No. 18-10134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAZZMIN DAILEY,
Defendant-Appellant,
v.
UNITED STATES OF AMERICA,
Plaintiff-Appellee.

Appeal from the United States District Court for the District of Nevada
Criminal Case No. 2:15-cr-0226-GMN-PAL

Honorable Gloria M. Navarro, United States District Judge

APPELLANT'S OPENING BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

The entirety of this appeal centers around a single act: the district court's imposition of a mandatory probation condition requiring compliance with the Sex Offender Registration and Notification Act, 42 U.S.C. § 16901 *et seq*., ("SORNA") "as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency…." While this might not ordinarily be a cause for concern in a sex offense case, the district court in this case never actually found that Jazzmin Dailey's offense – a violation of the Travel Act, 18 U.S.C. § 1952 – was a "sex offense" as defined by SORNA before imposing such a condition on her. Instead, and as confirmed by the language of the condition itself, the district impermissibly delegated this determination in derogation of the district court's Article III powers to either the Probation Office or a state sex offender registration agency. By nonetheless imposing such a condition on Ms. Dailey without making the requisite findings itself, all without notice as required by Federal Rule of Criminal Procedure 32, the district court imposed an illegal sentence on Ms. Dailey, this aspect of which must now be vacated.

ISSUES PRESENTED

1. Whether the imposition of a mandatory condition requiring compliance with the Sex Offender Registration and Notification Act renders Ms. Dailey's sentence illegal insofar as her statute of conviction is not specified as a "sex offense" requiring compliance?
2. Whether the district court provided adequate notice pursuant to Federal Rule of Criminal Procedure 32(h) prior to sentencing Ms. Dailey that she was subject to compliance with the Sex Offender Registration and Notification Act?
3. Whether the district court impermissibly delegated the determination as to whether Ms. Dailey was required to comply with the Sex Offender Registration and Notification Act to the Probation Office or a state sex offender registration agency in derogation of its Article III powers?

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this federal criminal proceeding pursuant to 18 U.S.C. § 3231. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). The district court entered its judgment on April 2, 2018 (ER36.) Ms. Dailey filed her timely notice of appeal on April 13, 2018. (ER145.)

BAIL STATUS

Ms. Dailey is currently on probation serving the 3-year sentence imposed on her in this case.

STATEMENT OF THE CASE

I. Relevant Facts

Jazzmin Dailey's conviction stems from a single night—no less than her 22nd birthday—in which she, two other females, and Ms. Dailey's much-older boyfriend at the time—a co-defendant in the underlying case—travelled from Phoenix, Arizona to Las Vegas, Nevada to celebrate her birthday. (ER97.) To pay for the trip, Ms. Dailey planned on engaging in prostitution with some of the others. (ER97.) As such, on the trip from Phoenix to Las Vegas, Ms. Dailey purchased provocative clothing at a store for the females and instructed them in the rules of pimp/prostitute subculture. (ER46.) Ms. Dailey did not know that one of the females was underage, and instead believed she was 20 years old. (ER97; Revised PSR at 6.) When they arrived in Las Vegas, Ms. Dailey rented a hotel room. (ER46.) Instructed to get dressed and hit the streets by Ms. Dailey's boyfriend, the females did as they were told, got dressed, dispersed, and shortly thereafter, were arrested. (ER47; Revised PSR at 6.)

II. Procedural History

On July 1, 2015, a sealed criminal complaint was filed against Ms. Dailey and a co-defendant charging them both with one count of violating 18 U.S.C. § 2423(a) and (e), transportation of a minor for prostitution, and one count of violating 18 U.S.C. §§ 1591(a), (b)(2) and 1594(a) and (b), attempted transportation a minor who had attained the age of 14, but not 18, to engage in a commercial sex act. On July 7, 2015, the complaint was unsealed.

On August 5, 2015, the grand jury returned an indictment against Ms. Dailey and a co-defendant. Both were charged with one count of violating 18 U.S.C. § 2423(a) and (e), transportation of a minor for prostitution and one count of 18 U.S.C. §§ 1591(a)(1), (b)(2) and 1594(a) and (b), attempted transportation of a minor who had attained the age of 14, but not 18, to engage in a commercial sex act.

On August 13, 2015, Ms. Dailey was arraigned and entered a plea of not guilty. Ms. Dailey, who was in custody following the filing of the criminal complaint, was remanded. Shortly thereafter, she was released on a personal recognizance bond.

On September 27, 2016, the Government filed a criminal information against Ms. Dailey, charging her with a single count of 18 U.S.C. § 1952(a)(3)(A), traveling in interstate commerce with the intent to commit an unlawful act.

(ER42.) The same day Ms. Dailey signed a plea agreement and pled guilty in district court. (ER56-57, ER79.)

On March 30, 2018, the district court sentenced Ms. Dailey to three years of probation. (ER31.)

A. Plea Agreement and Change of Plea Hearing

On September 27, 2016, Ms. Dailey entered into a plea agreement, pleading guilty to one count of violating 18 U.S.C. § 1952(a)(3)(A), travelling in interstate commerce with the intent to commit an unlawful act. (ER57, ER79.) In entering the plea agreement, the factual basis as to the single count of violating the Travel Act provided:

> On June 15, 2015, Jazzmin Dailey drove a rented Dodge Charger carrying "J.M.,"[1] "R.M.," and "T.B."[2] from Phoenix, Arizona to Las Vegas, Nevada with the intent to facilitate the promotion, management, establishment, or carrying on of prostitution by herself, "R.M.," and "T.B."
>
> Before leaving Arizona, Dailey bought provocative clothing for "R.M." and "T.B." from a commercial clothing establishment in Arizona. During the drive from Arizona to Nevada, Jazzmin Dailey instructed "R.M." and "T.B." about the rules of behavior in the pimp/prostitute subculture. When Dailey, "J.M.," "R.M.," and "T.B." arrived in Las Vegas, Nevada, Dailey rented a room at the Orleans Hotel and Casino in Las Vegas.

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[1] "J.M." refers to Ms. Dailey's co-defendant, Johnny Moore, who was also prosecuted.

[2] As the Government made clear at the change of plea hearing, the Government used initials to identify "J.M." and "R.M." because they are civilians, not because they were minors. (ER8.)

> Dailey acted in concert with and at the direction of "J.M." in renting the car, buying clothing, imparting the rules of behavior in the pimp/prostitute subculture, renting a room in Las Vegas, and facilitating prostitution.
>
> Dailey was arrested with "T.B." on June 16, 2015 on suspicion of prostitution. "T.B." was, in fact, a missing juvenile out of the state of Arizona. Post-*Miranda*, Dailey admitted to law enforcement officials that she traveled from Arizona to Nevada with "J.M.," "R.M.," and "T.B." with the intent to engage in acts of prostitution that violated the laws of the State of Nevada, and that she brought "R.M." and "T.B." to Nevada with the intent that they also engage in acts of prostitution that violate the laws of the State of Nevada.

(ER46-47.)

As to possible registration under the Sex Offender Registration and Notification Act as a consequence of conviction, the plea agreement contained the following advisement:

> The defendant understands and agrees that she may be required to register as a sex offender under the laws of the state of her residence. The defendant further understands that the Government has made no representations about the consequences of her guilty plea and conviction on any potential sex offender registration requirements.

(ER53.)

At the hearing, Ms. Dailey waived reading of the charge, and the district court proceeded to read the elements of the crime into the record. (ER60-61.) The Government then summarized the essential terms of the plea agreement, reiterating that the Government had "made no representations about the consequences of her

guilty plea and conviction on any potential sex offender registration requirements." (ER2-3.)

The district court then questioned Ms. Dailey to confirm that her understood the consequences of her guilty plea to ensure that her plea was knowing and voluntary. (ER69-85.) When the district court reached the issue of SORNA registration, the district court, at first, mistakenly believed that the parties had agreed that Ms. Dailey would register as a sex offender in Nevada. (ER4.) The Government, however, advised the district court that it could not represent that Ms. Dailey's violation of the Travel Act was a registerable offense, and that whether Ms. Dailey would be required to register in Arizona, the state of her residence, would be something that she and her attorney would have to determine:

THE COURT:	Let's see. I have a note here that as a condition of supervised release that the parties agreed that she will initially register with the state offender registration here in Nevada or --
THE GOVERNMENT:	No, Your Honor. We can't actually represent that this is a registerable offense.
THE COURT:	Okay.
THE GOVERNMENT:	And it will --
THE COURT:	And I thought that I read she's in Arizona, not in Nevada.
THE GOVERNMENT:	Right. And for that reason, the government has made no representation about whether she might have to register or not. That would be up to her to determine -- her and her attorney to determine whether she would have to initially register. It's entirely possible that she doesn't have to register, but

I can't make that representation one way or another.

