16-1429

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

THOMAS ABDUL HOLCOMBE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (WHITE PLAINS)

BRIEF FOR APPELLANT
THOMAS ABDUL HOLCOME

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Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from the judgment of the Southern District of New York, convicting appellant Thomas Holcombe, after a bench trial on stipulated facts, of failure to register as required by the Sex Offender Registration and Notification Act ("SORNA") in violation of 18 U.S.C. § 2250(a).

Subject matter jurisdiction in the District Court was conferred by 18 U.S.C. § 3231, which grants original and exclusive jurisdiction of all offenses against the United States, including the offenses of conviction. Entry of the District Court's judgment occurred on May 2, 2016, and a

timely notice of appeal was filed (A. 152).[1] The Hon. Vincent L. Briccetti presided over the district court proceedings. This Court's jurisdiction is invoked pursuant to 18 U.S.C. § 3742(a), 28 U.S.C. §§ 1291, 2106.

ISSUES PRESENTED

Was proper venue for Appellant's prosecution in the Southern District of New York? Does SORNA improperly delegate law-making authority to the executive branch; violate the Ex Post Facto Clause, violate the commerce clause, and the tenth amendment. Is SORNA void for vagueness? Is Appellant's prosecution barred because New York State has not implemented SORNA. Has Appellant's Constitutional right to travel been unduly burdened by SORNA?

STATEMENT OF THE CASE

Indictment

The indictment, filed on May 20, 2015, charged that from on or about the fall of 2013, up to and including January 2015, in the Southern District of New York and elsewhere, Appellant, being an individual required to register under SORNA who did travel in interstate commerce, knowingly did

[1]Numerical references preceded "A." refer to the Appendix. Numerical references preceded by D.E. refer to the docket entries in the District Court. The abbreviation "PSR" refers to the Presentence Report submitted to the Court under seal.

fail to register and update a registration as required by SORNA in violation of 18 U.S.C. § 2250.

Motion to Dismiss

On August 28, 2015, Appellant filed a motion to dismiss on the following grounds: improper venue; SORNA improperly delegates law-making authority to the executive branch, violates the Ex Post Facto Clause, the commerce clause, and the tenth amendment. Appellant argued that SORNA is void for vagueness; and that his prosecution was barred by the fact that New York State has not implemented SORNA (D.E. 13).

Decision on Motion

On November 13, 2015, the District Court denied Appellant's motion to dismiss. The Court issued an oral decision holding that this Court's decision in *United States v. Guzman,* 591 F.3d 83 (2d Cir. 2010), precluded Appellant's arguments that: SORNA is unconstitutional because it applies retroactively to sex offenders convicted of the underlying offenses before SORNA's enactment based upon an unconstitutional delegation of legislative authority to the executive branch; application of SORNA to someone convicted of an underlying sex offense prior to SORNA's enactment violates the *ex post facto* clause by retroactively increasing the potential punishment for the underlying offense; SORNA violates the

Commerce Clause because the statute regulates purely intrastate activity; SORNA violates the Tenth Amendment by imposing a federal obligation to register with state sex offender registries; and that it would be unconstitutional to penalize Holcombe under SORNA for failing to update his New York State registration because New York State has not yet implemented SORNA.

The Court rejected Appellant's claim that SORNA is void for vagueness because it fails to define the term "resides" with sufficient specificity to provide a due process notice or to provide sufficient notice of what is provided to satisfy the due process clause. First, the Court found that SORNA requires a convicted sex offender to register and keep that registration current in any jurisdiction in which he resides, is employed or is a student. The term "resides" is defined as the location of the individual's home or other place where the individual habitually lives. The Court found that the definition is not vague, and is sufficiently clear as to give notice to the defendant as to where and when he must register. The Court found that the SMART guidelines, promulgated by the Attorney General, state that a sex offender habitually lives somewhere where he lives for at least thirty days (4-5).

The Court held that venue was proper in the Southern District of New York because venue is proper in the district where the offense was committed, and if the offense begins in one district and is completed in another, venue lies in both districts. The Court found that the offense as alleged began in New York and was completed in Maryland; that the offense as alleged was committed in both New York and Maryland because the offense required interstate travel from New York to Maryland.

Bench Trial on Stipulated Facts

In order to preserve legal objections to his prosecution, and in light of the prosecution's refusal to consent to a conditional plea pursuant to Fed. R. Crim. P. 11(a)(2), Appellant consented to waive his right to a jury trial and was tried pursuant to a stipulation of fact. The following facts were stipulated to by Appellant and the government:

> 1. On or about September 28, 1992, the defendant was convicted by guilty plea, in the New York County Court for Westchester County, of Attempted Rape in the First Degree by Forcible Compulsion, a Class C felony, in violation of New York Penal Law §s 110.00 and 130.35(1).
>
> a. The New York State crime of Attempted Rape in the First Degree by Forcible Compulsion qualifies as a "sex offense" under the federal Sex Offender Registration and Notification Act ("SORNA") .
>
> b. SORNA's registration requirements became applicable to individuals, like the defendant, who were convicted of sex offenses

prior to SORNA' s enactment, by August 1, 2008, at the latest.

c. Accordingly, as of August 1, 2008, the defendant was a "sex offender" subject to SORNA's registration requirements.

2. On or about June 13, 1996, the defendant registered as a sex offender in New York by completing and signing a New York State Sex Offender Registration Form.

a . On the form, the defendant indicated that he would be residing at an address in Peekskill, New York.

b. The form set forth the defendant's registration obligations under New York law. In particular, HOLCOMBE's signature appears on the form directly below the following statement: "I understand that I must annually verify my address with [the New York State Division of Criminal Justice Services ("DCJS")] and notify DCJS in writing if my address changes from that listed above."

c. The form further provided that: "You must notify your local law enforcement agency and DCJS in writing of any change of home address within 10 days before you move."

3. On multiple occasions after the defendant's initial registration in 1996, the defendant verified his residence address by completing and signing a New York State Sex Offender Registry Address Verification Form and updated his residence address by completing and signing a New York State Sex Offender Change of Address Form.

4. On or about April 17, 2013, shortly after his release from a term of incarceration in Westchester County Jail, the defendant completed and signed a New York State Sex Offender Change of Address Form stating that he had moved on April 12, 2013, and updating his address from the Westchester County Jail in Valhalla, New

York, to 1000 Main Street in Peekskill, New York.

a. The defendant did not in fact reside at 1000 Main Street in Peekskill, New York, on or after April 12, 2013.

b . Accordingly, the defendant was required under SORNA to update his New York State sex offender registration with an accurate residence address.

