# 19-1895

*To Be Argued By*:
DANIEL NESSIM

# United States Court of Appeals

**FOR THE SECOND CIRCUIT**

**Docket No. 19-1895**

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

## BRIEF FOR THE UNITED STATES OF AMERICA

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# United States Court of Appeals

**FOR THE SECOND CIRCUIT**

**Docket No. 19-1895**

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

SALVADOR DIAZ,

*Defendant-Appellant.*

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## Preliminary Statement

Salvador Diaz appeals from a judgment of conviction entered on June 26, 2019, in the United States District Court for the Southern District of New York, following a two-day trial before the Honorable Valerie E. Caproni, United States District Judge, and a jury.

Superseding Indictment S1 17 Cr. 227 (VEC) (the "S1 Indictment") was filed on November 19, 2018, in one count. The S1 Indictment charged Diaz with traveling in interstate commerce and failing to register and update a registration as a sex offender as required by the Sex Offender Registration and Notification Act ("SORNA"), in violation of 18 U.S.C. § 2250.

Trial commenced on February 25, 2019, and ended on February 26, 2019, when Diaz was convicted on the sole count of the S1 Indictment.

On June 26, 2019, Judge Caproni sentenced Diaz to a term of 5 years' probation and imposed a $100 mandatory special assessment.

Diaz is serving his sentence.

## Statement of Facts

### A. The Offense Conduct

On December 1, 2000, Diaz, a chief petty officer in the United States Navy, was convicted by court-martial of three counts of rape of a child under 13, in violation of Article 120 of the Uniform Code of Military Justice, and two counts of indecent acts with a child under 16, in violation of Article 134 of the Uniform Code of Military Justice. (PSR ¶¶ 6, 40).[1] The victim was Diaz's daughter, whom Diaz admitted abusing. (PSR ¶ 41). Diaz was sentenced to 9 years' imprisonment and a dishonorable discharge. (PSR ¶ 6).

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[1] "Br." refers to Diaz's brief on appeal; "A." refers to the appendix filed with that brief; "SA" refers to the supplemental appendix filed with this brief; "PSR" refers to the Presentence Investigation Report prepared by the United States Probation Office in connection with Diaz's sentencing; and "Dkt." refers to an entry on the District Court's docket for this case. Unless otherwise noted, case text quotations omit all internal quotation marks, citations, and alterations.

As a result of the convictions, Diaz was required under SORNA to register as a sex offender in the states where he lived and worked. (PSR ¶ 8); 34 U.S.C. § 20913(a). On March 14, 2007, Diaz completed a form acknowledging his registration requirements as a convicted sex offender. (SA 91). On the form, Diaz indicated that upon his release from prison, he would be residing at an address in New York, New York. (SA 91). Diaz signed the form below a statement acknowledging "that I was informed that every change in my address must be reported in the manner provided by State law"; "that if I move to another state, I must report the change of address to the responsible agency in the state I am leaving, and comply with the registration requirements in the new state of residence"; and "that if I fail to register and/or change or update such registration information as required under a State sex offender registration program, I may be subject to criminal prosecution." (SA 91). Diaz was released from prison on March 15, 2007 (PSR ¶ 7), and he registered as a sex offender in New York later that month (PSR ¶ 10).

Diaz maintained his New York registration by completing an address verification form annually through 2014. (SA 92-119; PSR ¶ 13). Later in 2014, Diaz moved to New Jersey. (PSR ¶¶ 15-22). The next year, he also established a residence in Virginia. (PSR ¶ 54). But Diaz never registered as a sex offender in New Jersey or Virginia. (PSR ¶ 22).

### B. The S1 Indictment

On April 12, 2017, a grand jury returned an indictment (the "Initial Indictment") charging Diaz in one count with knowingly failing to register and update a registration as a sex offender after having been convicted of a federal sex offense, in violation of SORNA. (A. 27). On November 16, 2018, the District Court issued an order directing the Government to explain whether, among other things, the Initial Indictment properly stated an offense and venue was proper in the Southern District of New York in light of *Nichols v. United States*, 136 S. Ct. 1113 (2016). (A. 48-49). In particular, the District Court noted its understanding that under *Nichols*, "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 stablishes a new residence." (A. 48).

On November 19, 2018, a grand jury returned the S1 Indictment, which charged Diaz with traveling in interstate commerce and knowingly failing to register and update a registration as a sex offender as required by SORNA. (A. 50). That same day, the Government filed a letter summarizing the S1 Indictment and responding to the issues raised in the District Court's November 16, 2018 order. (SA 15-17).

### C. The Pretrial Motions

Diaz, proceeding *pro se*, filed pretrial motions seeking dismissal of the indictments and other relief.

### 1. Diaz's Motions Challenging His Predicate Convictions

Diaz repeatedly sought to challenge the underlying convictions that made him subject to SORNA registration requirements.

On March 2, 2018, Diaz moved to dismiss the Initial Indictment, arguing, among other things, that the underlying convictions were obtained "in violation of the laws and the Constitution of the United States." (A. 29-38). On July 13, 2018, the District Court denied the motion in a written opinion. (SA 1-8). The opinion first described the numerous direct appeals and collateral challenges Diaz had filed, without success, attacking his court-martial convictions. (SA 2-4). After analyzing SORNA's text and various precedents precluding defendants charged under other criminal statutes from attacking predicate convictions (SA 6-8), the District Court concluded that "[t]he procedural validity *vel non* of Diaz's prior conviction is . . . not at issue in the instant prosecution, and Diaz may not use this proceeding to collaterally attack it" (SA 8). On July 18, 2018, Diaz moved for reconsideration. (A. 43; Dkts. 72-73). The District Court denied that motion on July 30, 2018. (A. 44-47).