THE COURT: All right.

(ER4.) There was no further discussion as to whether the offense – a violation of the Travel Act – qualified as a registerable offense under SORNA, and the issue remained unresolved.

The district court then questioned Ms. Dailey as to the factual basis contained in the plea agreement, and she confirmed the facts contained therein. (ER7-10.) At no point did Ms. Dailey admit that she knew that "T.B." was a "missing juvenile out of the state of Arizona" prior to or during the commission of the offense.

Ms. Dailey then pled guilty to violating the Travel Act as charged in the superseding criminal information, and the district court accepted Ms. Dailey's plea. (ER10-11.)

B. Sentencing Hearing

On November 28, 2016, the Probation Office prepared a presentence report ("PSR"), and revised the report on July 19, 2017. (Revised PSR at 1.) Neither the Government nor Ms. Dailey submitted any objections to the PSR. (Revised PSR at 19.) In the report, the Probation Office determined that Ms. Dailey had no prior criminal history, no other criminal conduct, and no other pending criminal charges. (Revised PSR at 10.) It also determined that Ms. Dailey had "clearly demonstrated

acceptance of responsibility for the offense" and that she "assisted authorities in the investigation or prosecution of the defendant's own misconduct by timely notifying authorities of the intention to enter a plea of guilty." (Revised PSR at 9.) Calculating the offense level to be 23, resulting in a Sentencing Guideline range of 46 to 57 months imprisonment, the Probation Office recommended that Ms. Dailey be sentenced to the low-end of the range, 46 months, to be followed by three years of supervised release. (Revised PSR at 13, 17-18.) Without any explanation as to how it determined that Ms. Dailey's offense constituted a registerable offense under SORNA, the Probation Office conclusorily recommended that as a condition of supervised release, that Ms. Dailey be required to comply with SORNA:

> You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense.

(Revised PSR at 18.)

On March 27 and 28, 2018, the parties submitted their sentencing positions to the district court. (ER92-102.) The Government disagreed with the PSR's calculation of the offense level and sentencing range, requesting that the district court follow the calculation set forth in the plea agreement, which calculated the offense level to be 25 or 26, depending on the application of the reductions for acceptance of responsibility. (ER47-49, ER92-93.) Nevertheless, the Government

requested that the district court impose a custodial sentence on the low-end of the Sentencing Guideline range to be followed by a three-year period of supervised release. (ER94.) The Government did not address any of the conditions proposed by the Probation Office for supervised release, including the recommendation that Ms. Dailey be required to comply with SORNA "as directed by the probation officer, the [BOP], or any state sex offender registration agency[.]"

In her memorandum, Ms. Dailey requested that the district court vary from the Sentencing Guidelines and impose a sentence of probation as this was sufficient, but not greater than necessary to accomplish the sentencing objectives set forth in 18 U.S.C. § 3553. (ER101.) Ms. Dailey reiterated that she was a first-time offender, and that she did not know that the victim was underage. (ER97.) Ms. Dailey did not address the Probation Office's recommendation that she be required to comply with SORNA.

The district court held a sentencing hearing on March 30, 2018, and sentenced Ms. Dailey to three years of probation finding that this was "sufficient but not more than necessary to comply with the purposes of sentencing." (ER31.) In imposing its sentence, the district court specifically noted that Ms. Dailey's behavior was "aberrant," that she was "unusually vulnerable" to her much-older co-defendant, and that she was "remorseful." (ER30-31.) As far as mandatory

conditions of probation, including compliance with SORNA's registration requirements, the district court only vaguely and ambiguously stated that:

> THE COURT: And the terms of your probation are going to be similar to what was recommended for supervised release beginning on page 17, the standard and mandatory conditions of probation, …

(ER31.) The district court did not specifically mention SORNA compliance nor did it make any findings that Ms. Dailey's Travel Act conviction constituted a registerable offense under SORNA.[3]

ARGUMENT

I. The Appellate Waiver in Ms. Dailey's Plea Agreement Does Not Bar the Challenges She Makes in This Appeal to Her Illegal Sentence.

A. Standard of Review.

This Court reviews whether a defendant has validly waived her right to appeal in a plea agreement *de novo*. *See United States v. Bibler,* 495 F.3d 621, 623 (9th Cir. 2007). Relatedly, this Court reviews whether a condition imposed by the district court illegally exceeds the permissible statutory penalty or violates the Constitution *de novo*. *United States v. Watson*, 582 F.3d 974, 981 (9th Cir. 2009)

[3] Ms. Dailey was ultimately required to register as a sex offender in Arizona. It is unclear as to which entity made this determination – the U.S. Probation Office or an Arizona state sex offender registration agency. That Ms. Dailey was, in fact, required to register is not a fact in the record because the issue was never litigated in the district court, and instead was delegated to one of these agencies, which is precisely what Ms. Dailey takes issue with in this appeal.

(citing *United States v. Gementera*, 379 F.3d 596, 600 n.5 (9th Cir. 2004)). In determining whether a sentence is illegal, the court will consider the substance of the defendant's appeal. *United States v. Bomber*, 656 Fed.Appx. 812, 813 (9th Cir. 2016) (citing *Bibler*, 495 F.3d at 624).

B. The Appellate Waiver Does Not Bar a Challenge to Ms. Dailey's Illegal Sentence.

For a defendant's appellate waiver to be effective, "the language of the waiver [must] encompass[] his right to appeal on the grounds raised," and "the waiver [must be] knowingly and voluntarily made." *United States v. Jeronimo*, 398 F.3d 1149, 1152-53 (9th Cir. 2005). "The scope of a knowing and voluntary waiver is demonstrated by the express language of the plea agreement." *United States v. Leniear*, 574 F.3d 668, 672 (9th Cir. 2009) (internal quotation marks omitted).

The court has a duty to construe appellate waivers narrowly according to the literal terms of the agreement, and any ambiguity in a plea agreement will be construed against the drafter. *United States v. Transfiguracion*, 442 F.3d 1222, 1228 (9th Cir. 2006) ("[a]s a defendant's liberty is at stake, the government is ordinarily held to the literal terms of the plea agreement it made, so that the government gets what it bargains for but nothing more") (internal citations and quotations omitted); *Leniear*, 574 F.3d at 672 (finding broad appellate waiver

waiving right to challenge sentence did not bar challenge to district court's jurisdiction to modify sentence).

A waiver of appellate rights does not apply to a challenge of a defendant's sentence if the sentence is illegal. *United States v. Torres*, 828 F.3d 1113, 1124-25 (9th Cir. 2016). A sentence is illegal if it either exceeds the permissible statutory penalty or violates the Constitution. *Bibler*, 495 F.3d at 624. "Overstepping a maximum statutory prison term is not the only way a sentence can "exceed[ ] the permissible statutory penalty." *Bomber*, 656 Fed.Appx. at 813 (citing *Bibler*, 495 F.3d at 624). Imposing unwarranted conditions may also cause a sentence to exceed the permissible statutory penalty. *Id*.; *see also Watson*, 582 F.3d at 981.

Here, Ms. Dailey's plea agreement waived:

> the right to appeal any sentence imposed within or below the applicable Sentencing Guideline range as determined by the Court; (b) the right to appeal the manner in which the Court determined that sentence on the grounds set forth in 18 U.S.C. § 3742; and, (c) the right to appeal any other aspect of the conviction or sentence and any order of restitution or forfeiture.

(ER54.) This waiver, however, was ineffective to waive Ms. Dailey's right to appeal an illegal sentence. As discussed in greater detail below, the district court imposed an illegal sentence upon Ms. Dailey insofar as it imposed a probation condition on her, Condition #5, requiring her to register as a sex offender under SORNA. Because a Travel Act violation is not specified as a "sex offense" under SORNA, and because the district court did not make any finding that Ms. Dailey's

conviction otherwise constitutes a registerable "sex offense" under SORNA, imposing Condition #5 caused her sentence to exceed the permissible statutory penalty, thereby rendering it illegal. Because Ms. Dailey could not have waived her right to appeal an illegal sentence, this Court may consider the challenges to her sentence that she makes in this appeal.

II. The District Court's Imposition of Condition #5 Exceeded the Permissible Statutory Penalty for a Travel Act Conviction and Therefore Constituted an Illegal Sentence.

A. Standard of Review.

This Court reviews the legality of a sentence *de novo*. *United States v. Fernandes*, 636 F.3d 1254, 1255 (9th Cir. 2011).

B. A Travel Act Violation Is Not a "Sex Offense" Subject to SORNA Registration.

At the time of Ms. Dailey's offense, the version of SORNA then in place provided as follows:

> 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.

