19-1895

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

SALVADOR DIAZ,

Defendant - Appellant.

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

OPENING BRIEF OF APPELLANT

Robin Christine Smith, Esq.
Leean Othman, Esq.
Law Office of Robin C. Smith, Esq., P.C.
99 Wall Street, Suite 901
New York, New York 10005
(415) 726-8000

Counsel for Defendant-Appellant

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER

In the

United States Court of Appeals

For the Second Circuit

United States of America,
Appellee,
v.

Salvador Diaz,

Defendant-Appellant.

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

Subject Matter and Appellate Jurisdiction

This is an appeal from the judgment of the Southern District of New York following Appellant Salvador Diaz's conviction after a jury trial of one count of traveling in interstate and foreign commerce, and knowingly failing to register and update a registration as required by the Sex Offender Registration and Notification Act ("SORNA") under 18 U.S.C. § 2250. Mr. Diaz was convicted of moving from New York to New Jersey, residing in New Jersey, where he was required to register, without registering as a sex offender in that state. The Hon. Valerie

Caproni presided over the District Court proceedings. Appellant filed a timely notice of appeal. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1291, 2106.

Questions Presented

Whether, where the government failed to prove that any crime occurred in New York, the District Court erred when it denied Diaz's motion to dismiss his indictment for improper venue.

Whether the District Court erred when it held that Appellant could not prove that the underlying conviction necessary to any SORNA conviction was obtained in violation of the constitution.

Whether this Court should revisit its holding in *Doe v. Pataki*, 120 F.3d 1263, 1271, 1284 (2d Cir. 1997) that sex offender registration acts are not punitive and violate the double jeopardy clause, given that empirical studies and history since the implementation of SORNA have shown that sex offender registration acts are overly punitive and consequently violate the Fifth and Eighth Amendments to the United States Constitution.

Statement of the Case

Salvador Diaz appeals from the judgement of conviction, failure to register as sex offender or to update sex-offender registration, following a jury trial.

Indictment

The indictment filed on April 12, 2017, charged that from at least in or about 2014, up to and including in or about January 2017, in the Southern District of New York and elsewhere, Diaz, being an individual required to register under SORNA by reason of a conviction under Federal law, knowingly did fail to register and update a registration as required by SORNA in violation of 18 U.S.C. § 2250. Diaz failed to verify his address each year from 2015 through 2017, as required by law and changed his residence without updating his registered address in New York (A. 27).

On November 16, 2018, the District Court issued an Order requiring that the government submit a letter addressing the effect of *Nichols v. United States*, 136 S. Ct. 1113 (2016), on this case. The District Court explained:

The Court understands *Nichols* to hold that a sex offender who changes his residence does not need to update his registration in the jurisdiction where he is departing but, rather, needs to re-register only in the jurisdiction where he establishes a new residence. *See* 136 S. Ct. at 1117–18. Applied here, *Nichols* suggests that Mr. Diaz was not required to notify New York authorities of his change of residence; he was (allegedly) required to notify only the New Jersey and/or Virginia authorities of his change of residence.

Accordingly, the District Court Ordered:

1. In light of *Nichols*, the Government must explain why the Indictment properly states an offense, given that it

alleges that Mr. Diaz "changed his residence without updating his registered address in New York," Dkt. 12 (emphasis added).

2. The Government must also explain why venue is proper in this District, given that *Nichols* suggests that Mr. Diaz's alleged offense was his failure to report his change of residence to New Jersey and/or Virginia authorities, not New York authorities. The Government's explanation regarding venue should address *United States v. Holcombe*, 883 F.3d 12 (2d Cir. 2018), and the Court of Appeals decisions cited therein.

(A. 48-49).

Three days following the District Court's Order, the government filed a superseding indictment changing the theory of prosecution. Rather than charging Diaz as a federal offender under 18 U.S.C. §2250(a)(2)(A), the government charged Diaz as a state offender under 18 U.S.C. § 2250(a)(2)(B), alleging that from at least in or about 2014, up to and including in or about January 2017, in the Southern District of New York and elsewhere, Appellant, being an individual required to register under SORNA who did travel in interstate commerce, knowingly did fail to register and update a registration as required by SORNA in violation of 18 U.S.C. § 2250. The indictment charged that Appellant moved from New York to New Jersey to reside and failed to register as a sex offender in that state (A. 50).

Motions to Dismiss

On March 2, 2018, Diaz filed a motion to dismiss arguing that the charges against him should be dismissed because they were based on an invalid underlying conviction. Diaz argued that his conviction was reviewed by Chief Judge Dorman of the Navy-Marine Corps Court of Criminal Appeals (NMCCA), who denied him the protection of the law by conducting a biased review, where Judge Dorman "avoided the proper standards of review for the issues presented in retaliation for Mr. Diaz's allegations of misconduct by the NMCCA before the Court of Appeals for the Armed Forces (CAAF)." Diaz alleged that after he brought a conflict of interest issue to the military court's attention, it was not addressed and instead, Judge Dorman, when confronted with evidence of a conflict of interest on the record, dismissed the evidence and stated that "given the lapse of time between the two hearings, consistencies would be expected." Diaz argued that as a result of the military trial court's failure to address the conflict of interest issue, the proper course of action upon review would have been an automatic reversal of the conviction, as established by the Supreme Court in *Holloway v. Arkansas*, 435 U.S. 475 (1977). However, Judge Dorman failed to apply this precedent.

Diaz further argued that the NMCCA has a pattern of completely disregarding the constitutional rights of appellants and "looks only to resolve as many cases as possible." Diaz argued that NMCCA judges took measures which resulted in a "deceptive set of statistics which allowed its members to receive

impressive performance reports and rapid promotions," including: rubber stamping of opinions by participating judges and changing court's rules to mass process requests for extension of time to file appeals.

Additionally, Diaz argued that a sex offender registration hearing is a second sentencing hearing predicated on the same conviction which violates the double jeopardy protection of the Fifth Amendment and the excessive punishment clause of the Eighth Amendment.

Decision on Motions

On July 3, 2018, the District Court denied Diaz's motion to dismiss. Relying on cases such as *Lewis v. United States*, 445 U.S. 55 (1980) and *Custis v. United States*, 511 U.S 485 (1994), the court explained that it has consistently been held that a defendant may not use a subsequent criminal proceeding to argue that their prior conviction was obtained in violation of the Constitution. The court adopted the reasoning of *United States v. Delgado,* 592 F. App'x 602, 603 (9th Cir. 2015), which held that a defendant may not challenge the prior conviction that made him a sex offender during a prosecution for failure to register. The court stated nothing in SORNA authorizes a defendant to argue that his prior conviction was obtained in violation of the Constitution, *Delgado,* 592 F. App'x at 603, and SORNA focuses only on "the *fact* of the [prior] conviction." *Custis*, 511 U.S. at 491.

Because the procedural validity of Diaz's prior conviction was not at issue in the prosecution, he thus could not use the proceeding to attack it.

In addressing Diaz's constitutional challenges, the court noted that the Second Circuit has expressly held that New York's sex offender registration laws are not "punitive" in nature and thus do not "invoke the protections" of the Double Jeopardy Clause, the Eighth Amendment, or the criminal "procedural safeguards of the Fifth and Sixth Amendments." *Doe v. Pataki*, 120 F.3d 1263,1271, 1284 (2d Cir. 1997); cf. *Smith v. Doe*, 538 U.S. 84 (2003).

