IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-12176-AA

UNITED STATES OF AMERICA,

Appellee,

v.

WILFREDO G. MADERA,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLANT

R. Fletcher Peacock
Federal Public Defender

James T. Skuthan
Chief Assistant Federal Public Defender
Florida Bar No. 0544124
John L. Badalamenti
Appellate Division
Florida Bar Number 0185299
201 South Orange Ave., Suite 300
Orlando, Florida 32801
Telephone: 407-648-6338
Facsimile: 407-648-6095
E-Mail: John_Badalamenti@fd.org
Counsel for Appellant Madera

No. 07-12176-AA

United States of America v. Wilfredo G. Madera

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The persons listed below are interested in the outcome of this case:

Badalamenti, John L.

The Honorable David A. Baker

Bodnar, Roberta

Cakmis, Rosemary T.

Counts, Jr., Clarence W.

Gillick, Patrick

The Late Honorable James G. Glazebrook

Hawkins, Cynthia A.

Klindt, James

Madera, Wilfredo G.

Peacock, R. Fletcher

Perez, Jr., Paul I.

Phipps, Tamra

The Honorable G. Kendall Sharp

Skuthan, James T.

Sofia, Laura

West, Donald R.

STATEMENT REGARDING ORAL ARGUMENT

Mr. Madera requests oral argument in this case. This is appeal involves issues of first impression in this Court. It is respectfully submitted that argument by counsel familiar with the issues, the facts, and the record on appeal will provide this Honorable Court with assistance in resolving this action.

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases **Page(s)**

Statutes

Miscellaneous

STATEMENT OF JURISDICTION

The United States District Court, Middle District of Florida, Orlando Division, had jurisdiction pursuant to 18 U.S.C. § 3231. The judgment and commitment order was entered on April 26, 2007. Doc 43. A timely notice of appeal was filed on May 1, 2007. Doc 44.

Under 28 U.S.C. § 1291, the courts of appeals have jurisdiction from all final decisions of the district courts of the United States, except where a direct review may be had in the Supreme Court of the United States.

STATEMENT OF THE ISSUES

ISSUE I: WHETHER THE DISTRICT COURT ERRED BY DETERMINING THAT SORNA WAS RETROACTIVE AS TO THE DATE OF ITS ENACTMENT, AND THUS APPLIED TO MR. MADERA.

ISSUE II: WHETHER EVEN ASSUMING THAT THE DISTRICT COURT DID NOT ERR BY DETERMINING THAT SORNA WAS TO BE APPLIED RETROACTIVELY, CONGRESS NONETHELESS EXCEEDED ITS CONSTITUTIONAL AUTHORITY BY DELEGATING THIS CRUCIAL LEGISLATIVE DETERMINATION TO ANOTHER BRANCH OF GOVERNMENT.

ISSUE III: WHETHER THE ADAM WALSH ACT VIOLATES THE *EX POST FACTO* CLAUSE OF THE CONSTITUTION BECAUSE IT PUNISHES MR. MADERA FOR ACTS COMMITTED PRIOR TO THE PASSAGE OF THE ACT.

ISSUE IV: WHETHER THE DISTRICT COURT ERRED BY DETERMINING THAT 18 U.S.C. § 2250(a) DID NOT VIOLATE THE COMMERCE CLAUSE BECAUSE IT NEITHER REQUIRES A JURISDICTIONAL NEXUS BETWEEN THE TRAVEL AND CRIME, NOR ANY EFFECT ON COMMERCE.

ISSUE V: WHETHER SORNA VIOLATES MR. MADERA'S PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Court Below

The Appellant, Wilfredo Madera, was arrested on October 23, 2006, and charged, by way of Criminal Complaint, with failure to register as a sex offender, in violation of 18 U.S.C. § 2250. *See* Doc 1. On November 1, 2006, a federal grand jury returned a one count indictment, charging Mr. Madera with failing to register as a sex offender, in violation of 18 U.S.C. § 2250. Doc 13. Specifically, the indictment charged that Mr. Madera "did knowingly and unlawfully fail to register and update a registration as required by the Sex Offender Registration and Notification Act," (hereafter "SORNA"), in violation of 18 U.S.C. § 2250(a). Doc 13, ¶ 4.

On January 5, 2007, Mr. Madera filed a motion to dismiss the indictment. Doc 29. The Honorable G. Kendall Sharp, Unites States District Judge, held an evidentiary hearing on the motion to dismiss, orally denying the motion to dismiss. Doc 34. Later that same day, Mr. Madera entered, with permission of the district court and consent of the government, a conditional plea of guilty, reserving his right to appeal the district court's denial of the motion to dismiss. Doc 39 at 26. The district court later entered a written order denying the motion to dismiss. Doc 36. On April 25, 2007, the parties filed a written conditional guilty plea pursuant to Federal Rule of Criminal Procedure 11(a)(2), memorializing their intent to permit Mr. Madera to appeal the district court's

denial of his motion to dismiss. Doc 42.

Judge Sharp sentenced Mr. Madera to time served (which was approximately 6 months' imprisonment), four years of probation, and a $500.00 fine. Doc 43. The judgment was entered on April 26, 2007. Doc 43. Mr. Madera filed a timely notice of appeal on May 2, 2007. Doc 44. The government has filed a cross-appeal. Doc 48.

Mr. Madera is currently serving his term of probation.

(ii) Statement of the Facts

A. Chronology of Events

The facts of this case are straightforward and are primarily taken from the sworn complaint and indictment:

On November 17, 2005, Mr. Madera was convicted of the *misdemeanor* offense in New York of "Sexual Contact with Person less than 14 years old." Doc 13 at 1; PSR ¶29. He was later sentenced to six years' probation for that state conviction. Doc 1 at 2.

On May 1, 2006, Mr. Madera signed a New York sexual offender registration form stating, *inter alia*, "If you move to another state you must register as a sex offender within 10 days of establishing residence." Doc 1 at 2.

On June 6, 2006, Mr. Madera moved from New York to Florida and was issued a Florida Driver's License. Doc 1 at 3; Doc 38 at 7.

On July 27, 2006, as will be discussed in detail below, Congress passed the Adam Walsh Act ("the Act"), P.L. 109-248, which created, among many other things, the Sex Offender Registration and Notification Act ("SORNA"). SORNA requires "sex offenders" to register and maintain current information in each jurisdiction where the offender resides or works. *See* 42 U.S.C. § 16911(1), 16913(a)–(c). The Act also created a new criminal offense for individuals who are required to register under SORNA, but fail to do so. *See* 18 U.S.C. § 2250 (entitled, "Failure to Register").

On October 23, 2006, a sworn criminal complaint was filed in the United States District Court for the Middle District of Florida, alleging that Mr. Madera was a registered sex offender in New York State, was living at 905 Alton Avenue, Orlando, Florida 32804, and had failed to register as a sex offender in the State of Florida, in violation of 18 U.S.C. § 2250. *See* Doc 1 at 1-2. He was arrested later that day. *See* Doc 8.

On November 1, 2006, a grand jury returned an indictment, charging Mr. Madera with failure to register as a sex offender, in violation of 18 U.S.C. § 2250. *See* Doc 13. The indictment failed to allege specific dates where Mr. Madera traveled in interstate commerce, but instead generally stated, "**Subsequent to his conviction in New York**, defendant Madera traveled in interstate commerce to the State of Florida, where he resided and was employed." Doc 13 at 1 (emphasis supplied).

On January 11, 2007, after the district court orally denied Mr. Madera's motion to dismiss, Mr. Madera entered a conditional plea of guilty to the failure to register charge, permitting him to appeal the denial of that motion.

On April 26, 2007, the district court sentenced Mr. Madera to time served and four years of probation. Doc 43.