42 U.S.C. § 16913.[4] In what is a series of nested definitions, the statute defines who is a "sex offender" subject to SORNA registration. A "sex offender" is defined as "an individual who was convicted of a sex offense." 42 U.S.C. § 16911(1). What constitutes a "sex offense[,]" in turn and in relevant part, is defined as including "(i) a criminal offense that has an element involving a sexual act or sexual contact with another; (ii) a criminal offense that is a specified offense against a minor; [and] (iii) a Federal offense (including an offense prosecuted under [18 U.S.C. § 1152 or 1153]) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;…." 42 U.S.C. § 16911(5)(A). Here, Ms. Dailey's conviction under § 1952 could not constitute a "sex offense" under § 16911(5)(A)(iii) because it is not one of the specified federal offenses requiring registration. Ms. Dailey's would only be required to register if she committed an offense that constituted the offenses described in § 16911(5)(A)(i) – a criminal offense having an element involving a sexual act or sexual contact with another – or § 16911(5)(A)(ii) – a criminal offense that is a "specified offense against a minor." Ms. Dailey's conviction, however, does not constitute either.

[4] Ms. Dailey refers to the version of SORNA, 42 U.S.C. § 16901 *et seq*., that was in place at the time she committed her offense as imposing penalties on her pursuant to provisions that were enacted after her offense was committed would raise *ex post facto* issues.

1. Ms. Dailey's Offense Is Not a "Sex Offense" Under § 16911(5)(a)(i).

Ms. Dailey's Travel Act conviction pursuant to 18 U.S.C. § 1952(a)(3)(A) does not "ha[ve] an element" involving a sexual act or sexual contact with another, and therefore is not a "sex offense" under § 16911(5)(A)(i) requiring registration.

The starting point of any analysis of statutory interpretation is the plain language of the statute itself. *Hughey v. United States,* 495 U.S. 411, 415 (1990); *Coronado-Durazo v. I.N.S.*, 123 F.3d 1322, 1325 (9th Cir. 1997) ("'[u]nder the established interpretation, we rely on plain language in the first instance[.]'"). There is a strong presumption that Congress expresses its intent through the language it chooses. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *United States v. Fiorillo*, 186 F.3d 1136, 1146 (9th Cir. 1999). Where Congress has required the application of an enhancement based on whether the underlying offense has a particular "element," courts have adopted a categorical approach to determine whether the sentence enhancement encompasses the elements of the offense in question. *See Taylor v. United States*, 495 U.S. 575, 600 (1990) (noting that statutory language in the Armed Career Criminal Act containing the phrase "has as an element," "supports the inference that Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions."); *United States v. Rogers*, 804 F.3d 1233, 1237 (7th Cir. 2015)

("[b]ased on the statutory language, it's clear that a categorical approach applies to the threshold definition of the term 'sex offense' in § 16911(5)(A)(i); the use of the word 'element' suggests as much."); *United States v. Faulls*, 821 F.3d 502, 511-12 (4th Cir. 2016) (applying categorical approach to determine whether an offense "ha[d] an element involving a sexual act or sexual contact"); *United States v. Gonzalez-Medina*, 757 F.3d 425, 430 (5th Cir. 2014) ("Subsection (5)(A)(i)['s] focus on the 'element[s]' of the predicate offense strongly suggests that a categorical approach applies to [§ 16911](5)(A)(i).") (internal citation omitted).

Assuming that the categorical approach applies here,[5] "sentencing courts compare the elements of the statute of conviction with a federal definition of the crime to determine whether conduct proscribed by the statute is broader than the generic federal definition." *United States v. Caceres–Olla*, 738 F.3d 1051, 1054 (9th Cir. 2013) (internal quotation marks omitted). "To constitute an 'element' of a crime, the particular factor in question needs to be a 'a "constituent part" of the offense [that] must be proved by the prosecution *in every case* to sustain a conviction under a given statute.'" *Id*. (original emphasis). "If the statute of conviction 'sweeps more broadly than the generic crime, a conviction under that

[5] It does not appear that the Ninth Circuit has yet passed on the issue as to whether either the categorical or modified categorical approach applies to determining whether the offense meets the definition of "sexual offense" set forth in § 16911(5)(A)(i).

law cannot count as [a qualifying] predicate, even if the defendant actually committed the offense in its generic form.'" *Id.* (original emphasis) (quoting *Descamps v. United States*, 570 U.S. 254, 261 (2013)).

The categorical approach generally precludes sentencing courts from considering information other than the elements of the crime of conviction and the generic federal crime. *Descamps,* 570 U.S. at 260-61. Where a statute of conviction is "divisible," however, courts can instead apply the "modified categorical approach" and may "consult a limited class of documents," such as, in the case of a plea, the plea agreement and plea colloquy "to determine which alternative formed the basis of the defendant's prior conviction." *Id*. at 262; *Shepard v. United States*, 544 U.S. 13, 26 (2005). "The court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime." *Descamps*, 570 U.S. at 257. As the Supreme Court explained in *Descamps*, the purpose of scrutinizing a plea agreement or colloquy is "not to determine 'what the defendant and [] judge must have understood as the factual basis of the prior plea,' but only to assess whether the plea was to the version of the crime…corresponding to the generic offense." *Id*. at 263 (citing *Shepard*, 544 U.S. at 25-26.); *id*. at 263-64 ("[a]ll the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so

effectively creates 'several different ... crimes.' If at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of. That is the job…of the modified approach: to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense."). If the elements of the statutory alternative under which the defendant was convicted are broader than the generic crime, the prior conviction "cannot count as [a qualifying] predicate." *Id.* at 261.

Here, Ms. Dailey's offense—a violation of the Travel Act, as set forth in 18 U.S.C. § 1952(a)(3)(A)—is not a "categorical match" to the definition of "sex offense" under § 16911(5)(A)(i) and therefore cannot serve as a "sex offense" requiring her to register under SORNA. The elements of a Travel Act violation are as follows:

> (a)Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform—
>
> (A) an act described in paragraph…(3) shall be fined under this title, imprisoned not more than 5 years, or both; or

18 U.S.C. § 1952(a). "Unlawful activity" as used is defined as meaning "prostitution offenses in violation of the laws of the State in which they are

committed or of the United States." 18 U.S.C. § 1952(b). Here, each of the crimes defined by this statute does not necessarily contain an "element involving a sexual act or sexual contact with another," because each does not require the prosecution to prove that an act of prostitution occurred. While travelling in interstate commerce and performing an act of "carrying on" prostitution presumably would contain "an element involving a sexual act or sexual contact with another,"[6] travelling in interstate commerce with the intent to "facilitate" prostitution and performing (or attempting to perform) an act that "facilitates" prostitution would not. This is because "facilitating prostitution" does not, absent the actual prostitution occurring, involve a sexual act or sexual contact. Thus, under the categorical approach, Ms. Dailey's offense of conviction is "broader than" and therefore not a categorical match to § 16911(5)(A)(i). Her conviction, thus, may not subject her to SORNA registration under the categorical approach.

Even employing a modified categorical approach when faced with a divisible statute does not change this conclusion as Ms. Dailey's plea agreement and plea colloquy only confirm that her offense does not contain "an element involving a sexual act or sexual contact with another." Specifically, the facts set

[6] This Court has previously recognized that the terms "sexual act" and "sexual contact" are undefined by the statute, and as a result, has employed an "ordinary, contemporary, and common meaning of the statutory words." *See United States v. Westerman*, 705 Fed.Appx. 651, 652 (9th Cir. 2017) (citing *United States v. Sinerius*, 504 F.3d 737, 740 (9th Cir. 2007)).

forth in Ms. Dailey's plea agreement establish that Ms. Dailey travelled with the intent that she and others engage in prostitution and that she performed acts that facilitated prostitution such as renting a car to travel, purchasing provocative clothing, instructing others about the rules of behavior in pimp/prostitute subculture, and renting a hotel room. (ER6-10, ER46-47.) The facts do not reveal that Ms. Dailey or the others actually "carried on" any prostitution. Thus, the facts of Ms. Dailey's plea agreement and plea colloquy establish that she violated the Travel Act because she travelled in interstate commerce with the intent to carry on prostitution, and performed acts that facilitated prostitution. Just as before, this is not a categorical match to § 16911(5)(a)(i) because the offense of conviction does not contain "an element involving a sexual act or sexual contact with another," and thus cannot qualify as a "sex offense" under § 16911(5)(a)(i). Accordingly, Ms. Dailey cannot be required to register under SORNA pursuant to this definition of "sex offense."