On February 25, 2019, just before commencement of trial, Diaz filed a motion to dismiss for improper venue and because that the charge in the indictment that defendant "did travel in interstate and foreign commerce" failed to state an offense. Because he was a federal offender, Diaz argued, interstate travel is not an element of the offense and, therefore, it fails to state an offense. Diaz argued that in alleging travel in interstate and foreign commerce solely for the purpose of attaching venue, the government knowingly attempts to deprive the defendant of his Sixth Amendment Constitutional right to a "public trial, by an impartial jury of the state and district wherein the crime shall have been committed." (A. 135)

On the first day of trial, the District Court denied the motions to dismiss on the grounds that they were filed out of time, and therefore waived, and in any event, without merit. The Court held that Section 2250 phrases the "federal

conviction" And "interstate commerce" theories of the offense in terms of "or" indicating that the government may proceed under either one. If an unregistered sex offender travels in interstate commerce, the government has a federal interest in prosecuting him, regardless of whether he is a federal or state sex offender. As to venue, the District Court held, the Second Circuit held in *United States v. Holcombe* that venue for register in any district in which the defendant begins or ends his interstate travel. 843 F.3d 12 (2d Cir. 2018)(T. 20-21).

Trial

Government witness Alison Ernst, an employee with New York's Division of Criminal Justice Services ("DCJS"), testified that Diaz signed a notice of release following his discharge from prison, where the acknowledgement clause stated that Diaz was aware that he must report a change of address to the state he is leaving if he moves to another state and must comply with the registration requirements in the new state of residence (T. 60-62). According to Ernst, Diaz confirmed to DCJS that he was residing at 52 Arden Street in Manhattan, New York by continuing to verify his address for multiple years by filling out annual address verification forms and sending them to DCJS. Ernst testified that in 2015 and 2016, the annual verification forms that were sent to Diaz at the Arden Street address were undeliverable and returned to DCJS because Diaz was no longer at that address (T. 63-73). On cross examination, Ernst admitted that there were inconsistencies in

Diaz's New York sex offender registration form, such as the date of crime and date of arrest, which listed the same date, December 12, 2000 (74-75).[1]

Pablo Rios, property manager of the Arden Street apartment building, testified that Diaz was listed as a tenant on lease renewal forms up until 2014, after which he was not listed on any subsequent renewal forms. Rios acknowledged that there are circumstances where all tenants who live in an apartment may not be listed, such as if they are the tenant of record or if "they are the first name that's there" then the office "might miss that." Rios testified that an apartment vacancy report had been filed, which indicated that the Arden street apartment had been vacated by December 31, 2014 (T. 91-98).

Government witness Sabrina Obreiter, manager at Oceanpointe Towers in Long Branch, New Jersey, identified Diaz in court and testified that she witnessed him coming to the Oceanpointe Towers building two to three times a week with a suitcase following October 1, 2014, the date that his mother moved in. Diaz's mother, Gladys, was a tenant in the building. Obreiter testified that she believed Diaz was living with his mother in violation of the lease since he was not listed as a tenant and therefore, Obreiter asked an employee to speak with Gladys. During

[1] NYPD officer Kelly Rourke testified that Diaz signed a sex offender registration form on December 2, 2010 that indicated if the offender moves to another state, they must register as a sex-offender within ten days of establishing residence. She also indicated that Diaz signed a rules and regulations form and a form titled the "top ten ways registered sex-offenders fail to register" (T. 80-85).

the lease renewal process, Obreiter told Diaz that he could only remain as a guest for thirty days [per year], or he would have to be added to the lease. Obreiter alleged after realizing that he would have to provide references and submit to a background check, Diaz responded that he would wait because he was "surprised that he had to do all that in order to get on a lease" (T. 178-182). Obreiter contended that she continued to see Diaz at Oceanpointe Towers two to three times a week following the conversation and that surveillance cameras showed him arriving after hours with suitcases. Through an attorney, Obreiter and Oceanpointe sent a "notice to cease," followed by a "notice to quit," to Gladys, warning her of the lease violation by allowing Diaz to live with her. Obreiter testified that Gladys was not evicted because both parties attended mediation. According to Obreiter, Diaz continued to show up to the building even after mediation. Obreiter testified that Oceanpointe Towers did not evict Gladys because at mediation, they were promised that Diaz would no longer be in the building or apartment unit. (T. 183-187, 194).

Ron Hamilton, an investigator at the Navy Federal Credit Union testified that Diaz's monthly bank statements listed his Arden Street New York address up until October 2014. Subsequent statements listed the Oceanpointe Towers address in New Jersey, which is where Diaz's mother was a tenant and 243 Purdue Avenue

in New Jersey, which was Diaz's sister's address. The final address listed on Diaz's monthly statements was 11076 Atlantic Road in Virginia (T. 205-210).

According to testimony of government witness Charles Johnson, deputy registrar at the Elections Office of Burlington County, New Jersey, Diaz's voter registration application provided the 243 Purdue Avenue New Jersey address. Johnson testified that Diaz signed his name next to the "I swear or affirm that I live at the above address box" on July 26, 2016 (T. 211-215). Additionally, government witness Joseph Mazza, an employee of the New Jersey Motor Vehicle Commission testified that Diaz provided the 243 Purdue Avenue address on an examination permit form and vehicle registration form on January 13, 2015 (T. 215-222).

Michael Acquaviva, a detective for the Monmouth County, New Jersey prosecutor's office, testified that there were no records or registration forms found for Diaz in the "offender watch" database, where all sex offender registration documents are filed. Acquaviva stated if any registration had been made by Diaz anywhere in New Jersey, it would have been in the system (T. 227-232).

Following the issuance of an arrest warrant for failure to register in Virginia, government witness Sherri Annan, with the United States Marshal Service, testified that she arrested Diaz on January 27, 2017 at his trailer on a Virginia campground (T. 233-237). Annan stated that after Diaz waived his Miranda rights, he told her he had registered as a sex offender in New York, after which he left

New York in 2014 and moved with his mother and sister to New Jersey. Diaz allegedly told Annan he resided at the Virginia campground in summer 2015 or 2016 and that he had lived there, where he was arrested, for the "last couple of months." Anna testified that during the arrest, Diaz stated he thought he was "far back enough" at the campground that they would not be able to find him (T. 238-240).

Following the conclusion of summations and jury deliberations, the jury found Diaz guilty of failing to register or update his sex offender registration.

SUMMARY OF ARGUMENT

The District Court violated Diaz's Constitutional right to a trial in the state and district wherein the crime was committed when it permitted the government to supersede the indictment and charge him under the interstate commerce theory of SORNA. Diaz is a federal offender and therefore venue was proper only in the state in which he failed to register, New Jersey. Alternatively, this Court's decision in *United States v. Holcombe*, deciding that venue is proper in the state from which the offender departed prior to relocating to a new state of residence is incorrect. Venue is only proper in the new state of residence as SORNA requires registration in the state in which the offender "resides, where the offender is an employee, and where the offender is a student." There is a split in the Circuits on this issue.

The District Court erred when it held that Appellant could not prove his prior conviction was obtained in violation of the constitution because the language in SORNA suggests that a predicate conviction can be challenged, especially given the unfair conviction exception, and the legislature could not have rationally intended to only allow challenges to foreign convictions but not unfair convictions obtained in the United States.

The Sex Offender Registration and Notification Act violates the Fifth and Eighth and Amendments of the United States Constitution because it is overly punitive, constituting cruel and unusual punishment, and also violates the double jeopardy clause, as it acts as a second punishment for the same crime.

Argument

Point I

The District Court Erred by Denying Appellant's Motion to Dismiss for Improper Venue.