Diaz also sought to admit evidence at trial challenging the validity of his court-martial convictions. The Government moved *in limine* to preclude Diaz from introducing evidence or argument on that issue (Dkt. 80), and Diaz opposed (Dkt. 83). On October 10, 2018, the District Court granted the Government's motion, explaining that for reasons stated in its earlier decisions denying Diaz's motions seeking dismissal

and reconsideration, "the validity of Mr. Diaz's sex-offense conviction . . . is not relevant to the charge of failure to register." (SA 13-14).[2]

On November 20, 2018, during his arraignment on the S1 Indictment, Diaz revisited the topic. He maintained that he was entitled to challenge the underlying convictions and present evidence that the court-martial was unfair. (SA 29-31). Diaz cited Federal Rule of Evidence 104(e), which he characterized as saying "that I can challenge that conviction in court, in front of the jury." (SA 30). The District Court rejected Diaz's argument and informed Diaz that he would not be permitted to attack the validity of his underlying convictions at trial. (SA 31).

On December 6, 2018, Diaz filed a letter asking the District Court to "reopen my original motion" and dismiss the S1 Indictment "on the ground that my military conviction was unconstitutionally obtained." (SA 35).

On February 15, 2019, Diaz raised the issue during the final pretrial conference. He stated that he did not oppose the Government's *in limine* motions to admit a certified copy of his convictions and to instruct the jury that he was convicted of a crime that qualifies as a sex offense under SORNA. (SA 37-39). He argued, however, that various authorities entitled him to attack

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[2] Diaz appealed the District Court's *in limine* ruling (Dkt. 85), but this Court dismissed the appeal *sua sponte* on under the final judgment rule. *United States v. Diaz*, Docket No. 18-3086 (2d Cir. Jan. 22, 2019).

the fairness of his court-martial, including a provision of SORNA concerning certain foreign convictions (*see* SA 39-41, 46); Federal Rule of Evidence 104(e), which Diaz argued "supersedes" the District Court's ruling that the evidence was irrelevant (*see* SA 43-44); the rule of completeness (*see* SA 47-48); and his right to dispute that his failure to register was knowing (*see* SA 49-50). On February 19, 2019, the District Court denied Diaz's motions. (SA 51-52).

### 2. Diaz's Motion to Dismiss on Constitutional Grounds

Diaz's March 2, 2018 motion to dismiss the Initial Indictment also challenged SORNA and New York's Sex Offender Registration Act ("SORA") on constitutional grounds. (A. 38-40). Diaz argued in relevant part that "[a] sex offender registration hearing is effectively 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." (A. 39). The District Court denied the motion on July 13, 2018, citing decisions from this Court and others concluding that sex offender registration laws are not "punitive" and thus do not violate the Fifth or Eighth Amendments. (SA 10).

### 3. Diaz's Motion to Dismiss for Improper Venue

In its November 19, 2018 letter, the Government detailed its view of why the Southern District of New York was an appropriate venue to prosecute the charge in the S1 Indictment. (SA 16-17). The letter

stated that under *United States v. Holcombe*, 883 F.3d 12 (2d Cir. 2018), "where, as here, a defendant is charged with a SORNA offense that involves travel in interstate commerce as an element, venue is proper in any district in which such offense was begun, continued, or completed." (SA 16). Because Diaz left his registered address in New York to live first in New Jersey and then in Virginia, the letter continued, the S1 Indictment "charges the defendant with an offense that 'began' and for which venue would be proper in this District." (SA 16-17).

On November 20, 2018, during Diaz's arraignment on the S1 Indictment, Judge Caproni pressed the Government to explain its venue theory. (SA 22). A prosecutor responded that the jury could find venue in the Southern District of New York on either of two bases: first, that Diaz "moved from New York State to New Jersey, he resided in New Jersey, he failed to register," or second, that Diaz "moved from New York, passed through New Jersey and did not establish a residence there but ultimately established his residence in Virginia, where he failed to register." (SA 22).

Judge Caproni then explained the concept of venue to Diaz. (SA 22-27). She told Diaz, among other things, that the Government's first theory of venue, "that is, that you moved from New York to New Jersey and failed to register," was a "new theory" that "invok[ed] the interstate commerce prong of the statute" (SA 23-24); that the Government, by obtaining the S1 Indictment, "altered their theory" of venue (SA 25); that "I think there is a real question" about the Government's "second theory, that is, that you moved from New

York, you kind of passed through New Jersey and then eventually found your way to Virginia" (SA 22); that the "[v]enue can be changed" by "transferr[ing] to Virginia," in which case Diaz would be "tried in Virginia" (SA 23); and that Diaz could "waive venue" and "say you are not going to argue venue" (SA 23). Judge Caproni also advised Diaz that if he wanted to challenge venue, he needed to file a pretrial motion: "If you do not make a motion that says venue on that theory of this indictment is wrong, that is, this is the wrong district for that theory of the case, then you will have waived it." (SA 23). During the conference, Judge Caproni also set a new trial date of February 25, 2019. (SA 21).

On November 26, 2018, the District Court issued an order reflecting the new trial date and setting pretrial deadlines. (SA 32-34). The order stated, in part, "If Mr. Diaz wishes to file any pretrial motions relating to the S1 Indictment, he must do so no later than December 21, 2018, or else those motions will be deemed waived." (SA 33 (emphasis in original)).

Diaz did not file any pretrial motions regarding venue by December 21, 2018.

On Saturday, February 23, 2019, Diaz emailed Judge Caproni's chambers and the Government a motion to dismiss the S1 Indictment for improper venue and failure to state an offense. (A. 52-54). The motion argued that when a sex offender moves to a different state and fails to register in that new state, venue is not proper in the district where the offender's interstate travel began. (A. 53). In addition, the motion asserted that because Diaz's underlying sex offense was

a federal crime, he could not be charged under SORNA's interstate-travel provision. (A. 54).

