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

REPLY BRIEF OF APPELLANT

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POINT I

THE GOVERNMENT'S CLAIMS THAT THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTIONS TO DISMISS FOR LACK OF VENUE SHOULD BE REJECTED.

The government concedes that a motion for lack of venue is reviewed by the Second Circuit *de novo* (G.B. 16). The District Court erred when it denied Appellant's motion to dismiss for improper venue.

The Superseding Indictment charged that in the Southern District of New York, Appellant, who was required to register under SORNA, traveled and failed to register and update his registration as required by SORNA. The Indictment alleged that Appellant moved from New York to "another state" and failed to register there as required by SORNA. The government argues that Appellant waived review of his improper venue claim on appeal because his venue objection in the District Court was untimely (G.B. 14). However, the sequence of events leading up to trial demonstrates that any claim that Appellant waived his improper venue argument must be rejected. On February 5, 2018, Appellant requested that defense counsel be discharged. Appellant elected to proceed pro se on March 1, 2018 and counsel was relieved on March 2, 2018. On November 16, 2018, the District Court instructed the Government to submit an explanation of whether in light of *Nichols v. United States*, 136 S. Ct. 1113 (2016), the superseding

indictment they wanted to file properly stated an offense and whether venue was proper. The Government submitted their explanation letter on November 18, 2018 and filed the superseding indictment on November 19, 2018, changing the theory of prosecution. Rather than charging Appellant as a federal offender under 18 U.S.C. §2250(a)(2)(A), the government charged Appellant 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.

On November 20, 2018, the District Court instructed Appellant that he could file a motion to argue the venue issue or it would be waived. On November 26, 2018, a Court Order instructed Appellant that if he wished to file any pretrial motions relating to the indictment, he needed to do it by December 21, 2018. Appellant moved to dismiss for improper venue on February 23, 2019 and the trial began on February 25, 2019. While the Government contends that the "District Court did not abuse its discretion or otherwise err in denying Diaz's venue motion for untimeliness without good cause," (G.B. 15), as detailed by the sequence of

events above, the District Court erred when it gave Appellant only less than a month on a complex issue. Appellant had good cause as he was navigating through the judicial process pro se and clearly did not understand the concept of venue and what legal grounds he had to oppose venue in the Southern District of New York, as evidenced by his response to the Court on November 20, 2018, when he responded "vaguely" to the Court's inquiry about whether he understood the Government's venue theory (Dkt. 117). Appellant asked whether this theory was in a motion filed by the government and the Court responded that "this aspect wasn't really briefed…this was when the Court issued an order last week asking for an explanation from the government" and that the government had "changed the theory of the indictment." The Court explained that the government altered their theory from Appellant failing to update his New York registration to, he failed to register in his new state of residence. Appellant asked whether they were allowed to change their theory, and the Court responded in the affirmative and advised Appellant that he could move to dismiss but that the Court "did not recommend it." The Court proceed to arraign Appellant on the new superseding indictment. The legal language in the indictment is complex especially for a lay person. Appellant, who was fully *pro se,* did not understand the meaning of venue until a week prior to trial after extensive online research and hence, no waiver should have applied.

While the Government cites *United States v. Khan*, 821 F.2d 90, 93 (2d Cir. 1987) to support its argument that venue is waived when the venue defect is apparent on the face of the indictment and the defendant fails to object, *Khan* is distinguishable in that the defect was not apparent on the face of Appellant's indictment. Appellant's indictment stated "…in the Southern District of New York and elsewhere…" In *United States v. Novak*, 443 F.3d 150, 161 (2d Cir. 2006), a case that was also used by the Government to support its waiver contention, actually supports Diaz's argument that the waiver should not be applied. The *Novak* court decided that the fact that the defendant's indictment included the "and elsewhere" language could have led the defendant to reasonably believe that "and elsewhere" meant that the Government intended to produce evidence at trial linking his crimes to both the Southern and Eastern Districts. Thus, the venue defect was not evident on the face of the indictment and the venue objection made at the close of the Government's evidence was timely. *Id*.

Similarly, the venue defect was not apparent on the face of Appellant's indictment as the "and elsewhere" language coupled with "did travel…" and "resided…without registering as a sex offender in **that state**," could have reasonably led Appellant to believe that the Government intended to produce evidence at trial linking his crime to another district or state. Appellant's indictment was very unspecific, especially in relation to the "that state" language.

