IN THE UNITED STATES COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff, v. DARRELL L. TEMPLETON, Defendant.	)	CR-06-291-M

GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS INDICTMENT

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The plaintiff, United States of America, by John C. Richter, United States Attorney for the Western District of Oklahoma, through Randal A. Sengel, Assistant United States Attorney, submits this response to Defendant Darrell L. Templeton's Motion to Dismiss Indictment.

BACKGROUND AND PROCEDURAL HISTORY

A single-count indictment filed December 6, 2006, charged Darrell Lynn Templeton with knowingly failing to register as a sex offender in Oklahoma, as required by the Sex Offender Registration and Notification Act, 18 U.S.C. § 2250(a). (Doc. 15). In Arizona in 1989, Defendant pled guilty to sexual abuse, a Class 5 felony, in that on May 15, 1988, he engaged in sexual contact with a female without consent, in violation of Ariz. Rev. Stat. Ann. §§ 13-1404, 13-701, 13-702, 13-801, 13-804, and 13-812. (Plea Ag.)(Attach. 1). As part of the terms and conditions of his plea agreement, Defendant understood "that he [was] pleading to a Chapter 14 Offense of the Criminal Code, Title 13, A.R.S., and w[ould] be required to register as a sex offender in the county of his residence pursuant to A.R.S. § 13-3821." (Plea Ag.)(Attach. 1). Defendant's crime involved taking a female victim into the desert, assaulting her, raping her vaginally and anally, and performing forcible sodomy. (Affidavit in Support of Complaint at ¶ 2)(Attach. 7).

Defendant registered as a sex offender in 1991 in Arizona. (Sex Offender Reg.)(Attach. 2). At that time, § 13-3821 required that one who stood convicted of § 13-1404, which is part of Chapter 14 of the Arizona Revised Statute, must register without any limitation as to the victim's age. Ariz. Rev. Stat. Ann. § 13-3821 (Attach. 3). Under present Arizona law, § 13-3821 provides that persons convicted under § 13-1404 must register as sex offenders under state law where the victim was under eighteen years of age. Ariz. Rev. Stat. Ann. § 13-3821 (2006)(Attach. 4).

On January 23, 2006, Defendant applied for an Oklahoma driver's license and stated that he currently held a Texas driver's license. (Application)(Attach. 5). Defendant stated in the application that he was a resident of Oklahoma. The application notified Defendant that any person convicted of a sex offense who relocates to Oklahoma must register with the Oklahoma Department of Corrections within ten days, and with local law enforcement within three days. Defendant called Arizona law enforcement after Oklahoma officials told him he must register as a sex offender. This shows Defendant had notice of the Oklahoma registration requirement. Defendant failed to register as a sex offender in Oklahoma, as required by Oklahoma law.

On July 27, 2006, President Bush signed into law the Adam Walsh Child Protection and Safety Act, which contains the Sex Offender Registration and Notification Act and the federal failure to register as a sex offender statute, 18 U.S.C. § 2250(a), and establishes a comprehensive national system for the registration of sex offenders.

Defendant was arrested in New Mexico on October 20, 2006, on a criminal complaint filed October 12, 2006, in the Western District of Oklahoma. (Doc.1). Defendant was then transported to the Western District of Oklahoma, where he was indicted on the federal charges on December 6, 2006, as set forth above.

ARGUMENT AND AUTHORITIES

Defendant moves this Court to dismiss the indictment on several grounds: (1) the indictment fails to set forth the subsection of the Sex Offender Registration and Notification Act (SORNA) that Defendant's 1989 Arizona sexual abuse conviction allegedly meets; (2) lack of subject matter jurisdiction on grounds the statute violates the Commerce Clause; (3) he was not required to register federally because he was no longer required to register in Arizona; (4) his 1989 Arizona sexual abuse conviction occurred in a time frame not covered by SORNA and the failure to register as a sex

offender statute; (5) SORNA and the federal failure to register as a sex offender statute violate the Ex Post Facto Clause; and (6) SORNA and the federal failure to register as a sex offender statute violate the Due Process Clause. (Doc. 22 at 1).

None of Defendant's claims support dismissal of the indictment, and this Court should deny Defendant's Motion.