2. Ms. Dailey's Travel Act Conviction Is Not a "Specified Offense Against a Minor" Under SORNA's Residual Clause.

Similarly, Ms. Dailey's Travel Act offense does not qualify as a "specified offense against a minor" is defined in § 16911(7) thereby subjecting her to SORNA registration. A "specified offense against a minor" is defined by SORNA as including, as relevant here, "[a]ny conduct that by its nature is a sex offense

against a minor."[7] 42 U.S.C. § 16911(7)(I). This has come to be known as SORNA's "residual clause."

This Circuit has previously interpreted the residual clause to call for a circumstance-specific approach in determining the age of the victim. *United States v. Mi Kyung Byun,* 539 F.3d 982, 990-91 (9th Cir. 2008). At the time that *Byun* was decided, however, the Ninth Circuit did not have the benefit of the National Guidelines for Sex Offender Registration and Notification (the "SMART Guidelines") issued by the Attorney General interpreting § 16911(7).[8] The SMART Guidelines, notably, adopt a categorical approach in determining the victim's age. Since the SMART Guidelines were adopted, it does not appear that this Court has had occasion to determine whether they, are entitled to deference under *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Under either approach – categorical or circumstance-specific – Ms. Dailey's offense does not involve "conduct that by its nature is a sex offense against a minor" and therefore does not qualify as a "sex offense." Because,

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[7] To the extent it is argued that Ms. Dailey's offense also falls into either § 16911(7)(C) or (E), solicitation to engage in sexual conduct or solicitation to practice prostitution, nowhere in Ms. Dailey's plea agreement does it say that Ms. Dailey solicited her alleged victims. That Ms. Dailey "instructed 'R.M.' and 'T.B.' about the rules of behavior in the pimp/prostitute subculture" (ER46-47), this is a far cry from solicitation.

[8] *Byun* was originally decided on July 1, 2008. The opinion was amended and superseded on August 14, 2008, but only to correct errors in the caption. The Attorney General issued the final SMART Guidelines on July 2, 2008.

however, the SMART Guidelines provide the Attorney General's conclusive interpretation of the residual clause, they are entitled to deference under the Supreme Court's opinion in *Chevron.*

a) Standard for Deference to an Agency's Rulemaking Under Chevron.

Chevron's "familiar standard requires a court to abide by an agency's interpretation or implementation of a statute it administers if Congress has not directly spoken 'to the precise question at issue' and if the agency's answer is 'permissible' under the statute." *Managed Pharmacy Care v. Sebelius*, 716 F.3d 1235, 1246 (9th Cir. 2013); *Chevron*, 467 U.S. at 843-44. As the Supreme Court explained, "[i]f Congress has explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44; *see also Mead v. United States*, 533 U.S. 218, 227 (2001) ("any ensuing [agency] regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute.")

Courts afford an agency's interpretation of a statute *Chevron* deference "only when: (1) it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, *and* (2) the agency interpretation

claiming deference was promulgated in the exercise of that authority." *Fournier v. Sebellius*, 718 F.3d 1110, 1119 (9th Cir. 2013) (quoting *Mead,* 533 U.S. at 226–27) (original emphasis). Needless to say, if Congress has not delegated authority to the agency to make rules carrying the force of law, or if the agency's interpretation at issue was not promulgated pursuant to the exercise of such authority, deference under *Chevron* is not warranted. *Mead*, 533 U.S. at 226-27.

The Ninth Circuit has aptly and succinctly set forth the analysis required by *Chevron* and *Mead* as follows:

> At step one, we evaluate whether Congressional intent regarding the meaning of the text in question is clear from the statute's plain language. If it is, we must give effect to that meaning. If the statute is ambiguous, and an agency purports to interpret the ambiguity, prior to moving on to step two, we must determine whether the agency meets the requirements set forth in *Mead:* (1) that Congress clearly delegated authority to the agency to make rules carrying the force of law, and (2) that the agency interpretation was promulgated in the exercise of that authority. If both of these requirements from *Mead* are met, then we proceed to step two. Under step two, we must determine if the agency's interpretation of the statute is "a reasonable policy choice for the agency to make."

North California River Watch v. Wilcox, 633 F.3d 766, 772-73 (9th Cir. 2011) (internal citations omitted). Ms. Dailey addresses the issues in this same order.

b) Chevron Step One.

Section 16911(1) as defined by § 16911(5)(A)(ii), which, in turn, is defined and expanded by § 16911(7)(I) results in two ambiguities upon which Congress

plainly has not spoken: First, it is ambiguous as to whether a categorical or a circumstance-specific approach controls the determination whether a defendant has committed a "specified offense against a minor," and therefore has been "convicted of a sex offense" as required to be subject to SORNA. Second, it is ambiguous as to what a "sex offense" as defined by § 16911(5)(A)(ii) actually is when it is circularly defined by § 16911(7)(I) as "conduct that by its nature is a sex offense against a minor."

This Circuit has already recognized the first ambiguity insofar as § 16911(1)—defining a "sex offender" as one who has been "*convicted* of a sex offense"—appears to call for application of a categorical approach because it uses the term "convicted" while § 16911(7)(I)—defining "specified offense against a minor" as used in § 16911(5)(A)(ii) as "*conduct* that by its nature is a sex offense against a minor"—appears to call for a circumstance-specific approach insofar as it uses the term "involves" and "conduct." *See Byun*, 539 F.3d at 991 ("…the language of the statute is somewhat more ambiguous with regard to whether a categorical approach must be applied to all elements of a 'specified offense against a minor'" because the statute used both words "convicted" and "committed"); *accord United States v. White*, 782 F.3d 1118, 1130 (10th Cir. 2015) ("the term 'offense' as used in 42 U.S.C. § 16911 is ambiguous."); *Taylor*, 495 U.S. at 600 (use of the word "convicted" rather than "committed" in the Armed Career

Criminal Act indicated that the court should apply a categorical approach, and not a circumstantial approach considering the facts underlying the conviction). While this Circuit in *Byun* resolved the ambiguity in favor of the circumstance specific approach before the promulgation of the SMART Guidelines, to do so again now would contravene *Chevron* and the long line of Supreme Court precedent upon which *Chevron* relied when it prohibited a court from "substitut[ing] its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency[,]" where a statute is ambiguous and Congress has not plainly spoken. 467 U.S. at 844 (citing *INS v. Jong Ha Wang*, 450 U.S. 139, 144 (1981) and *Train v. National Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975)).

The second ambiguity results from the circular definition of "sex offense." When the nested definitions—§§ 16911(1), 16911(5)(A)(ii) and 16911(7)(I)—are read together, a "sex offense" is ultimately defined tautologically as "involv[ing]" "conduct that by its nature is a sex offense against a minor." Courts have previously recognized that circular definitions—including the definition employed by §§ 16911(1), 16911(5)(A)(ii) and 16911(7)(I) to define a "sex offense,"—are ambiguous. *See*, *e.g.*, *United States v. Baptiste*, 34 F.Supp.3d 662, 678 (W.D. Tex. 2014) (recognizing §§ 16911(5)(A)(ii) and 16911(7)(I) to circularly define "sex offense," and deferring under *Chevron* to the SMART Guidelines as to the age of

the victim under § 16911(7)(I)); *United States v. Bestfoods*, 524 U.S. 51, 56 (1998) (interpreting CERCLA and stating "[t]he phrase 'owner or operator' is defined only by tautology, however, as 'any person owning or operating' a facility, § 9601(20)(A)(ii), and it is this bit of circularity that prompts our review."); *see also Fogo De Chao (Holdings) Inc. v. U.S. Dept. of Homeland Sec.*, 769 F.3d 1127, 1135-36 (D.C. Cir. 2014) (*Chevron* deference not accorded to a circularly-defined statutory term because the agency regulation "parrot[ed]" the circularity "rather than interpret[]" it); *cf. United States v. Schofield*, 802 F.3d 722, 730-31 (5th Cir. 2015) (finding SORNA's residual clause is not circular or ambiguous, and declining to afford SMART Guidelines *Chevron* deference).

For these reasons, "Congressional intent regarding the meaning of the text in question" is not "clear from the statute's plain language." *North California River Watch*, 633 F.3d at 772-73. Accordingly, under the first step of *Chevron*, both the definition of "sex offense" as "[a]ny conduct that is by its nature a sex offense against a minor" as set forth in § 16911(7)(I) and whether the definition of "sex offense" requires a court to employ a categorical or circumstance-specific approach are ambiguous.

c) Congress Clearly Delegated Authority to the Attorney General to Interpret § 16911 of SORNA, and That Interpretation, Set Forth in the SMART Guidelines, Was Promulgated Pursuant to that Authority.

