No. 18-10134

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

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 REPLY BRIEF

Kathleen Bliss, Esq.
Jaya C. Gupta, Esq.
KATHLEEN BLISS LAW PLLC
1070 W. Horizon Ridge Pkwy., # 202
Henderson, Nevada 89012
Tele: (702) 463-9074
E-mail: kb@kathleenblisslaw.com

Counsel for Defendant-Appellant
July 3, 2019

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INTRODUCTION

The Government goes to extraordinary lengths to claim that the lower court made a finding that Jazzmin Dailey, who pled guilty to a violation the Travel Act, 18 U.S.C. § 1952, committed a "sex offense" subjecting her to SORNA's registration requirements. According to the Government, by simply check-marking a box on the judgment form, the district court made the weighty decision of deeming Ms. Dailey a "sex offender." The Government's arguments are belied by the record and its own admissions, all of which indicate that the district court delegated its Article III functions and left to others the determination as to whether Ms. Dailey's conviction actually constituted a "sex offense" for which she would have to register.

Even if it could be said that the district court determined that Ms. Dailey's offense was a registrable "sex offense," the district court clearly did so in error. The Attorney General's definitive interpretation of SORNA's residual clause makes clear that the offense in question must contain an element showing that the offense was committed against a minor. The Travel Act does not contain such an element and therefore cannot constitute a registrable sex offense under SORNA. By nonetheless imposing a condition on Ms. Dailey that she register as a sex offender, the district court imposed an illegal sentence, that aspect of which must now be vacated.

Ms. Dailey incorporates by reference her arguments and authorities presented in her Opening Brief, and replies to some of the Government's assertions in its Answering Brief (AB), which she deems as necessarily warranting reply.

ARGUMENT

I. The Appellate Waiver in Ms. Dailey's Plea Agreement Did Not Waive Challenges to an Illegal Sentence and Therefore Does Not Prohibit Ms. Dailey's Appeal.

The Government contends that because Ms. Dailey's conviction "is a specified offense against a minor under SORNA's residual clause," she is required to register as a sex offender under SORNA. (AB at 7-8.) Her sentence, according to the Government, thus "falls squarely within the bargained-for appellate waiver[,]" and this appeal must be dismissed. (AB at 8.) Neither of these arguments has merit.

As discussed in detail in Ms. Dailey's Opening Brief and below, Ms. Dailey's offense, a violation of the Travel Act, 18 U.S.C. § 1952, does not fall within the scope of SORNA's residual clause, 42 U.S.C. § 16911(7)(I), and is not subject to registration. The Government does not deny that, if this Court finds that Ms. Dailey's Travel Act violation is beyond the scope of SORNA's residual clause, then that aspect of her sentence requiring sex offender registration is illegal. *See United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) ("An appeal waiver

will not apply if…the sentence violates the law."). Moreover, the Government does not bother to address the argument that if the district court imposed Condition #5 on Ms. Dailey without making the requisite finding that her Travel Act violation was subject to SORNA registration, then this, too, constitutes an illegal sentence. (AOB at 13-14.) Thus, this Court must consider the substance of Ms. Dailey's appeal. If, in so doing, this Court determines that the district court improperly imposed Condition #5 on Ms. Dailey, the appellate waiver is ineffective and this Court must vacate that aspect of her sentence.

II. The District Court Never Determined That Ms. Dailey's Travel Act Conviction Was a Registrable "Sex Offense" And Delegated The Responsibility for Making That Determination to Others.

A. The District Court Never Determined That Ms. Dailey's Travel Act Conviction Was a Registrable "Sex Offense."

The Government's contention that district court found that Ms. Dailey's Travel Act violation was a "sex offense" subject to SORNA registration by check-marking a box or by ambiguously adopting conditions referenced in the PSR is dubious, to say the least.

The Government's own representations at the change of plea hearing undercut its argument that the District Court necessarily found that Ms. Dailey was a "sex offender" subject to SORNA registration. (AB at 17; ER37.) During the change of plea hearing, the Government emphasized that it could not represent to the district court that Ms. Dailey's offense was a registrable "sex offense," that it

was "entirely possible" that Ms. Dailey would not have to register, and that it "would be up to" Ms. Dailey and her attorney to determine at some later point if she would have to initially register. (ER4.) The reason the Government gave as to why it could not represent whether Ms. Dailey's offense was registrable or not was because Ms. Dailey was from Arizona, not Nevada, where she was being prosecuted:

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.) That the district court would have then gone ahead and made that determination anyway in light of the Government's refusal to take a position and in light of the Government's misleading suggestion to defense counsel that Ms. Dailey need not worry about the issue at that stage of the proceeding, is difficult to credit. Equally difficult to credit is the Government's contention that the entirety of the district court's decision-making process on such a consequential issue was

making a wholly-ambiguous statement that Ms. Dailey's probationary conditions would be "similar" to the conditions recommended in the PSR for supervised release, (ER31), and check-marking a box on the judgment form, (ER37). (AB at 17.) The district court clearly did not determine that a Travel Act offense constitutes a "sex offense" subject to SORNA registration and instead delegated that responsibility to others. The question remains, to whom?

