection to this issue; the government's assertion that he failed to raise a *contemporary* objection is both factually and legally incorrect. *Brawner*, 173 F.3d at 970.

Second, the government's brief barely addresses Mr. Paul's central argument, which is that under the unique facts of this case, the first element of

SORNA—whether he had a duty to register under SORNA—is a factual as well as legal question that the jury, not the judge, should have been allowed to decide. The government's only response is the constitutionally dubious assertion that a judge is entitled to direct a verdict on an entire element of an offense, which effectively occurred here. *See Sandstrom v. Montana*, 442 U.S. 510, 520-24 (1979) (jury must find *all* elements beyond a reasonable doubt, and judge may not issue an instruction that creates a legal presumption of guilt as to any given element). The government does not provide a citation to *any* authority demonstrating that the first element of a SORNA offense is a purely legal question, much less address Mr. Paul's arguments that the unique facts of this case require jury determination.

Finally, the government once again conflates the first and third elements of a SORNA offense in arguing that Mr. Paul actually *did* have an opportunity to present his argument to the jury. It asserts that "Paul, in short, put on the very defense that he now claims he was precluded from making" because he was allowed to argue that the Tennessee judgment deprived him of notice that he was required to register (the third element of the offense). (Gov't Br. at 36-37.) This is dramatically different, of course, from being allowed to argue that he had no *duty* to register, which the district court specifically prohibited Mr. Paul from arguing. Mr. Paul's best argument at trial was that, in this one-of-a-kind case, the Tennessee judgment relieved him of the duty to register as a sex offender under SORNA. The

government's only answer is that Mr. Paul should be happy to settle for a different, lesser defense regarding a different element of the offense. It offers no legal basis for why this was an adequate substitute.

Respectfully submitted,

s/ Isaiah S. Gant
ISAIAH S. GANT (BPR# 025790)
Assistant Federal Public Defender
Andrew C. Brandon
Research and Writing Attorney
810 Broadway, Suite 200
Nashville, Tennessee 37203
615-736-5047
Attorneys for Ronald W. Paul

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 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 and James I. Pearce, U.S. Department of Justice, Criminal Division, Appellate Section, 950 Pennsylvania Avenue, N.W., Washington, DC 20530.

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 _4,142_ 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