Where was Appellant required to register? Whether did he fail to register? The venue defect was not apparent on the face of the indictment as the indictment was significantly nebulous. Therefore, no waiver should have applied in Appellant's case.

While the Government also relies on *Khan* and *United States v. Levasseur*, 816 F.2d 37, 45 (2d Cir. 1987) to argue that a defendant waives their right to contest venue when the motion is untimely and the indictment gives clear notice of venue defects, the cases are distinguishable. While the defendant in *Levasseur* objected to venue at the close of the government's case, *Id*., and the defendant in *Khan* did not object until the end of the first day of trial, 821 F.2d at 93, Appellant in the instant case objected by filing his motion two days *prior* to trial. Waiver should not have applied as Appellant, even with the lack of knowledge as a lay person, objected to venue *before* the trial began, unlike defendants in the cases cited by the Government, who waited until after trial had started, or at the close of the government's case. Additionally, the cases relied on by the government do not involve pro se defendants, unlike Appellant who was pro se and had to navigate through the judicial process with insufficient legal knowledge. "A party appearing without counsel is afforded extra leeway in meeting the procedural rules governing litigation, and trial judges must make some effort to protect a party so appearing from waiving a right to be heard because of his or her lack of legal knowledge."

Enron Oil Corp. v. Diakuhara, 10 F.3d 90, 96 (2d Cir. 1993)(citing *Traguth v. Zuck*, 710 F.2d 95 (2d. Cir. 1983); *Haines v. Kerner*, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972)). Courts "have traditionally given pro se litigants greater leeway where they have not followed the technical rules of pleading and procedure." *Tabron v. Grace*, 6 F.3d 147, 153 n.2 (3d Cir. 1993)(citing *Riley v. Jeffes*, 777 F.2d 143, 147-48 (3d Cir. 1985); *Siers v. Morrash*, 700 F.2d 113, 116 (3d Cir. 1983)).

The government also contends that Appellant's reliance on *Nichols v. United States*, 136 S. Ct. 1113 (2016) and *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013) is "misplaced," as these cases did not specifically address venue, (G.B. 21), however, these cases are relevant as they hold that defendants did not have to update their SORNA registrations or notify the jurisdictions in which they left. Thus, venue would be improper in the departure jurisdictions for SORNA violations. The only jurisdictions that defendants were required to update their registrations in and the only "jurisdiction[s] involved," would location of new residence. *Nichols*, 136 S.Ct. at 1117-1118; *Lunsford*, 725 F.3d at 861-862. Therefore, while these cases did not explicitly address venue as an issue, they both support the notion that venue is proper where the act of eluding takes place, or more specifically, where the act of failing to register under SORNA takes place, the new place of residence. Hence, in the instant case, that would be New Jersey.

Venue was improper in New York as Appellant was not required to notify New York or update his registration there when he left for New Jersey. Additionally, while *Nichols* did not specifically mention venue, if Appellant had gone to the Philippines (as did the defendant in *Nichols*) instead of New Jersey, there would be no current case against Appellant because there would be no violation of the statute until the individual leaves somewhere and resides there. As decided by *Nichols*, there is no crime in the departure state because there is no requirement to update registration there. *Nichols*, 136 S.Ct. at 1117-1118. Accepting venue in New York cannot be reconciled with *Nichols*.

While the government argues that venue is proper in the location where an offense begins (G.B. 17), although in the instant case no offense began in New York, the Supreme Court has made it 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. See *Travis v. United States*, 364 U.S. 631 (1961); *United States v. Anderson*, 328 U.S. 699, 705 (1946); *United States v. Lombardo*, 241 U.S. 73, 76-78 (1916). Failing to update your SORNA registration would be failing to perform a legally required act. In the instant case, that would make New Jersey the proper location for venue. The government contends that the Supreme Court cases that support this notion do not apply in the instant case because "those cases involved criminal offenses that lacked an interstate-travel element" (G.B.