B. The District Court Delegated The Determination As to Whether Ms. Dailey's Travel Act Conviction Constituted a "Sex Offense" Subject to SORNA Registration.

The Government complains that Ms. Dailey's reading of Condition #5 as delegating responsibility for determining whether a defendant must register as a sex offender is "unreasonable" and "has no merit." (AB at 17-18.) By the Government's own admission elsewhere, that determination is delegated to Arizona's "local county sheriffs."

The Government neglects to inform this Court that the person who determines whether a federal conviction is a "sex offense" subject to SORNA registration is the local county sheriff. By the Department of Justice's own admission, "[i]n Arizona, the decision regarding whether a federal conviction is comparable to an Arizona offense such that registration is required *is left to the local county sheriff*." *See* U.S. Dept. of Justice, *SORNA Substantial Implementation Review, State of Arizona*, OFFICE OF SEX OFFENDER SENTENCING,

MONITORING, APPREHENDING, REGISTERING, AND TRACKING (SMART), https://www.smart.gov/pdfs/sorna/arizona-hny.pdf (November 2015) (last visited July 3, 2019) (emphasis supplied).[1] The Department of Justice made this finding in the course of determining whether the State of Arizona has substantially complied in implementing SORNA. *Id.* One of the issues that the Department of Justice addressed concerned the scope of Arizona's registration scheme and its reliance on statutory equivalence between state offenses and non-state offenses in determining whether registration is required. *See id*.; Ariz. Rev. Stat. Ann. § 13-3821. This finding indicates that the person who likely determined whether Ms. Dailey's Travel Act offense was subject to registration was an Arizona local county sheriff.[2] This is clearly impermissible.

This Court has made clear that while "it is permissible to delegate to the probation officer the details of where and when the condition will be satisfied[,]" a

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[1] It does not appear that this document is in the record. It, however, is a public document, available on a Department of Justice website (www.smart.gov), and is necessary in replying to the Government's contention that the determination as to whether Ms. Dailey's offense is a registrable sex offense was not delegated by the district court despite all indications to the contrary.

[2] The date of the Department of Justice's report regarding Arizona's compliance with SORNA is November 2015. The change of plea hearing in Ms. Dailey's case took place on September 27, 2016. (ER1.) There is no evidence to suggest that the State of Arizona changed its practices in the intervening timeframe. Indeed, the November 2015 status report is the last status report that the Department of Justice published. Moreover, if one goes to the Department of Justice's Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking ("SMART") website, the November 2015 status report is the only report that appears.

probation officer or other individual, "may not decide the nature or extent of the punishment imposed upon a probationer[.]" *United States v. Stephens*, 424 F.3d 876, 881 (9th Cir. 2005). This is because "under our constitutional system the right to impose the punishment provided by law is judicial[.]" *Ex parte United States*, 242 U.S. 27, 41-42 (1916); *Stephens*, 424 F.3d at 881. This "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. Thus, courts have found impermissible delegation where an individual like a 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); *United States v. Nash*, 438 F.3d 1302, 1306 (11th Cir. 2006); *United States v. Kent*, 209 F.3d 1073, 1079 (8th Cir. 2000).

Here, Ms. Dailey's reading of Condition #5 is not unreasonable as the Government claims because the Department of Justice has itself admitted that in Arizona, the determination as to "*whether*" a federal conviction is subject to sex offender registration is "left to the local county sheriff." This could conceivably mean that someone like Joseph Arpaio, the former sheriff of Maricopa County, Arizona, and himself a convicted (and now-pardoned) criminal, would make the determination as to whether a federal offense is subject to sex offender registration. It is unclear what recourse, if any, someone like Ms. Dailey would have to

challenge a determination made by a local county sheriff. Further, giving someone like a local county sheriff the power to make such a consequential decision that potentially subjects a defendant to further criminal prosecution under 18 U.S.C. § 2250, is rife with due process and equal protection issues. As a hypothetical example, Mr. Arpaio has long been accused of racially profiling Latinos. One can easily envision how an individual could abuse the power to determine whether a defendant must register for a minimum of 15 years as a sex offender and use it in an unconstitutional way. Simply put, depending on the discretion of the elected county sheriff, a unilateral determination of sex offender status could vary from race to race, gender to gender, and/or county to county, for no rational reason other than politics and personal predilections of the decision maker. While the Government may be willing to accept such a willy-nilly process, this Court should not.