B. Overview of The Adam Walsh Act, P.L. 109-248 (July 27, 2006)

On July 27, 2006, President George W. Bush signed the Adam Walsh Act into law. Title I of the Act, entitled the Sex Offender Registration and Notification Act, creates a federally-mandated, national sex offender registry law. *See* 42 U.S.C. §§ 16901-16962. SORNA requires, *inter alia*, individuals who are "sex offenders" to register and maintain current information in each jurisdiction: (a) where the sex offender was convicted, (b) where the sex offender resides, (c) where the sex offender is employed and where the sex offender attends school, and (d) requires that the individual register prior to his release from prison, or no later than three business days after any change in residence, employment or student status. *See* 42 U.S.C. §§ 16911(1), 16913(a)–(c). SORNA further requires that every state establish an internet website, publishing information about sex offenders registered in its registry. *See* 42 U.S.C. § 16918.

SORNA also establishes a "National Sex Offender Public Website" to be

maintained by the Attorney General, which shall include "relevant information for each sex offender and other person listed on a jurisdiction's website," and make "relevant information" publicly accessible. *See* 42 U.S.C. § 16920. It also requires that each jurisdiction include in the design of its own website all field search capabilities need for full participation in the National Sex Offender Public Website and "shall participate in that website as provided by the Attorney General." 42 U.S.C. § 16918.

SORNA further establishes a three-tier classifications system for sex offenders. *See generally* 42 U.S.C. § 16911. Tier I sex offenders are, among myriad other factors, those whose offense is punishable by one year or less imprisonment. *See* 42 U.S.C. § 16911(2). Tier II sex offenders, again among myriad other factors, are those individuals whose offense is punishable by more than one year imprisonment and who committed that offense against a minor. *See* 42 U.S.C. § 16911(3). Tier III classifications, the most severe of the classification tiers, include individuals whose offense is punishable by imprisonment of more than one year and involve, *inter alia*, aggravated sexual abuse of an adult or minor. *See* 42 U.S.C. § 16911(4). It is important to note that Congress did not provide a **procedural mechanism** for challenging a tier classification.

Lastly, and perhaps most applicable to facts and circumstances of this case, the

Act further creates **new** federal crimes for those individuals who, among other things, are required to register under SORNA, but fail to do so. *See* 18 U.S.C. § 2250 (entitled, "Failure to Register").

As will soon be explained, Congress delegated to the Attorney General the authority "to specify the applicability" of SORNA to "sex offenders" who are "convicted **before**" July 27, 2006, as well as those who are "convicted before . . . its implementation in a particular jurisdiction." 42 U.S.C. §§ 16912(b), 16913(b), 16913(d), 16917(a)–(b) (emphasis supplied). As such, Congress explicitly did not decide whether SORNA would apply retroactively to persons, such as Mr. Madera, who were convicted before July 27, 2006, but instead authorized the Attorney General to make that crucial decision. *See* 42 U.S.C. § 16913(d)

C. The Elements of the 18 U.S.C. § 2250(a) Offense

The Act amended Title 18 of the criminal code, creating the new federal criminal offense of "failure to register." *See* 18 U.S.C. § 2250. That new criminal offense provides the following in relevant part:

> (a) In general.--Whoever–
>
> (1) is required to register under the Sex Offender Registration and Notification Act; [and]
>
> (2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction 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; or
>
> (B) **travels in interstate or foreign commerce**, or enters or leaves, or resides in, Indian country; and
>
> (3) **knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act**;
>
> shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. § 2250(a) (emphasis supplied).

Subsection (a) of the statute provides a statutory maximum of 10-years' imprisonment for anyone convicted of failure to register. *See* 18 U.S.C. § 2250(a)(B)(3). If the individual charged with failure to register "commits a crime of violence," then that individual has a mandatory minimum sentence of five years' imprisonment, and a statutory maximum of 30 years' imprisonment, which "shall be in addition and consecutive to the punishment provided for the violation in subsection (a)." 18 U.S.C. § 2250(c)(1).

Stated simply, the Act specifies that it is crime for an individual (1) who is required to register under SORNA (such as an individual with a prior sexual offense–as defined by SORNA), (2) to travel in interstate commerce to a different state to reside or work, and (3) then subsequently fails to register as a sex offender in that

state. *See* 18 U.S.C. § 2250(a).

D. The Hearing on the Motion to Dismiss

At the hearing on the motion to dismiss, defense counsel asserted that the Act, which was passed on July 27, 2006, violated Mr. Madera's rights under the *Ex Post Facto* Clause in two ways. Doc 39 at 5. Defense counsel first asserted that the Act, which (defense counsel contended) was punitive in nature, violated the *Ex Post Facto* Clause to punish Mr. Madera for conduct that occurred prior to the July 27, 2006 enactment of the Act. Doc 39 at 6. Specifically, defense counsel argued that because Mr. Madera traveled from New York in interstate commerce and established residency in Florida "prior to" the enactment of the Act, it was a violation of the *Ex Post Facto* Clause to "prosecute him" for that conduct. Doc 39 at 6.

Next, defense counsel argued that because the underlying New York misdemeanor sex offense, which was the basis for requiring Mr. Madera to register under SORNA in Florida, also occurred *prior to* the enactment of the Act, it was also a violation of the *Ex Post Facto* Clause. Doc 39 at 6.

Defense counsel then argued that because the Act delegated the authority to the Attorney General to decide whether the Act applies "to sex offenders convicted before the enactment of the Act," and the Attorney General, to date, had failed to make that retroactivity determination, it was premature to prosecute Mr. Madera for violating the

Act. Doc 39 at 8. Furthermore, defense counsel argued that even if the prosecution was not premature, Congress' delegation to the Attorney General violated the delegation doctrine. Doc 39 at 9.

Lastly, defense counsel argued that the Act violated the Commerce and Due Process Clauses of the Constitution. *See* Doc 39 at 10-11.

The government responded that the charged offense did not violate Mr. Madera's protections under the *Ex Post Facto* Clause because "the indictment in this case does not seek to charge the defendant with something he did prior to the enactment of the [Adam] Walsh Act." Doc 39 at 12. Specifically, the government argued that the crime was "not being convicted in New York and moving" to Florida. Doc 39 at 12. Instead, the government asserted, the "crime is living [in Florida] and working here and not being registered after being informed of the requirement to do so." Doc 39 at 12.

Next, the government asserted that Congress did not, by authorizing the Attorney General to determine whether the Act be applied retroactively, violate the delegation doctrine because "the attorney general is not being ceded the right to decide whether or not the law is to be applied retroactively." Doc 39 at 13. Instead, the government contended, that the Act states that "the attorney general can establish and make rules and publish rules to show what the states should do and what the individual

should do when the defendant has a conviction that occurred prior to July 27th of 2006, and to set time limits, how to implement the law in those gap-filling measures." Doc 39 at 13.

The district court subsequently found that the Act was constitutional. Doc 39 at 18. It held that the Act was a "nonpunitive," notice statute, and, as such, it did not violate the *ex post facto* provision of the Constitution. Doc 39 at 18. The district court then went on to address Mr. Madera's claim that Congress impermissibly delegated to the Attorney General the authority to determine whether the Act be applied retroactively as follows:

> Now, with regard to Section 113(d) of the Act in which Congress has delegated certain regulatory authority to the attorney general, this court finds that Congress does not have the power to either abrogate its own authority or delegate that authority to an executive branch of the government. What Congress can do would be either to make the Act retroactive or by delegating it to the attorney general. The attorney general can issue regulations, which are only advisory to the federal courts. The federal courts must make the end decision as to whether a regulatory act is constitutional or not. So therefore, this Court finds that the Walsh Act is retroactive. And, therefore clarifies it as of this date.

Doc 39 at 19.

The district court nonetheless stated that it was "amenable to dismissing the case" if Mr. Madera updated his sex offender registration. Doc 39 at 19. The district court reasoned, "Well, now that [Mr. Madera has] agreed to register, if he does, then

the spirit of the Act has been met. And from this point on, there wouldn't be any confusion, unless what I have just ruled is overturned by a court of appeals that says, well, it isn't retroactive, then that's a different point." Doc 39 at 20. It then declared, "But today is new law and, therefore, it should be punitive if he is willing today to accept the Court's ruling and register. I mean, [the government], can go ahead and appeal it, but [that] is what I am offering . . .." Doc 39 at 20. The government then vehemently objected to the district court's inclination to dismiss the indictment, noting that it did not believe "the Court had any legal basis or jurisdiction for dismissing the case . . ." Doc 39 at 20. After defense counsel agreed to have Mr. Madera immediately register, the district court stated, "if you will certify to this court that he has registered, that [it] will dismiss the case." Doc 39 at 21-22.