I. THE INDICTMENT IS MORE THAN SUFFICIENT UNDER FEDERAL RULE OF CRIMINAL PROCEDURE 7(c)(1) BECAUSE IT CONTAINS A PLAIN, CONCISE, AND DEFINITE WRITTEN STATEMENT OF THE ESSENTIAL FACTS CONSTITUTING THE OFFENSE CHARGED.

Defendant contends that the indictment in this case fails to comply with Federal Rule of Criminal Procedure 7(c)(1) because it fails to specify the subsection Defendant is charged with violating. Defendant's claim should be denied. The indictment meets the requirements of Rule 7(c)(1).

Rule 7(c)(1) of the Federal Rules of Criminal Procedure provides that "[t]he indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." The Tenth Circuit has applied a two-part test when examining the sufficiency of an indictment. First, the court looks to whether the indictment contains the elements of the offense and sufficiently apprises the defendant of what he must be prepared to meet. *United States v. Salazar*, 720 F.2d 1482, 1486 (10th Cir. 1983) (citations omitted). Second, the indictment must show to what extent the defendant may plead a former acquittal or conviction as a bar to further prosecution for the same cause. *Id*. This two-part test is embodied in Federal Rule of Criminal Procedure 7(c)(1). *United States v. Elliott*, 689 F.2d 178, 180 (10th Cir. 1982). In applying the two-part test for sufficiency of the indictment, courts may consider the entire document. *United States v. Staggs*, 881 F.2d 1527, 1531 (10th Cir.1989) (citations omitted). *See also United States v.*

Kilpatrick, 821 F.2d 1456, 1462 (10th Cir. 1987) (stating an "indictment should be read as a whole and interpreted in a common-sense manner").

The indictment in this case meets the two-part test. It contains the elements of the charges and apprises Defendant of those charges. It also shows to what extent Defendant may assert a double jeopardy defense as a bar to further prosecution for the same cause. The indictment contains the date of the offense, tracks the language of 18 U.S.C. § 2250(a), and adequately sets out the elements of the offense. *See United States v. Gama-Bastidas*, 222 F.3d 779, 785 (10th Cir. 2000) (stating sufficiency of indictment is determined by looking to whether it "sets forth the elements of the offense charged, puts the defendant on fair notice of the charges against which he must defend, and enables the defendant to assert a double jeopardy defense")(quoting *United States v. Dashney*, 117 F.3d 1197, 1205 (10th Cir. 1997)); *United States v. Poole*, 929 F.2d 1476, 1478 (10th Cir.1991)(same) (quotations omitted). The indictment is more than sufficient under Federal Rule of Criminal Procedure 7(c)(1) and should not be dismissed.

Defendant's claim that the indictment is insufficient because it fails to specify "which subsection of the Sex Offender Registration and Notification Act [that Defendant's] conviction allegedly meets[ ]" is not a basis for dismissal. (Doc. 22 at 9). The indictment identifies 18 U.S.C. § 2250(a) as the statute violated. While the indictment does not specify the subsection Defendant violated, this is not a sufficient basis for dismissing the indictment. "[T]he sufficiency of an indictment is determined by practical rather than technical considerations." *Gama-Bastidas*, 222 F.3d at 785. It "is not a question of whether it *could* have been more definite and certain." *Salazar*, 720 F.2d at 1487 (citing *United States v. Debrow*, 346 U.S. 374, 378). Nor is it a question of "whether the indictment could have been framed in a more satisfactory manner." *Gama-Bastidas*, 222 F.3d

at 785. Instead, the focus is on whether the indictment conforms to minimal constitutional standards. *Id*.

In this case, the indictment conforms to those standards. Moreover, even the omission of citation is not a grounds for dismissal of an indictment unless it misleads a defendant to his prejudice. *United States v. Hutcheson*, 312 U.S. 219, 229 (1941); *United States v. Freeman*, 813 F.2d 303, 305(10th Cir. 1987)(citing Fed. R. Crim. P. 7(c)(3)). If a complete omission of citation does not make an indictment insufficient, it follows that the mere failure to include the subsection cannot be fatal.

This Court should also reject Defendant's claim that "[t]he indictment fails to inform Defendant as to why he is allegedly required to register under the Sex Offender Registration and Notification Act[.]" (Doc. 22 at 9). That information is spelled out in the indictment. The indictment charges that Defendant was previously "convicted of a sexual offense in the State of Arizona and initially registered as a sex offender[.]" (Doc. 15.) "[H]e traveled thereafter in interstate commerce to Oklahoma, and knowingly failed to register as a sex offender in the State of Oklahoma where he resided." *Id*.