5. Between on or about April 17, 2013, and on or about July 10, 2013, the defendant traveled from the State of New York to Baltimore, Maryland, where he resided until after his arrest on or about January 28, 2015. On that date, the defendant was arrested in Baltimore, Maryland, pursuant to a warrant issued by the Peekskill City Court for failing to comply with sex offender registration requirements under New York law.

a. Because his residence changed from the State of New York to the State of Maryland, the defendant was required under SORNA to register as a sex offender or update his sex offender registration in either the State of New York or the State of Maryland.

6. After April 17, 2013, the defendant did not update his New York State sex offender registration until on or about February 11, 2015.

7. After April 17, 2013, the defendant did not register as a sex offender or update his sex offender registration in the State of Maryland.

On January 19, 2016, the District Court rendered a guilty verdict.

Guidelines Calculation

The probation department, by Probation Officer James Mullen calculated the following Guidelines' Total Offense Level:

Base Offense Level: 16

> Under U.S.S.G. § 2A3.5(a)(1), the guideline for a conviction pursuant to 18 U.S.C. § 2250, conviction of an offense involving a Tier III sex offender has a base offense level of 16.

Acceptance of Responsibility 0

> Holcombe elected to have a non-jury trial of stipulated facts to preserve his right to appeal, which he would lose if he pleaded guilty. A bench trial with stipulated facts does not necessarily preclude the crediting of acceptance of responsibility; however, the Probation Department stated, based on Holcombe's court statements, it did not believe that he clearly accepted responsibility for his conduct.

Total Offense Level 16

Criminal History Computation V

Sentence

On April 27, 2016, Appellant appeared for sentence before Judge Briccetti. The Court found that Appellant was entitled to a two-level reduction for acceptance of responsibility under Guideline 3E1.1(a)(63). The Court found that Appellant's final offense level was 14 with a criminal history of V, yielding a sentencing range of 33 to 41 months imprisonment (63). The Court considered the advisory Guidelines range, all the statutory factors set forth in 18 U.S.C. § 3553(a) and the materials submitted by the parties. The Court calculated a modest downward departure to a sentence of

27 months' imprisonment to be followed by five years of supervised release (70-71). The Court departed downwardly because an error in Appellant's state court records regarding the age of the victim in his 1992 rape conviction, caused some adverse consequences, such as harassment by correction officers (73-74).

SUMMARY OF ARGUMENT

The Indictment should be dismissed for improper venue. SORNA is unconstitutional because it applies retroactively to sex offenders convicted of the underlying offenses before SORNA's enactment, based upon an unconstitutional delegation of legislative authority to the executive branch; application of SORNA to someone convicted of an underlying sex offense prior to SORNA's enactment violates the *ex post facto* clause by retroactively increasing the potential punishment for the underlying offense. SORNA violates the Commerce Clause because the statute regulates purely intrastate activity. SORNA violates the Tenth Amendment by imposing a federal obligation to register with state sex offender registries. Appellant's Constitutional right to travel has been unduly burdened by SORNA. It is unconstitutional to penalize Appellant under SORNA for failing to update his New York State registration because New York State has not yet implemented SORNA. SORNA is void for vagueness because it fails to

define the term "resides" with sufficient specificity to provide a due process notice or to provide sufficient notice of what is provided to satisfy the due process clause.

ARGUMENT

POINT I

THE INDICTMENT SHOULD HAVE BEEN DISMISSED FOR IMPROPER VENUE.

Applicable Law

Under the Adam Walsh Child Protection and Safety Act of 2006, 109 P.L. 248, 120 Stat. 587, 593-594, 109 P.L. 248, 2006 Enacted H.R. 4472, 109 Enacted H.R. 4472, a sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence. (a)

> **Under subsection (c),** a sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to sub§ (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that

> information to all other jurisdictions in which the offender is required to register.
>
> **Under subsection (d),** the Attorney General shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with sub§ (b).

In accordance with Fed. R. Crim. P. 12(b)(3)(A)(1) and Fed. R. Crim. P. 18, the indictment should have been dismissed because the Southern District of New York was not the proper venue for prosecution. No offense conduct occurred in the Southern District of New York.

Under the Sixth Amendment, a defendant has a right to a trial by "an impartial jury of the state and district wherein the crime shall have been committed." U.S. Const. Amend. VI. 18 U.S.C. § 3237(a) provides that:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued or completed."

"[W]here the crime charged is the failure to do a legally required act, the place fixed for its performance fixes the situs of the crime." *Johnston v. United States*, 351 U.S. 215, 220 (1956)(defendants, who were conscientious

objectors and failed to report for civilian work in lieu of induction, were properly prosecuted in districts where they were assigned to work).

Improper Venue

Assuming that Appellant changed his residence from New York to Maryland, there would be no obligation under SORNA for Appellant to update his registration in New York, a former residence. The situs of the criminal conduct (failure to register) would be Maryland. This issue was addressed recently in *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013).[2] In *Lunsford*, the defendant sustained pre-SORNA state convictions, which made him subject to federal sex offender registration when SORNA was enacted. Lunsford, who lived and was registered at an address in Kansas City, Missouri, booked a flight to the Philippines and left the jurisdiction without updating his Missouri registration. He was arrested in the Philippines and returned to the United States to face prosecution under

[2]*But see United States v. Kopp*, 778 F.3d 986, 989 (11th Cir. 2015). In *Kopp,* the Eleventh Circuit held that "[t]he act of travel by a convicted sex offender may serve as a jurisdictional predicate for [§] 2250, but it is also . . . the very conduct at which Congress took aim." *Id.* (quoting *Carr v. United States*, 560 U.S. 438, 454 (2010). Because the crime consists of both traveling and failing to register, Kopp began his crime in the "departure" state; i.e., the state he moved his residence from (Georgia) and consummated it in Florida. *Id. See also United States v. Lewis*, 768 F.3d 1086, 1092-94 (10th Cir. 2014); *United States v. Leach*, 639 F.3d 769, 771-72 (7th Cir. 2011).

SORNA based on the theory that he did not update his Missouri registration to indicate a change in residence. *Id.* at 860.

As noted in *Lunsford*: SORNA requires a sex offender to "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." *Id* (citing 42 U.S.C. § 16913(a). To "keep the registration current," an offender must, "not later than 3 business days after each change of . . . residence . . . appear in person in at least one jurisdiction involved pursuant to [42 U.S.C. § 16913(a)] and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry." *Id*. § 16913(c).