Before trial on February 25, 2019, the District Court denied Diaz's motions. Judge Caproni first denied the motions as untimely, finding that the motions were filed long after the December 21 deadline and that there was "no good cause to excuse waiver here." (SA 54-55). Judge Caproni then assessed the motions on the merits and concluded that "even if these arguments had not been waived, they are meritless." (SA 55). Specifically, Judge Caproni determined that Diaz's venue argument was foreclosed by this Court's decision in *Holcombe*, which "was brought to Mr. Diaz's attention months ago in the government's letter dated November 19, 2018" (SA 55-56), and that prosecuting a federal sex offender under the SORNA provision requiring interstate travel was consistent with the statute's text and purpose (SA 55).

### D. The Trial and Sentencing

Trial commenced on February 25, 2019. The Government's evidence included a certified copy of Diaz's 2000 convictions for sex offenses (SA 89-90), as well as forms Diaz signed acknowledging he was required to register in any state where he resided (SA 91-119). The Government also called multiple witnesses, including the manager of a New Jersey building into which Diaz moved in late 2014 (SA 58-81) and a representative of New Jersey who testified that Diaz never registered as a sex offender there (SA 82-87).

Diaz, proceeding *pro se* with the assistance of standby counsel, did not call any witnesses. In his

summation, he did not dispute that he was convicted of sex offenses, but he argued, “This case is about the government trying to make me pay for the rest of my life for what I was convicted of in 2000.” (SA 88).

On February 26, 2019, the jury returned a verdict finding Diaz guilty of the sole count in the S1 Indictment. (Dkt. 139).

Diaz appeared for sentencing on June 26, 2019. Judge Caproni sentenced Diaz to 5 years’ probation, with a special condition that he serve the first 3 months under house arrest, and imposed a $100 mandatory special assessment. (A. 55-60).

## ARGUMENT

## POINT I

### The District Court Properly Denied Diaz’s Motion to Dismiss for Lack of Venue

Diaz contends that the District Court erred by denying his motion to dismiss the S1 Indictment for improper venue. (Br. 13-33). His argument fails for multiple independent reasons. First, the District Court did not abuse its discretion in finding that Diaz failed to establish good cause to excuse the untimeliness of his venue claim, a determination Diaz fails to challenge on appeal and has thus waived. Second, this Court’s decision in *Holcombe* forecloses Diaz’s venue argument on the merits.

## A. Diaz Has Waived Any Objection to Venue

### 1. Applicable Law

An objection asserting "a defect in instituting the prosecution," including "improper venue," or "a defect in the indictment," including "failure to state an offense," "must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3). "The court may . . . set a deadline for the parties to make pretrial motions," Fed. R. Crim. P. 12(c)(1), in which case a Rule 12(b)(3) motion made after the deadline "is 'untimely,'" *United States v. O'Brien*, 926 F.3d 57, 83 (2d Cir. 2019) (quoting Fed. R. Crim. P. 12(c)(3)). "[T]he court may nonetheless entertain" an untimely motion "if the movant shows 'good cause' for his failure to make it prior to the deadline." *Id.* (quoting Fed. R. Crim. P. 12(c)(3)).

Although "waiver of objections to venue should not be readily inferred," *United States v. Price*, 447 F.2d 23, 27 (2d Cir. 1971), waiver occurs "when the indictment or statements by the prosecutor clearly reveal a venue defect but the defendant fails to object," *United States v. Novak*, 443 F.3d 150, 161 (2d Cir. 2006); *accord United States v. Khan*, 821 F.2d 90, 93 (2d Cir. 1987) (finding waiver where venue defect was apparent on face of indictment); *United States v. Levasseur*, 816 F.2d 37, 45 (2d Cir. 1987) (affirming ruling that defendant waived right to contest venue at close of government's case where "the indictment gave clear notice of venue defects"). "Therefore, even though it is af-

forded significant Constitutional protection, a defendant's right to proper venue is a personal defense subject to waiver." *Novak*, 443 F.3d at 161 (citing *United States v. Calderon*, 243 F.3d 587, 590 (2d Cir. 2001)).

The District Court's determination that a defendant failed to show "good cause" to avoid waiver of an untimely pretrial motion is reviewed "for abuse of discretion or clear error." *United States v. Kopp*, 562 F.3d 141, 143 (2d Cir. 2009) (citing *United States v. Crowley*, 236 F.3d 104, 110 (2d Cir. 2000)).[3]

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[3] When *Kopp* and *Crowley* were decided, versions of what is now Rule 12(c)(3) were codified under different subsections of the Federal Rules of Criminal Procedure. *See Kopp*, 562 F.3d at 143 (applying waiver rule codified at Rule 12(e)); *Crowley*, 236 F.3d at 110 (applying waiver rule codified at Rule 12(f)). Although amendments removed the word "waives" from the rule in 2014, the revisions did not alter the standard for determining whether a defendant surrendered an untimely objection. The change merely clarified that "[a]lthough the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right," what is now Rule 12(c)(3) "has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion." Fed. R. Crim. P. 12 advisory committee's note; *see also O'Brien*, 926 F.3d at 83-84 (applying prior waiver case law to find that defendant had failed

**2. Discussion**

Although he appeals the denial of his motion to dismiss for improper venue, Diaz, who is now represented by counsel, offers no argument challenging the District Court's determination that his venue objection was untimely and not excused by good cause. (Br. 13-33). He has therefore waived review of his venue claim on appeal. *See Gross v. Rell*, 585 F.3d 72, 95 (2d Cir. 2009) (failure to address issue in principal brief "constitutes waiver"); *Diesel v. Town of Lewisboro*, 232 F.3d 92, 110 (2d Cir. 2000) (after perfunctory argument in opening brief, "subsequent discussion of th[e] argument in the text of his reply brief does not save th[e] argument from waiver"); *Frank v. United States*, 78 F.3d 815, 833 (2d Cir. 1996) ("Issues not sufficiently argued are in general deemed waived and will not be considered on appeal."), *vacated on other grounds*, 521 U.S. 1114 (1997).