The indictment in this case is more than sufficient under Federal Rule of Criminal Procedure 7(c)(1). It is pled in a plain, concise, and definite written statement that includes the essential facts constituting the offense charged. No dismissal of the indictment is warranted.

II. THE FAILURE TO REGISTER AS A SEX OFFENDER STATUE, 18 U.S.C. § 2250, DOES NOT VIOLATE THE COMMERCE CLAUSE; THEREFORE, THIS COURT HAS SUBJECT MATTER JURISDICTION FOR THIS PROSECUTION.

Defendant seeks to have the indictment dismissed by claiming there is no federal subject matter jurisdiction for this prosecution because SORNA and the federal failure to register as a sex offender statute, 18 U.S.C. § 2250, violate the Commerce Clause. Defendant asserts that the

decision in *United States v. Lopez*, 514 U.S. 549 (1995), *United States v. Morrison*, 529 U.S. 598 (2000), and *Jones v. United States*, 529 U.S. 848 (2000), require such a result. In making these assertions, Defendant misconstrues and misapplies the holdings of *Lopez*, *Morrison*, and *Jones*.

Article I, Section 8, Clause 3 of the United States Constitution gives Congress the power "[t]o regulate Commerce with Foreign Nations, and among the several states, and with the Indian tribes." Since its decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court, with few exceptions, has interpreted the Commerce Clause expansively, upholding many exertions of legislative authority. Further, statutes are presumed constitutional. *United States v. Morrison*, 529 U.S. 598, 607 (2000). A congressional enactment will only be invalidated on a plain showing that Congress exceeded its authority under the Constitution. *Id.*

"[S]ection 2250 is a valid exercise of Congress' power under the Commerce Clause because it is substantially related to the protection of the public from sex offenders who travel interstate and may re-offend." *United States v. Madera*, No. 6-06-cr-202-Orl-18KRS, 6 (M.D.FL. Jan. 16, 2007)(Order)(Attach. 6). The district court in *Madera* noted that the Supreme Court has found criminalization of intrastate possession of child pornography a valid exercise of Commerce Clause authority because it is rationally related to regulation of interstate commerce in child pornography. *Id.* The *Madera* court further found that a law that penalizes a sex offender who travels between states and fails to register as required clearly affects interstate commerce under the analysis of *Gonzales v. Raich*, 545 U.S. 1 (2005)(finding application of law that criminalizes manufacture, distribution, or possession of marijuana to intrastate growers and users of marijuana for medical purposes does not exceed congressional authority under Commerce Clause). *Id.* at 13. Moreover, the *Madera* court noted that only a "rational basis" must exist for concluding that the activity

legislated substantially affects interstate commerce. *Id.* at 13-14 (citing *Raich*, 545 U.S. at 22). This Court should reach the same conclusion the *Madera* court reached.

Although Defendant claims the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549 (1995), supports his position, the *Madera* court employed *Lopez* in finding that 18 U.S.C. § 2250(a) does not violate the Commerce Clause. *Madera*, No. 6-06-cr-202-Orl-18KRS, at 13. In *Lopez*, the Supreme Court held that Congress exceeded its interstate commerce powers when it enacted the Gun-Free School Zone Act, 18 U.S.C. § 922(q)(1)(A), because the Act did not regulate a commercial activity, nor did it contain a requirement that the possession of a firearm in a school zone be connected in any way to interstate commerce. *Lopez*, 514 U.S. at 551. This Act made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." *Lopez* at 551 (quoting 18 U.S.C. § 922(q)(1)(A (1988 ed., Supp. V)).

Reviewing the Court's jurisprudence on the constitutionality of congressional enactments under the Commerce Clause, the *Lopez* Court determined that Congress may properly enact legislation under its commerce powers in three broad categories: (1) to regulate use of the channels of interstate commerce; (2) "to protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities" ; and (3) to regulate activities having a substantial effect on interstate commerce. *Id.* at 558-559. In holding the Gun-Free School Zone Act an invalid exercise of Congress's commerce power, the Court concluded that where an enactment neither purports to regulate a use of a channel of interstate commerce, or persons or things in interstate commerce, the proper test of constitutionality under the Commerce Clause is whether the regulated activity otherwise substantially affects interstate commerce. *Id.* at 562.