The offender must supply, among other things, the address of "each residence at which the sex offender resides or will reside." *Id*. § 16914(a)(3). A sex offender violates 18 U.S.C. § 2250(a) if he travels in interstate or foreign commerce and knowingly fails to register or update a registration as required by SORNA.

Lunsford changed his residence when he moved to the Philippines. A change of residence triggers an obligation on the part of a sex offender to update a "jurisdiction involved" with the address of his new residence. 42 U.S.C. § 16913(c); 16914(a)(3). *Id.* at 861. SORNA's definition of

"jurisdiction" excludes foreign countries, *id*. § 16911(10), so Lunsford was not required to register in the Philippines. The government's theory was that Lunsford violated SORNA when he did not supply information about his change of residence to the Missouri registry. *Id.* He was required to do so, however, only if Missouri was a "jurisdiction involved," within the meaning of SORNA, when he changed his residence. A "jurisdiction involved" is a jurisdiction where the offender resides, is an employee, or is a student. Id. § 16913(a), (c). The government did not argue that Lunsford was an employee or a student in Missouri at the relevant time, but contended that Missouri was a "jurisdiction involved" because it was the "jurisdiction where the offender reside[d]." Id. § 16913(a). SORNA defines "resides" to mean, "with respect to an individual, the location of the individual's home or other place where the individual habitually lives." *Id*. § 16911(13).

In *Lunsford*, the Court noted further; the government did not contend, for example, that Lunsford established a new residence in Missouri after he abandoned his residence in Missouri and before he boarded his flight to the Philippines. The plea agreement reflected the understanding of the parties that Lunsford did not change his residence and trigger a reporting obligation until after he left the United States. But after Lunsford left the country, Missouri was not the location of his home or a place where he habitually

lived, so Lunsford did not "reside" in Missouri when he changed his residence. 725 F.3d at 861; *see,* 42 U.S.C. § 16911(13).

The government nonetheless contended in *Lunsford* that Missouri was a "jurisdiction involved," because it was the jurisdiction where Lunsford resided until he changed his residence. The National Guidelines for Sex Offender Registration and Notification, which provide guidance to States about SORNA, seem to reflect this understanding of the statute, saying that "[i]f a sex offender simply leaves the country and does not inform the jurisdiction or jurisdictions in which he has been registered, then the requirement to keep the registration current will not have been fulfilled." 73 Fed.Reg. 38, 030, 38, 066-67 (July 2, 2008). The Court held that neither the National Guidelines nor the government's brief, explained effectively how the quoted Guideline was supported by the language of the statute on this point. The Court thus concluded that the text of the statute foreclosed the government's position. An offender is required to "keep the registration current" in the jurisdiction where he "resides," 42 U.S.C. § 16913(a), not a jurisdiction where he "resided." "Resides" is a present-tense verb, and "the present tense generally does not include the past." *Carr v. United States*, 560 U.S. 438 (2010)(citing the Dictionary Act, 1 U.S.C. § 1). There was thus no textual basis for requiring an offender to update his registration in a

jurisdiction where he formerly "resided," and where he is not currently an employee or a student. Missouri was not a "jurisdiction involved" after Lunsford changed his residence to somewhere in the Philippines, so Lunsford was not required by the federal statute to update the Missouri registry. 725 F.3d at 861-862. This interpretation makes sense because a person may be very likely to leave a state without the intention to no longer live there, but a visit to another state may easily turn into residency. To require the defendant to register in the departure state ignores this common occurrence.

If the Court rejects Holcombe's argument that he was not required to notify New York when he departed here, and holds that venue is proper in the departure state, the District Court still erred, by failing to require that the government prove that at the time that Appellant left New York, he had the intention of moving to a known location outside of New York. Without this finding, there is a lack of scienter and a strict liability crime in this instance violates the due process clause of the Fifth Amendment to the United States Constitution.

In *United States v. Miller*, No. 2:10-CR-196 2011 WL 711090, at *5 (S.D.Ohio Feb. 22, 2011), a District Court in Ohio addressed the issue of whether an individual who travels from one state to another engaged in

offense conduct in the State he initially left. The Court in *Miller* ruled that the "criminal act itself takes place entirely within the district where the offender had a duty to register [but] failed to do so;" noting that the requirement of "interstate travel is more like a condition precedent than an essential element of the crime."

Three circuit court cases hold that venue is proper in the state from which the defendant departed. *See* supra fn 3. These cases base the decision that venue is proper in the state from which the defendant departed on the theory that the failure to register is inherently a continuing offense that begins in the state from which the defendant moved and ends in the state to which the defendant relocated.

These cases utilize flawed logic. There is no continuing offense. The offense, assuming the government is correct that Appellant relocated his residence from New York to Maryland, did not occur until Appellant failed to register in Maryland. Appellant's departure from New York was not a violation of SORNA until he resided in Maryland and failed to register there because before Appellant actually changed his residence, no violation of SORNA occurred. Appellant's departure from New York may be been completely benign--a vacation. The government should have been required to prove that at the time Appellant left New York, he intended to move to

Maryland, and then, a violation of SORNA would not offend the constitution.

In *United States v. Bailey*, No. 2:13-cr-00094, 2014 U.S. Dist. LEXIS 16402, at *17-18, 2014 WL 534193 (S.D. W. Va. Feb. 10, 2014), the Court held that the plain language of § 16913(c) required the defendant to keep his registration current in "at least one" of three possible places, that is, where he: (1) resides; (2) is an employee; and (3) is a student. The Court held that after the Defendant moved to Ohio and no longer resided in West Virginia, the only jurisdiction that met the requirements of § 16913(c) was Ohio. *Id.*

The plain wording of the statute also supports the only logical interpretation of the statute: A sex offender "shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection." Taking note of this wording, it is clear that no crime occurs until three days after a defendant's arrival in the state he intends to make his home.

Under the plain wording of SORNA, Appellant was not obligated under SORNA to update his New York registration after he moved to Maryland, since New York was no longer his residence. Consequently, the District Court erred in its finding that the failure to register crime in violation of 18 U.S.C. § 2550, began in New York and ended in Maryland.

In fact, no federal crime was committed in the Southern District of New York because no crime was committed until Appellant resided in Maryland for three days without registering. Consequently, the District Court erred by failing to dismiss the indictment. *Lunsford,* 725 F.3d at 861-862; *Bailey*, No. 2:13-cr-00094, 2014 U.S. Dist. LEXIS 16402, at *17-18, 2014 WL 534193; *Miller*, No. 2:10-CR-196 2011 WL 711090, at *5 (S.D.Ohio Feb. 22, 2011),

POINT II

THE INDICTMENT SHOULD HAVE BEEN DISMISSED BECAUSE SORNA VIOLATES THE NON-DELEGATION DOCTRINE.