Courts will only afford an agency's interpretation of a statute *Chevron* deference "when: (1) it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, *and* (2) the agency interpretation claiming deference was promulgated in the exercise of that authority." *Fournier*, 718 F.3d at 1119 (quoting *Mead,* 533 U.S. at 226–27) (emphasis original). Whether the second prong of the analysis is met, "depends on the form and context of [the agency's] interpretation." *Id*. at 1120. It is clear that Congress expressly delegated authority to the Attorney General to issue regulations carrying the force of law, and that the SMART Guidelines were promulgated pursuant to an exercise of that authority.

Section 16912(b) expressly states that "[t]he Attorney General shall issue guidelines and regulations to interpret and implement this subchapter." 42 U.S.C. § 16912(b). Section 16912 is set forth in Subchapter I, which, prior to its transfer to 34 U.S.C. § 20911 *et seq.* effective September 1, 2017, encompassed §§ 16911 to 16929, and therefore encompassed the very provisions at issue here.

Moreover, the SMART Guidelines were promulgated pursuant to a valid exercise of that authority. The SMART Guidelines were published in proposed form on May 30, 2007. Office of the Attorney General; The National Guidelines

for Sex Offender Registration and Notification, 72 Fed.Reg. 30,210 (May 30, 2007). The notice proposing the Guidelines specifically stated that "[t]hese proposed guidelines carry out a statutory directive to the Attorney General, in section 112(b) of SORNA (42 U.S.C. § 16912(b)) to issue guidelines to interpret and implement SORNA." *Id*. Approximately 275 comments were received on the proposed guidelines. Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification, 73 Fed.Reg. 38,030, 38,030-31 (Jul. 2, 2008). After a notice-and-comment period that ended on August 1, 2007, they were published in final form on July 2, 2008. 73 Fed.Reg. at 38,030. Thus, the Guidelines were adopted after formal notice and comment had taken place, thereby complying with the requirements of the Administrative Procedures Act ("APA"), 5 U.S.C. § 553. *See United States v. Valverde*, 628 F.3d 1159, 1164 (9th Cir. 2010) (recognizing that "[t]he final SMART guidelines complied with the APA's procedural requirements"); *United States v. Mattix*, 694 F.3d 1082, 1083-84 (9th Cir. 2012) (same); *United States v. Lott*, 750 F.3d 214, 217-19 (2d Cir. 2014) (finding that the SMART Guidelines "were an act of substantive rulemaking" and that they satisfied the notice and comment requirements of the APA.) Because the SMART Guidelines clearly complied with the *Mead* requirements, they may be afforded *Chevron* deference if they are based on a permissible construction of the statute.

d) Chevron Step Two.

Legislative regulations issued pursuant to an express delegation of authority "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44. As the Supreme Court cautioned, "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id*. at 843 n.10; *Smiley v. Citibank, N.A.*, 517 U.S. 735, 744-45 (1996) ("[s]ince we have concluded that the Comptroller's regulation deserves deference, the question before us is not whether it represents the best interpretation of the statute, but whether it represents a reasonable one."). If the interpretation is reasonable, it must be upheld. *Smiley*, 517 U.S. at 744-45.

The SMART Guidelines provide reasonable interpretations of the two ambiguities identified earlier in the following interpretation of § 16911(7)(I):

> Conduct by Its Nature a Sex Offense Against a Minor (§ 111(7)(I)): The final clause covers "[a]ny conduct that by its nature is a sex offense against a minor." It is intended to ensure coverage of convictions under statutes defining sexual offenses in which the status of the victim as a minor is an element of an offense, such as specially defined child molestation or child prostitution offenses, and other offenses prohibiting sexual activity with underage persons. Jurisdictions can comply with the offense coverage requirement under this clause by including convictions for such offenses in their registration requirements.

73 Fed.Reg. at 38052. The SMART Guidelines make clear that § 16911(7)(I) should be interpreted using a categorical approach insofar as it clarifies that "the status of the victim as a minor is an element of the offense[,]" thereby resolving the first ambiguity. This interpretation is reasonable because it comports with the categorical approach embraced in § 16911(1) defining the term "sex offender," which is the defined term used in § 16913, the provision mandating registration. 42 U.S.C. § 16913 ("[a] sex offender shall register, and keep the registration current in each jurisdiction where the offender resides…").

As to the second ambiguity created by the nested definitions in §§ 16911(1), 16911(5)(A)(ii) and 16911(7)(I), by interpreting "any conduct that by its nature is a sex offense against a minor" as used in § 16911(7)(I) as including "convictions under statutes defining sexual offenses in which the status of the victim as a minor is an element of an offense[,]" the SMART Guidelines remove the circularity created by essentially defining a "sex offense" (§ 16911(1)) as a "sex offense" (§ 16911(7)(I)). Instead, when §§ 16911(1), 16911(5)(A)(ii) and 16911(7)(I) are read together with the SMART Guideline interpreting § 16911(7)(I), a "sex offense" becomes a "conviction[]…in which the status of the victim as a minor is an element of an offense[.]" This is a reasonable interpretation because it ensures that the conduct subject to registration that has not otherwise been covered by

§ 16911(7)(A)-(H) is covered but also still constitutes a "sex offense against a minor."

Accordingly, because the SMART Guidelines offer a reasonable interpretation of the two ambiguities that exist in § 16911, they satisfy *Chevron* Step Two and should be afforded deference and upheld by this Court.

e) Pursuant to the Categorical Approach Adopted by the SMART Guidelines, Ms. Dailey's Conduct Did Not Involve A "Sexual Offense[] in Which the Status of the Victim as a Minor Is an Element of an Offense" and Therefore, Her Travel Act Violation Is Not a Categorical Match.

Applying the foregoing analysis, Ms. Dailey's Travel Act conviction is not a categorical match to § 16911(7)(I) as interpreted by the SMART Guidelines, and therefore her conviction is not subject to registration under SORNA.

As discussed above in Section II.B.1, the elements of Ms. Dailey's Travel Act violation are as follows:

> (a)Whoever travels in interstate or foreign commerce or uses the mail or any facility in interstate or foreign commerce, with intent to—
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, and thereafter performs or attempts to perform—
>
> (A) an act described in paragraph…(3) shall be fined under this title, imprisoned not more than 5 years, or both; or

18 U.S.C. § 1952(a). "Unlawful activity" as used is defined as meaning "prostitution offenses in violation of the laws of the State in which they are committed or of the United States." 18 U.S.C. § 1952(b). Applying a modified categorical approach, Ms. Dailey's plea agreement and plea colloquy establish that she violated the Travel Act because she travelled in interstate commerce with the intent to carry on prostitution, and performed acts that facilitated prostitution. Just as before, this is not a categorical match to § 16911(7)(I) because the offense of conviction does not contain an element that the victim was a minor. As such it is not a categorical match to the definition to § 16911(7)(I).

f) Even Under the Circumstance-Specific Approach, Ms. Dailey's Conduct Did Not Involve "Conduct that by its Nature Is a Sex Offense."

Even if this Court were to apply a circumstance-specific approach, it would not change the conclusion that Ms. Dailey's Travel Act violation did not involve "conduct that by its nature is a sex offense." Once again looking at the facts underlying Ms. Dailey's conviction, and even accounting that a victim was a "juvenile," Ms. Dailey's plea agreement establish that Ms. Dailey's offense was travelling in interstate commerce with the intent that she and others including a juvenile carry on prostitution, and performed acts that facilitated prostitution. (ER6-10, ER46-47.) Once again, the facts do not reveal that Ms. Dailey or the others actually "carried on" any prostitution. Thus, travelling with the intent that a

juvenile carry on prostitution and taking steps that "facilitate" prostitution is not "conduct that by its nature is a sex offense against a minor."

Accordingly, because it cannot be shown that Ms. Dailey committed a "specified offense against a minor" and therefore committed a "sex offense" thereby rendering her a "sex offender," it was in error that Ms. Dailey was required to register as a sex offender under SORNA as a mandatory condition of her probation. This error renders her sentence illegal.

III. The District Court Erred in Failing to Give Ms. Dailey Notice and an Opportunity to Be Heard Before Imposing Condition #5 Requiring SORNA Registration.

A. Standard of Review.

The Ninth Circuit reviews the adequacy of the district court's notice of its intent to impose an upward departure *de novo*. *United States v. Evans-Martinez*, 530 F.3d 1164, 1167 (9th Cir. 2008). When a defendant does not make a timely objection at sentencing to the adequacy of the notice, a claim of error is reviewed for plain error. *Id*.

"Plain error is '(1) error, (2) that is plain, and (3) that affects substantial rights.'" *Id*. (citing *United States v. Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005) (en banc)). If the failure to provide notice is plain error, the Ninth Circuit will grant relief if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id*.