The district court then stated its legal basis for proposing to dismiss the case, "The legal basis is that the case – upon his registration, the case becomes moot, because it *is only as of today* that he knew that the case was retroactive, because the Court so found." Doc 39 at 22 (emphasis supplied). The district court subsequently reversed course, stating "I don't think I can validly dismiss the case, but the defense knows where the Court stands on the punitive aspects at this moment." Doc 39 at 26. Defense counsel then stated that "if the Court has now modified its order and has denied the defense motion, then we need to proceed to trial or a plea. . . . I think it

would be our intent to enter a [conditional] plea, so that we could preserve our appellate issues." Doc 39 at 26. The district court then stated that it was "willing to sentence" Mr. Madera that day, which the government objected to as well. Doc 39 at 27. A recess was then taken.

E. The Conditional Guilty Plea is Entered

After a one hour recess, the district court conducted a change of plea hearing. Doc 38 at 2. Defense counsel then "reassert[ed]" all arguments made earlier that day, as well as those made in Mr. Madera's motion to dismiss. Doc 38 at 2. After a plea colloquy, Mr. Madera entered a conditional plea of guilty, reserving his right to appeal the denial of his motion to dismiss the indictment. Doc 38 at 7. Agreeing with the government, the district court denied Mr. Madera's motion to be released pending sentencing. Doc 38 at 9. Although the district court had "no objection" to releasing Mr. Madera pending his sentence, it nevertheless referred the issue of release to the magistrate judge. Doc 38 at 10. As such, Mr. Madera was remanded into custody pending his sentencing hearing. Doc 38 at 10.

F. The District Court's Written Order Denying the Motion to Dismiss

The district court issued a written order five days after the hearing on the motion to dismiss. *See* Doc 36. The district court first held that Congress did not violate the non-delegation doctrine when it mandated that "[t]he Attorney General **shall** have the

authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 . . ." Doc 36 at 7 (emphasis supplied); *see* 42 U.S.C. § 16913 . It summarily stated that Congress was not "abrogating its legislative authority, in violation of the Constitution, through this statute." Doc 36 at 7.

The district court then opined that the "determination of whether a law is retroactive is in the capable hands of either one of two branches of government: Congress or the courts." Doc 36 at 7. The district court reasoned that Congress, in passing the Act, was merely providing an "advisory role" to the Attorney General as follows, "Congress, in stating that the Attorney General has the authority to determine how sex offenders convicted before July 27, 2006, should comply with SORNA registration, is merely giving the Attorney General an advisory role to the courts." Doc 36 at 7.

Next, the district court contradicted its ruling from the bench that the Act was retroactive as of the date *of the hearing* on the motion to dismiss. *See* Doc 39 at 19. Instead, the district court ruled that the Act was retroactive as to the date of the *enactment of the Act*, which was on July 27, 2006. Doc. 36 at 5. It reasoned that because Mr. Madera signed a sexual offender registration form relating to his New York conviction, he was "on fair notice" that he was required to register as a sex

offender" under the Act once he moved to Florida. Doc 36 at 8. As such, the district court reasoned that, because no "new duties" were imposed by the passage of the new federal legislation, the retroactive effect of the statute did not "impair any rights [Mr. Madera] possessed when he failed to register in Florida." Doc 36 at 8.

Addressing Mr. Madera's *ex post facto* claim, the district court further held that there was no such violation because the purpose of the Act, in its judgment, was not punitive, but instead was simply "civil, nonpunitive." Doc 36 at 10. It then reasoned that the Act was not so punitive *in purpose or effect* as to negate the intent of the legislature. Doc 36 at 10-11 (citing *Smith v. Doe*, 538 U.S. 84, 97, 102, 105 (2003)). As such, the district court rejected Mr. Madera's *ex post facto* claims, holding that this "rationale effectively makes the Act a notice statute, and nothing more." Doc 36 at 11.

Next, the district court held that the Act did not violate Mr. Madera's substantive due process because this Court had "expressly held that substantive due process does not invalidate sex offender registration statutes." Doc 36 at 12 (citing *Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005)).

Lastly, the district court rejected Mr. Madera's claim that the Act violated the Commerce Clause of the Constitution because, it so held, that the "ability to track sex offenders as they move from state to state, and continue to identify these sex

offenders, is enough to fall under the veil of the Commerce Clause." Doc 36 at 13-14.

G. The Sentencing Hearing

On April 25, 2007, and after a Pre-Sentence Report (PSR) was prepared, the district court held a sentencing hearing. Doc 50.[1] Defense counsel objected to the categorization of Mr. Madera underlying New York sex offense as "three felony counts." Doc 50 at 3. Defense counsel clarified that Mr. Madera "pled to . . . a lesser charge of sexual abuse, second degree, which is a Class A misdemeanor." Doc 50 at 3. The district court sustained the objection, writing "misdemeanor" in paragraphs 26, 27 and 28 of the PSR. Doc 50 at 4.

Defense counsel thereafter made the following mitigation argument to the district court, "I think the court is aware that Mr. Madera is now registered [as a sex offender] by the State of Florida. . . . He's been incarcerated for six months. I think that's a fair sentence in this particular case." Doc 50 at 6-7. Defense counsel further noted that at least one other district court has dismissed the failure to register charges, holding that "the Adam Walsh Act pertaining to acts that were committed before July 27, 2006, the effective date of the act, was an *ex post facto* violation of the

[1] Because the Sentencing Commission had not yet promulgated a sentencing guideline provision for the failure to register offense charged here, the PSR was unable to indicate a sentencing guidelines range. *See* PSR ¶ 45 (listing only that 18 U.S.C. § 2240 had a statutory maximum sentence of ten years' imprisonment).

Constitution." Doc 50 at 7. As such, defense counsel asserted, the district court should "take that into account in determining the sentencing because you have different courts throughout the United States holding differently." Doc 50 at 8.

The government then advised the district court that the Sentencing Commission had "proposed amendments" for the failure register offense. Doc 50 at 7. As such, the government argued that Mr. Madera should be sentenced within what **it had believed** the proposed amendments' guideline range would be: 24 to 30 months' imprisonment. Doc 50 at 7. Defense counsel clarified that the proposed guidelines referenced by the government were not "applicable to this case," as those guidelines "came out after Mr. Madera entered his plea." Doc 50 at 11. Defense counsel requested that Mr. Madera be sentenced to time served. Doc 50 at 11.

The district court then, again noting that the purpose of the Act was not punitive, imposed a term of four years' probation. Doc 50 at 12. The district court ruled, "But for the next four years, if you refuse to register wherever you are, you're going to be back here." Doc 50 at 12. After the imposition of the sentence, defense counsel reasserted "all the issues that we raised in the motion dismiss, not only the written motion but as argued before the court." Doc 50 at 13. The government thereafter objected the sentence as being unreasonable. Doc 50 at 13-14.

(iii) Standard of Review

This Court reviews the district court's denial of a motion to dismiss for an abuse of discretion. *See United States v. Noriega*, 117 F.3d 1206, 1211 (11th Cir. 1997). "To the extent [a defendant's] assignments of error on these matters implicate the district court's resolution of questions of law, however, [this Court's] review is *de novo*." *Id.* (citation omitted).

SUMMARY OF THE ARGUMENT

This appeal presents many issues of first impression relating to the constitutionality of the Adam Walsh Act, which Congress passed on July 27, 2006. The Honorable G. Kendall Sharp, United States District Judge, Middle District of Florida, was one of the first (if not, the first) district judges in the Nation to decide the difficult constitutional issues. Judge Sharp held that the Adam Walsh Act was constitutional, retroactive as to the date of its enactment, and Mr. Madera's prosecution under failure to register as a sex offender, 18 U.S.C. 2250(a), was proper.