21). However, the fact that the Supreme Court cases "lacked an interstate-travel element," is irrelevant, as demonstrated in *Johnston v. United States*, 351 U.S. 215, 220 (1956), where the Supreme Court, after finding that venue was proper in the districts where the work was failed to be performed, stated 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*. The term "general" implies that the Court intended the rule to apply to all criminal circumstances/offenses and not only where there is an "interstate-travel element." It would be irrational to believe that, as the Court explicitly called it a "general rule," indicating it should apply whenever a criminal offense is committed.

In addition, the Supreme Court's ruling in *Travis* mandates that venue is only proper in New Jersey. In *Travis*, venue was proper only in the District of Columbia, where the affidavits executed by the defendant in Colorado and mailed to the District of Columbia, were required to be on file with the board. *Travis*, 364 U.S. at 635-636. The Court decided that "where Congress is not explicit, 'the *locus delicti* must be determined from the nature of the crime alleged and the location of the act of acts constituting it.'" *Id*. at 635 citing *United States v. Anderson*, 328 U.S. 699, 703. The Court explained that "the false statement statute, under which the prosecution is brought, penalizes him who knowingly makes any 'false'

statement 'in any matter within the jurisdiction of any department or agency of the United States.' There would seem to be no offense, unless petitioner completed the filing in the District of Columbia. The statute demanded that the affidavits be on file with the Board before it could extend help to the union; the forms prescribed by the Board required the filing in the District of Columbia; the indictment charged that petitioner filed the affidavits there. The words of the Act – 'unless there is on file with the Board' -- suggest to us that the filing must be completed before there is a 'matter within the jurisdiction' of the Board within the meaning of the false statement statute." *Travis*, 364 U.S. at 635-636. While the government argues that "*Holcombe's* holding that venue to prosecute a violation of SORNA's Interstate Travel Clause lies in any district 'where the interstate journey begins,'" 883 F.3d at 15, and that because the "interstate journey alleged in the S1 Indictment and proven at trial 'beg[an]' in the Southern District of New York, where Diaz resided for years before moving to New Jersey, venue in the Southern District of New York was proper," (G.B. 19), the Supreme Court rejected this similar argument in *Travis*, which is similar to the government's argument in Appellant's case and how the Court held in *Holcombe*.

In *Travis*, the government argued that venue was proper in Colorado because the offense had its "beginning" there and it was there that the defendant set in motion "the train of events" which resulted in the completion of the offense.

Travis, 364 U.S. at 361. The Court did not agree and stated that "venue should not be made to depend on the chance use of the mails, when Congress has so carefully indicated the *locus* of the crime. When a place is explicitly designated where a paper must be filed, a prosecution for failure to file lies only at that place." *Id*. citing *Lombardo*, 241 U.S. at 76-78. Moreover, in *Anderson*, the Supreme Court highlighted that the Sixth Amendment's command that trials shall be in the "State and district wherein the crime shall have been committed," makes it clear where venue should lie. 328 U.S. at 703. The defendant's duty (to take an oath) "was clear and precise, as were the place of performance and the place of refusal to perform." *Id*. at 706. *"*The place where this was required to be done was Fort Lewis and nowhere else. The place where appellee refused, flatly and unequivocally, to take it and thereby to submit to induction was likewise Fort Lewis. Until that refusal, as the Government says, he had violated no provision of the law or of any regulation." *Id*. Similarly, in Appellant's case, his duty to register and the place where he was required to register (New Jersey), was clear and precise. He was required to register in New Jersey and nowhere else. Id. Until that refusal, Appellant had not violated any law, including SORNA. Thus, venue in New York was improper.

Furthermore, while the government uses *Holcombe* to support its argument that venue to prosecute a violation of SORNA's interstate travel clause lies in any

district where the interstate journey begins, 883 F.3d at 15, all of the cases relied on by the Court in *Holcombe* pre-date *Nichols* and the Nichols decision changed the circumstances in relation to venue issues. The *Holcombe* decision was incorrect as *Nichols* held that offenders did not have to update their registration in departure jurisdictions, ultimately changing the outlook on venue. The Court in *Holcombe* should have approached the issue as the Seventh Circuit in *United States v. Haslage*, 851 F.3d 331, 334 (7th Cir. 2017) did, where the Court relied on the Supreme Court in *Nichols* observing that an earlier statute had imposed the duty to report a change of address to the responsible agency in the departure jurisdiction, but that SORNA repealed that part of the law and replaced it with language that did not include required notification to the departure state. The Court in *Haslage* used the *Nichols* decision to hold that venue was improper in the departure state. *Id.*