Standard of Review

This Court reviews a district court's ruling regarding venue de novo. *United States v. Geibel*, 369 F.3d 682, 695 (2d Cir. 2004) (citing *United States v. Svoboda*, 347 F.3d 471 (2d Cir.2003)). "Because it is not an element of the crime, the government bears the burden of proving venue by a preponderance of the evidence." *Giebel*, 369 F. 3d at 696 (quoting United *States v. Smith,* 198 F.3d 377, 382 (2d Cir.1999). This Court reviews the sufficiency of the evidence as to venue

in the light most favorable to the government, crediting "every inference that could have been drawn in its favor." *Id*. (quoting *United States v. Rosa*, 17 F.3d 1531, 1542 (2d Cir.1994).

Applicable Law

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

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

Under the Sixth Amendment, a defendant has a right to a trial by "an impartial jury of the state and district wherein the crime shall have been committed." Federal Rule of Criminal Procedure 18 requires that "unless a statute or these rules permit otherwise, the government must prosecute an offense in a

district where the offense was committed." Fed. R. Crim. P. 18.

"[W]here the crime charged is the failure to do a legally required act, the place fixed for its performance fixes the situs of the crime." *Johnston v. United States*, 351 U.S. 215, 220 (1956)(defendants, who were conscientious objectors and failed to report for civilian work in lieu of induction, were properly prosecuted in districts where they were assigned to work).

Whether venue is proper in a particular district turns on the elements of the underlying crime and where the acts satisfying those elements occurred. *United States v. Holcombe*, 883 F.3d 12, 15 (2d Cir. 2018); *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999) ("[T]he *locus delicti* [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it. In performing this inquiry, a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts.")).

In *Nichols v. United States*, 136 S. Ct. 1113 (2016), the United States Supreme Court analyzed "whether federal law required Nichols, whose underlying offense was a federal sex offense, to update his registration in Kansas to reflect his departure from the State." 136 S.Ct. at 1115. The Court observed that an earlier version of the federal sex offender registration statute had imposed the duty to report a change of address to the responsible agency in the state from which the

offender was leaving. The prior statute directed states to require a sex offender to "report the change of address to the responsible agency in the state the person is leaving, and [to] comply with any registration requirement in the new state of residence." 42 U.S.C. § 14071(b)(5)(2000ed) (emphasis added). *Id*. At 1116.

SORNA repealed the part of the law that required the offender to report the change of address to the responsible agency i*n the state the person is leaving* and replaced it with the following language:

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

34 U.S.C. § 20913(c)(emphasis added). The reference to one jurisdiction involved refers to any one jurisdiction in which the offender works, lives or is a student. Once the offender notifies that one jurisdiction, then that jurisdiction would notify a list of interested parties, including other jurisdictions. 34 U.S.C. §§ 20923(b)(1)-(7)(A sex offender is required to notify only one "jurisdiction involved"; that jurisdiction must then notify a list of interested parties, including the other jurisdictions).

The Court in *Nichols* stressed the fact that 42 U.S.C. § 16913(a)(the identical predecessor to 34 U.S.C. § 20913(a)), identifies "involved" jurisdictions and uses

the present tense: “resides,” “is an employee,” and “is a student.” “SORNA's plain text therefore did not require Nichols to update his registration in Kansas once he no longer resided there.” *Id.* At 1118.

Venue was Improper in New York

The District Court erred when it denied Diaz’s motions to dismiss for improper venue given that no offense was committed in New York. Assuming that Diaz changed his residence from New York to New Jersey, there would be no obligation under SORNA for Diaz to update his registration in New York, a former residence. The obligation to register would be in New Jersey.

The District Court ignored Congress’s intent in a structuring SORNA prosecutions when it permitted the government to supersede the indictment to charge Diaz under 18 U.S.C. § 2250(a)(2) subsection B, rather than subsection A, under which he was originally charged, and denying Appellant’s motion to dismiss for improper venue on that ground (D.E. 135). As the Supreme Court stated in *Carr v. United States*, 560 U.S. 438, 451 (2010), “Section 2250 imposes criminal liability on two categories of persons who fail to adhere to SORNA's registration requirements:

- any person who is a sex offender ‘by reason of a conviction under Federal law . . . , the law of the District of Columbia, Indian tribal

law, or the law of any territory or possession of the United States.' 18 U.S.C. § 2250(a)(2)(A), or

- any other person required to register under SORNA who 'travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country.

18 U.S.C. § 2250(a)(2)(B).'" *Id.* These categories resemble "two alternate sources of power to achieve Congress's aim of broadly registering sex offenders." *Id.* In *Carr*, the government stated that "placing pre-SORNA travelers within the statute's coverage . . .ensures that the jurisdictional reach of Section 2250(a)(2) has a comparable breadth as applied to both federal and state sex offenders." *Id.*

It is clear that Congress' intent was to reach all sex offenders who fail to register. Congress has authority to regulate federal offenders by virtue of their conviction under federal law. Therefore § 2250(a)(2)(A) does not contain any reference to interstate commerce. However, to confer its authority to punish state offenders for not registering, Congress had to add interstate commerce as a precursor for a SORNA conviction for state offenders who fail to register. Congress could not have intended that the government be required to prove that federal offenders traveled in interstate commerce in order to be found guilty of a SORNA violation. Rather, Congress' intent was for all offenders to register and to

be punished if they did not register. But, Congress could not have intended that offenders' Constitutional right to be tried in the state and district where the crime was committed be violated and Congress could not have intended offenders to be prosecuted in a court with no connection to the crime, and that is what we have here. For some unknown reason, the Southern District of New York wanted to prosecute this case rather than the District of New Jersey. But venue is not proper here and the statute is being contorted to suit the government's whim to prosecute in New York in violation of Diaz's Constitutional rights. This Court should not permit the government's whim to overcome venue requirements. Nor should New York's federal district courts be clogged with offenders who fail to register in New Jersey like Diaz. Those offenders who fail to register in other states should be prosecuted by the United States Attorney's office that serves the area where the offense of failing to register occurred, and in this case, that is New Jersey.

In a long line of cases, the Supreme Court has made it very clear that where a charged crime is the failure to perform a legally required act, venue lies only in the district where the act should have been performed. In *Travis v. United States*, 364 U.S. 631 (1961), the defendant was indicted in Colorado for making and executing in Colorado and filing in Washington D.C., false affidavits. *Id*. at 633. He was tried and convicted in Colorado. *Id*. The Court held that venue should lie only in the District of Columbia, where the Board's regulations required the

affidavits to be "on file with the Board." *Id*. at 637. In *Travis*, the Supreme Court cited its own decision in *United States v. Lombardo*, 241 U.S. 73, 76-78 (1916), where it stated, "when a place is explicitly designated where a paper must be filed, a prosecution for failure to file lies only at that place…" Additionally, in *Johnston v. United States*, 351 U.S. 215, 220 (1956), where registrants were ordered to report for civilian work at state hospitals in judicial districts other than those in which they resided, the Supreme Court held that venue for their trials was in the judicial districts where the civilian work was to be performed, not in the judicial districts in which they resided and where their orders were issued. *Id*. The Supreme Court reasoned that it was "led to this conclusion by the general rule that where the crime charged is a failure to do a legally required act, the place fixed for its performance fixes the situs of the crime." *Id*. Similarly, in *United States v. Anderson*, 328 U.S. 699, 705 (1946), where the defendant was indicted following his refusal to submit to induction into the armed forces at Fort Lewis in Washington, the Court held that under such a prosecution, venue is properly laid in the judicial district where the act of refusal occurred, rather than in the district where the draft board which issued the order is located. *Id*. at 699-700. These cases support a finding that venue is appropriate in the place in which a defendant's obligation arose or is only conferred when the criminal act occurs. Hence, in the case at hand, the only jurisdiction in which venue is appropriate is where Diaz

failed to register, making New York or any other jurisdiction other than New Jersey inappropriate for venue purposes. There was no evidence at trial that Diaz left New York intending to move to New Jersey and no act involved with the SORNA violation was committed in New York.