In any event, the District Court did not abuse its discretion or otherwise err in denying Diaz's venue motion for untimeliness without good cause. His motion argued that venue was not proper in New York for an offense committed by traveling from New York to New Jersey and failing to register as a sex offender in the latter state. (A. 53). Assuming that motion identified an actual venue defect—which it did not—the defect was evident well before the pretrial motions deadline of December 21, 2018. (SA 33). The venue issue was

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to establish "good cause" excusing untimely motion under rule as amended in 2014).

clear from the face of the S1 Indictment, which the grand jury returned on November 19, 2018 (A. 50); from the letter the Government filed that same day explaining its theory of venue (SA 15-17); and from the prosecutor's statements about the venue theory the next day (SA 22). Diaz was therefore required to raise any venue objection in a timely pretrial motion, *see Novak*, 443 F.3d at 161; Fed. R. Crim. P. 12(b)(3), as Judge Caproni informed him on November 20, 2018 (SA 23). Instead, Diaz moved to dismiss for improper venue on Saturday, February 23, 2019, more than two months after the December 21 deadline and just two days before trial. Moreover, he offered no explanation for the delay. The District Court acted well within its discretion when it denied the motion as untimely.

## B. Circuit Precedent Forecloses Diaz's Venue Argument

### 1. Applicable Law

The proper forum for a criminal prosecution is the district in which the crime was committed. U.S. Const. art. III, § 2; *id.*, amend. VI; Fed. R. Crim. P. 18. Where "the acts constituting the crime and the nature of the crime charged implicate more than one location, the constitution does not command a single exclusive venue." *United States v. Reed*, 773 F.2d 477, 480 (2d Cir. 1985). Acts constituting a crime, or the nature of a crime, may therefore implicate more than one district. *See United States v. Ramirez*, 420 F.3d 134, 139 (2d Cir. 2005). An offense "begun in one district and completed in another, or committed in more than one district," may be "prosecuted in any district in which

such offense was begun, continued, or completed." 18 U.S.C. § 3237(a).

SORNA's "express 'purpose' is 'to protect the public from sex offenders and offenders against children' by 'establishing a comprehensive national system for their registration.' " *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (quoting 34 U.S.C. § 20901). "To that end, SORNA covers more sex offenders, and imposes more onerous registration requirements, than most States had before," and it "backs up those requirements with new criminal penalties." *Id.*

SORNA provides two ways to prosecute sex offenders who knowingly fail to register or update a registration as required. First, it criminalizes registration failures by anyone convicted of certain types of sex offenses, namely, offenses "under Federal law (including the Uniform Code of Military Justice), 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) (the "Sex Offense Clause"). Second, it criminalizes registration failures by anyone who is required to register and who "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country." 18 U.S.C. § 2250(a)(2)(B) (the "Interstate Travel Clause").

Diaz's appeal challenging the denial of his motion to dismiss for lack of venue raises a legal issue that this Court reviews *de novo*. *See Holcombe*, 883 F.3d at 15.

**2. Discussion**

In *United States v. Holcombe*, this Court held that a SORNA prosecution under the Interstate Travel Clause may be prosecuted in any venue where " 'such offense was begun, continued, or completed.' " 883 F.3d at 15 (quoting 18 U.S.C. § 3237(a)). And that offense, the Court explained, "begins where the interstate journey begins, regardless of whether the defendant had already formed an intent to violate the statue when the interstate travel began." *Id.* at 15-16. This Court's holding is consistent with the Supreme Court's recognition that "[t]he act of travel by a convicted sex offender may serve as a jurisdictional predicate for § 2250, but it is also . . . the very conduct at which Congress took aim." *Carr v. United States*, 560 U.S. 438, 454 (2010).

The majority of Circuits to consider the issue have reached the same conclusion. *See United States v. Kopp*, 778 F.3d 986, 988-89 (11th Cir. 2015) (offender who failed to register in Florida " 'beg[a]n' his crime in Georgia because his interstate journey started there" (quoting 18 U.S.C. § 3237(a))); *United States v. Lewis*, 768 F.3d 1086, 1094 (10th Cir. 2014) ("[V]enue for a failure to register under § 2250(a) is proper in the departure district."); *United States v. Stewart*, 461 F. App'x 349, 352 (4th Cir. 2012) (Western District of Virginia was proper venue to prosecute offender whose move from Virginia "gave rise to his duty to register in Kentucky, where his offense was completed when he failed to register"); *United States v. Howell*, 552 F.3d 709, 717-18 (8th Cir. 2009) (Northern District of Iowa was proper venue to prosecute offender who moved

from Iowa to Texas and failed to notify either state's sex offender registry as required).[4]

*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, is fatal to Diaz's venue argument. The S1 Indictment charged Diaz with violating the Interstate Travel Clause "in the Southern District of New York and elsewhere," alleging that Diaz, "being an individual required to register under [SORNA], did travel in interstate and foreign commerce, and knowingly did fail to register and update a registration as required by SORNA." (A. 50). The S1 Indictment further alleged that Diaz "moved from New York to another state, in

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[4] The Seventh Circuit reached the opposite result in *United States v. Haslage*, holding that venue to prosecute defendants charged under the Interstate Travel Clause was not proper in the departure district. *See* 853 F.3d 331, 335-36 (7th Cir. 2017). In *Holcombe*, this Court considered and rejected the Seventh Circuit's approach. Among other points, *Holcombe* observed that *Haslage*'s holding "that interstate travel is not a SORNA element because the defendant need not have criminal intent while traveling across state lines," 883 F.3d at 16 (citing *Halsage*, 853 F.3d at 334), conflicted with Second Circuit precedent establishing "that venue turns on 'where physical *conduct* occurred, and not where criminal intent was formed,' " *id.* (quoting *United States v. Miller*, 808 F.3d 607, 615 (2d Cir. 2015)).

which he resided and where he was required to register, without registering as a sex offender in that state." (A. 50). 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. *See Holcombe*, 883 F.3d at 15-16; 18 U.S.C. § 3237(a).