Additionally, regarding Appellant's argument that he was charged as a state offender to escape the Constitutional venue requirements, while true that the government had discretion to choose between which SORNA clause to prosecute Appellant under (G.B. 19), to protect and uphold the dignity of our judicial system, such discretion must be implemented rationally and fairly. According to Standard 3-1.9 of the American Bar Association's Criminal Justice Standards, a prosecutor should act "…with due regard for fairness, accuracy, and rights of the

defendant…" suggesting this discretion is not unrestrained and should be used wisely in the interests of justice.

In the instant case, it's questionable that Appellant was charged under subsection A to begin and then was charged under subsection B following the government's change of heart. Following the government's change of heart, the government concedes that "Judge Caproni pressed the Government to explain its venue theory," a theory which was described as "new," (G.B. 8), suggesting that even the Court was likely confused about how venue was proper in New York and why the charge was changed from the initial indictment. While the government argues that "overlap between clauses or subsections of a criminal statute is not uncommon," (G.B. 21), the fact that two clauses in the SORNA statute, subsections A and B, were included indicates that the clauses were meant to be used separately. If an offender does not fall under subsection A, then subsection B should be used. However, if an offender falls within the first subsection, subsection A, as did Appellant, a federal offender, then the offender should be charged in the district where venue is proper. To ensure a logical result, as the government in *Carr v. United States*, 560 U.S. 438, 446 (2010) recognized, for a defendant to violate the SORNA provision, "the statute's three elements must be satisfied in sequence, culminating in a post-SORNA failure to register." In the instant case, avoiding the sequential approach and jumping to Subsection B was illogical and

likely a way for the government to evade Constitutional protections that are in place to enforce venue requirements. Changing the theory of prosecution also resulted in a waste of judicial resources. Had the proper sequence been followed by the Government, Appellant, a federal offender, would have been tried in the proper venue (such as New Jersey for example) and would not have had to the waste the Court's time and resources while challenging improper venue.

In sum, because the Supreme Court has decided that SORNA registrants do not need to update their registration in jurisdictions from which they leave and that proper venue lies in the jurisdiction where the required act was failed to be performed, New York is irrelevant and an improper venue in the instant case, and this Court should find that the District Court erred when it denied Appellant's motion to dismiss for improper venue.

POINT II

THE GOVERNMENT'S CLAIM THAT THE DISTRICT COURT PROPERLY REJECTED APPELLANT'S EFFORTS TO CHALLENGE HIS UNDERLYING CONVICTION IS FLAWED.

The government argues that Appellant's contention that SORNA permits attacks on underlying convictions because 34 U.S.C. § 20911(5)(B) states 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… established under section 112," is incorrect because the "foreign convictions" provision does not permit collateral attacks on foreign convictions, but "simply delegates to the Attorney General the tasks of establishing 'guidelines' for determining whether foreign convictions qualify as sex offenses." (G.B. 27). Although the statute does not explicitly state attacks on prior convictions are permitted, it does state that if obtained in violation of constitutional rights, an underlying offense will not qualify as an underlying conviction for purposes of the SORNA statute. Thus, the underlying conviction would be invalid, the offender would not have to register under SORNA, and it would therefore preclude prosecution for a violation of SORNA. Thus, in the instant case, if Appellant had the chance to demonstrate that his underlying conviction was "not obtained with sufficient safeguards for fundamental fairness and due process," and proved so, it would not have qualified as a sex offense under SORNA, and he would not have violated SORNA. Additionally, if SORNA permits undermining foreign convictions that were obtained in violation of constitutional rights, it would only be reasonable and rational that individuals are permitted to undermine, or attack convictions obtained unfairly in the United States. The Attorney General's National Guidelines for Sex Offender Registration and Notification provide that "because the SORNA registration requirements are predicated on convictions, registration (or continued registration) is normally not required under the SORNA

standards if the predicate conviction is reversed, vacated, or set aside, or if the person is pardoned for the offense on the ground of innocence," *73 Fed. Reg. 38050* (July 2, 2008), furthering implying that attacks on predicate convictions are recognized and that Appellant should have had an opportunity to undermine and attack his underlying conviction. The District Court's decision to the contrary was erroneous and an abuse of discretion. Appellant maintains that the appropriate standard of review is *de novo*. However, in the event that the Court decides that the appropriate standard of review is abuse of discretion, the District Court's determination to exclude evidence of the unreliability of Appellant's court martial conviction was arbitrary and irrational for the reasons stated herein and in Appellant's opening brief.