Insofar as Defendant relies on *Lopez* to support his argument, his reliance is misplaced. The statute in question in *Lopez* presented a much different situation than that presented by 18 U.S.C. § 2250. In *Lopez*, the Gun-Free School Zone Act criminalized mere possession of a firearm in a school zone. The statute contained no language or jurisdictional element linking its reach to the use or movement of things or people in the channels of interstate commerce. *Lopez*, 514 U.S. at 561. In the instant case, however, 18 U.S.C. § 2250 provides just such a jurisdictional nexus:

> **(a) In general.**--Whoever--
>
> > **(1)** is required to register under the Sex Offender Registration and Notification Act;
> >
> > **(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)(2).

Defendant's reliance on *United States v. Morrison*, 529 U.S. 598 (2000), is also misplaced. In *Morrison*, the Supreme Court ruled that the Violence Against Women Act, 42 U.S.C. § 13981(b), which provided a federal civil remedy, was an unconstitutional statute because Congress exceeded its commerce power in enacting it. *Morrison*, 529 U.S. at 617. The *Morrison* court analyzed the statute's viability under the Commerce Clause in light of *Lopez*. Using the three-pronged framework articulated in *Lopez*, the *Morrison* court concluded that because the statute did not regulate the use

of the channels of interstate commerce, or protect or regulate instrumentalities of interstate commerce, the statute could only be upheld if it substantially affected interstate commerce, *i.e.*, *Lopez*'s third permissible regulation category. The *Morrison* court also noted that like the statute in *Lopez*, § 13981, did not contain a jurisdictional element establishing that the federal cause of action was "in pursuance of Congress' power to regulate interstate commerce." *Morrison,* 529 U.S. at 613.

In *Jones v. United States*, 529 U.S. 848 (2000), the Court never questioned the facial validity of the statute at issue. Instead, the issue presented in *Jones* was whether the private residence that was firebombed came within 18 U.S.C. § 844(i)'s ambit as being a building used in any activity affecting commerce. *Jones*, 529 U.S. at 854. (citation and internal quotation omitted). Disregarding the government's arguments, the Court reasoned the destroyed building needed a more substantial connection to interstate commerce beyond merely its passive use of supplies that have moved in interstate commerce or financing by an out of state company. To apply the statute otherwise, the Court concluded, would produce the result that "hardly a building in the land would fall outside the federal statute's domain." *Jones*, 529 U.S. at 857.

Jones adds nothing to the analysis required by *Lopez* to determine whether a statute is a facially invalid exercise of Congress' power to enact legislation under the Commerce Clause and says nothing to expand or restrict the three broad categories of permissible commerce power regulation announced in *Lopez*. *Jones* answered only the very specific fact-driven question of whether an owner-occupied dwelling used as a residence for everyday family living was used in an activity affecting interstate commerce to the extent necessary to confer jurisdiction for prosecution of a federal crime. Thus, even after *Jones*, 18 U.S.C. § 2250(a) is a facially valid exercise of Congress's commerce power because, as *Lopez* requires, it contains a jurisdictional element.

Section 2250 does not violate the Commerce Clause for at least two reasons. First, this case involves interstate travel. Such travel is inherently national and affects commerce. "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or **persons or things in interstate commerce** . . . ." *Lopez*, 514 U.S. at 558 (emphasis added). The federal commerce power encompasses the movement of persons in interstate commerce as well as commodities. *United States v. Guest*, 383 U.S. 745, 758-59 (1966).

Second, 18 U.S.C. § 2250 regulates activities that substantially affect interstate commerce. *Lopez, Morrison,* and *Jones* all analyzed whether activities "substantially affected" interstate commerce. In *United States v. Plotts*, 347 F.3d 873 (10th Cir. 2003), the Tenth Circuit found that the DNA Act, 18 U.S.C. § 3583(d), which requires persons convicted of enumerated criminal sexual offenses to provide DNA samples, "is necessary and proper to the exercise of the Commerce Clause," regardless of whether the Act is construed as a civil sanction for committing a qualifying federal offense or as a law enforcement tool. *Plotts*, 347 F.3d at 879. In *Plotts*, the defendant had pled guilty to receiving child pornography over the internet in violation of federal law and argued on appeal that the DNA Act exceeded Congress's power under the Commerce Clause. *Id.* at 875.