Diaz emphasizes that his predicate sex offense, unlike Holcombe's, was a federal crime that subjected him to potential prosecution under SORNA's Sex Offense Clause. (Br. 31). That is true but ultimately irrelevant. Diaz was also prosecutable under SORNA's Interstate Travel Clause, the plain text of which applies to "[w]hoever . . . is required to register" under the statute, because he engaged in interstate travel before failing to register. 18 U.S.C. § 2250(a)(1). Overlap between clauses or subsections of a criminal statute "is not uncommon." *Loughrin v. United States*, 573 U.S. 351, 358 n.4 (2014) (bank fraud); *see also, e.g.*, *United States v. Veliz*, 800 F.3d 63, 72 (2d Cir. 2015) (witness tampering); *United States v. Alfisi*, 308 F.3d 144, 151 n.3 (2d Cir. 2002) (official bribery); *United States v. Pick*, 724 F.2d 297, 301 (2d Cir. 1983) (bank robbery). Because both SORNA clauses applied to Diaz's conduct, the Government had discretion to choose between them in bringing its charges. *See United States v. Batchelder*, 442 U.S. 114, 123-24 (1979) ("[W]hen an act violates more than one criminal statute, . . . [w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."). No authority requires

the Government to prosecute federal sex offenders under the Sex Offense Clause rather than under the Interstate Travel Clause. *See United States v. Snype*, 441 F.3d 119, 141 (2d Cir. 2006) ("A criminal defendant 'has no constitutional right' to be prosecuted under any particular statute." (quoting *Batchelder*, 442 U.S. at 125)); *United States v. Kim*, 193 F.3d 567, 572-74 (2d Cir. 1999) (Government had discretion to charge an employer under provision for harboring aliens, even though separate provision specifically addressed unlawful employment of aliens). Indeed, this Court has affirmed a federal sex offender's SORNA conviction under the Interstate Travel Clause. *See United States v. Van Buren*, 599 F.3d 170, 172, 175 (2d Cir. 2010).

Diaz's assertion that he was "charged as a state offender to evade Constitutional venue requirements" (Br. 31) fails for similar reasons. He was not charged as a "state offender," a term that appears nowhere in the S1 Indictment or Section 2250; he was charged as someone "required to register" under SORNA (A. 50), language that mirrors the statutory text, *see* 18 U.S.C. § 2250(a)(1). Moreover, charging under a statutory provision for which venue is proper does not equate to "evad[ing] Constitutional venue requirements." The constitutional right to be prosecuted in a proper forum applied with equal force to Holcombe, whose predicate crime was a state sex offense, as it does to Diaz. *Holcombe* and the venue principles it applied thus compel affirmance here.

The cases Diaz highlights do not alter the analysis. He cites several decisions for the proposition that

venue for failing to perform an act "lies only in the district where the act should have been performed." (Br. 19-21). But those cases involved criminal offenses that lacked an interstate-travel element. *See Travis v. United States*, 364 U.S. 631, 632 (1961) (prosecution for filing false statements in affidavits required under the National Labor Relations Act); *Johnston v. United States*, 351 U.S. 215, 216 (1956) (prosecution of conscientious objectors for violating Universal Military Training and Service Act); *United States v. Anderson*, 328 U.S. 699, 699-700 (1946) (prosecution for refusing induction into Army in violation of Selective Training and Service Act); *United States v. Lombardo*, 241 U.S. 73, 74-75 (1916) (prosecution for harboring an immigrant for prostitution without filing required report with federal immigration authority). In contrast, SORNA's Interstate Travel Clause includes an interstate-travel element, and "[t]he act of travel by a convicted sex offender . . . is . . . the very conduct at which Congress took aim." *Carr*, 560 U.S. at 454.

Diaz's reliance on *Nichols v. United States*, 136 S. Ct. 1113 (2016), and *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013) (Br. 21-27), is also misplaced. Those cases did not address venue; they addressed whether defendants violated SORNA at all. *See Nichols*, 136 S. Ct. at 1118 (holding that SORNA did not require offender who moved to Philippines to update registration in Kansas); *Lunsford*, 725 F.3d at 860 (holding that SORNA did not require offender who moved to Philippines to update registration in Missouri); *see also Holcombe*, 883 F.3d at 16 (distinguishing *Nichols* and *Lunsford*). In contrast, it is undis-

puted that Diaz was required to register as a sex offender in New Jersey after moving there from New York.

Finally, Diaz claims that judicial decisions permitting offenders to be prosecuted under the Interstate Travel Clause in the district of departure "conflict with the separation of powers" and "undermine the authority of the legislative branch to establish what constitutes an offense." (Br. 27-28). He is incorrect. Interpreting venue provisions *enacted by Congress* and applying those provisions to federal criminal offenses *defined by Congress*—as this Court did when it considered Sections 2250 and 3237 in *Holcombe*, *see* 883 F.3d at 13-15—is plainly within the province of the judiciary and presents no separation-of-powers concern.