In *Nichols v. United States*, 136 S. Ct. 1113 (2016), the United States Supreme Court analyzed "whether federal law required Nichols [a federal offender] to update his registration in Kansas to reflect his departure from the state." 136 S.Ct. at 1115. The Court observed that an earlier version of the federal sex offender registration statute had imposed the duty to report a change of address to the responsible agency in the state from which the offender was departing. The prior statute directed states to require a sex offender to "report the change of address to the responsible agency in the [s]tate the person is leaving, and [to] comply with any registration requirement in the new [s]tate of residence." 42 U.S.C. § 14071(b)(5)(2000ed) (emphasis added). *Id*. At 1116.

SORNA repealed the part of the law that required the offender to report the change of address to the responsible agency *in the state the person is leaving* and replaced it with the following language:

> "A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to

> subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry."

34 U.S.C. § 20913(c)(emphasis added). The reference to one jurisdiction involved refers to any one jurisdiction in which the offender works, lives or is a student. Once the offender notifies that one jurisdiction, then that jurisdiction would notify a list of interested parties, including other jurisdictions. 34 U.S.C. §§ 20923(b)(1)-(7)(A sex offender is required to notify only one "jurisdiction involved;" that jurisdiction must then notify a list of interested parties, including the other jurisdictions).

The Court in *Nichols* stressed the fact that 42 U.S.C. § 16913(a)(the identical predecessor to 34 U.S.C. § 20913(a), identifies "involved" jurisdictions, and uses the present tense: "resides," "is an employee," and "is a student." It pointed out that a person (such as Nichols) who moves from Leavenworth, Kansas, to Manila, in the Philippines, no longer "resides" in Kansas. It follows, the Court said, "that once Nichols moved to Manila, he was no longer required to appear in person in Kansas to update his registration, for Kansas was no longer a 'jurisdiction involved' pursuant to subsection (c) of 16913." *Id.* At 1117. The Court found further support for its conclusion in the fact that an offender who moves to a new place has three business days after each change of residence to register in the new

place. “SORNA's plain text therefore did not require Nichols to update his registration in Kansas once he no longer resided there.” *Id*. At 1118.

The Seventh Circuit in *United States v. Haslage*, decided that venue was improper in the departure state even for a state offender. 853 F.3d 331, 334 (7th Cir. 2017). The Seventh Circuit relied on the fact that the Supreme Court in *Nichols* observed that an earlier statute had imposed the duty to report a change of address to the responsible agency in the state from which the offender was leaving, but that SORNA repealed that part of the law and replaced it with the language that did not include notification of the departure state. The Court found further support for its conclusion in the fact that an offender who moves to a new place has three business days after each change of residence to register in the new place. "SORNA's plain test ... therefore did not require Nichols to update his registration in Kansas once he no longer resided there." *Haslage,* at 333 (citing *Nichols* at 1118). *Haslage* and *Nichols* hold that no offense is committed in the departure state, because it was not the travel alone that violated SORNA. It is the change of residence that results from the travel, coupled with the failure to register in the *new* place within the allotted three days, that SORNA reaches. *Id* at 334.

The Seventh Circuit held that from the Court's guidance in *Carr*, the elements of a section 2250 violation for failure to register are sequential, not distinct or independent. See *United States v. Sanders*, 622 F.3d 779, 783 (7th Cir.

2010). A section 2250 SORNA violation for failure to register in one state does not span the entire geographic range of states the offender has traversed, even though it might have been necessary to pass through several states before reaching the destination. The interstate travel is a necessary precursor, but it is neither a distinct crime nor an element of the crime. If it were, the Court held, and the Court conceived of the crime as beginning in Wisconsin, the Court could find itself faced with the "absurd conclusion that venue could be laid anywhere the travel occurred or evidence of the travel was located (*i.e.*, in Haslage's case, perhaps in a state such as Montana or Idaho; in Nichols's case, perhaps California)." *Id.*, at 335.

In *Haslage*, the Seventh Circuit noted that the Government's position that travel is part of the crime and allows venue in the departure state was a "glaring problem." *Haslage*, at 335. The court determined that such an approach is incorrect as the Supreme Court decided in *Nichols* that "travel even to a place outside of the United States did not transform the defendant's act of leaving Kansas into a Kansas-based SORNA violation." Furthermore, viewing *Carr* and *Nichols* together reiterates the question of the location of "where the act of eluding takes place," an answer that *Nichols* reveals is in the place of the new residence, reasoned the Seventh Circuit. *Id.*, at 335. Implementing this analysis, the court decided that Haslage's 2250 violations "began, were carried out, and ended in the place of the new residence." *Haslage*, at 336. Similarly, this Court should find that Diaz's

violation began and was carried out in New Jersey, making New York a completely improper venue, as the Seventh Circuit has made it clear that the act of leaving one's home in State A and traveling to State B is not a separable part of the offense defined in section 2250 for purposes of criminal venue, even for offenders charged under the interstate commerce section of 2250, subsection B. 853 F.3d at 334. Indeed, in countless cases the act of traveling from State A to State B will not be the predicate for any offense at all. “SORNA does not prohibit all interstate travel; it does not require registration by an offender who travels across state lines, for example, “from Chicago to Hammond, Indiana, to attend a Saturday wedding; and it places no obligation on the offender to do anything in the state of origin.” *Haslage,* at 334.

This issue was addressed correctly by the Eighth Circuit in *United States v. Lunsford,* 725 F.3d 859 (8th Cir. 2013). In *Lunsford,* the defendant sustained pre-SORNA state convictions, which made him subject to federal sex offender registration when SORNA was enacted. Lunsford, who lived and was registered at an address in Kansas City, Missouri, booked a flight to the Philippines and left the jurisdiction without updating his Missouri registration. He was arrested in the Philippines and returned to the United States to face prosecution under SORNA based on the theory that he did not update his Missouri registration to indicate a change in residence. *Id*. at 860.

Lunsford changed his residence when he moved to the Philippines. A change of residence triggers an obligation on the part of an offender to update a "jurisdiction involved" with the address of his new residence. 34 U.S.C. § 20913(c); 20914(a)(3). *Id*. at 861. SORNA's definition of "jurisdiction" excludes foreign countries, *id*. § 20911(10), so Lunsford was not required to register in the Philippines. The government's theory was that Lunsford violated SORNA when he did not supply information about his change of residence to the Missouri registry. *Id*. He was required to do so, however, only if Missouri was a "jurisdiction involved," within the meaning of SORNA, when he changed his residence. A "jurisdiction involved" is a jurisdiction where the offender resides, is an employee, or is a student. *Id*. § 20913(a), (c). The government did not argue that Lunsford was an employee or a student in Missouri at the relevant time, but contended that Missouri was a "jurisdiction involved" because it was the "jurisdiction where the offender reside[d]." *Id*. § 20913(a). But, SORNA defines "resides" to mean, "with respect to an individual, the location of the individual's home or other place where the individual habitually lives." *Id*. § 20911(13).