SORNA delegated to the Attorney General the authority to "specify the applicability" of the Act to "sex offenders " who are "convicted before" July 27, 2006, as well as those who are "convicted before . . . its implementation in a particular jurisdiction." 42 U.S.C. §§ 16912(b), 16913(b), 16913(d), 16917(a)(b). *See Reynolds v. United States*, 132 S. Ct. 975, 984 (2012)(holding that SORNA's registration requirements do not apply to pre-SORNA offenders until the Attorney General so specifies). On February 28, 2007, the Attorney General published an Interim Rule, ostensibly making SORNA applicable to Appellant despite the fact that his sex offense pre-dates the passage of the Act. Specifically, in 28 C.F.R. § 72.3, the Attorney General stated that SORNA's requirements "apply to all

sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3.

The effect of this delegation of authority was to permit the Attorney General to legislate the scope of the Act's retrospective reach. The authority to legislate or make law, however, is entrusted solely to Congress. U.S. Const., Art. I, § § 1, 8. This authority carries with it a corresponding limitation: Congress cannot delegate its legislative authority to another branch of the government. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (explaining that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421, 432 (1935) (observing that "[i]f the citizen is to be punished for the crime of violating a legislative order of an executive officer... due process of law requires that it shall appear that the order is within the authority of the officer.").

The doctrine prohibiting Congress from delegating its authority to another branch is a necessary component of the separation of powers that underlies our tripartite system of government and the checks and balances inherent in our constitutional framework. *See Mistretta v. United States*, 488 U.S. 361, 380-81 (1989)(describing the separation of powers as essential to

the preservation of liberty). In *Panama Refining Co*., the Court invalidated a delegation of authority to the executive branch under the National Industrial Recovery Act ("NIRA") to prohibit the interstate transport of petroleum produced or withdrawn in violation of state law. *Panama Refining Co*., 293 U.S. at 406, 432. The Court emphasized that the statute did not declare any policy with respect to the transportation of excess production, did not qualify the President's authority, did not establish any criteria governing the President's course, and treated disobedience as a crime. *Id.* at 415.

Similarly, in *A.L.A. Schechter Poultry*, the Court addressed another provision of NIRA, which authorized the President to approve codes of fair competition from industry groups or prescribe such codes. *A.L.A. Schechter Poultry*, 295 U.S. at 521-22. A violation of a code was a crime, with each day of the violation constituting a separate offense. *Id*. at 523. As in *Panama Refining Co.*, the Court focused on the absence of standards and restrictions in connection with the broad grant of authority. *Id*. at 542. Such concerns are particularly significant where, as in Appellant's case, the delegation involves criminal liability. *See Fahey v. Mallonee*, 332 U.S. 245, 249-50 (1947).

In this case, the delegation extended to the chief law enforcement officer of the United States is the power to determine the retrospective scope of a criminal statute. In other words, it enabled the executive branch to

legislate the reach of a criminal statute with no limits on the Attorney General's exercise of his discretion. He was free to decide how far back the registration requirements should be extended, no matter how arbitrary his decision might be. This delegation is particularly troubling because retrospective legislation is disfavored and, in those limited circumstances where it is permitted, a legislative policy judgment must be manifest. In *I.N.S. v. St. Cyr*, 533 U.S. 289, 299, 316 (2001), the Supreme Court stated: [a] statute may not be applied retroactively ... absent a clear indication from Congress that it intended such a result. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. "Accordingly, the first step in determining whether a statute has an impermissible retroactive effect is to ascertain whether Congress has directed with the requisite clarity that the law be applied retrospectively." *Id*. at 316 (citing *Martin v. Hadix,* 527 U.S. 343, 352 (1999). *See also Landgraf v. USI Film Products*, 511 U.S. 244, 271 (1994) (discussing the presumption against retroactive effect and emphasizing the need for clear language requiring retroactivity). In the case of SORNA, there is no indication that Congress made such a judgment. Rather, it improperly abdicated that legislative responsibility to the

executive branch. As noted by Justice Scalia in his dissenting opinion in *Reynolds v. United States*, 132 S.Ct at 986-87 (2012): "[I]t is not entirely clear to me that Congress can constitutionally leave it to the Attorney General to decide - with no statutory standard whatever governing his discretion - whether a criminal statute will or will not apply to certain individuals. That seems to be sailing close to the wind with regard to the principle that legislative powers are nondelegable..."

Congress may, of course, obtain assistance from other branches of government, provided that the legislative act sets forth an intelligible principle that directs and fixes the discretion delegated to the agency or person. *See Mistretta v. United States*, 488 U.S. 361, 372 (1989) (citing *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)).

In *United States v. Guzman*, 591 F.3d 83, 92-93 (2d Cir. 2010), the Court held that a delegation is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105, 67 S. Ct. 133, 91 L. Ed. 103 (1946). In other words, Congress needs to provide the delegated authority's recipient an "intelligible principle" to guide it. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409, 48 S. Ct. 348, 72 L. Ed. 624, Treas. Dec. 42706 (1928); *see also*

Mistretta v. United States, 488 U.S. 361, 372-73 (1989). *Guzman*, 591 F.3d at 92-93.

The *Guzman* Court held that the Attorney General's authority under SORNA is highly circumscribed. SORNA includes specific provisions delineating what crimes require registration, 42 U.S.C. § 16911; where, when, and how an offender must register, *id*. § 16913; what information is required of registrants, *id*. § 16914; and the elements and penalties for the federal crime of failure to register, 18 U.S.C. § 2250. *See Ambert*, 561 F.3d at 1214. *Guzman*, 591 F.3d at 93.

Guzman was decided before the Supreme Court's decision in *Reynolds v. United States*, 132 S. Ct. 975, 984 (2012), in which the Court held that SORNA's registration requirements did not apply to pre-SORNA offenders until the Attorney General so specified. Consequently, at the time that *Guzman* was decided, it was an open question whether or not or § 16913(d) authorized the the Attorney General to determine SORNA's "retroactivity," or whether § 16913(d) gave the Attorney General the authority only to *implement* SORNA with respect to all sex offenders.