The Ninth Circuit also found the DNA Act a valid exercise of federal Commerce Clause power in *United States v. Reynard*, No. 02-50476, 2007 WL 79545 (9th Cir. Jan. 12, 2007). The court pointed out that collection of DNA samples falls under the second *Lopez* category as a "thing in commerce." *Reynard*, 2007 WL 79545, at *12. Noting that DNA samples convey information about a federal offender's identity, the court observed that the Supreme Court has long ago concluded that non-commercial activities that involve nothing more than the flow of information can constitute commerce. *Id.* (citing *Reno v. Condon*, 528 U.S. 141, 143 (2000)(quoting *Lopez*, 514 U.S. at 558-59)). "Congress has the authority, under the Commerce Clause, to regulate the interstate

release of personal information, even when this release does not involve a sale of the information and is non-economic in nature." *Id.* at *12 (citation omitted).

The *Reynard* court also found that Congress's exercise of authority under the Commerce Clause does not offend the principles of federalism. *Reynard*, 2007 WL 79545, at *12. "Courts have consistently recognized that federal statutes enacted to help states address problems that defy a local solution constitute an appropriate exercise of Congress' Commerce Clause power, because this power includes the authority 'to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing.'" *Id.* at *13 (citation omitted).

Similarly, the failure to register as a sex offender statute involves persons in interstate travel, which falls within the second *Lopez* category. Moreover, § 2250(a) helps states address a problem that defies local solution: the need for a national database of sex offenders in order to protect the public from sex offenders who move in interstate commerce, thereby facilitating the availability of sex offender registration information to all states, regardless of where the offender may relocate.

Nor is there anything to Defendant's suggestion that there is an insufficient nexus required under 18 U.S.C. § 2250 between interstate travel and the substantive offense conduct. (Doc. 22 at 10-11). Understanding the statute in conformity with its natural meaning and underlying purposes, it creates criminal liability for a person who has been convicted of an offense in the SORNA registration categories who travels interstate and knowingly fails to register as required. It does not purport to extend federal jurisdiction to every sex offender in the SORNA categories who has traveled interstate at some point in his life. Moreover, even if § 2250 were interpreted, however implausibly, so broadly as to reach cases in which the defendant traveled interstate only prior to conviction for the SORNA registration offense, it would still be valid as applied in the present case,

because Defendant did travel in interstate commerce following his Arizona conviction for an offense for which 42 U.S.C. § 16913(a) requires him to register and keep the registration current "in each jurisdiction where the offender resides."

Finally, there is nothing to Defendant's suggestion that SORNA's creation of a funding incentive for states to adopt failure to register offenses with felony penalties (42 U.S.C. §§ 16913(e), 16925(a)-(d)) is an "admission" that there can be no federal jurisdiction to prosecute where a sex offender travels in interstate commerce and fails to register as required. (Doc. 22 at 19-20). SORNA encourages states to attach substantial penalties to their failure- to-register offenses, recognizing that states will continue to be responsible for registration enforcement in routine intrastate situations. However, Congress also recognized sex offenders may fail to register as required when they relocate from state to state, just as Defendant did in the present case, and that SORNA's intended "comprehensive national system" of sex offender tracking, *see* 42 U.S.C. § 16901, cannot be effective if this is allowed to occur. Hence, SORNA contemplates a combination of federal and state efforts to enforce registration requirements. Whether other provisions of SORNA could validly provide incentives to states to have felony penalties for failure to register under their own laws is beside the point.

This court should deny Defendant's challenge to 18 U.S.C. § 2250 based on the Commerce Clause. Congress has authority to regulate persons in interstate commerce and activities having a substantial relation to interstate commerce. Moreover, this statute is rationally related to congressional authority to protect and inform the public by tracking and identifying sex offenders who travel from state to state.

III. BOTH OKLAHOMA AND FEDERAL LAW REQUIRED DEFENDANT TO REGISTER AS A SEX OFFENDER, REGARDLESS OF WHETHER HE WAS REQUIRED TO REGISTER IN ARIZONA.