In *Lunsford*, the plea agreement reflected the understanding of the parties that Lunsford did not change his residence and trigger a reporting obligation until after he left the United States. But after Lunsford left the country, Missouri was not the location of his home or a place where he habitually lived, so Lunsford did not

"reside" in Missouri when he changed his residence. 725 F.3d at 861; see, 34 U.S.C. § 20911(13).

The Eighth Circuit held that "resides," is a present-tense verb, and "the present tense generally does not include the past" under 34 U.S.C. § 20913(a). *Id* (citing *Carr v. United States*, 560 U.S. 438 (2010)(citing the Dictionary Act, 1 U.S.C. § 1). There was thus no textual basis for requiring an offender to update his registration in a jurisdiction where he formerly "resided," and where he is not currently an employee or a student. Missouri was not a "jurisdiction involved" after Lunsford changed his residence to somewhere in the Philippines, so Lunsford was not required by the federal statute to update the Missouri registry. 725 F.3d at 861-862.

The Sixth Circuit, relying upon the Supreme Court's decision in *Nichols*, has also held that 42 U.S.C. § 16913 does not require state offenders to update their registration in the jurisdictions they have left when they relocate to another jurisdiction, and vacated the defendant's conviction of failing to register under SORNA in the departure state. *Carr v. United States*, 660 F. App'x 329, 332 (6th Cir. 2016).

As it is the legislature's role to define what constitutes a crime, circuit courts that decide a SORNA violation begins when an offender leaves one state and is completed when they reside in another state, conflict with the separation of

powers. As this Court has stated, "the hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983). It is not the role of the judiciary to elaborate on or extend elements of crimes, including defining a failure to register under SORNA as beginning in one state and ending upon residing in another state. Such extensions result in unfairly expanding liability to offenders and also undermine the authority of the legislative branch to establish what constitutes an offense.

No federal crime was committed in the Southern District of New York in Diaz's case because no crime was committed until Diaz resided in New Jersey for three days without registering. The government alleged that Diaz resided in New Jersey, as demonstrated by their introduction of evidence concerning Diaz's New Jersey driver's license and New Jersey voting registration. This was to prove that Diaz was living in New Jersey at the time he failed to register as a sex offender. Therefore, if anything, Diaz should have been prosecuted in New Jersey for failing to register, not New York, where the government failed to prove an offense was committed.

Moreover, in *United States v. Miller*, No. 2:10-CR-196 2011 WL 711090, at *5 (S.D.Ohio Feb. 22, 2011), an Ohio district court granted the state offender's motion to dismiss for improper venue. Miller had previously pleaded guilty to

abduction and gross sexual imposition in state court, and had been sentenced to two years in prison. Because of this conviction, he was required to register as a sex offender under SORNA and did so in Ohio. Miller later sent an email to an Ohio Deputy, stating that he was living in his car somewhere in West Virginia. The deputy alleged that there was probable cause to believe that Miller had failed to update his sex offender registration in Ohio and in West Virginia as required by SORNA. Based on that, Miller was arrested and indicted in the Southern District of Ohio. Miller moved to dismiss the indictment for improper venue arguing that because he did not establish a new residence in Ohio and was not physically present in Ohio for more than 3 business days, Ohio was not "a jurisdiction involved" and he had no duty to update his registration information in Ohio.

The District Court addressed the issue of whether an individual who traveled from one state to another engaged in criminal conduct in the State he initially left. The Court held that the "criminal act itself takes place entirely within the district where the offender had a duty to register [but] failed to do so;" noting that the requirement of "interstate travel is more like a condition precedent than an essential element of the crime." This reiterates the fact that Diaz's criminal conduct took place in New Jersey, where he failed to register, and therefore, because no crime occurred in New York, venue was improper there.

In *United States v. Bailey*, No. 2:13-cr-00094, 2014 U.S. Dist. LEXIS

16402, at *17-18, 2014 WL 534193 (S.D. W. Va. Feb. 10, 2014), the Court held that the plain language of § 20913(c) (formerly cited as § 16913(c)) required the defendant, a state offender, to keep his registration current in "at least one" of three possible places, that is, where he: (1) resides; (2) is an employee; and (3) is a student. The Court held that after the Defendant moved to Ohio and no longer resided in West Virginia, the only jurisdiction that met the requirements of § 20913(c) (formerly cited as § 16913(c)) was Ohio. *Id*

As held by the Supreme Court in *Nichols*, the Eighth Circuit in *Lunsford*, the Seventh Circuit in *Haslage*, the Sixth Circuit in *Carr*, and these two district courts under the plain wording of SORNA, Diaz was not obligated to update his New York registration after he moved to New Jersey, since New York was no longer his current residence. As mentioned above, according to the Adam Walsh Child Protection and Safety Act, the "jurisdiction involved," is the one that the defendant resides in, is a student or works in. It is not the state that the individual left. *Nichols* at 1117-1118; *Lunsford*, 725 F.3d 859 at 861-862; *Haslage*, 853 F.3d at 334; *Carr*, 660 F. App'x at 332. Since the Supreme Court's decision in *Nichols*, only this Circuit and the Eleventh Circuit (in an unpublished case) have held that for a state offender, venue for a SORNA violation is appropriate in the departure state. *United States v. Lewallyn*, 737 F. App'x 471, 475 (11th Cir. 2018); *United States v. Holcombe*, 883 F.3d 12, 16 (2d Cir. 2018).

However, as discussed above, this Court also recognized in *Holcombe* that a federal offender, like Diaz, does not need to travel interstate to commit a SORNA offense. *See* 18 U.S.C. § 2250(a)(2)(A). *Holcombe*, 883 F.3d 12, 16 (2d Cir. 2018). In fact, as the Supreme Court emphasized in *Carr*, Section 2250 criminal liability has two alternate sources of power to achieve Congress's aim of broadly registering sex offenders." *Carr*, 560 U.S. at 451. Thus, for the reasons stated above, the government should not have been permitted to supersede the indictment in order to circumvent Diaz's right to be tried in the state in which the criminal conduct occurred.

Alternatively, if this Court rejects Diaz's argument that a federal offender may not be charged as a state offender to evade Constitutional venue requirements, the Court should order *en banc* review of this case to re-asses *Holcombe* because *Holcombe's* holding that venue is proper in the "departure" state, does not adequately distinguish *Nichols* and ignores the Supreme Court's long line of cases only conferring jurisdiction in the state in which the law required performance of an act. *Lombardo*, 241 U.S. at 76-78; *Anderson*, 328 U.S. at 705, *Johnston*, 351 U.S. at 220, *Travis*, 364 U.S. at 636.

Moreover, as it is the legislature's role to define what constitutes a crime, circuit courts that decide a SORNA violation crime begins when an offender leaves one state and is completed when they reside in another state, conflict with the

separation of powers. Respectfully, it is a contortion of the SORNA statute to hold that a SORNA violation begins when an offender leaves a state. Under the plain meaning of the SORNA statute, the crime begins when the offender has resided in a state for three days and has failed to register. As the Court noted in *Haslage,* under the departure state theory, if an offender traveled through several states before arriving in the state of his new residence, venue would be proper in any and all of the states the offender traveled through before arriving at the state of the offender's new residence. This would be a very awkward result. Rather, the crime simply does not begin until the offender establishes residence for three days and fails to register. It is not the role of the judiciary to elaborate on or extend elements of crimes, including defining a failure to register under SORNA as beginning in one state and ending upon residing in another state, which is what has happened in cases like *Holcombe*. Such extensions result in unfairly expanding liability to offenders and also undermines the authority of the legislative branch to establish what constitutes an offense

Consequently, the District Court erred in its finding that the failure to register crime in violation of 18 U.S.C. § 2550, began in New York. In fact, no federal crime was committed in the Southern District of New York because no crime was committed until Diaz resided in New Jersey for three days without registering. Consequently, the District Court erred by failing to dismiss the

indictment. *Nichols* at 1117-1118; *Lunsford,* 725 F.3d 859 at 861-862; *Haslage,* 853 F.3d at 334; *Carr*, 660 F. App'x at 332.