## POINT II

## The District Court Properly Rejected Diaz's Efforts to Challenge His Underlying Convictions

Without disputing that he was convicted of sex offenses in 2000, Diaz contends that he should have been permitted, as part of his defense in this SORNA prosecution, to attack his predicate convictions on the basis that they were obtained unfairly. (Br. 33-42). He is wrong, and his motions raising that issue were correctly denied.

### A. Relevant Facts

The District Court's written opinion denying Diaz's motion to dismiss the Initial Indictment began by detailing the various appeals and collateral challenges

Diaz had pursued between his convictions in 2000 and his 2017 arrest for violating SORNA. (SA 2-4). His appeals and other challenges, "each of which was denied" (SA 2), included the following:

- an appeal to the Navy-Marine Corps Court of Criminal Appeals ("NMCCA"), *see United States v. Diaz*, 61 M.J. 594, 596-98 (N-M. Ct. Crim. App. 2005);
- an appeal from NMCCA's decision to the United States Court of Appeals for the Armed Forces ("CAAF"), *see United States v. Diaz*, 64 M.J. 180 (C.A.A.F. 2006);
- a petition for reconsideration to CAAF, *see United States v. Diaz*, 64 M.J. 221 (C.A.A.F. 2006);
- two petitions for writ of certiorari to the United States Supreme Court, *see Diaz v. United States*, 549 U.S. 1356 (2007); *Diaz v. United States*, 549 U.S. 1167 (2007), and a petition for rehearing in the Supreme Court, *see Diaz v. United States*, 550 U.S. 981 (2007);
- three habeas petitions filed in the United States District Court for the District of Kansas, *see Diaz v. Inch*, No. 06-3306 (D. Kan. Sept. 28, 2007); *Diaz v. Harrison*, No. 04-3401 (D. Kan. Sept. 18, 2006); *Diaz v. McGuire*, No. 02-3271 (D. Kan. Nov. 1, 2004);

- appeals from the denial of two of those habeas petitions to the United States Court of Appeals for the Tenth Circuit, *see Diaz v. Inch*, 268 F. App'x 802, 803 (10th Cir. 2008); *Diaz v. McGuire*, 154 F. App'x 81 (10th Cir. 2005).
- two petitions for writ of certiorari to the United States Supreme Court, *see Diaz v. Inch*, 555 U.S. 854 (2008); *Diaz v. McGuire*, 546 U.S. 1221 (2006)
- two civil actions filed in the United States District Court for the Southern District of New York, *see Diaz v. Judge Advocate Gen. of the Navy*, No. 10 Civ. 1316 (S.D.N.Y. Feb. 18, 2010); *Diaz v. Dep't of Def.*, No. 08 Civ. 370 (S.D.N.Y. Jan. 15, 2008); and
- an appeal to this Court from the dismissal of one of those civil actions, *see Diaz v. Judge Advocate Gen. of the Navy*, 413 F. App'x 342 (2d Cir. 2011).

### B. Applicable Law

In interpreting a statute, this Court first looks to "the language of the statute, giving the statutory terms their ordinary or natural meaning." *United States v. Lockhart*, 749 F.3d 148, 152 (2d Cir. 2014), *aff'd*, 136 S. Ct. 958 (2016). Where the statute's language is "plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917));

*accord United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 879 F.2d 20, 21-22 (2d Cir. 1989) ("[C]onsideration must first be given to the language of the statute and if the language is clear and unambiguous it must ordinarily be regarded as conclusive."). The rule of lenity is an interpretive tool of last resort, "reserved for cases where, 'after seizing every thing from which aid can be derived, the Court is left with an ambiguous statute.'" *DiPierre v. United States*, 564 U.S. 70, 88 (2011) (quoting *Smith v. United States*, 508 U.S. 223, 239 (1993)). The canon applies only if, "after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute such that the Court must simply guess as to what Congress intended." *Maracich v. Spears*, 570 U.S. 48, 76 (2013).

In assessing the denial of a motion to dismiss an indictment, this Court reviews a district court's "conclusions of law *de novo* and . . . factual findings for clear error." *United States v. Bout*, 731 F.3d 233, 238 (2d Cir. 2013). A district court's legal interpretation of a statute is thus reviewed *de novo*, *United States v. Epskamp*, 832 F.3d 154, 160 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1122 (2017), while its factual findings are reviewed to determine whether "the district court's account of the evidence is plausible in light of the record viewed in its entirety," *United States v. Cerna*, 603 F.3d 32, 39 (2d Cir. 2010).

This Court reviews evidentiary rulings for abuse of discretion, recognizing that district courts have broad discretion to assess "the relevance of evidence for the purpose of its admission or exclusion," and according

those determinations "particular deference." *United States v. Gupta*, 747 F.3d 111, 137 (2d Cir. 2014); *accord United States v. Mercado*, 573 F.3d 138, 141 (2d Cir. 2009) ("We review evidentiary rulings for abuse of discretion."). " 'To find such abuse, [this Court] must conclude that the trial judge's evidentiary rulings were arbitrary and irrational.' " *Mercado*, 573 F.3d at 141 (quoting *United States v. Paulino*, 445 F.3d 211, 217 (2d Cir. 2006)).

### C. Discussion

Diaz's motions seeking to relitigate the fairness of his court-martial were properly denied, because SORNA does not permit challenges to underlying convictions for domestic sex offenses.