Nevertheless, the *Guzman* Court held that either way, the statute was not void under the non-delegation doctrine because if § 16913(d) authorized the Attorney General to determine SORNA's "retroactivity," it did "so only

with respect to the limited class of individuals who were convicted of covered sex offenses prior to SORNA's enactment. The Court held that the Attorney General "could not do much more than simply determine whether or not SORNA applied to those individuals and how they might comply as a logistical matter." The Court held that the authority of the Attorney General under the statute was limited and that "[t]he Supreme Court had upheld much broader delegations." *Guzman*, 591 F.3d at 93 (2d Cir. 2010)(citing *Mistretta*, 488 U.S. at 372-73.

Consequently, Appellant is mindful of the Court's position on this issue, and, by raising this claim at this time, seeks to preserve the issue to raise in the United States Supreme Court and preclude a procedural bar to relief in a motion pursuant to 28 U.S.C. § 2255, in the event case law intervenes. If one day, it is determined that the delegation to the Attorney General to determine the very individuals to which SORNA applies, with no standards to guide this determination, violates the non-delegation clause, Appellant has not waived his claim and will not be procedurally barred from seeking collateral review. *See United States v. Frady*, 456 U.S. 152, 168 (1982)(Under the procedural default doctrine, if a § 2255 movant could have raised a claim at trial or on direct appeal, but did not, § 2255 relief on that claim is deemed waived); *Bousley v. United States*, 523 U.S. 614, 622

(1998)(A litigant procedurally defaults on a claim if he fails to raise the claim when it could have been "fully and completely addressed on direct review based on the" record on appeal).

POINT III

APPELLANT'S CONVICTION UNDER SORNA VIOLATES THE EX POST FACTO CLAUSE OF THE CONSTITUTION.

Appellant was convicted of a sex offense in New York in 1992, twenty-four years before SORNA was enacted in 2006. Nonetheless, the Rules prescribed by the Attorney General applying SORNA to sex offenders convicted before enactment of the federal criminal offense, subjects Appellant to federal criminal liability for going to Maryland and not registering and reporting as a sex offender. *See* 18 U.S.C. § 2250(a) and 42 U.S.C. § 16913-16916. Such retroactive application of SORNA violates the ex post facto clause. Article I, § 9, Clause 2 of the United States Constitution prohibits the passing of an ex post facto law. See U.S. Const. Art. I, § 9, cl. 2. The Supreme Court has interpreted the Ex Post Facto Clause to apply to laws that retroactively alter the definition of crimes and increase the punishment of criminal acts. *Collins v. Youngblood*, 497 U.S. 37, 42-43 (1990). Application of SORNA to Appellant's circumstances has resulted in an increase in potential punishment for his prior criminal acts by ten years.

18 U.S.C. § 2250. The Ex Post Facto Clause restricts vindictive legislation out of concern that a legislature's response to political pressures poses a risk that they may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals. *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994). Currently, political pressure has made sex offenders a reviled group in our country. *See* Shiela T. Caplis, *Got Rights? Not if You're a Sex Offender in the Seventh Circuit*, 2 Seventh Cir. Rev. 115 (2006)(describing the convicted sex offender as perhaps the most despised and unsympathetic member of American society noting the general trend to strip convicted sex offenders of their rights). As noted by Justice Stevens in his dissent in *Smith v. Doe*, 538 U.S. 84, 113, 114 (2003), "... it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders and no one else, as a result of their convictions, are not part of their punishment. In Justice Stevens' opinion, "a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty, is punishment." Justice Stevens wrote that the Constitution's Double Jeopardy and Ex Post Facto Clauses prohibit the addition of these sanctions to the punishment of persons who were tried and convicted before the legislation was enacted. *Id.* Here, SORNA pairs an independent federal

obligation to register directly with punishment of up to 10 years in prison. Indeed, SORNA attached new, and as yet unidentified, legal consequences to events, specifically, Appellant's 1992 conviction, which occurred over a decade prior to SORNA's 2006 enactment. The additional requirements imposed by SORNA are punitive in both purpose and effect. For example: SORNA broadens the class of offenders subject to registration; expands the information gathered from those required to register; lengthens the registration; creates classes of offenders; reduces the time frame in advising the officials of any changes of required information; and substantially increases the penalties for a violation of any of the requirements. Compare 42 U.S.C. § 14072(i) (Wetterling Act (predecessor to SORNA)) with 42 U.S.C. § 16911 (SORNA, expansion of sex offender definition and expanded inclusion of child predators); § 16915 (SORNA, addressing the duration of the registration requirements); 18 U.S.C. § 2250 (SORNA, increasing the penalties for violations of the registration requirements). SORNA accordingly violates the Ex Post Facto Clause. (*But see United States v. Guzman*, 591 F.3d 83, 94 (2d Cir. 2010)(rejecting Ex Post Facto challenge to SORNA).

POINT IV

THE INDICTMENT SHOULD BE DISMISSED BECAUSE CONGRESS LACKS THE POWER UNDER THE COMMERCE CLAUSE TO FORCE INDIVIDUALS CONVICTED OF PURELY LOCAL SEX OFFENSES TO REGISTER AS SEX OFFENDERS.

In order to violate § 2250, a defendant must first be "required to register under the Sex Offender Registration and Notification Act." 18 U.S.C. § 2250(a)(1).

> **(a)** In general. Whoever--
>
> **(1)** is required to register under the Sex Offender Registration and Notification Act;
>
> **(2)**
>
> **(A)** is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice [10 USCS §§ 801 et seq.]), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
>
> **(B)** travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
>
> **(3)** knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both. 18 U.S.C.S. § 2250.

Congress lacks the authority to direct individuals convicted of purely

local offenses to register as state sex offenders. Therefore, Congress cannot constitutionally require Appellant, who was convicted of a local offense, to register under SORNA. Thus, the first and third element of § 2250 cannot be met and the indictment should have been dismissed.

SORNA creates affirmative requirements for "sex offenders" to register with their local jurisdiction. 42 U.S.C. §§ 16913-16916 (hereinafter "the registration requirements"). SORNA's definition of "sex offender" includes citizens who have been convicted solely under state criminal laws, even if their offense has no relation to interstate activity or commerce. 42 U.S.C. § 16911. The registration requirements are not directed to the states, but to individuals. For example, 42 U.S.C. § 16913(a) requires a sex offender "to register and keep the registration current, in each jurisdiction where the offender resides." § 16913 requires every sex offender to register, regardless of whether the offender has traveled across state lines.