Be that as it may, this Court can avoid those difficult constitutional questions and decide this case on narrower grounds. First, it is clear the district court ignored the plain language of SORNA, and thus erred as a matter of law, by determining that SORNA was retroactive as to the date of SORNA's enactment on July 27, 2006. First, as a *condition precedent* to applying SORNA retroactively to individuals who, like

Mr. Madera, were convicted of a sex offense *prior to* SORNA's enactment, Congress mandated that the Attorney General initially determine whether SORNA was retroactive in the first instance. Because the Attorney General failed to make that determination until February 28, 2007, the government's prosecution of Mr. Madera on November 1, 2006, was approximately four months premature. As such, the indictment could have been dismissed on that sole ground. Second, this Court can avoid the constitutional issues in this appeal if it determines that the plain language of the "failure to register as a sex offender" crime set forth in 18 U.S.C. § 2250 necessitates the conclusion that it be applied to individuals who travel in interstate commerce *after* the July 27, 2006 enactment of the Act. The district court erroneously determined that Mr. Madera's travels from New York to Florida pre-dating the passing of the July 27, 2006 Act satisfied section 2250(a).

In the event that this Court determines that the plain language of the statute was ambiguous, the statute must nonetheless be strictly construed consistent with the rule of lenity and applied only to clearly covered conduct, which bodes in favor of dismissing the indictment against Mr. Madera. That, again by itself, is an independent ground for reversal in this case, enabling this Court to not decide the case on constitutional grounds.

If this Court decides to delve into the constitutional issues, Mr. Madera first

argues that even though the district court determined that 18 U.S.C. § 2250(a) was to be applied retroactively prior to the Attorney General's February 28, 2007 declaration as to the same, Congress' delegation of that crucial decision to the Attorney General was an impermissible delegation of constitutionally-prescribed, legislature authority.

Additionally, the district court erred by determining that the Adam Walsh Act did not violate the *Ex Post Facto* Clause of the Constitution. Congress intended the Adam Walsh Act to be a punitive statute, which plainly affords individuals, like Mr. Madera, protection against the implementation of *ex post facto* laws. At a minimum, however, the Act is a civil, non-punitive statute that is so punitive in purpose or effect as to negate Congress' intention to deem it civil, which similarly affords individuals protection under the *Ex Post Facto* Clause. Additionally, the crime alleged in the indictment punishes Mr. Madera for acts committed prior to the passage of the Adam Walsh Act. Both Mr. Madera's predicate sex offense, as well as his travels in interstate commerce, occurred prior to the passage of the Act.

Furthermore, the district court erred as a matter of law by determining that section 2250(a) did not, either on its face or as applied to Mr. Madera, violate the Commerce Clause. The failure to register statute, 18 U.S.C. § 2250(a), violates the Commerce Clause because it fails to establish a constitutionally sufficient relationship to the regulation of interstate commerce.

The district court also erred by determining that SORNA did not violate Mr. Madera's procedural and substantive due process rights. The district court first erred by holding that Mr. Madera received "fair notice" of his requirements to register under SORNA via New York's sex registration laws, which pre-dated SORNA. SORNA's sex offender registries and reporting conditions further violate Mr. Madera's due process rights because SORNA neither provides for a hearing, nor even a petition process, prior to publishing the affected individual's name on the sex offender internet registries. Similarly, it offers neither a hearing nor a petition process prior to compelling that person to comply with other reporting conditions.

Lastly, Mr. Madera's substantive due process rights have been violated because he (or any other individual) may be deprived of liberty when his name is listed on the state and federal registries and is compelled to comply with the other reporting/registration portions of the Act, even if he had not actually been convicted of an offense that Congress listed as a qualifying "sex offense" in SORNA.

Accordingly, Mr. Madera requests that this Court vacate his conviction and resulting sentence.

ARGUMENT AND CITATIONS OF AUTHORITY

ISSUE I: THE DISTRICT COURT ERRED BY DETERMINING THAT SORNA WAS RETROACTIVE AS TO THE DATE OF ITS ENACTMENT, AND THUS APPLIED TO MR. MADERA.

Prior to delving into the more difficult constitutional issues presented in this appeal, it is clear the district court ignored the plain language of SORNA, and thus erred as a matter of law, by determining that SORNA was retroactive as to the date of its July 27, 2006 enactment. First, as a *condition precedent* to applying SORNA retroactively to individuals who, like Mr. Madera, were convicted of a sex offense *prior to* SORNA's enactment, Congress mandated that the Attorney General initially determine whether SORNA was retroactive in the first instance. Because the Attorney General failed to make that determination until February 28, 2007, the government's prosecution of Mr. Madera on November 1, 2006, was approximately four months premature. Additionally, the plain language of the "failure to register as a sex offender" crime set forth in 18 U.S.C. § 2250 necessitates the conclusion that it be applied only to individuals, unlike Mr. Madera, who traveled in interstate commerce *after* the July 27, 2006 enactment of the Act. As such, the district court abused its discretion by failing to grant Mr. Madera's motion to dismiss.

A. SORNA Did Not Apply Retroactively Until the Attorney General Said So on February 28, 2007.

Section 113(d) of SORNA provides:

> The Attorney General **shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act** or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

42 U.S.C. § 16913(d) (emphasis supplied)

The plain language of SORNA thus mandates that the Attorney General make that retroactivity decision and not the district court. *See* 42 U.S.C. § 16913(d). Until the Attorney General fulfilled its Congressional mandate that it "shall . . . specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act," – which he did not do until February 28, 2007 – the plain language of the statute reveals that SORNA was *not* to be retroactively applied. *Id.*

This Court has repeatedly stated that it begins its construction of a statutory provision "'where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the words of the statutory provision.'" *CBS, Inc. v. Primetime 24 Joint Venture*, 245 F.3d 1217, 1222 (11th Cir. 2001) (quoting *Harris v. Garner*, 216 F.3d 970, 972 (11th Cir. 2000) (*en banc*)). In

so doing, this Court follows the plain language of a statute and assumes that "Congress said what it meant and meant what it said." *CBS, Inc.*, 245 F.3d at 1222 (internal quotation and citation omitted).

Furthermore, this Court has recently reiterated the Supreme Court's directive that "the term 'shall' 'normally creates an obligation impervious to judicial discretion.'" *United States v. Quirante*, 486 F.3d 1273, 1275 (11th Cir. May 21, 2007) (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35, 118 S. Ct. 956, 962 (1998)). "That is, where Congress uses the word 'shall' to describe a party's obligation, Congress intends to command rather than suggest." *Quirante*, 486 F.3d at 1275 (reversing, where district court failed to give proper credence to Congress' usage of the word "shall" in its calculation of a sentence) (internal quotation omitted).

In SORNA, Congress commanded that the Attorney General "**shall** have the authority **to specify the applicability of** the requirements of this subchapter to sex offenders convicted before July 27, 2006." 42 U.S.C. § 16913(d) (emphasis supplied). In no uncertain terms, Congress utilized the word "shall," and thus commanded, that the statute *not* be applied retroactively until the Attorney General fulfills its Congressional mandate to make that retroactivity determination. *See* 42 U.S.C. § 16913(d). Congress also, again by utilizing the word "shall," set forth an obligation

of the Attorney General that was to be "impervious to judicial discretion.'" *Quirante*, 486 F.3d at 1275 (quoting *Lexecon Inc.*, 523 U.S. at 35, 118 S. Ct. at 962).