Moreover, the plain language of Condition #5 expressly provides that Ms. Dailey "must comply with the requirements of [SORNA] *as directed by* the probation officer, the Bureau of Prisons, *or any state sex offender registration agency*…." (ER37 (emphasis supplied).) As Ms. Dailey contended in her Opening Brief, the language of Condition #5 can be read to delegate the responsibility of determining whether a defendant is subject to SORNA registration to non-Article III actors because the clause beginning "as directed by" may be read to modify the

mandatory nature of the obligation to register. (*See* AOB at 47-48; *see also* *Peterson*, 248 F.3d at 84-85 (vacating special condition of probation as ambiguous because it could be read as saying that the defendant is required to undergo sex offender counseling if directed to do so by a probation officer).)

Given the Government's admission that it could not represent that the Travel Act was a registrable "sex offense" and its suggestion that the reason was because Ms. Dailey was from Arizona, where the Department of Justice has admitted that "local county sheriffs" determine "whether" a federal offense constitutes a registrable offense in Arizona, it is more than reasonable to assume that when the district court checked Condition #5 on the judgment form or when it said that Ms. Dailey's probationary conditions would be similar to those recommended for supervised release, it did not actually determine that Ms. Dailey had committed a registrable "sex offense" and therefore was a "sex offender." Instead, the inexorable conclusion is that the district court check-marked Condition #5 to delegate the responsibility to an Arizona state official to make that determination. Because the district court may not delegate its Article III functions, and because that is what appears to have happened in this case, the district court's imposition of Condition #5 must be vacated and remanded for the district court itself to make the determination as to whether Ms. Dailey's Travel Act conviction is a registrable sex offense.

III. If the District Court Determined That Ms. Dailey Had Committed a "Sex Offense" Subject to SORNA Registration, It Did So In Error.

The Government claims that the district court correctly determined that Ms. Dailey is a "sex offender" because her offense falls within the scope of SORNA's "residual clause" as involving "conduct that by its nature is a sex offense against a minor." (AB at 12.) The Government additionally claims that the circumstance-specific approach is the correct approach in interpreting the residual clause, and that the SMART Guidelines promulgated by the Attorney General, which adopt a categorical approach as to determining the alleged victim's age, are not entitled to deference under *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) because there is no ambiguity. (AB at 10.) These claims, again, lack merit.

To begin, by failing to address them, even in the alternative, the Government concedes that the two requirements set forth in *United States v. Mead Corp.*, 533 U.S. 218 (2001) – that Congress clearly delegated authority to the agency to make rules carrying the force of law, and that the agency interpretation was promulgated in the exercise of that authority – and *Chevron* step two – that the agency's interpretation of the statute is "a reasonable policy choice for the agency to make[,]" – have all been satisfied. *See North California River Watch v. Wilcox*, 633 F.3d 766, 772-73 (9th Cir. 2011) (internal citations omitted). The fight, so to speak, lies in *Chevron* step one.

As to *Chevron* step one, the Government's contention that there is no ambiguity neglects to address that this and other Circuits have already found ambiguity insofar as the definition of "sex offender" as someone who has been "convicted of a sex offense" appears to call for application of a categorical approach because of the term "convicted," while the definition of a "specified offense against a minor" includes "conduct that by its nature is a sex offense against a minor," which appears to call for a circumstance-specific approach insofar as it uses the term "conduct." *See United States v. Mi Kyung Byun*, 539 F.3d 982, 991-92 (9th Cir. 2008) ("…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"); *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.").

As noted in Ms. Dailey's Opening Brief, this is not the only ambiguity. There is a second ambiguity the results from the tautological definition of "sex offense" as "involv[ing]" "conduct that by its nature is a sex offense against a minor." 42 U.S.C. §§ 16911(1), 16911(5)(A)(ii) and 16911(7)(I). Courts have recognized that circular definitions 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); *see also Fogo De Chao (Holdings) Inc. v. U.S. Dept. of Homeland Sec.*, 769 F.3d 1127, 1135-36 (D.C. Cir. 2014).

Though this Circuit resolved the first ambiguity in favor of the circumstance-specific approach, it did so without considering the SMART Guidelines, which were promulgated *after* this Court rendered the substance of its opinion.[3] Additionally, it does not appear that this Court has considered the second ambiguity. Thus, there are ambiguities on the plain face of the statute on which Congress has not plainly spoken. This satisfies *Chevron* step one.