B. The District Court Plainly Erred in Failing to Provide Adequate Notice Before Imposing Condition #5 Requiring that Ms. Dailey Register as a Sex Offender.

The district court plainly erred in failing to provide Ms. Dailey notice before entering its written judgment imposing SORNA registration as a mandatory condition of probation. Codifying the holding in the Supreme Court's opinion in *Burns v. United States*, 501 U.S. 129, 138-39 (1991), Federal Rule of Criminal Procedure 32(h) provides that:

> Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure.

Fed. R. Crim. P. 32(h); *see also Evans-Martinez*, 530 F.3d at 1165 (holding that the Rule 32(h) requirement of notice survives the Supreme Court's opinion in *United States v. Booker*, 543 U.S. 220 (2005)). The very purpose of the notice requirement, as the Supreme Court recognized in *Burns*, is to permit, "full adversary testing of the issues relevant to a Guideline sentence[.]" *Burns*, 501 U.S. at 135. As such, Rule 32 requires that the district court give a defendant reasonable notice that it is contemplating a departure because, as the Supreme Court has observed, "'[t]h[e] right to be heard has little reality or worth unless one is informed' that a decision is contemplated." *Id*. at 136.

Here, imposing Condition #5 requiring SORNA registration constituted an upward departure mandating that the district court to give Ms. Dailey notice and an opportunity to be heard on the issue. Because the notice provided in the presentence report and at sentencing was hardly sufficient to notify Ms. Dailey that SORNA registration was being considered, this precluded her from being heard on the issue in violation of Rule 32.

1. Imposing Condition #5 Constituted an Upward Departure Triggering the Notice Requirement Under Rule 32.

Courts have found sex offender registration to be analogous to an "upward departure" from a statute of conviction's applicable Sentencing Guideline range, thereby requiring the district court to provide a defendant notice and an opportunity to be heard. *See*, *e.g.*, *United States v. Coenen*, 135 F.3d 938, 943 (5th Cir. 1998) (concluding that sex offender registration requirement was analogous to an upward departure because it was not expressly contemplated by the Sentencing Guidelines, and that Rule 32 and *Burns* required presentencing notice); *United States v. Bardsma*, 198 F.3d 1191, 1199-1200 (10th Cir. 1999), *overruled on other grounds by United States v. Atencio*, 476 F.3d 1099, 1105 (10th Cir. 2007) (imposition of sex offender registration as a special condition of supervised release required presentence notice under Rule 32 and *Burns*); *United States v. Angle*, 234 F.3d 326, 347 (7th Cir. 2000) (citing *Coenen* and finding registration as a sex offender as a special condition of supervised release to constitute an upward

departure requiring pre-sentence notice); *see also United States v. Martinez*, 266 Fed.Appx. 521, 522 (9th Cir. 2008) (finding that the district court violated Rule 32 by failing to provide notice that it was considering requiring sex offender registration and treatment, and vacating special conditions of supervised release and remanding for resentencing).

Here, by imposing Condition #5 for Ms. Dailey's conviction under the Travel Act requiring SORNA registration, the district court departed upward, thereby triggering the notice requirements of Rule 32. This is because Ms. Dailey was convicted of violating the Travel Act, which is *not* specified as a "sex offense" under SORNA requiring registration. The Sentencing Guideline applicable to this offense – § 2E1.2, with a cross-reference to § 2G1.3 – does not contemplate registration as a consequence of violating the Travel Act. Further, Sentencing Guideline § 5B1.3 setting forth the conditions of probation, only contemplates compliance with SORNA requirements "*if* the defendant is required to register under [SORNA][.]" (emphasis supplied). Since the district court did not make any findings that Ms. Dailey's Travel Act violation was a "sex offense" requiring registration under SORNA, to impose Condition #5 constituted an upward departure from the Sentencing Guidelines triggering notice under Rule 32 and *Burns*.

2. The District Court Failed to Provide Ms. Dailey with Adequate Notice and an Opportunity to Comment on Condition #5 Prior to Sentencing.

As this Circuit has explained, "[p]arties must receive notice the court is contemplating a departure to ensure that issues with the potential to impact sentencing are fully aired." *Evans-Martinez*, 530 F.3d at 1168. The notice requirement under Rule 32(h) "is a flexible one" as the "form and timing of the notice are left to the discretion of the district court[.]" *United States v. Quinzon*, 643 F.3d 1266, 1269-70 (9th Cir. 2011) (citing *United States v. Wise*, 391 F.3d 1027, 1033 (9th Cir. 2004)). "It may be enough in many cases for the judge to mention orally at the sentencing hearing that he is contemplating a condition, in case either party wishes to comment or request a continuance." *Id*. at 1269-70. In any case, however, Rule 32 requires the notice provided to be "reasonable," and to "specifically identify the ground on which the district court is contemplating an upward departure" because its purpose is to permit, "full adversary testing of the issues relevant to a Guideline sentence[.]" *Burns*, 501 U.S. at 135, 138-39; *Evans-Martinez*, 530 F.3d at 1167.

Here, the notice provided by the district court that Condition #5 was under consideration was not reasonable, not specific, and did not permit "full adversary testing of the issues relevant to a Guideline sentence" as Ms. Dailey was completely precluded from litigating the issue of whether her Travel Act violation rendered her a "sex offender" subject to SORNA registration. The extent of the

district court's notice to Ms. Dailey that she would be subjected to SORNA registration was a passing, non-specific reference to the presentence report, in which the Probation Office conclusorily recommended that Ms. Dailey be required to register "as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency…":

> The Court: And the terms of your probation are going to be similar to what was recommended for supervised release beginning on page 17 [of the PSR], the standard and mandatory conditions of probation,…

(ER31.) The district court, notably, did not spell out that one of the mandatory conditions imposed was SORNA registration. Nor did the district court invite argument as to the legality of requiring Ms. Dailey to register as a sex offender even though the district court was previously and expressly made aware that such an issue was open and unsettled. (*See* ER4.) Indeed, at the change of plea hearing, the Government explicitly informed the district court that it could not represent that a Travel Act violation was a "registerable offense," that it took no position on whether Ms. Dailey would be required to register, and that whether Ms. Dailey was required to register "would be up to…her and her attorney to determine…" (ER4.).

To compound the ambiguity and lack of notice, the district court stated that the terms of Ms. Dailey's conditions would be "similar to" the conditions recommended by the Probation Office for supervised release. (ER31.) Without

specifying which conditions would be imposed, it is unclear what such a statement means. Moreover, it suggests that some, but not all conditions recommended would be imposed, but does not specify which ones. The district court's failure to give adequate notice that it was considering imposing Condition #5 in these circumstances thus violated Rule 32 and *Burns* because Ms. Dailey was prevented from litigating the issue of registration.

That the Condition #5 is a mandatory condition of probation and that the Probation Office conclusorily recommended that Condition #5 be imposed in the presentence report does not change this conclusion because neither was sufficient to put Ms. Dailey on notice. The fact that Condition #5 is a mandatory condition of probation does not, by itself, mean that reasonable, specific notice was not required. *Cf. United States v. T.M.*, 330 F.3d 1235, 1242 (9th Cir. 2003) ("[the defendant] is considered to have advance notice of any condition that is contemplated by the sentencing guidelines."); *Wise*, 391 F.3d at 1033 ("[w]here a condition of supervised release is not on the list of mandatory or discretionary conditions in the sentencing guidelines, notice is required before it is imposed, so that counsel and the defendant will have the opportunity to address personally its appropriateness."). This is because application of the mandatory condition was undetermined Indeed, courts have found the mere fact that a condition is mandatory to constitute sufficient notice precisely because application of the

condition was straightforward. In *Burke* for example, the Sixth Circuit found that the defendant had sufficient notice that the court might impose registration from the fact that it was a mandatory condition because SORNA explicitly specified that the convicted offense was a "sex offense" subject to registration. *See United States v. Burke*, 252 Fed.Appx. 49, 54 (6th Cir. 2007).[9] Here, by contrast, a Travel Act conviction does not fall expressly within the definition of a "sex offense" subject to SORNA registration.

Moreover, it cannot be said that the presentence report was an adequate substitute for "reasonable notice." The only mention of SORNA registration in the entire presentence report was at the very end in the Probation Office's recommendations. (Revised PSR at 18.) There, however, was no discussion or explanation as to how Ms. Dailey's conviction for violating the Travel Act constituted a registerable "sex offense" under SORNA thereby warranting the imposition of Condition #5.