Despite Congress' clear and unambiguous efforts to delegate the retroactivity determination to the Attorney General, the district court pierced what was intended to be an "impervious" directive to the Attorney General and took it upon itself to usurp the Attorney General's delegated duty. That is, the district court determined that it was "retroactive as of the day it was enacted on July 27, 2006." Doc 36 at 5. If Congress had intended SORNA to apply to individuals, such as Mr. Madera, convicted of an applicable sexual offense before the date of SORNA's enactment, then it would *not* have so clearly and unambiguously asked the Attorney General to do so. Congress chose not to do so and left that determination (right or wrong) to the Executive Branch via the Attorney General. *See United States v. Kapp*, 487 F. Supp.2d 536, 542 (M.D. Pa. May 16, 2007) (dismissing 18 U.S.C. § 2250(a) failure to register indictment; holding that because the Attorney General failed to "animate SORNA's provisions to previously convicted offenders, SORNA did not apply to" defendants who were indicted *prior to* the Attorney General's pronouncement of the same); *United States v. Marvin Smith,* No. 2:07-cr-00092, 2007 WL 1725329 (S.D. W. Va. June 13, 2007) (unpub.) (same); *but see United States v. Hinen*, 487 F. Supp.2d 747, 750 (W.D. Va. May 12, 2007) (explaining that "the plain language of SORNA requires an offender

to register, without regard to any construction of the statute by the Attorney General") (citing, *inter alia*, *United States v. Manning*, No. 06-20055, 2007 WL 624037, at *2 (W.D. Ark. Feb. 23, 2007) (same)).

Furthermore, it logically follows that Congress would not have delegated that duty to the Attorney General if it had intended federal courts to make that retroactivity determination for the Attorney General.[2] To interpret section 16913(d) that way, as the district court did here, would be to render that entire section of SORNA meaningless, which would be impermissible under the well-established rules of statutory construction. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253, 112 S. Ct. 1146, 1149 (1992) (noting that "courts should disfavor interpretations of statutes that render language superfluous"); *United States v. Canals-Jiminez*, 943 F.2d 1284, 1287 (11th Cir. 1991) (noting that a statute should be "interpreted so that no words shall be discarded as meaningless, redundant, or mere surplusage").

Stated simply, section 16913(d) would be discarded as meaningless if Congress had intended the federal courts to make the retroactivity determination after it had forcefully directed the Attorney General to make that decision. As such, until the Attorney General fulfilled its Congressional mandate to "specify the applicability of"

---

[2] Mr. Madera does not concede that the delegation to the Attorney General was proper. Instead, Mr. Madera makes this argument assuming that Congress did *not* impermissibly delegate the retroactivity determination to the Attorney General.

SORNA to sex offenders convicted before July 27, 2006, such as Mr. Madera, SORNA was not to be retroactively applied.

The Attorney General did not fulfill its mandate until February 28, 2007. On that day, which was nearly *four months after* the grand jury indicted Mr. Madera in this case, the Attorney General promulgated an "interim rule" which deemed that SORNA shall retroactively apply to anyone convicted of a sex offense, regardless of when that offense took place. *See* 28 C.F.R. § 72.3.

Because Mr. Madera's predicate New York sex offense and the government's November 1, 2006, prosecution of Mr. Madera for failure to register as a sex offender under 18 U.S.C. § 2250(a) was *prior to* the Attorney General making its retroactivity determination, the plain and unambiguous language of SORNA shows that the prosecution was premature. Mr. Madera's motion to dismiss thus should have been granted on that independent ground.

B. The Plain Language of 18 U.S.C. § 2250(a) Necessitates that It Be Applied Only to the Individuals Who Traveled in Interstate Commerce After the July 27, 2006 Enactment of the Act.

Furthermore, the plain 1anguage of section 2250 is clear that it was to only be applied to individuals who, unlike Mr. Madera, traveled in interstate commerce *after* the July 27, 2006 enactment of the Act.

It is undisputed that Mr. Madera traveled (in interstate commerce) from New York to Florida on June 6, 2006, approximately six weeks prior to the July 27, 2006, enactment of the Act. *See* Doc 1 at 2-3.

Section 2250(a) states that whoever is "required to register" under SORNA, and "***travels*** in interstate or foreign commerce," and "knowingly fails to register or update a registration as required by" SORNA, "shall be fined under this title or imprisoned not more than 10 years, or both." 18 U.S.C. § 2250(a) (emphasis supplied).

The Supreme Court has noted that "Congress' use of a verb tense is significant in construing statutes" in the context of criminal laws. *United States v. Wilson*, 503 U.S. 329, 333, 112 S. Ct. 1351, 1354 (1992). Following that logic, this Court is to assume that Congress' usage of the word "travels" – a future tense verb – meant that section 2250(a) was to only apply to individuals who traveled in interstate commerce after the July 27, 2006 enactment of the Act. *See United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (*en banc*) ("Where the **language Congress chose to express** is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said.") (emphasis supplied).

Here, there is no evidence or claim that Mr. Madera traveled after the enactment of the Act. The plain language of the Act itself dictates that it was inapplicable to Mr.

Madera. His motion to dismiss thus should have been granted. *See United States v. Bobby Smith*, 481 F. Supp.2d 846, 851 (S.D. Mich. Mar. 8, 2007) (granting motion to dismiss in 18 U.S.C. § 2250(a) prosecution because government's case lacked "evidence or claim" that defendant traveled in interstate commerce after the July 27, 2006 effective date of the Act).

C. In All Events, the Rule of Lenity Necessitates Reversal of the District Court's Denial of the Motion to Dismiss.

In the event that this Court determines that the plain language of the statute was ambiguous, the statute must nonetheless be strictly construed consistent with the rule of lenity and applied only to clearly covered conduct, which bodes in favor of dismissing the indictment against Mr. Madera. *See United States v. Bass*, 404 U.S. 336, 346, 92 S. Ct. 515, 522 (1971) (noting that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite") (internal quotation and citation omitted); *see also United States v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 1225 (1997) (noting that the "canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it to conduct only clearly covered").

Even more, a "statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication." *Fernandez-Vargas v. Gonzales*, ___ U.S. ___, 126 S. Ct. 2422, 2428 (2006) (internal quotation and citation omitted). This is particularly true when a legislative enactment affects substantive rights. *See Landgraf v. USI Film Products*, 511 U.S. 244, 286-87, 114 S. Ct. 1483, 1522 (1994) (Scalia, Kennedy, and Thomas, J.J., concurring) (citing *Kaiser Aluminum and Chemical Corp. v. Bonjorno*, 494 U.S. 827, 840, 110 S. Ct. 1570, 1579 (1990) (Scalia, J., concurring)); *accord Bennett v. New Jersey*, 470 U.S. 632, 639, 105 S. Ct. 1555, 1560 (1985) (noting that "statutes affecting substantive rights and liabilities are presumed to have only prospective effect").

Be that as it may, this Court can avoid the more difficult Constitutional issues presented in this appeal if it determines that the district court, for whichever reason this Court determines, erred by holding that SORNA was to be applied retroactively as of the date of its enactment. *See, e.g.*, *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 465-68, 109 S. Ct. 2558, 2573 (1989) ("Our reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government.").

Accordingly, it was it error as a matter of law for the district court to conclude that SORNA's registration requirements were retroactive as to the date of the Act's

enactment on July 27, 2006.

ISSUE II: EVEN ASSUMING THAT THE DISTRICT COURT DID NOT ERR BY DETERMINING THAT SORNA WAS TO BE APPLIED RETROACTIVELY, CONGRESS NONETHELESS EXCEEDED ITS CONSTITUTIONAL AUTHORITY BY DELEGATING THIS CRUCIAL LEGISLATIVE DETERMINATION TO ANOTHER BRANCH OF GOVERNMENT.

Even though the district court made the retroactivity determination prior to the Attorney General's determination, Congress' decision to delegate to the Attorney General that crucial decision was nonetheless an impermissible delegation of constitutionally-prescribed, legislature authority.

Congress delegated an enormous amount of power to the Executive Branch. As noted, the registration provision delegates "the authority to specify the applicability of the requirements" of SORNA to those convicted before July 27, 2006. 42 U.S.C. § 16913. Even more, Congress also delegated to the Attorney General the authority to "prescribe rules for the notification of sex offenders who cannot be registered in accordance with subsection(a) of this section." 42 U.S.C. § 16917(b).

As previously noted, retroactive laws are highly disfavored because, among other things, they fail to give individuals proper notice and upset settled expectations.