Under *Chevron* step two – that the agency's interpretation of the statute is "a reasonable policy choice for the agency to make" – the SMART Guidelines offer reasonable interpretations that resolve the ambiguities at issue. 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. Moreover, "[t]he court need not conclude that the agency construction was the only one it permissibly could have

[3] As Ms. Dailey noted in her Opening Brief, this Circuit's opinion in *Byun* was originally decided on July 1, 2008. While the opinion was amended and superseded later on August 14, 2008, the amendments corrected errors in the caption. The Attorney General issued the final SMART Guidelines on July 2, 2008, after this Court had issued the substance of its opinion.

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. If the interpretation is reasonable, it must be upheld. *Smiley v. Citibank, N.A.*, 517 U.S. 735, 744-45 (1996). The SMART Guidelines provide reasonable interpretations of the two ambiguities identified earlier:

As to the first ambiguity, the SMART Guidelines clarify that "the status of the victim as a minor is an element of the offense." This is a reasonable interpretation 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 ultimately mandating registration by "sex offender[s]." 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, the SMART Guidelines interpret the relevant definitions in such a way that the circularity in defining a "sex offense" as a "sex offense" no longer exists. Indeed, 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."

Moreover, it would be contrary to *Chevron* to consider the issue whether a categorical or circumstance-specific approach is used in determining the victim's age without affording deference to the SMART Guidelines. This is because the Supreme Court has prohibited lower courts 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. *Chevron*, 467 U.S. at 844.

While the Government cites to cases that have adopted a circumstance-specific approach in interpreting SORNA's residual clause following the promulgation of the SMART Guidelines, many of these courts did even not consider the SMART Guidelines before adopting the circumstance specific approach, indicating that the issue of whether to afford the SMART Guidelines *Chevron* deference was not raised. *See*, *e.g.*, *Byun*, 539 F.3d at 992 (9th Cir.); *United States v. Dodge*, 597 F.3d 1347 (11th Cir. 2010) (en banc), *cert. denied*, 562 U.S. 961 (2010) (no mention of the SMART Guidelines or *Chevron* deference); *United States v. Gonzalez-Medina*, 757 F.3d 425 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1529 (2015) (same); *United States v. Rogers*, 804 F.3d 1233 (7th Cir. 2015). The Government's reliance on these cases, thus, is wholly misplaced.

As to cases like *United States v. Price*, 777 F.3d 700, 709 (4th Cir. 2015) and *United States v. Schofield*, 802 F.3d 722, 730-31 (5th Cir. 2015), which rejected giving deference to the SMART Guidelines, they did so because they found that there was no ambiguity in relation to the residual clause. Yet this Circuit *has found* ambiguity. *Byun*, 539 F.3d at 992-93. Moreover, the Fourth Circuit in *Price* noted the circularity in defining a "sex offense" as essentially a "sex offense". *Price*, 777 F.3d at 707 (" Read together, [42 U.S.C. § 16911(5)(A)(ii) and (7)(I)] define a "sex offense" as a criminal offense involving "[a]ny conduct that by its nature is a sex offense against a minor."). Given these patent ambiguities, cases that reject giving deference to the SMART Guidelines based on a lack of ambiguity are incorrectly decided.

Thus, in light of the residual clause's facial ambiguities and in accordance with *Chevron*, this Court should defer to the Attorney General's reasonable interpretation of the residual clause in the SMART Guidelines and apply a categorical approach to determining a victim's age. In applying a categorical approach, because Ms. Dailey's Travel Act conviction does not include an element that the victim was under the age of majority, it is not a categorical match to the residual clause and therefore does not constitute a "sex offense" requiring Ms. Dailey to register.

CONCLUSION

For the foregoing reasons, Ms. Dailey respectfully asks this Court to reach the merits of her appeal and to vacate the imposition of Condition #5 as part of her sentence.

DATED: July 3, 2019 KATHLEEN BLISS LAW PLLC

By: /s/ Kathleen Bliss
Kathleen Bliss
Jaya Gupta

Attorneys for Defendant-Appellant
Jazzmin Dailey

CERTIFICATE OF COMPLIANCE

United States v. Jazzmin 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 4,049 words.

DATED: July 3, 2019 KATHLEEN BLISS LAW PLLC

By: /s/ Kathleen Bliss
Kathleen Bliss
Jaya C. Gupta

Attorneys for Defendant-Appellant
Jazzmin Dailey