Congress may only enact legislation pursuant to the powers specifically delegated to it by the Constitution. *See United States v. Lopez*, 514 U.S. 549, 552 (1995). SORNA does not explain under what authority Congress imposed the registration requirements. However, the only power through which Congress could conceivably enact such requirements is its power "[t]o regulate Commerce with foreign Nations, and among the several

States, and with Indian Tribes." U.S. Const. art. 1, § 8, cl. 3. Under modern Commerce Clause jurisprudence, as articulated in *Lopez* and *United States v. Morrison*, 529 U.S. 598 (2000), it is clear that Congress does not have the power to impose registration requirements on individual citizens convicted of purely intrastate offenses.

As the Supreme Court noted in *Morrison*, "modern Commerce Clause jurisdiction has identified three broad categories of activity that Congress may regulate under its commerce powers." *Id*. at 608-09 (quoting *Lopez*, 514 U.S. at 558). First, Congress may regulate the use of the channels of interstate commerce, such as interstate highways, the mail or air routes, *id* at 609. SORNA's registration requirements clearly do not effect the channels of interstate commerce. Second, Congress can regulate the instrumentalities of interstate commerce, or persons or things in interstate commerce. *Id*. SORNA requires sex offenders to register regardless of whether they travel interstate. For instance, even if Appellant never left the state of New York (the jurisdiction under which he was prosecuted for the sex offense), he would still be required to register under SORNA every time he changed addresses within the State. By enacting a statute, which purports to regulate intrastate activity, Congress has exceeded its authority under the Commerce Clause. Third, the Commerce Clause allows Congress to regulate those

activities that have a substantial effect on interstate commerce. *Id*. at 609. In *Lopez* and *Morrison*, the Supreme Court set forth several factors that determine whether a regulation can be upheld as an activity that substantially affects interstate commerce. The first factor is whether the regulated activity has an economic character. *Morrison*, 529 U.S. at 611 ("*Lopez's* review of Commerce Clause case law demonstrates that in those cases where we have sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of economic endeavor."). In *Lopez*, the Gun-Free School Zones Act was struck down in large part because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evidence commercial nexus." *Id.* at 580. Similarly, SORNA's registration requirements have no commercial character, nor any relation to economic activity of any kind. In fact, the stated purpose of SORNA is "to protect the public from sex offenders and offenders against children." 42 U.S.C. § 16901. SORNA does not have an economic character by any stretch of the imagination.

The second factor examined in *Lopez* and *Morrison* is whether the statute contains a "jurisdictional element," such as a requirement of travel across state lines for the purposes of committing the regulated act. *Morrison*,

529 U.S. at 611-12. Although § 2250(a) requires a sex offender to "travel in interstate commerce" in order to qualify for federal prosecution, the registration requirements contain no such jurisdictional element. *See* 42 U.S.C. §§ 16913-16916. In fact, the registration requirements apply to citizens whose criminal activities are purely intrastate, and who never travel in interstate commerce. Third, the existence of congressional findings indicating that the statute is a valid exercise of Congress's Commerce Clause power will at least enable a court "to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce, even though no such substantial effect was visible to the naked eye." *Lopez*, 514 U.S. at 563. Such congressional findings were not present in *Lopez*, and they are not present here. SORNA is a subchapter of the Adam Walsh Act, which enacts a wide range of legislation in addition to SORNA. In other provisions of the Adam Walsh Act, Congress included findings, which connected the regulated activity to interstate commerce. For instance, Title V of the Act, entitled "Child Pornography Prevention," contains findings that "intrastate incidents of production, transportation, distribution, receipt, advertising, and possession of child pornography, as well as the transfer of custody of children for the production of child pornography, have a substantial and direct effect upon interstate commerce..." H.R. 4472, Sec. 501. SORNA's

registration requirements, on the other hand, contain no such findings. Like the Gun Free School Zones Act in *Lopez*, SORNA is entirely unsupported by legislative findings indicating that regulation of purely local sex crimes has any affect on interstate commerce.

Finally, a reviewing court is directed to examine the extent of the relationship between the regulated activity and its effects on commerce. *Morrison*, 529 U.S. at 612. There is no indication in the statute, or anywhere else, that the activities sought to be regulated by SORNA have any effect on commerce, not even an attenuated one. Nor can such an effect be hypothesized by the aggregate economic effects that sex crimes and sex offenders inflict upon society. The Supreme Court has flatly rejected the notion that the aggregate effect of local criminal activity on interstate commerce can be used to justify the invocation of Congress's Commerce Clause power. *Morrison*, 529 U.S. at 617. The costs of crime control and the effects of crime on "national productivity" also cannot support the use of the Commerce Clause to regulate intrastate criminal activity. *Lopez*, 514 U.S. at 564; *Morrison*, 529 U.S. at 612-13.

In *Morrison*, after applying all of these factors, the Court ruled that "[g]ender motivated crimes of violence are not, in any sense of the phrase, economic activity," and struck down the Violence Against Women Act as an

impermissible use of Congress's power under the Commerce Clause. *Morrison*, 529 U.S. at 613. Similarly, in *Lopez*, the Court held that the Gun Free School Zones Act "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561. Purely local sex offenses are similarly non-economic and, while validly regulated by the states, are not subject to regulation by Congress under the Commerce Clause.

This conclusion is not affected by the Supreme Court's recent Commerce Clause case, *Gonzales v. Raich*, 545 U.S. 1 (2005). In *Raich*, the Court held that the Controlled Substances Act ("CSA"), which criminalized the distribution and possession of medical marijuana, was legally enacted under the Commerce Clause, even if the marijuana was locally grown, consumed locally, and never traveled in interstate commerce. The Court held that the CSA is connected to "economic" activity because marijuana is a commodity that has an interstate market: Unlike those at issue in *Lopez* and Morrison, the activities regulated by the CSA are quintessentially economic. "Economics" refers to "the production, distribution, and consumption of commodities." Webster's Third New International Dictionary 720 (1966). The CSA is a statute that regulates the production, distribution, and

consumption of commodities for which there is an established, and lucrative, interstate market. Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product. *Raich*, 545 U.S. at 25-26.

Clearly, the Court's reasoning in *Raich* has no application to SORNA, which does not regulate anything resembling economic activity. SORNA, with its stated purpose "to protect the public from sex offenders and offenders against children," 42 U.S.C. § 16901, far more closely resembles the statutes struck down in *Lopez* and *Morrison*.

The Supreme Court continued to revisit and clarify the reach of Congress's power to regulate Commerce in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). In *United States v. Kebodeaux*, 570 U.S. ___, 133 S. Ct. 2496, 2507 (2013) Chief Justice Roberts, concurring in the judgment, observed in a SORNA case predicated upon a predicate federal sex offense conviction that, "[t]he fact of a prior federal conviction, by itself, does not give Congress a freestanding, independent, and perpetual interest in protecting the public from the convict's purely intrastate conduct."