See, e.g., *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 114 S. Ct. 1483, 1497 (1994). A "statute shall not be given retroactive effect unless such construction is required by explicit language or by necessary implication." *Fernandez-Vargas v. Gonzales*, ___ U.S. ___, 126 S. Ct. 2422, 2228 (2006).

Be that as it may, the Supreme Court has further made clear that "Congress is manifestly not permitted to abdicate or to transfer to others the essential legislative functions with which it is [constitutionally] vested." *See Panama Refining Co. v. Ryan*, 293 U.S. 388, 421, 55 S. Ct. 241, 248 (1935). Instead, the *Ryan* Court made clear that Congress may only leave to "selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply." *Id.* at 421, 55 S. Ct. at 248 (holding that Congress had unconstitutionally delegated the Executive Branch the authority to prohibit transportation of excess petroleum, which would be subject to fine or imprisonment).

This is exactly what Congress did in the Adam Walsh Act. It placed the crucial prosecutorial decision (*i.e.*, whether or not to retroactively expose individuals to criminal liability) in the hands of the Executive Branch via the Attorney General. The authority to legislate or make law, however, is entrusted to Congress. *See* U.S. CONST. ART. I, §§ 1,8. Conversely, Congress cannot delegate its authority to another branch

of government. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550, 55 S. Ct. 837, 852 (1935) (holding that Congress had unconstitutionally authorized the Executive Branch to prescribe codes of fair competition, the violation of which would be a misdemeanor offense).

In *Panama Refining Co.*, the Court invalidated a delegation of authority under the National Industrial Recovery Act (NIRA) to the Executive Branch (via the President). 293 U.S. at 406, 432, 55 S.Ct. at 242, 253. Specifically, Congress delegated to the President the power to prohibit the interstate transport of petroleum products produced or withdrawn in violation of state law. *See id.* In declaring NIRA unconstitutional, the Court emphasized that the statute (a) did not declare any policy respecting the transportation of excess production, (b) did not qualify the President's authority, (c) did not establish any criteria governing the President's court, and (d) treated disobedience as a crime. *Id.* at 415, 55 S. Ct. at 246 .

Similarly, in *A.L.A. Schechter Poultry Corp.,* the Court addressed another provision of NIRA, which authorized the President to approve codes of fair competition from industry groups or prescribe such codes. 295 U.S. at 520-21, 55 S. Ct. at 839-40. A violation of that code was a crime. *Id.* at 523, 55 S. Ct. at 840. The Court, as it did in *Panama Refining Co.*, honed in on the absence of standards and restrictions in connection with this broad grant of authority, as well as

the delegation of the determination of criminal liability to the Executive Branch. *Id.* at 541-42, 55 S. Ct. at 848.

Under SORNA, the putative improper delegation extends to the Attorney General an across-the-board power to determine the retrospective effect of the failure to register as a sex offender criminal statute, 18 U.S.C. § 2250(a). The Attorney General was given no guidance from Congress whether, for example, all such individuals must be subject to SORNA, regardless of how old their offense, when they completed their sentences, or the nature of the offense. Instead, the Attorney General had the discretion to determine that the registration requirements of SORNA shall apply to individuals who were convicted of sex offenses 5, 10, 20, 30, or even 60 years ago. As such, it goes without saying that the Attorney General, the chief law enforcement officer of the United States, has been delegated the discretion to determine the reach of a criminal statute. It further does not appear, as was the case in both *Panama Refining Co.* and *A.L.A. Schechter Poultry Corp.*, that there are any limits placed on the Attorney General's power.

Here, the government charged Mr. Madera for failing to register as a sex offender based on a November 17, 2005, New York misdemeanor conviction. Mr. Madera has been therefore charged with an offense arising from conduct that occurred *prior to* the passage of the crimes set forth in 18 U.S.C. § 2250(a). Equipped with an

unbridled delegation from Congress, the Attorney General made a decision, via its retroactive determination, to punish that conduct. Congress allowed it. This was an impermissible delegation of constitutionally-prescribed, legislature authority. *See Panama Refining Co.*, 295 U.S. at 550, 55 S. Ct. at 852; *A.L.A. Schechter Poultry Corp.*, 294 U.S. at 550, 55 S. Ct. at 852; *but see United States v. Hinen*, 487 F. Supp.2d 747, 753 (W.D. Va. May 12, 2007) (holding that delegation to Attorney General was permissible).

ISSUE III: THE ADAM WALSH ACT VIOLATES THE *EX POST FACTO* CLAUSE OF THE CONSTITUTION BECAUSE IT PUNISHES MR. MADERA FOR ACTS COMMITTED PRIOR TO THE PASSAGE OF THE ACT.

The district court erred by determining that the Act did not violate the *Ex Post Facto* Clause of the Constitution.[3] The crime alleged in the indictment punishes Mr. Madera for acts committed prior to the passage of the Act, which is a violation of the *Ex Post Facto* Clause of the Constitution.

The Supreme Court has noted that the *Ex Post Facto* Clause applies "only to penal statutes which disadvantage the offender affected by them." *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S. Ct. 2715, 2718 (1990) (discussing origins of the prohibitions of *ex post facto* laws). Indeed, the *Ex Post Facto* Clause law applies if

[3] *See* U.S. CONST., ART. I, § 9, cl. 2.

the legislation's intent was to impose punishment. *See id.*

Additionally, the Supreme Court has stated that if "the intention of the legislature was to enact a regulatory scheme that is civil and nonpunitive, [the Court] must further examine whether the statutory scheme is so punitive in purpose or effect as to negate [Congress'] intention to deem it civil." *Smith v. Doe*, 538 U.S. 84, 92, 123 S. Ct. 1140, 1147 (2003). If the reviewing court therefore determines that the legislature had intended to establish civil proceedings, it must then examine whether that challenged statutory scheme is indeed "so punitive in purpose or effect," and the *Ex Post Facto* Clause thus applies. *Id.*

The *Ex Post Facto* Clause also "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Weaver v. Graham*, 450 U.S. 24, 28-29, 101 S. Ct. 960, 964 (1981). The genesis of this restriction is the concern that a legislature's response "to political pressures poses a risk that they may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *Landgraf*, 511 U.S. at 266, 114 S. Ct. at 1497. Indeed, it cannot be disputed that political pressure has made sex offenders a very unpopular group in our country.[4]

---

[4] *See generally* Shiela T. Caplis, *Got Rights? Not if You're a Sex Offender in the Seventh Circuit*, 2 SEVENTH CIRCUIT REV. 115 (2006) (describing the convicted sex offender as "perhaps the most despised and unsympathetic member of American

Here, the district court held that the Act was civil, non-punitive and the *Ex Post Facto* Clause did not apply. Mr. Madera contends the Act is punitive in nature. Alternatively, even if the Act is civil and non-punitive, Mr. Madera asserts that the statutory scheme of the Act was "so punitive in purpose or effect as to negate [Congress'] intention to deem it civil." *Smith*, 538 U.S. at 92, 123 S. Ct. at 1147.

Although the Supreme Court has recently upheld the State of Alaska's sex offender statute, it is noteworthy that the sharply-divided Court's decision was premised largely upon the non-punitive purpose of Alaska's sex offender registration act.[5] *Smith v. Doe*, 538 U.S. 84, 102, 105-06 123 S. Ct. 1140, 1154 (2003) (upholding constitutionality of the Alaska sex offender registry law because the law was not punitive in nature and therefore did not trigger the protections of the *Ex Post Facto* Clause). There are significant differences between Alaska's statute and the one we have here.

First, unlike the Alaska sex offender statute addressed by the *Smith* Court, the Adam Walsh Act was intended by Congress to be punitive in nature. *See Smith*, 538 U.S. at 93-96, 123 S. Ct. at 1147-49 (finding that the Alaska legislature intended to

---

society").