Furthermore, while the government uses *Custis v. United States*, 511 U.S. 485, 491 (1994) to support its argument that SORNA does not allow collateral attacks (G.B. 26-27), and while *Custis* was used to support the District Court's decision that Appellant was not permitted to challenge his underlying conviction, the *Custis* decision, where the Supreme Court made a clear distinction between §924(e) and "other related statutes that expressly permit repeat offenders to challenge prior convictions…" such as 21 U.S.C. § 851, suggests that the Supreme Court decided that the language of a statute, explicit or implied, is what dictates whether prior convictions may be challenged. Although 924(e) does not address

challenges to prior convictions, the court "create[d] a clear negative implication," which denied the right to contest underlying convictions. *Id*. Thus, adhering to the logic in *Custis*, and the language contained within the statute, SORNA implicitly suggests that challenges to underlying convictions are permitted. The District Court's decision to the contrary was erroneous and an abuse of discretion.

In addition, while the Court used *Custis* (where the Supreme Court did mention 21 U.S.C. §851) to support its decision that collateral attacks are precluded, the Court, stating that the statue had no bearing on a SORNA violation and only applied to drug-related offenses, prevented Appellant from using 21 U.S.C. §851 to argue that he could attack his underlying conviction. If the Supreme Court used § 851 to hold that Congress by "negative implication" did not intend to allow collateral attacks, then why would Appellant be precluded from using § 851 or any other statute to demonstrate what may be implied or explicit within a statute. To promote consistency and uniformity within the judicial system, Appellant should have been able to use § 851 to argue that challenges to prior convictions are permitted under SORNA rather than have § 851 disqualified by the Court.

While the government argues that Appellant had his opportunity to contest his court-martial conviction on Appeal (G.B. 28-29), the fact that to date, 367 wrongfully convicted individuals have been exonerated as a result of DNA

evidence demonstrates that the U.S. Court system is not flaw-proof and has allowed unreliable convictions. The Innocence Project, *DNA Exonerations in the United States*, https://www.innocenceproject.org/dna-exonerations-in-the-united-states/ (last visited April 2, 2020). These exonerees were proven innocent not through the U.S. Court system, but through post-conviction DNA testing. Thus, it would be irrational to interpret the foreign convictions provision in the SORNA statute to say that only foreign convictions, and not domestic convictions, had the chance of not being "obtained with sufficient safeguards for fundamental fairness and due process."

Furthermore, an individual's right to present evidence and more specifically, Federal Rule of Evidence 104(e), should be paramount where SORNA is based entirely on one's underlying conviction. FRE 104(e) "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). Therefore, Appellant's right to contest the government's evidence that Appellant had a prior conviction as an element of his current conviction, was denied under FRE 104(e). Rule 104(e) was violated as Appellant was prevented from introducing evidence to challenge the credibility of his prior conviction. The District Court's decision to the contrary was erroneous and an abuse of discretion.

Because the language in SORNA and the Attorney General's National Guidelines demonstrate that a predicate conviction can be challenged, and the legislature could not have plausibly intended to only allow attacks on foreign convictions but not unfair domestic convictions, the District Court erred in finding that Appellant could not attack his underlying conviction.

CONCLUSION

For the reasons set forth in this Reply as well as those set forth in Appellant's principal brief, Appellant's conviction should be reversed and the case dismissed for improper venue. If the Court agrees with Appellant that venue was improper in the state of New York, Appellant requests that this Court still rule on the issue regarding the challenging of his underlying conviction. Alternatively, Appellant's conviction should be reversed and a new trial ordered.

Dated: April 29, 2020
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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 Reply Brief of Appellant contains 4,297 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.

April 29, 2020

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CERTIFICATE OF SERVICE

I hereby certify that I have this April 29, 2020, filed electronically using the Court's CM/ECF system which will send notification to all parties of record.

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