[9] As the Sixth Circuit in *Burke* explained, "Burke did receive adequate notice that such a condition would be imposed as part of his sentence. At the time Burke committed the offense, and throughout his sentencing, 18 U.S.C. § 3583 required any person convicted of a sex offense as described in 18 U.S.C. § 4042(c)(4) to register as a sex offender as a mandatory condition of supervised release….During this time, 18 U.S.C. § 2252(a)(4)(B) was listed as a qualifying sex offense under § 4042(c)(4). Therefore, Burke was on notice that registration as a sex offender could be imposed as part of his sentencing." 252 Fed.Appx. at 54.

Thus, pursuant to Rule 32 and the Supreme Court's holding in *Burns*, the district court could only have imposed Condition #5 requiring SORNA registration if it gave Ms. Dailey "reasonable" and specific notice and an opportunity to be heard on the issue of SORNA registration prior to sentencing. Because it failed to do so, and only made a passing, non-specific reference to the conditions recommended by the Probation Office, and did not permit Ms. Dailey an opportunity to be heard on the issue, the district court erred.

C. The District Court Plainly Erred in Failing to Provide Ms. Dailey Notice and an Opportunity to Comment Before Imposing Condition #5, and Such Error Affected Ms. Dailey's Substantial Rights.

An error is plain if it is "contrary to the law at the time of appeal." *Ameline*, 409 F.3d at 1078 (citing *Johnson v. United States*, 520 U.S. 461, 468 (1997)). This Circuit has previously found a district court's failure to abide by the requirements of Rule 32 to constitute plain error. *See Evans-Martinez*, 530 F.3d at 1168 (finding that the district court plainly erred in failing to provide "explicit notice" before departing upward from Sentencing Guidelines and vacating sentence).

Whether the error affected the defendant's substantial rights considers whether the error affected sentencing such "that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding." *Id*. (citing *United States v. Dominguez Benitez*, 542 U.S. 74 (2004)). Because the purpose of Rule 32 is to "ensure that issues with the potential to impact sentencing

are fully aired[,]" this Circuit has found an error affecting the defendant's substantial rights where this purpose is not served and the court "cannot be confident that the issues which impacted sentencing were thoroughly tested as intended under Rule 32(h)." *Id*.; *United States v. Masmari*, 609 Fed.Appx. 939, 940 (9th Cir. 2015) (finding that because the purposes of Rule 32(h) were fulfilled, the defendant had not succeeded in showing an error affecting his substantial rights.)

Here, it is clear that the purposes of Rule 32(h) were not fulfilled as Ms. Dailey was never heard on the issue of sex offender registration. Had she been heard, she would have argued, just as she has done here, that her violation of the Travel Act is not a "sex offense" requiring registration under SORNA. Because the lack of full adversarial testing of issues impacting sentencing undermines confidence in the outcome of the proceedings, the district court's error in failing to notify Ms. Dailey that it was considering imposing Condition #5 affected Ms. Dailey's substantial rights. Accordingly, this aspect of Ms. Dailey's sentence should be vacated and remanded to the district court for full consideration before re-sentencing.

IV. The District Court Impermissibly Delegated the Determination as to Whether Ms. Dailey Was Required to Register Under SORNA.

A. Standard of Review.

This Court reviews the district court's application of the Sentencing Guidelines *de novo*. *United States v. Stephens*, 424 F.3d 876, 879 (9th Cir. 2005). The district court's decision to impose an available condition is typically reviewed for abuse of discretion. *Id*. Where the defendant fails to object to a condition, however, the Ninth Circuit reviews for plain error. *Id*. at 879 n.1 (citing *United States v. Rearden*, 349 F.3d 608, 618 (9th Cir. 2003)). The standard for plain error review is set forth above in Sections III.A. and III.C.

B. The District Court Plainly Erred in Impermissibly Delegating Its Power to Determine Whether Ms. Dailey Was Required to Register Under SORNA.

The district court impermissibly delegated its Article III powers to the Probation Office and/or the Arizona state sex offender registration agency when it failed to determine, pursuant to Condition #5 whether Ms. Dailey had been "convicted of a qualifying offense," and therefore was required to register under SORNA, and instead left those determinations to be made by the "probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where" Ms. Dailey resides, was a student, or was convicted of a qualifying offense. (ER37.)

It is well-established that "the court makes the determination of *whether* a defendant must abide by a condition, and *how* (or, when the condition involves a specific act such as drug testing, *how many times*) a defendant will be subjected to the condition." *Stephens*, 424 F.3d at 880 (original emphasis). While "it is permissible to delegate to the probation officer the details of where and when the condition will be satisfied[,]" a probation officer categorically, "may not decide the nature or extent of the punishment imposed upon a probationer[.]" *Id*. at 881; *United States v. Pruden*, 398 F.3d 241, 250 (3d Cir. 2005) ("[t]he most important limitation is that a probation officer may not decide the nature or extent of the punishment imposed upon a probationer"); *United States v. Sines*, 303 F.3d 793, 799 (7th Cir. 2002) ("a district court may delegate to the probation office details regarding the selection and schedule of a sex offender treatment program even though it must itself impose the actual condition requiring participation in a sex offender treatment program."). This is because "'under our constitutional system the right to ... impose the punishment provided by law is judicial,'" and the "limitation is therefore of constitutional dimension, deriving from Article III's grant to the courts of power over 'cases and controversies.'" *Stephens*, 424 F.3d at 881 (citing *Ex Parte United States*, 242 U.S. 27, 41-42 (1916)); *United States v. Mike*, 632 F.3d 686, 695 (10th Cir. 2011) ("Article III prohibits a judge from delegating the duty of imposing the defendant's punishment to the probation

officer."); *United States v. Kent*, 209 F.3d 1073, 1078 (8th Cir. 2000) ("the imposition of punishment is a judicial functions reserved to the courts under Article III of the United States Constitution"). "This limitation extends not only to the length of a prison term imposed, but also to the conditions of probation or supervised release." *Pruden*, 398 F.3d at 250.

To determine whether a particular delegation violates this restriction, courts have distinguished between those delegations that merely task the probation officer with performing ministerial acts or support services related to the punishment imposed and those that allow the officer to decide the nature or extent of the defendant's punishment. *See*, *e.g.*, *Stephens*, 424 F.3d at 881; *United States v. Nash*, 438 F.3d 1302, 1304-05 (11th Cir. 2006) ("[t]o determine if a court improperly delegated the judicial authority of sentencing, we have drawn a distinction between the delegation to a probation officer of a 'ministerial act or support service' and 'the ultimate responsibility' of imposing the sentence."); *Mike*, 632 F.3d at 695. Needless to say, courts have found impermissible delegation where the probation officer determines *whether* or not to impose a particular condition of probation or supervised release. *See*, *e.g.*, *United States v. Peterson*, 248 F.3d 79, 84-85 (2d Cir. 2001); *Nash*, 438 F.3d at 1306 (finding improper delegation on plain error review where the court imposed a condition of supervised release that stated, "as deemed necessary by the Probation Officer, the

defendant shall participate in mental health counseling." (emphasis omitted)); *Kent*, 209 F.3d at 1079 ("the lower court improperly delegated a judicial function to [the defendant's] probation officer when it allowed the officer to determine whether [the defendant] would undergo counseling."); *cf. Stephens*, 424 F.3d at 882 (finding no improper delegation where court had specifically required as a condition of supervised release that the defendant undergo drug testing, but allowed drug treatment officials to design the course of treatment); *United States v. Talbert*, 501 F.3d 449, 453 (5th Cir. 2007) (affirming district court's delegation to the probation officer the authority to determine whether state law required the defendant to register under SORNA when the defendant had been convicted of what was an explicitly defined "sex offense.")

United States v. Peterson, in particular, is instructive on this issue. There, the Second Circuit found a supervised release condition concerning participation in a sex offender therapy program to constitute an "excessive delegation" because the language of the condition could be read to require the defendant "to participate in a mental health intervention only if directed to do so by his probation officer." 248 F.3d at 84-85. Specifically, the condition stated "[t]he defendant is to enroll, attend and participate in mental health intervention specifically designed for the treatment of sexual predators *as directed by the U.S. Probation Office*." *Id*. (original emphasis). While the Second Circuit stated that the first clause of the

condition could be read as the court imposing a mandatory obligation, it found the last clause "as directed by the U.S. Probation Office" to modify the mandatory nature of that obligation, thereby impermissibly delegating it to the Probation Office. *Id*. at 85. Accordingly, the Second Circuit vacated this aspect of the defendant's sentence and remanded for resentencing, cautioning that "if the court intends to leave the issue of the defendant's participation in therapy to the discretion of the probation officer, such a condition would constitute an impermissible delegation of judicial authority and should not be included." *Id*.