[5] Since the Court's issuance of its 5-4 majority decision, two members of the majority (Chief Justice Rhenquist and Justice O'Connor), have left the Court.

create a civil, non-punitive regulatory scheme). For example, the Adam Walsh Act: (1) broadens the class of offenders subject to registration, *see* 42 U.S.C. § 16911; (2) lengthens the duration of registration, *see* 42 U.S.C. § 16915; (3) creates classes of offenders, *see* 42 U.S.C. § 16911; (4) reduces the time frame for the affected individual to advise officials of any changes to his registration information, *see* 42 U.S.C. 16913; and (5) increases the penalties for violating any of its registration requirements, *see* 18 U.S.C. § 2250.[6]

Furthermore, unlike the Alaska law, Congress' stated purpose of SORNA was to "protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below." *Compare* Pub. L. 109-248, § 102, 42 U.S.C. § 16901; *with Smith*, 538 U.S. at 93, 123 S. Ct. at 1147. Congress stated this purpose without, also *unlike* Alaska's law upheld in *Smith*, finding that sex offenders indeed have a high risk of recidivism or that public notification would promote public safety, as was the case when Alaska's legislature enacted its sex offender registration law. *Smith*, 538 U.S. at 93, 123 S. Ct. at 1147.

Mr. Madera's qualifying sex offense conviction occurred on November 17,

---

[6] Interestingly, prior to the passage of the Act, it was only a misdemeanor for an individual to fail to register as a sex offender. *See* 42 U.S.C. § 14072(i). Congress placed language in the Adam Walsh Act repealing the 42 U.S.C. § 14072 misdemeanor offense. *See* P.L. 109-248, Title I, § 129.

2005, and he traveled to Florida on June 6, 2006. Doc 1 at 2-3; Doc 13 at 1. It is thus undisputed that Mr. Madera has been charged with an offense arising from conduct that occurred prior to Congress' passage of the crimes (July 27, 2006) set forth in 18 U.S.C. § 2250(a). Additionally, Mr. Madera's failing to register in Florida in June of 2006 would only have been a misdemeanor under federal law had the government charged him prior to the July 27, 2006 passage of the Act.

Congress, via its enactment of 18 U.S.C. § 2250(a), chose to increase its previous misdemeanor penalty and make it a felony for an individual to fail to register as a sex offender. *Compare* 42 U.S.C. § 14072(i) (listing failure to register as a misdemeanor offense), *with* 18 U.S.C. § 2250(a) (listing failure to register as a felony offense punishable by up to ten years' imprisonment).

As further evidence of Congress' punitive intent (or, at a minimum, a civil, non-punitive statute that was so punitive in purpose or effect as to negate Congress' intention to deem it civil), it placed the crime for failing to register in Title 18 (a criminal part) of the United States Code. *See* 18 U.S.C. § 2250(a); *Smith*, 538 U.S. at 92, 123 S. Ct. at 1147. The misdemeanor offense that is set to be repealed pursuant to the Adam Walsh Act is set forth in Title 42 of the United States Code, entitled "Public Health and Welfare." *See* 42 U.S.C. § 14072(i).

Congress punished Mr. Madera for conduct predating the Act's July 27, 2006

passage. It punished Mr. Madera for conduct that would have otherwise been a federal misdemeanor offense. This violates *Ex Post Facto* Clause of the United States Constitution. *See United States v. Bobby Smith*, 481 F. Supp.2d 846, 851 (S.D. Mich. Mar. 8, 2007) (holding that 18 U.S.C. § 2250(a) violates the *Ex Post Facto* Clause); *United States v. Barnes*, No. 07 Cr. 187, 2007 WL 2119895, at *5 (S.D. N.Y. July 23, 2007) (rejecting government's position that "knowledge of the state law requiring registration is equivalent to knowledge of SORNA's requirements"; and noting, "The Constitutional mandate that defendants be given adequate notice and fair warning applies not only to what conduct is criminal but to the punishment which may be imposed.") (unpub.); *but see United States v. Hinen*, 487 F. Supp.2d 747, 757 (W.D. Va. May 12, 2007) (distinguishing the Court's *Smith* decision, and rejecting *Ex Post Facto* claim); *United States v. Templeton*, No. CR-06-291-M, 2007 WL 445481 (W.D. Okla. Feb. 7, 2007) (unpub.) (same).

It was thus error for the district court to determine that no such violation existed.

ISSUE IV: THE DISTRICT COURT ERRED BY DETERMINING THAT 18 U.S.C. § 2250(a) DID NOT VIOLATE THE COMMERCE CLAUSE BECAUSE IT NEITHER REQUIRES A JURISDICTIONAL NEXUS BETWEEN THE TRAVEL AND CRIME, NOR ANY EFFECT ON COMMERCE.

The district court erred as a matter of law by determining that section 2250(a) did not, either on its face or as applied to Mr. Madera, violate the Commerce Clause. The failure to register statute, 18 U.S.C. § 2250(a), violates the Commerce Clause because it fails to establish a constitutionally sufficient relationship to the regulation of interstate commerce.

Section 2250(a)(2) includes a jurisdictional predicate based upon traveling in interstate commerce. *See* 18 U.S.C. § 2250(a)(2)(B). The penalty provisions of section 2250(a) are based upon an individual's failure to comply with the registration requirement set forth in SORNA. The registration requirements of SORNA, however, do not have an adequate connection with interstate commerce and thus violates the Commerce Clause. *See Jones v. United States*, 529 U.S. 848, 859, 120 S. Ct. 1904, 1912 (2000) (vacating federal arson conviction due to insufficient nexus between the alleged criminal activity and interstate commerce); *United States v. Morrison*, 529 U.S. 598, 619, 120 S. Ct. 1740, 1754 (2000) (declaring unconstitutional a statute providing for a federal civil remedy for victims of certain crimes because, *inter alia*,

it violated the Commerce Clause) ; *United States v. Lopez*, 514 U.S. 549, 551, 155 S. Ct. 1624, 1626 (1995) (holding as unconstitutional under the Commerce Clause a federal gun law because the law "neither regulate[d] a commercial activity nor contain[ed] a requirement that the possession be connected in any way to interstate commerce").

Section 2250(a) specifies as an element of the offense that the "sex offender" must have traveled in "interstate commerce." 18 U.S.C. § 2250(a). The statute does not, however, require that the sex offender travel in interstate commerce **in furtherance of a crime that affects interstate commerce**. *See id.* Thus, it is evident that the statute requires *no jurisdiction nexus* between interstate travels and a crime, or any effect on commerce for that matter. On its face and as applied to Mr. Madera, therefore, there is an insufficient nexus between Mr. Madera traveling from New York to Florida, and how that travel affected interstate commerce.

Because the statute fails to require that the individual traveled in interstate commerce with **intent to commit** a specified crime, it does not meet the requisite jurisdictional nexus to affect commerce. As such, the law is unconstitutional on its face and as applied to Mr. Madera.

ISSUE V: SORNA VIOLATES MR. MADERA'S PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS

The district court erred by determining that SORNA did not violate Mr. Madera's procedural and substantive due process rights. First, the district court erred by holding that Mr. Madera received "fair notice" of his requirements to register under SORNA via New York's sex registration laws, which pre-dated SORNA. Next, SORNA's sex offender registries and reporting conditions violate Mr. Madera's due process rights because SORNA neither provides for a hearing, nor even a petition process, prior to publishing the affected individual's name on the sex offender internet registries *or* compelling that individual to comply with other reporting conditions. Mr. Madera's substantive due process rights have been violated because he (or any other individual) may be deprived of liberty when his name is listed on the state and federal registries and is compelled to comply with the other reporting/registration portions of the Act, even if he had *not actually been convicted* of an offense that Congress listed as a qualifying "sex offense" in SORNA.

A. The District Court Erred by Holding That Mr. Madera Received "Fair Notice" of His Registration Requirements under SORNA via New York's Sex Registration Laws, Which Pre-Dated SORNA.

It is axiomatic that "the right to notice and an opportunity to be heard must be

granted at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80, 92 S. Ct. 1983, 1994 (1972) (internal quotation and citation omitted).