In the context of other criminal statutes predicated on prior offenses, the Supreme Court has precluded defendants from challenging underlying convictions. For example, a prosecution for being a felon in possession of a firearm "does not open the predicate conviction to a new form of collateral attack." *Lewis v. United States*, 445 U.S. 55, 67 (1980). Similarly, a defendant may not collaterally attack a prior conviction used to enhance a federal sentence under the Armed Career Criminal Act ("ACCA") unless the prior conviction was obtained in violation of the right to counsel. *See Custis v. United States*, 511 U.S. 485, 487 (1994). ACCA, the Supreme Court explained, "focuses on the *fact* of the conviction and nothing suggests that the prior final conviction may be subject to collateral attack for potential constitutional errors before it may be counted." *Id.* at 490-91. Like the felon-in-possession statute and

ACCA, SORNA "focuses on the *fact* of the conviction," not on the proceedings leading up to it. Thus, the only other Court of Appeals to address whether SORNA defendants may attack predicate convictions for domestic sex offenses has held that "SORNA does not authorize such a collateral attack." *United States v. Delgado*, 592 F. App'x 602, 603 (9th Cir. 2015).

Diaz argues that SORNA permits collateral attacks on underlying convictions because the statute includes a provision stating that "[a] foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines established [by the Attorney General]." 34 U.S.C. § 20911(5)(B). (Br. at 34-35, 38-40). This argument suffers from two fundamental flaws. First, the "foreign convictions" provision does *not* permit collateral attacks on foreign convictions. It simply delegates to the Attorney General the task of establishing "guidelines" for determining whether foreign convictions qualify as sex offenses. The Attorney General's National Guidelines for Sex Offender Registration and Notification provide that foreign convictions qualify if they were obtained under the laws of Canada, United Kingdom, Australia, New Zealand, or any country for which the U.S. State Department "concluded that an independent judiciary generally (or vigorously) enforced the right to a fair trial . . . during the year in which the conviction occurred." 73 Fed. Reg. 38030, 38050-51 (July 2, 2008). The Attorney General's Guidelines do not provide for collateral attacks on particular foreign convictions.

Second, even if SORNA's "foreign convictions" provision could be read to permit collateral attacks on foreign convictions (and it cannot), it would not constitute a tacit endorsement of collateral attacks on predicate *domestic* convictions. To the contrary, the inclusion of an exception for foreign convictions would show that if Congress wanted to let SORNA defendants challenge underlying domestic offenses, it knew how to do so explicitly. *See Loughrin*, 573 U.S. at 357 ("We have often noted that when Congress includes particular language in one section of a statute but omits it in another —let alone in the very next provision—this Court presumes that Congress intended a difference in meaning."); *Dean v. United States*, 556 U.S. 568, 573 (2009) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Furthermore, the lack of ambiguity in Section 20911(5)(A) and (B) precludes Diaz's argument that this Court should permit collateral attacks of predicate offenses under the rule of lenity (*see* Br. 41-42). *See Maracich*, 570 U.S. at 76.

Prohibiting collateral attacks on underlying convictions in SORNA prosecutions does not suggest, as Diaz asserts, a naïve "assum[ption] that all convictions in the United States are obtained fairly." (Br. 39). Instead, it reflects the reality that mechanisms to challenge fundamentally unfair convictions obtained in the United States—whether in state, federal, or military proceedings—already exist. Diaz's own litigation history proves the point. Far from being denied a chance to challenge how his court-martial was conducted,

Diaz has asserted his claims in appeals, collateral attacks, and civil lawsuits filed in courts throughout the nation. (SA 2-4). Diaz did not need SORNA's help to challenge his underlying offense.

Because SORNA's predicate-offense element looks only to the fact of the prior conviction, the District Court properly precluded Diaz from offering evidence at trial challenging the fairness of the court-martial. Diaz conceded below that he was convicted of a sex offense under SORNA (SA 37-39, 88), and the District Court did not abuse its discretion in ruling that evidence regarding the fairness of the 2000 proceedings was irrelevant.

## POINT III

### SORNA Does Not Violate the Double Jeopardy Clause or the Cruel and Unusual Punishments Clause

Diaz also challenges SORNA's constitutionality. (Br. 42-50). He contends that registration and compliance requirements amount to "a second punishment" for the same offense in violation of the Double Jeopardy Clause (Br. 49), and that the public registry inflicts cruel and unusual punishment in violation of the Eighth Amendment because it "results in public shaming" and creates "lifetime deprivations" of employment and housing opportunities (Br. 44-45). Diaz's constitutional arguments are meritless.

### A. Applicable Law

The Fifth Amendment's constraint that no "person be subject for the same offence to be twice put in jeopardy of life or limb," U.S. Const., amend. V, the Eighth Amendment's prohibition against "cruel and unusual punishments," *id.*, amend. VIII, and the Ex Post Facto Clause's ban on any "ex post facto Law," *id.*, art. I, §§ 9-10, all limit the government's power to punish. *See Hudson v. United States*, 522 U.S. 93, 98-99 (1997) (Double Jeopardy Clause "protects only against the imposition of multiple criminal punishments for the same offense" (emphasis omitted)); *Cal. Dep't. of Corr. v. Morales*, 514 U.S. 499, 504 (1995) (Ex Post Facto Clause provides that legislatures may not "retroactively alter the definition of crimes or increase the punishment for criminal acts"); *Austin v. United States*, 509 U.S. 602, 609 (1993) ("The Cruel and Unusual Punishments Clause is self-evidently concerned with punishment."). Accordingly, courts employ overlapping frameworks to analyze claims that statutes violate those constitutional provisions. *See, e.g.*, *Smith v. Doe*, 538 U.S. 84, 97 (2003) (considering factors that "migrated into our *ex post facto* case law from double jeopardy jurisprudence" and "have their earlier origins in cases under the Sixth and Eighth Amendments" to assess whether sex offender registration statute violates Ex Post Facto Clause); *Kansas v. Hendricks*, 521 U.S. 346, 361-62 (1997) (analyzing whether statute is sufficiently "punitive either in purpose or effect" to implicate Double Jeopardy Clause or Ex Post Facto Clause); *United States v. Certain Funds Contained in Account Nos. 600-306211-006, 600-306211-011 & 600-306211-014*, 96 F.3d 20, 26 (2d Cir. 1996) (noting that

analysis of whether forfeiture proceedings trigger Double Jeopardy Clause protections "is equally applicable to a determination of whether" statutes "are criminal or penal for purposes of the Ex Post Facto Clause").