Similarly here, Condition #5 also constitutes an "excessive delegation" insofar as either the Probation Office or a state sex offender registration agency determines whether Ms. Dailey must register as a sex offender under SORNA. Starting, as the court did in *Peterson*, with the language in Ms. Dailey's written judgment, Condition #5 states:

> You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) *as directed by* the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense.

(ER37 (emphasis supplied).) Just as in *Peterson* where the condition contained the same "as directed by" clause, a plain reading of Condition #5 demonstrates that Ms. Dailey may be required to register under SORNA (i.e., "comply with the requirements of [SORNA]" only if "directed" to do so "by the probation officer,

the Bureau of Prisons, or any state sex offender registration agency…" Like *Peterson*, this delegates the determination as to whether Ms. Dailey must register to the US Probation Office, the Bureau of Prisons, or a state sex offender registration agency.[10]

At best, and like *Peterson*, Condition #5 is ambiguous as to which entity—the court or the probation office, BOP, or state sex offender registration agency—determines the requirement that one comply with SORNA by registering. This is because it is ambiguous whether the phrase "as directed by…" modifies the verb phrase "must comply" or modifies the noun phrase "the requirements of [SORNA]." If "as directed by" modifies the verb phrase "must comply," this constitutes an "excessive delegation" since the Probation Office, BOP or state sex offender registration agency impermissibly "direct[s]" *how* Ms. Dailey "must comply with the requirements of [SORNA][.]" *See Stephens*, 424 F.3d at 880 ("the court makes the determination of *whether* a defendant must abide by a condition, and *how*…a defendant will be subjected to the condition." (original emphasis)).

[10] That potentially a lifetime of registration under SORNA may be delegated to a non-judicial, non-Article III officer does not comport with the Due Process Clause of the Fifth Amendment. Such a consequential decision merits appropriate notice (as discussed above) and full consideration by an Article III judicial officer.

The conclusion that the district court impermissibly delegated its Article III responsibilities is only bolstered by the fact that the district court did not make any findings that Ms. Dailey, who was convicted of violating the Travel Act—which is *not* a specified "sex offense" under SORNA—had committed a "sex offense" as defined by SORNA and therefore was required to register. As this Circuit has explained:

> A person must register if the person's conviction renders the person a "sex offender." 42 U.S.C. § 16913(a). A "sex offender" is "an individual who was convicted of a sex offense." *Id.* § 16911(1). A "sex offense" is "a criminal offense that has an element involving a sexual act or sexual contact with another." *Id.* § 16911(5)(A)(I).

Fernandes, 636 F.3d at 1256-57 (finding that the defendant was required to register under SORNA as a mandatory condition of probation because his conviction constituted a "sex offense" as defined by the statute). Here, to require Ms. Dailey to comply with the requirements of SORNA, the district court must have found Ms. Dailey's Travel Act conviction to constitute a "sex offense," thereby rendering her a "sex offender" subject to registration. The district court, however, did not make any such findings, and therefore could not have found that she was required to register.

Indeed, the only thing that the district court said with respect to the conditions of probation, including Condition #5, is that:

> The Court: And the terms of your probation are going to be similar to what was recommended for supervised release

> beginning on page 17 [of the PSR], the standard and mandatory conditions of probation,…

(ER31.) Here, the district court merely adopted the recommendations of the Probation Office, which recommended that Ms. Dailey be required to register. (Revised PSR at 18.) This was in error. While the district court may adopt the factual findings contained in a presentence report, it may not rely on conclusory statements, including recommendations, unsupported by facts. *See*, *e.g.*, *United States v. Navarro*, 979 F.2d 786, 789 (9th Cir. 1992) (district court erred by relying on PSR recommendation to base defendant's offense level on drug quantities sold by co-conspirators absent evidence that he participated in conspiracy after initial sale). Here, the Probation Office's recommendation that Ms. Dailey register as a sex offender was unsupported by any facts. (*See* Revised PSR at 18.) Moreover, just as the probation officer had no authority to determine whether Ms. Dailey was required to register under SORNA, the probation officer similarly had no authority to make the antecedent determination as to whether Ms. Dailey's Travel Act violation constituted a "sex offense" subject to SORNA registration. Thus, even if it could be said that it was permissible to delegate to the Probation Office, the Bureau of Prisons or a state sex offender registration agency the determination as to whether a defendant was required to register under SORNA, it cannot be said that these agencies have the authority to interpret federal law and determine

whether an offense like a Travel Act violation constitutes a registerable "sex offense."

Nor does *United States v. Talbert*, the only published case located by Appellant's counsel regarding the legality of delegating a sex offender registration determination, change this conclusion. In *Talbert*, the Fifth Circuit affirmed the district court's delegation to the Probation Office the determination pursuant to a supervised release condition as to whether the defendant was required to register as a sex offender "in accordance with state law." 501 F.3d at 453. The defendant had been convicted of violating 18 U.S.C. § 922, being a felon in possession of a firearm, but had "two state convictions for sex-related offenses." *Id*. at 452-53. In reaching its conclusion, the Fifth Circuit "presumed" that "whether [the defendant] is required to register under state law is a mechanical, straightforward question—one the court did not address merely for lack of definitive information about [the defendant's] prior sex-related convictions and state law." *Id*. *Talbert* is distinguishable from the circumstances here because the Fifth Circuit "presumed" that the determination as to whether the defendant had to register under state law for his prior sex-related convictions was a "mechanical, straightforward question." Here, whether a Travel Act conviction, which is Ms. Dailey's only conviction and is not a statutorily defined "sex offense," qualifies as a "sex offense" requiring registration under SORNA is anything but a "mechanical, straightforward

question." Indeed, even the Government could not represent to the district court that the conviction in this case was a "registerable offense," and admitted that "[i]t's entirely possible that [Ms. Dailey] doesn't have to register." (ER4.)

In sum, it is clear that the district court impermissibly delegated its responsibility under Article III of determining whether or not Ms. Dailey would have to register as a sex offender under SORNA. Accordingly, the Court should vacate this aspect of Ms. Dailey's sentence and remand the case to the district court so it can determine whether Ms. Dailey's Travel Act conviction qualifies as a registerable offense under SORNA to the extent that this Court does not make such a determination.

C. The District Court's Delegation Constitutes Plain Error Affecting Ms. Dailey's Substantial Rights.

Here, the district court plainly erred in delegating the determination as to whether Ms. Dailey would have to register as a sex offender under SORNA as the law is clearly established that a court's Article III functions cannot be delegated. *Stephens*, 424 F.3d at 881; *Ameline*, 409 F.3d at 1078 (an error is plain if it is "contrary to the law at the time of appeal.").

Moreover, such an error "inevitably" affects Ms. Dailey's substantial rights as she is subject to prosecution and incarceration for knowingly failing to register and update her SORNA registration pursuant to 18 U.S.C. § 2250. It also undermines the fairness, integrity, and reputation of the proceedings insofar as the

imposition of SORNA results in a sentence unauthorized by law. *See Pruden*, 398 F.3d at 251 ("the District Court erred in imposing the mental health condition, and in delegating discretion to the probation officer…A plainly erroneous condition of supervised release will inevitably affect substantial rights, as a defendant who fails to meet that condition will be subject to further incarceration. Similarly, imposing a sentence not authorized by law seriously affects the fairness, integrity, and reputation of the proceedings. Thus, we are required to correct the plain error in this case by vacating this aspect of the sentence.") (internal quotations and citations omitted).

CONCLUSION

For the foregoing reasons, Ms. Dailey respectfully asks this Court to find that the imposition of Condition #5 resulted in an illegal sentence, that the district court failed to give Ms. Dailey notice that it was considering imposing Condition #5 in violation of Federal Rule of Criminal Procedure 32(h), and that the district court impermissibly delegated the responsibility of determining whether Ms. Dailey was required to register under SORNA in violation of Article III, and to vacate that aspect of Ms. Dailey's sentence until a determination is made as to whether Ms. Dailey's offense qualifies as a registerable offense under SORNA.

DATED: February 13, 2019 KATHLEEN BLISS LAW PLLC

By: /s/ Kathleen Bliss
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STATEMENT OF RELATED CASES

United States v. Dailey, No. 18-10134

Ms. Dailey is aware of the following pending case that is related as a case arising from the same case in the district court as defined under Ninth Circuit Rule 28-2.6(a):

United States v. Johnny Moore, Case No. 18-10077 (9th Cir.)

CERTIFICATE OF COMPLIANCE
United States v. Dailey, No. 18-10134

Pursuant to Fed. R. App. P. 32(g), the undersigned counsel hereby certifies that the attached opening brief is proportionately spaced, has a typeface of 14 points or more and contains 12,827 words.

DATED: February 13, 2019 KATHLEEN BLISS LAW PLLC

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