Here, the district court held that although the Attorney General had yet to decide whether the registration requirements of SORNA were to be retroactively applied to Mr. Madera – an individual convicted of a predicate sex offense prior to the enactment of the Act – Mr. Madera was nonetheless provided notice from the State of New York that he must register as a sex offender if he moved from New York to another state. Doc 35 at 8. Specifically, the district court reasoned that because Mr. Madera signed "a sex offender registration form from New York, dated May 1, 2006, which stated, 'If you move to another state you must register as a sex offender within 10 days of establishing residence,'" he was on "fair notice" that he was required to register as a sex offender in Florida. Doc 35 at 8 (quoting Doc. 1, ¶ 4). The district court reasoned that "no new duties were imposed on" Mr. Madera by SORNA's enactment. Doc 35 at 8. As such, Mr. Madera's received "fair notice," the district court held, that he was required to register under SORNA. Doc 35 at 8.

The district court's reasoning is flawed and undercuts fundamental principles of due process. Section 2250(a) makes it a crime to "knowingly register or update a registration **as required by**" by SORNA. 18 U.S.C. § 2250(a)(3) (emphasis supplied). At the *earliest*, Mr. Madera was given notice by the district court that the registration

requirements of SORNA retroactively applied to him during the January 11, 2007 hearing on the motion to dismiss. There, the district court declared that it was "only as of" that day that Mr. Madera "knew that the case was retroactive, because the Court so found." Doc 39 at 22 (emphasis supplied). *See, e.g.*, *United States v. Barnes*, No. 07 Cr. 187, 2007 WL 2119895, at *3–*5 (S.D. N.Y. July 23, 2007) (holding that defendant's notice of requirement to register pursuant to state law does not equate to notice for him to register pursuant to SORNA).

In *Lambert v. California*, 355 U.S. 225, 78 S. Ct. 240 (1957), the Supreme Court held that a prosecution pursuant to a city ordinance for failing to register as a felon violated the Due Process Clause, because the defendant had neither knowledge of the duty to register nor notice of the statute requiring registration. *Id.* at 229, 78 S. Ct. at 243. The Court held that "[e]ngrained in our concept of due process is the requirement of notice. . .. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act." *Id.* at 228, 78 S. Ct. at 243.

In this case, New York's sex offender registration requirements could not have served as a proxy for SORNA's requirements because SORNA's registration requirements, as well as the penalties for not complying with those requirements, are different. For example, New York law requires a registered offender to notify the registry within ten days of the change. *See* N.Y. Correct. Law § 168-f. SORNA,

however, requires registrants to make changes of address notifications within three days. *See* 42 U.S.C. § 16913(c). Furthermore, New York's registration requirements is only a misdemeanor, whereas, SORNA's criminal provision for failure to register is a felony. *Compare* N.Y. Correct. Law § 168-t, *with* 18 U.S.C. § 2250(a). It cannot be said that the registration notice requirements for a misdemeanor offense can serve as the same for a more serious felony offense.

Moreover, because New York has failed to pass legislation conforming their sex offense registries with SORNA's requirements, it would have been impossible for Mr. Madera to have registered "as required by SORNA," which is what section 2250(a)(3) plainly requires. That is, SORNA directs each "jurisdiction" to create a sex offender registry in accordance with requirements of the Act. *See* 42 U.S.C. § 16912. SORNA further directs the states to make it a felony offense to fail to register within the state. *See* 42 U.S.C. § 16913(e). Although New York has a sex offender registry that predates SORNA, it has yet to implement the more detailed and burdensome registration requirements set for in SORNA. It would thus be impossible for Mr. Madera to have complied with the reporting requirements of SORNA in New York because there was no state vehicle that would have enabled him to do so.

Criminalizing the failure to do something that is impossible to do violates the Due Process Clause's guarantee of fundamental fairness. *See, e.g.*, *United States v.*

Dalton, 960 F.2d 121, 124 (10th Cir. 1992) (noting that it was a violation of fundamental fairness to hold someone liable for a crime when an essential element of the crime is his failure to perform an act he was incapable of performing); *see also United States v. Spingola*, 960 F.2d 909, 911 (7th Cir. 1972) (same). Because it was impossible for Mr. Madera to have complied with SORNA at the time at which he moved from New York to the Florida, the statute violated his due process rights. It was thus error as a matter of law for the district court to have concluded that New York's sex registration requirements could have provided Mr. Madera "fair notice" of his registration duties required pursuant to the newly enacted SORNA.

B. SORNA's Sex Offender Registries and Reporting Conditions Violate Mr. Madera's Due Process Rights

SORNA neither provides for a hearing, nor even a petition process, prior to publishing the affected individual's name on the sex offender internet registries *or* compelling that individual to comply with other reporting conditions. As such, SORNA violates both the procedural and substantive components of the Due Process Clause of the Fifth Amendment to the Constitution.[7]

SORNA imposes, *inter alia*, automatic sex offender status, public notification

[7] SORNA provides for a hearing in very narrow set of circumstances, none of which are applicable to facts and circumstances of this case.

on the Internet, and tier-level risk classifications. *See* Pub. L. 109-249, § 637 (requiring the Attorney General to assemble a task force to study the risk-based systems and report back within 18 months). It imposes such without a hearing to assess risk of recidivism or current dangerousness of the affected individual. *But see Connecticut Dept. of Public Safety v. Doe*, 538 U.S. 1, 123 S. Ct. 1160 (2003) (finding no procedural due process violation in Alaska's SORNA statute by not requiring a sex offender a hearing to determine his current dangerousness prior to his name being published as a sex offender on the Internet).

Despite the *Doe* decision, Mr. Madera asserts that the lack of a hearing violates his procedural due process rights, as there is no procedural method for him to challenge the validity of a prior conviction prior to his name being published on the internet registries (both state and federal registries required under SORNA).

This, in turn, can lead to a violation of his substantive due process rights because he (or any other individual) may be deprived of liberty when his name is listed on the state and federal registries and is compelled to comply with the other reporting/registration portions of the Act. This would be true even if he had not actually been convicted of an offense that Congress listed as a qualifying "sex

offense" in SORNA.[8]

Indeed, the Eleventh Circuit has held that substantive due process does not invalidate the State of Florida's sex offender registration statutes. *See Doe v. Moore*, 410 F.3d 1337, 1345 (11th Cir. 2005). This Court has yet to decide, however, whether substantive due process rights invalidate the recently-passed SORNA.

Accordingly, Mr. Madera's procedural and substantive due process rights have been violated.

---

[8] This may occur, among other avenues, when a prior conviction is overturned or expunged, or the person is pardoned. There is nevertheless no avenue in SORNA to challenge the publication of an individual's name on the registry.

CONCLUSION

Based on the foregoing arguments, reasoning, and citations of authority, Mr. Madera respectfully requests that this Court vacate his conviction and sentence.

Respectfully submitted,

R. FLETCHER PEACOCK
FEDERAL PUBLIC DEFENDER

_____

James T. Skuthan
Chief Assistant Federal Public Defender
Florida Bar No. 0544124
John L. Badalamenti
Appellate Division
Florida Bar No. 0185299
201 S. Orange Avenue, Suite 300
Orlando, Florida 32801
Telephone: 407-648-6338
E-Mail: John_Badalamenti@fd.org
Attorneys *for* Appellant Madera

CERTIFICATE OF COMPLIANCE

Counsel for Wilfredo Madera, certifies that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32 (a) (7) (B). The brief contains 11,527 words, excluding the table of contents, table of citations, Statement Regarding Oral Argument, Certificate of Compliance and Certificate of Service. Times New Roman 14 is the type size and style used in this brief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellant was furnished by United States Mail to Roberta Josephina Bodnar, Assistant United States Attorney, United States Attorney's Office, 501 W. Church Street, Suite 300, Orlando, FL 32805; and Wilfredo G. Madera, 2409 Winston Ave., Apt. C, Orlando, FL 32810 – on this 14th day of August, 2007.

I HEREBY CERTIFY that, in compliance with 11th Cir. R. 31-5, an Adobe Acrobat® PDF file of the foregoing brief was uploaded via the Internet to this Court's website on August 14, 2007, at _____ p.m.

_____

John L. Badalamenti
Appellate Division