Because SORNA's registration requirements are unconstitutional, Holcombe cannot be "required to register under the Sex Offender Registration and Notification Act," a necessary element for a violation of §

2250. Accordingly, the Indictment should be dismissed. *But see Guzman* 591 F.3d at 90 (rejecting Commerce Clause challenge to SORNA).

Unlike other statutes, such as the Travel Act, 18 U.S.C. § 1952, which require a defendant to travel in interstate commerce with the intent to commit certain prohibited acts, the travel element of § 2250 does not require that the travel occur in connection with the defendant's failure to register. In other words, there is no requirement that the defendant travel in interstate commerce with the intent to violate § 2250. Furthermore, SORNA is not a regulation that protects the channels of commerce. Upholding § 2250 based on its travel requirement would allow Congress to federalize every local offense simply by making it a crime for someone who committed a local offense to travel in interstate commerce. Clearly, some nexus must exist between the criminal activity and the interstate travel in order to satisfy the Commerce Clause. Because § 2250 contains no such nexus, it cannot be said to regulate "people in interstate commerce."

Just as the *Lopez* and *Morrison* factors did not support SORNA's registration requirements as a valid exercise of the Commerce Clause power, the factors also do not support § 2250, which aims to regulate the same activities. Like the registration requirements, § 2250 regulates a noneconomic activity and contains no congressional findings to connect the

regulated activity to interstate commerce. Moreover, although § 2250 has a "jurisdictional element" that requires a defendant to "travel in interstate or foreign commerce," this is insufficient by itself to make the statute a legitimate exercise of Congress's Commerce Clause authority. The presence of a jurisdictional element is not dispositive, but rather "may establish that the enactment is in pursuance of Congress's regulation of interstate commerce." *Morrison*, 529 U.S. at 612 (emphasis added). § 2250's jurisdictional element is insufficient for a court to declare that the statute has an effect on interstate commerce because there is no nexus between the travel and the defendant's failure to register, which is a purely local act. Finally, any economic effect that the activities regulated by § 2250 might have on interstate commerce is too attenuated to bring the statute within the authority of the Commerce Clause. The potential aggregated economic effects of sex offenders' failure to register are insufficient to sustain the statute. *Morrison*, 529 U.S. at 617; *Lopez*, 514 U.S. at 564.

§ 2250 does not fall within any of the categories of activities that Congress may regulate through the exercise of its power under the Commerce Clause. Therefore, the statute is unconstitutional and the Indictment should be dismissed. *But see Guzman* 591 F.3d at 90 (rejecting Commerce Clause challenge to SORNA).

POINT V

THE INDICTMENT SHOULD BE DISMISSED BECAUSE SORNA IMPERMISSIBLY ENCROACHES UPON STATE POWER IN VIOLATION OF THE TENTH AMENDMENT.

SORNA's registration requirements, which impose a federal obligation on offenders to register in individual state sex offender registries, are an unconstitutional encroachment of federal power on state sovereignty. The Tenth Amendment provides that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S.Const. Amend. X. The Tenth Amendment has been applied to uphold the principles of federalism by limiting the power the federal government may exercise over state activities. For example, the Tenth Amendment prohibits the federal government from commandeering state officials into enacting or administering federal law. *Printz v. United States*, 521 U.S. 898, 935 (1997). In *Printz*, the Supreme Court struck down a law requiring local law enforcement officials to conduct background checks of prospective handgun purchasers. The Court held, "[t]he Federal Government may neither issue directives requiring the states to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id*. at 935. (*See also New York v.*

United States, 505 U.S. 144 (1992) finding Congress did not have the power to compel the states to enact a federal program regulating the disposal of toxic waste); *United States v. Snyder*, 852 F.2d 471, 475 (9th Cir. 1988) ("[T]he federal government has no constitutional authority to interfere with a state's exercise of its police power except to the extent the state's action intrudes on any of the spheres in which the federal government itself enjoys the power to regulate."). The local law enforcement officials in *Printz* are analogous to the law enforcement officials who run state sex offender registries.

Just as Congress has no power to compel local law enforcement to conduct federally mandated background checks, it has no power to compel local law enforcement to accept registrations from federally mandated sex offender programs. SORNA's registration requirements are therefore invalid under the Tenth Amendment and the indictment should be dismissed. *But see Guzman*, 591 F.3d at 94 (rejecting Tenth Amendment challenge to SORNA).

POINT VI

SORNA IS VOID FOR VAGUENESS BECAUSE IT FAILS TO DEFINE THE TERM "RESIDES" WITH SUFFICIENT SPECIFICITY TO PROVIDE DUE PROCESS NOTICE OF WHAT IS PROHIBITED.

As generally stated, the void-for-vagueness doctrine requires that a penal statute defines the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" *United States v. Rybicki*, 354 F.3d 124, 129 (2d Cir. 2003)(en banc)(*quoting Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). A law fails to meet the requirements of the Due Process Clause "if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits…" *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966). The Due Process Clause thus ensures that "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). When the interpretation of a statute does not implicate the First Amendment, it is assessed for vagueness only "as applied, i.e., in light of the specific facts of the case at hand and not with regard to the statute's facial validity." *Rybicki*, 354 F.3d at 129 (interior quotes omitted). SORNA is void for vagueness as applied to the facts of this case because the

statute's use of the vague term "resides" does not provide notice of at what point Appellant would have been deemed to have changed his residence and required to register in Maryland. The statute does not make clear how many continuous days Appellant would have had to have spent in Maryland in order to have established Maryland as his residence for SORNA registration purposes. Although the statute does require any sex offender to notify at least one jurisdiction "not later than 3 business days after each change of … residence,…" 42 U.S.C. § 16913(c), this three-day time period provides no help in determining when the residence is deemed to have changed, and thus it does not cure any vagueness.

As noted above, SORNA defines "resides" as meaning, "with respect to an individual, the location of the individual's home or other place where the individual habitually lives." 42 U.S.C. § 16911(13). This definition just replaces one vague term, "resides," with another – "habitually lives." The Justice Department has issued guidelines defining "habitually lives," but they further muddy the waters. The guidelines define locations where the sex offender "habitually lives" as those places in which the sex offender lives with some regularity, and with reference to where the sex offender actually lives, not just in terms of what he would choose to characterize as his home address or place or residence for self-interested reasons. The specific

interpretation of this element of "residence" these Guidelines adopt is that a sex offender habitually lives in the relevant sense in any place in which the sex offender lives for at least 30 days. Hence, a sex offender resides in a jurisdiction for purposes of SORNA if the sex offender has a home in the jurisdiction, or if the sex offender lives in the jurisdiction for at least 30 days.