In sum, because the government failed to prove that any element of a SORNA violation occurred in New York, the District Court erred when it denied Diaz's motion to dismiss his indictment for improper venue. Consequently, Appellant's conviction should be reversed and a new trial ordered.

Point II

The District Court Erred in Holding that Appellant Could Not Prove that His Prior Conviction was Obtained in Violation of the Constitution.

Standard of Review

This Court reviews a district court's ruling regarding a dismissal of an indictment, which "raises questions of constitutional interpretation," de novo. *United States v. King*, 276 F.3d 109, 111 (2d Cir. 2002) (reversing dismissal of indictment because statute in question was "a permissible exercise of Congressional authority under the Commerce Clause"). This standard of review comports with the Court's "customary approach to questions of statutory interpretation and constitutionality." *See United States v. Pettus*, 303 F.3d 480, 483 (2d Cir. 2002) (reviewing a "question of statutory interpretation and of the constitutionality of [a statute] *de novo*"); *Muller v. Costello*, 187 F.3d 298, 307 (2d Cir. 1999). In construing a statute, courts "begin with its language and plain

meaning.” See *United States v. Koh*, 199 F.3d 632, 636 (2d Cir. 1999); *United States v. Figueroa*, 165 F.3d 111, 114 (2d Cir. 1998); *United States v. Proyect*, 989 F.2d 84, 87 (2d Cir. 1993) ("When the language of the statute is clear, its plain meaning ordinarily controls its construction."). "However, where statutory language is ambiguous a court may resort to the canons of statutory interpretation and to the statute's legislative history to resolve the ambiguity." *Canada Life Assurance Co. v. Converium Ruckversicherung (Deutschland) AG*, 335 F.3d 52, 57 (2d Cir. 2003).

Applicable Law

The precursor to a conviction for failing to register as a sex offender under the Sex Offender Registration and Notification Act (“SORNA”) is the requirement to register. 18 U.S.C. § 2250(a)(1). Under 18 U.S.C. § 2250, individuals convicted as sex offenders under Federal law (including the Uniform Code of Military Justice) or the law of any United States territory; or those who travel in interstate or foreign commerce and knowingly fail to register or update their registration as required by SORNA, shall be fined or imprisoned not more than 10 years, or both. 18 U.S.C.S. § 2250.

SORNA permits a finding that a foreign conviction is not a sex offense under SORNA if “it was not obtained with sufficient safeguards for fundamental

fairness and due process for the accused under guidelines or regulations established under section 112." 34 U.S.C. § 20911 (5)(B).

Diaz Should Have Been Permitted to Argue that His Underlying Conviction was Obtained in Violation of the Constitution

In its decision denying Diaz's motion to dismiss his indictment and holding that Diaz could not prove his prior conviction was obtained in violation of the constitution, the District Court relied on decisions such as *Custis v. United States*, 511 U.S 485 (1994), which held that with the sole exception of convictions obtained in violation of the right to counsel, a defendant in a federal sentencing proceeding has no right to collaterally attack the validity of previous state convictions used to enhance his sentence under the Armed Career Criminal Act. The Court reasoned that a felon-in-possession statute "focuses on the fact of the conviction and [that] nothing suggests that the prior final conviction may be subject to collateral attack for potential constitutional errors before it may be counted" in a subsequent prosecution. The Court also relied upon *Lewis v. United States*, 445 U.S. 55, 67 (1980), which held that the felon-in-possession statute did not "open the predicate conviction to a new form of collateral attack." However, these decisions are not analogous to the current case given the fact that the Court held that a defendant cannot challenge the underlying conviction at a *sentencing* proceeding.

In addition, *Custis* is distinguishable from the case at hand. *Custis* dealt with 18 U.S.C. § 924(e) and the Court compared it to 21 U.S.C. § 851. Both of these statutes provide for enhanced sentencing based on prior convictions, making the prior convictions relevant only if the defendants are found guilty of the current charges. The prior convictions can be introduced for an enhancement of the current sentence if the defendant is found guilty. However, under 18 U.S.C. § 2250, which Appellant has been convicted of in the current case, the prior conviction is an element of the offense. Without a prior conviction for a sex offense, a defendant would not be charged with violating 18 U.S.C. § 2250. Thus, because the prior conviction of a sex offense is an element of SORNA, and is necessary to sustain a conviction under 18 U.S.C. § 2250, it would be expected that the legislature intended to allow a challenge to a predicate conviction under 18 U.S.C. § 2250. Put another way, because 18 U.S.C. § 2250 fully relies on there being a prior conviction for a sex offense, it would be irrational to suggest that no challenge could be brought to the prior conviction when being charged with 18 U.S.C. § 2250. Moreover, not only does SORNA suggest that a predicate conviction can be challenged, but SORNA includes an explicit unfair conviction exception, 34 U.S.C § 20911 (5)(B).

The unfair conviction exception provides that when the predicate sex offense foreign conviction has not been obtained fairly or with due process protections, it

will not be considered a registrable offense under SORNA. This indicates that Congress took care to safeguard an individual from being required to register as a sex offender potentially for his entire life, based upon a conviction obtained unfairly and without due process protections, which our system of justice recognizes is an indication that the conviction may not be reliable. The unfair conviction exception does not exist in the Armed Career Offender Act. So, while SORNA mandates that a foreign, unfair conviction is not a sex offense for the purposes of SORNA "if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused…" 34 U.S.C.A § 20911 (5)(B), the ACCA lacks such protections and cases such as *Custis*[2] and *Lewis* are not binding. In addition, *Custis* and *Lewis*, are not cases where the prior conviction is an element of the crime. Hence, the District Court's decision relying on decisions like *Custis* and *Lewis* in order to deny Diaz's motion to dismiss on the grounds of an invalid prior conviction was incorrect because the ACCA lacks the

[2] Alternatively, the Court's interpretation of the felon-in-possession statute in *Custis* is incorrect. The Court erroneously concluded that because Congress chose to explicitly include language to allow challenges to prior convictions under 21 U.S.C. § 851(c), Congress' silence in 18 U.S.C. § 924(e), indicate that Congress did not intend to give defendants the right to challenge prior convictions. *Custis*, 511 U.S. at 492. Such an interpretation overlooks the fact that a defendant's due process rights are embedded in the Constitution and Congress could not deny such rights. Additionally, if the court in *Custis* decided that a defendant could not argue that his prior conviction was obtained in violation of the Constitution, unless the challenge was founded upon a violation of the right to counsel, it does not make sense that a challenge not be permitted for a violation of due process or a conviction that was otherwise obtained unfairly.

unfair conviction exception and the prior conviction is not an element of the crime as it is in SORNA.

Additionally, the unfair conviction exception of SORNA is applicable to Diaz's case even though the conviction that he alleged was the result of unfair proceedings and conducted in violation of due process protections was obtained not by a foreign government, but by our own government by court martial, because the foreign conviction exception is irrational unless also applied to American convictions. The practical result of only applying the exception to foreign convictions would be that if an individual has an unfair trial in the United States, there is no relief, but an individual who had an unfair trial in a foreign country would have relief. Imagine this occurring before the same District Court, while the families of the American "sex offender" watch in utter disbelief and horror. We protect those convicted overseas in foreign countries from unfair convictions but not, in this case, a man who served his country honorably for twenty years overseas while our own military railroads him.