This Court reviews the constitutionality of federal statutes *de novo*. *See, e.g.*, *United States v. Henry*, 888 F.3d 589, 596 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 2615 (2019); *United States v. Al Kassar*, 660 F.3d 108, 129 (2d Cir. 2011).

### B. Discussion

Although no Supreme Court or Second Circuit decision has addressed SORNA's constitutionality under the Double Jeopardy Clause or the Cruel and Unusual Punishments Clause, both courts have rejected ex post facto challenges to analogous state statutes on the basis that registration and notification requirements are not punitive. The Supreme Court upheld an Alaska statute that created a public registry of sex offenders and subjected offenders who knowingly fail to register to criminal prosecution. *See Smith v. Doe*, 538 U.S. at 90, 105-06. The Court disagreed that the registry's notification provisions "resemble[] shaming punishments of the colonial period," observing that any "stigma" from the registry "results not from public display for ridicule and shaming but from the dissemination of accurate information about a criminal record." *Id.* at 97-98; *accord id.* at 98 ("Our system does not treat dissemination of truthful information in furtherance of a legitimate governmental objective as punishment."). That echoed this Court's decision upholding New York's Sex Offender Registration Act ("SORA") as

applied to offenders who completed their sentence before the statute's enactment. *See Doe v. Pataki*, 120 F.3d 1263 (2d Cir. 1997). As to SORA's notification requirements, this Court acknowledged the parties' stipulation that sex offenders had "suffered harm in the aftermath of notification—ranging from public shunning, picketing, press vigils, ostracism, loss of employment, and eviction, to threats of violence, physical attacks, and arson." *Id.* at 1279. But those "detrimental consequences" did not "suffice to transform the regulatory measure of community notification into punishment." *Id.* As to SORA's registration provisions, although the statute imposed "onerous" requirements that some offenders "register in person every 90 days for a minimum of ten years," the registration burden was not "sufficiently severe to transform an otherwise nonpunitive measure into a punitive one." *Id.* at 1285. This Court reached the same conclusion when it rejected ex post facto arguments challenging amendments to SORA, including changes that extended certain registration requirements from 10 to 20 years. *See Doe v. Cuomo*, 755 F.3d 105, 108 (2d Cir. 2014).[5]

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[5] This Court has repeatedly held that SORNA does not violate the Ex Post Facto Clause, albeit without explicitly addressing whether the statute is punitive. *E.g.*, *Holcombe*, 883 F.3d at 18; *United States v. Lott*, 750 F.3d 214, 220 (2d Cir. 2014); *United States v. Brunner*, 726 F.3d 299, 304 (2d Cir. 2013); *United States v. Guzman*, 591 F.3d 83, 94 (2d Cir. 2010).

Similarly, decisions from other Circuits have consistently held that SORNA and analogous state statutes are insufficiently punitive to violate the Double Jeopardy Clause or the Cruel and Unusual Punishments Clause. *See, e.g.*, *United States v. Under Seal*, 709 F.3d 257, 264-66 (4th Cir. 2013) (concluding that SORNA does not violate Cruel and Unusual Punishments Clause because "application of SORNA to Appellant does not have a punitive effect"); *ACLU of Nev. v. Masto*, 670 F.3d 1046, 1053 (9th Cir. 2012) (Nevada statute's registration requirements "do not constitute retroactive punishment in violation of the Ex Post Facto Clause or Double Jeopardy Clause"); *United States v. Juvenile Male*, 670 F.3d 999, 1010 (9th Cir. 2012) (rejecting claim that SORNA provision requiring juveniles to register as sex offenders for at least 25 years violates Cruel and Unusual Punishments Clause); *United States v. Davis*, 352 F. App'x 270, 272-73 (10th Cir. 2009) (characterizing "claim that SORNA violates the Eighth Amendment's prohibition on cruel and unusual punishment" as frivolous).

Diaz's claims challenging SORNA's constitutionality recycle arguments the Supreme Court and the Second Circuit have soundly rejected. Acknowledging some of that case law, Diaz urges this Court to "revisit" *Doe v. Pataki*'s holding that SORA was not "punitive" (Br. 44), but does not explain how that is possible given the Supreme Court's similar conclusion, *see Smith v. Doe*, 538 U.S. at 98 (rejecting argument that Alaska's sex offender registration and notification statute constituted "punishment"). Both precedents foreclose Diaz's arguments.

Nor was *Doe v. Pataki* decided when "there was little knowledge of how drastically registering as a sex offender disrupted the lives of those who are required to register" (Br. 44). This Court considered the very points Diaz raises to support his claim that SORNA is punitive. For example, Diaz asserts that as a result of the registration requirement, he "lost his job and continued to have various job offers rescinded because of his status as a registered sex offender," and he "is not eligible for low income housing." (Br. 44). That echoes the offenders' arguments about "loss of employment" and "eviction" in *Doe v. Pataki*. 120 F.3d at 1279. But as this Court explained then, those "detrimental consequences" did not amount to "punishment" that implicated constitutional protections. *Id*. Diaz's case is no different, as the District Court correctly recognized when it denied his motion to dismiss the Initial Indictment on constitutional grounds. (SA 10).

## CONCLUSION

**The judgment of conviction should be affirmed.**

Dated: New York, New York
March 19, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 8,134 words in this brief.

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