Jurisdictions may specify, in the manner of their choosing, the application of the 30-day standard to sex offenders whose presence in the jurisdiction is intermittent but who live in the jurisdiction for 30 days in the aggregate over some longer period of time. 73 Fed. Reg. 38030, 38032 (emphasis added). Although these guidelines make clear that living in one state for 30 consecutive, uninterrupted days, would qualify as "habitually" living and residing here, the guidelines punt this issue to the states, saying they may "specify in the manner of their choosing the application of the 30-day standard to sex offenders whose presence is intermittent …" Since Maryland has not specified how the 30-day standard applies the terms "resides" and "habitually lives" are left undefined and vague. Does the government meet its burden if it shows that Mr. Holcombe spent one day per week in Maryland for 30 weeks? Or two days per week for 15 weeks? Or three days per week for 10 weeks?

In the complete absence of the required specification by the state, the term "resides" is necessarily void for vagueness because if fails to provide Appellant with reasonable notice regarding how long a stay in Maryland would trigger the SORNA registration requirement. As applied to Appellant, the statute therefore violates Due Process because on these facts it leaves Appellant "uncertain as to the conduct it prohibits." *Rybicki*, 354 F.3d at 135 (interior quotes and cite omitted).

POINT VII

THE INDICTMENT MUST BE DISMISSED BECAUSE NEW YORK HAS NOT IMPLEMENTED SORNA.

The Attorney General's SMART Guidelines affirmatively indicate that SORNA is not effective in pre-implementation jurisdictions. The following language makes plain that sex offenders with "pre-SORNA implementation convictions," like Holcombe, have a duty to register only after the jurisdiction implements the federal law: With respect to sex offenders with pre-SORNA or pre-SORNA implementation convictions who remain in the prisoner, supervision, or registered sex offender populations at the time of implementation . . . jurisdictions should endeavor to register them with SORNA as quickly as possible. 73 Fed. Reg. at 38031 (emphasis added).

As noted by the Attorney General in the SMART Guidelines, a jurisdiction has not implemented SORNA until it has (1) "carrie[d] out the requirements of SORNA as interpreted and explained in these Guidelines," and (2) the SMART Office has determined that it has done so. 72 Fed. Reg. at 30213-30214.

Neither mandate has been met here. Because New York has not complied with SORNA, the SMART Office is unable to certify the compliance of the very state in which Appellant is alleged to have failed to register. Punishing Appellant for failing to register under SORNA in New York - a law not yet applicable to him in this state - would violate the Ex Post Facto Clause of the Constitution. *See* U.S. Const., art. I, § 9, cl. 3.

In *Weaver v. Graham*, 450 U.S. 24, 28 (1981), the United States Supreme Court explained that the Ex Post Facto Clause prohibits punishment of a defendant "for an act which was not punishable at the time it was committed." The Supreme Court reasoned: "Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when . . . punishment [is increased] beyond what was prescribed when the crime was consummated." *Id*. at 30-31.Criminally punishing Holcombe for failure to register under SORNA when he had no such duty to register directly violates this principle.

Furthermore, requiring Holcombe to register in pre-implementation states violates the Due Process Clause. SORNA explicitly provides that one is "unable" to register in a jurisdiction where the Act has yet to be implemented. 42 U.S.C. § 16913(d). In doing so, the statute recognizes that where states have not passed legislation conforming their sex offender registry with SORNA's requirements, it is impossible for a sex offender in that jurisdiction to register under SORNA. Simply put, no state apparatus exists through which the offender can come into compliance with SORNA. Criminalizing the failure to do something that is impossible to do violates the Due Process Clause's guarantee of fundamental fairness. *See United States v. Dalton*, 960 F.2d 121, 124 (10th Cir. 1992)(holding that it is a violation of fundamental fairness to hold someone liable for a crime when an essential element of the crime is his failure to perform an act that he is incapable of performing). Because it was impossible for Appellant to comply with SORNA in New York, punishing him for failing to register under that statute violates his due process rights. *But see Guzman*, 591 F.3d at 93 (rejecting non-implementation challenge to SORNA).

POINT VIII

SORNA VIOLATES APPELLANT'S CONSTITUTIONAL RIGHT TO TRAVEL.

SORNA violates Appellant's fundamental right to "enter and to leave another state." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). In *Saenz*, the Court described the right to travel as protecting: (1) "the right of a citizen of one State to enter and to leave another State," (2) the "right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State," and (3) "the right to be treated like other citizens of that State" if one chooses to become a permanent resident. 526 U.S. at 500. In *Shapiro v. Thompson,* the Court "recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which *unreasonably burden or restrict* this movement." 394 U.S. 618, 629 (1969).[3] Statutes that

[3]But see, *United States v. Shenandoah,* 595 F.3d 151, 162 (3d Cir. 2010(moving from one jurisdiction to another entails many registration requirements required by law which may cause some inconvenience, but which do not unduly infringe upon any one's right to travel."); *United States v. Ambert*, 561 F.3d 1202, 1210 (11th Cir. 2009)("The requirement to update a registration under SORNA is undoubtedly burdensome; however, the government's interest in protecting others from future sexual offenses and preventing sex offenders from subverting the purpose of the statute is sufficiently weighty to overcome the burden. This statute does not violate [the defendant's] right to travel.")

unreasonably burden the right to travel will be struck down unless "necessary to promote a compelling government interest." *Id*. at 634. Because the individual states have their own sex offender registration acts, the only value of SORNA is to confer federal jurisdiction over a state violation." The restriction SORNA imposes is not strictly related to any federal purpose. Therefore, SORNA unreasonably burdens the right to travel and should be struck down because it is not "necessary to promote a compelling government interest." *Id*. at 634; *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 262 (1974). Alternatively, in view of the fact that Appellant's predicate sex offense conviction occurred in 1992, over 20 years ago, the registration updating requirements of SORNA as applied to Appellant on or after 2013 constitute an unreasonable burden of his right to travel.

CONCLUSION

WHEREFORE, for the reasons set forth in Points I through VIII, the indictment should be dismissed.

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CERTIFICATE OF COMPLIANCE

ROBIN C. SMITH, hereby declares the following:

This brief contains 10,467 words. This brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac in 14 point Times New Roman font style.

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