Such an interpretation is illogical and irrational because Congress' decision to include an unfair conviction exception illustrates the intent of the drafters of the SORNA statute to exclude from the category of registrable offenses convictions obtained unfairly and without due process.

In drafting SORNA, it is reasonable to presume that Congress (incorrectly) assumed that all convictions in the United States are obtained fairly and this is why the statutes' wording only mentioned an exception for foreign convictions that were unfairly obtained. It would be implausible to suggest that only foreign convictions are vulnerable to having been obtained unfairly or that an individual who suffered an unfair trial in Venezuela or Cambodia would be able to obtain relief, but one who had an unfair trial in the United States would not. Therefore, the intent of the SORNA statute would be satisfied if a defendant could challenge an underlying conviction "if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused," no matter where the injustice occurred.

The fact that SORNA extends protections of fundamental fairness and due process to foreign convictions indicates that it also recognizes these rights to those in the United States. To suggest otherwise would be unreasonable and absurd, especially considering that every person in the United States is guaranteed constitutional rights such as due process and fair proceedings. After all, defense attorneys serve to defend the rights of the accused, especially during court proceedings. Thus, why would the legislature intend to ensure that foreign convictions are obtained with fundamental fairness and due process under SORNA, but not those convictions obtained in the United States?

The District Court's decision to preclude Diaz from challenging his underlying conviction violates Federal Rule of Evidence 104(e). FRE 104(e) states that while a court decides what evidence is admissible, rule 104 "does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence." Fed. R. Evid. 104(e). Thus, Diaz's right and opportunity to contest the government's evidence that Diaz had a prior conviction as an element of his current conviction, was denied under FRE 104(e). By not allowing Diaz to challenge his underlying conviction, Rule 104(e) was violated as Diaz was prevented from introducing evidence to challenge the credibility of his prior conviction.

In sum, because the language in SORNA suggests that a predicate conviction can be challenged, especially given the unfair conviction exception, because the legislature could not have rationally intended to only allow challenges to foreign convictions but not unfair convictions in the United States, and because Federal Rule of Evidence 104(e) does not limit a party's ability to contest evidence, the District Court erred when it denied Diaz the right to prove that his prior conviction was obtained in violation of the constitution. Consequently, Appellant's conviction should be reversed and a new trial ordered.

Rule of Lenity

Appellant is cognizant of the fact that in Point II, he is asking the Court to interpret the unfair conviction exception of SORNA in an unstated but rational manner, arguably broadly, but in Point I, he is asking the court to allow the legislature to be the one who clearly defines the breath of the SORNA statute, advocating an arguably narrow interpretation. The difference between Point I and II, however, is that in Point I, Diaz is asking the Court to narrowly interpret SORNA, and the result is consistent with the rule of lenity applied in criminal cases, that statutes are interpreted narrowly to prevent a defendant from being subject to prosecution for a crime that Congress did not intend to subject the criminal to. And similarly, in Point II, Appellant is asking the court to interpret the statute in the only logical way and in the way that would prevent a defendant from suffering a conviction unfairly, also consistent with the rule of lenity. The rule of lenity “requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008); *Rewis v. United States*, 401 U.S. 808, 812 (1971)("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."). The rule of lenity is premised on two ideas: First, "'a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed'"; second, "legislatures and not courts should

define criminal activity." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n. 18, (1995)(quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)); *see Whitman v. United States*, 574 U.S. 1003, 1005 (2014)(mem)(noting that the rule of lenity vindicates "equally important" principles of fair notice to would-be violators and "that only the *legislature* may define crimes and fix punishments.").

Point III

The Sex Offender Registration Act Violates the Constitution.

Standard of Review

This Court reviews a district court's ruling regarding violations of the Constitution, de novo. *United States v. King*, 276 F.3d 109, 111 (2d Cir. 2002) (reversing dismissal of indictment because statute in question was "a permissible exercise of Congressional authority under the Commerce Clause"). This standard of review comports with the Court's "customary approach to questions of statutory interpretation and constitutionality." *See United States v. Pettus*, 303 F.3d 480, 483 (2d Cir. 2002) (reviewing a "question of statutory interpretation and of the constitutionality of [a statute] *de novo"*); *Muller v. Costello*, 187 F.3d 298, 307 (2d Cir. 1999). In construing a statute, courts "begin with its language and plain meaning." See *United States v. Koh*, 199 F.3d 632, 636 (2d Cir. 1999); *United States v. Figueroa*, 165 F.3d 111, 114 (2d Cir.

1998); *United States v. Proyect*, 989 F.2d 84, 87 (2d Cir. 1993) ("When the language of the statute is clear, its plain meaning ordinarily controls its construction."). "However, where statutory language is ambiguous a court may resort to the canons of statutory interpretation and to the statute's legislative history to resolve the ambiguity." *Canada Life Assurance Co. v. Converium Ruckversicherung (Deutschland) AG*, 335 F.3d 52, 57 (2d Cir. 2003).

Applicable Law

The Eighth Amendment of the U.S. Constitution states that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII. This Amendment serves to prohibit the government from imposing unduly punitive or harsh penalties on criminal defendants.

Under the Fifth Amendment, “no person shall . . .be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. “The State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . .” *Green v. United States*, 355 U.S. 184, 187–88 (1957).

The Sex Offender Registration Act is Excessively Punitive

The Sex Offender Registration Act runs afoul of the Constitutions as its laws are punitive and excessively punish offenders. This Court should revisit it's holding that New York's sex offender registration laws are not "punitive" in nature and therefore do not "invoke the protections" of the Double Jeopardy Clause, the Eighth Amendment or the procedural safeguards of the 5th and 6th amendments. *Doe v. Pataki*, 120 F.3d 1263, 1271, 1284 (2d Cir. 1997). At the time that *Pataki*, was decided, New York's sex offender registration laws had only been in effect for approximately a year and a half. At that time, there was little knowledge of how drastically registering as a sex offender disrupted the lives of those who are required to register. However, since this Court's decision in *Pataki*, much empirical evidence has demonstrated that sex offender registration laws are unconstitutional because instead of serving its purpose in reducing recidivism, these laws actually increase recidivism rates, as they make it more difficult for offenders to reintegrate back into society.

As a result of the sex offender registration requirements, Diaz lost his job and continued to have various job offers rescinded because of his status as registered sex offender. Moreover, as a registered sex offender, Diaz is not eligible for low income housing, which is necessary as a result of his limited income. Such lifetime deprivations, deny Diaz a quality standard of life and amount to cruel and unusual punishment in violation of the Eighth Amendment.

Compelling Diaz to follow the sex offender registration requirements also results in public shaming. "Public shaming and banishment are forms of punishment that may be considered cruel and unusual under the Eighth Amendment." *Millard v. Rankin*, 265 F. Supp. 3d 1211, 1226–27 (D. Colo. 2017)(citing *Smith v. Doe*, 538 U.S. 84, 109 (2003) (Souter, J., concurring)). Courts have recognized that "these laws serve to shame, isolate, and ostracize the convicted offender." Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 Hastings L.J. 1071, 1113 (2012)(See, e.g., *Smith v. Doe*, 538 U.S. at 99 ("It must be acknowledged that notice of a criminal conviction subjects the offender to public shame, the humiliation increasing in proportion to the extent of the publicity. And the geographic reach of the Internet is greater than anything which could have been designed in colonial times."); see also *Neal v. Shimoda*, 131 F.3d 818, 829 (9th Cir. 1997) ("We can hardly conceive of a state's action bearing more 'stigmatizing consequences' than the labeling of a prison inmate as a sex offender."); *Doe v. Pryor*, 61 F. Supp. 2d 1224, 1231 (M.D. Ala.1999)("[C]ommunity notification under the Act will seriously damage [a registrant's] reputation and standing in the community."); *Young v. State*, 806 A.2d 233, 249 (Md. 2002) ("Being labeled as a sexual offender within the community can be highly stigmatizing and can carry the potential for social ostracism.")).

Currently, political pressure has made sex offenders a loathed group in our country. *See* Shiela T. Caplis, *Got Rights? Not if You're a Sex Offender in the Seventh Circuit*, 2 Seventh Cir. Rev. 115 (2006)(describing the convicted sex offender as perhaps the most despised and unsympathetic member of American society noting the general trend to strip convicted sex offenders of their rights). Hence, enforcing the registration requirements, after offenders have already served prison sentences and "done their time," only adds to their punishments and furthers the stigma surrounding them, forcing society to view these offenders through an intolerable lens. Such penalties are overly punitive. Courts have found that similarities to historical forms of punishment (such as suffering from "the indignity of being unable to find housing . . . maintaining the sex offender registry, requiring internet publication of information on the registry, and permitting republication of the information by private websites") weigh in favor of finding that [sex offender registration acts'] effects are punitive. *Rankin*, 265 F. Supp. at 1227,1229.

As noted by Justice Stevens in his dissent in *Smith v. Doe*, 538 U.S. 84, 113, 114 (2003), "... it will never persuade me that the registration and reporting obligations that are imposed on convicted sex offenders and no one else, as a result of their convictions, are not part of their punishment." In Justice Stevens' opinion, "a sanction that (1) is imposed on everyone who commits a criminal offense, (2) is not imposed on anyone else, and (3) severely impairs a person's liberty, is

punishment." *Id*. While offenders are sentenced to periods of incarceration for their offenses, in reality their sentences are actually lifelong in that registration laws require lifetime registration and notification for some offenders. Registration laws are a life sentence that sex offenders cannot escape and thus have no fair chance to reintegrate back into society as they are shunned by community members. As explained by Justice Ginsburg's dissent in *Smith*, "the Act makes no provision whatever for the possibility of rehabilitation: Offenders cannot shorten their registration or notification period, even on the clearest demonstration of rehabilitation or conclusive proof of physical incapacitation. However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation." *Smith*, 538 U.S.at 117.

Sex offender registration laws not only penalize sex offenders in an overly punitive manner, but are also an ineffective solution to tackling sex crimes. While state legislatures and federal courts have accepted the assumption that sex offender registration acts reduce recidivism rates, "empirical studies have not supported this assumption…these laws do, however, impact the public's perception of sex offenders in a manner that negatively impacts these sex offenders' lives and makes them *more* likely to recidivate." Early research on the effectiveness of Sex Offender Registration Acts "found no 'statistically significant' reduction in

recidivism rates of sex offenders" after the enactment of Sex Offender Registration Acts. Joshua E. Montgomery, *Fixing A Non-Existent Problem with an Ineffective Solution: Doe v. Snyder and Michigan's Punitive Sex Offender Registration and Notification Laws*, 51 Akron L. Rev. 537, 570 (2017)(citing J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Law Affect Criminal Behavior?*, 54 J. L. & ECON. 161, 162-163 (2011)). More recently conducted research has found "little evidence that [Sex Offense Registration Acts] have had any meaningful influence on the overall number of sex offenses." *Montgomery, Id*. at 570 (citing *Prescott & Rockoff*, at 163). Some studies have suggested that sex offender registration acts ". . . actually *increase* the risk of recidivism, likely because the restrictions imposed by such laws exacerbate recidivism risk factors by making it extremely difficult for registrants to re-integrate into society." *Montgomery, Id*. at 550. Studies have found that other types of offenders, such as drug offense offenders and public-order offenders, have much higher re-arrest rates than that of sex offenders. *Montgomery, Id*. at 565 (citing *U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994* (2003)). "Research comparing the recidivism rates of sex offenders with those of non-sex offenders consistently finds that sex offenders have lower overall recidivism rates than non-sex offenders." Ryan W. Porte, *Sex Offender Regulations and the*

Rule of Law: When Civil Regulatory Schemes Circumvent the Constitution, 45 Hastings Const. L.Q. 715, 727 (2018)(citing Roger Przybylski, *Dep't of Just.*, *Recidivism of Adult Sexual Offenders, Sex Offender Management Assessment and Planning Initiative* (2015)).

Furthermore, the sex offender registration hearing that is required under the Sex Offender Registration Act is ultimately a second sentencing hearing founded on the same conviction, violating the Double Jeopardy Protection of the Fifth Amendment. In addition, following the completion of a sentence imposed by the court, requiring mandatory notification and registration results in a second punishment. "Where a second punishment is imposed for the same crime, the statute violates the prohibition against double jeopardy on its face." Robin L. Deems, *California's Sex Offender Notification Statute: A Constitutional Analysis*, 33 San Diego L. Rev. 1195, 1216 (1996).

In sum, history as well as empirical studies have shown that sex offender registration acts are not only punitive, but are in fact cruel and unusual punishment and violate the double jeopardy clause, and do not serve the intended purpose of preventing recidivism. Consequently, this Court should revisit its holding in *Pataki* that sex offender registration acts are not punitive.

Alternatively, in the event that intervening case law recognizes Diaz's view, Diaz has not waived his claim and will not be procedurally barred from seeking

collateral review. See *United States v. Frady,* 456 U.S. 152, 168 (1982)(Under the procedural default doctrine, if a § 2255 movant could have raised a claim at trial or on direct appeal, but did not, § 2255 relief on that claim is deemed waived); *Bousley v. United States*, 523 U.S. 614, 622 (1998)(A litigant procedurally defaults on a claim if he fails to raise the claim when it could have been "fully and completely addressed on direct review based on the" record on appeal).

Conclusion

For the reasons set forth in Points I, II, and III, Appellant's conviction should be reversed and a new trial ordered.

Dated: December 17, 2019
New York, New York

ROBIN C. SMITH, ESQ.
LEEAN OTHMAN, ESQ.
Law Office of Robin C. Smith, Esq., P.C.
Attorney for Appellant
99 Wall Street Suite 901
New York, New York 10005
(415) 726-8000

CERTIFICATE OF COMPLIANCE

1. This brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.

2. Exclusive of the table of contents; table of citations; certificate of compliance and the certificate of service, this Opening Brief of Appellant contains 11,934 words.

I understand that a material misrepresentation can result in the court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and a copy of the word or line printout.

December 17, 2019

ROBIN C. SMITH, ESQ.
LEEAN OTHMAN, ESQ.
Law Office of Robin C. Smith, Esq., P.C.
Attorney for Appellant
99 Wall Street Suite 901
New York, New York 10005
(415) 726-8000

CERTIFICATE OF SERVICE

In accordance with Rule 25 of the Rules of the United States Court of Appeals for the Fourth Circuit, I hereby certify that I have this December 17, 2019, filed electronically using the Court's CM/ECF system which will send notification to all parties of record.

ROBIN C. SMITH, ESQ.
LEEAN OTHMAN, ESQ.
Law Office of Robin C. Smith, Esq., P.C.
Attorney for Appellant
99 Wall Street Suite 901
New York, New York 10005
(415) 726-8000