Defendant's third claim is that he was no longer required to register under Arizona law. In support, Defendant cites Ariz. Rev. Stat. § 13-3821 in effect in 1989, which required persons convicted of any violation of Chapter 14, a chapter that included § 13-1404 under which Defendant was convicted, to register without any limitation as to the victim's age. Ariz. Rev. Stat. Ann. § 13-3821 (1989) (Attach. 3). Under present Arizona law, § 13-3821 provides that persons convicted under § 13-1404 must register as sex offenders under state law where the victim was under eighteen years of age. Ariz. Rev. Stat. Ann. § 13-3821 (2006)(Attach. 4). Defendant's victim was not under eighteen.

Regardless of whether Defendant would be required to register as a sex offender in Arizona if he committed the same offense today, Defendant was obligated to register under both the laws of his state of residence, Oklahoma, and by SORNA of the Adam Walsh Act. The facts in this case show that Defendant had knowledge of his requirement to register. Defendant applied for a driver's license in Oklahoma on January 23, 2006, and stated that he currently held a Texas driver's license. (Application)(Attach. 5). Defendant further stated in the application that he was a resident of Oklahoma. The application notified Defendant that any person convicted of a sex offense who relocates to Oklahoma must register with the Oklahoma Department of Corrections within ten days, and with local law enforcement within three days. The State of Oklahoma, which Defendant claimed as his state of residence, requires sex offender registration pursuant to Okla. Stat. tit. 57, § 581, *et. seq*. (2002).

Further, Defendant was required to register under SORNA of the Adam Walsh Act. SORNA defines "sex offender" as "an individual who was convicted of a sex crime," a definition into which

Defendant clearly falls. *See* 42 U.S.C. § 16911. A "sex offense" means "a criminal offense that has an element involving a sexual act or sexual contact with another." 42 U.S.C. §16911(5)(i). Clearly both Defendant's state of residence, Oklahoma, as well as federal law, required Defendant to register as a sex offender.

Defendant candidly admits that the opinion from the Arizona Office of the Attorney General, which states that persons previously required to register who are not required to register under current Arizona law are no longer statutorily required to register, is purely advisory. (Doc 22 at 22) (quoting Ariz. Op. Atty Gen. No. 100-030, at 1). Arizona registration law does not control, where Defendant became a resident of Oklahoma and received notice that Oklahoma required him to register as a sex offender.

IV. THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT AND THE FEDERAL FAILURE TO REGISTER AS A SEX OFFENDER STATUTE BOTH COVER THE TIME FRAME OF DEFENDANT'S 1989 ARIZONA SEXUAL ABUSE CONVICTION.

Defendant argues that his Arizona conviction is not a qualifying conviction because it occurred before July 27, 2006, when the Adam Walsh Act was signed into law, and because the Attorney General has not promulgated regulations "'specify[ing] the applicability of this subchapter to sex offenders convicted before July 27, 2007.'" (Doc. 22 at 24)(citing 42 U.S.C. § 16913(d)). The defendant, in effect, argues that a criminal statute enacted by Congress sits moribund until the Attorney General issues regulations. The defendant fails to note the full language of subsection (d). The sections of SORNA to which Defendant refers allow the Attorney General to promulgate regulations for persons that were unable to initially register for a sex offense. Here Defendant did register initially in Arizona and faced no barrier to registering upon becoming a resident of Oklahoma. Thus, Attorney General regulations are not relevant to Defendant.

The registration requirements of the Adam Walsh Act provide:

§ 16913. Registry requirements for sex offenders

(a) In general
A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration
The sex offender shall initially register--

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

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

(d) Initial registration of sex offenders unable to comply with subsection (b) of this section
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 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) of this section.

42 U.S.C. § 16913.

Defendant also claims that Congressional delegation of authority to the Attorney General to specify how the Adam Walsh Act applies to individuals unable to initially register before July 27, 2006, violates the Ex Post Facto Clause and, if pursuant to a regulation, the non-delegation doctrine. (Doc. 22 at 25-26). The Government addresses Defendant's ex post facto argument in Section V.

As to the non-delegation issue, in this case Defendant knew he must register as a sex offender in Oklahoma. Oklahoma law enforcement provided notice to Defendant when he applied for an Oklahoma driver's license, and Defendant's telephone call to Arizona law enforcement after Oklahoma officials told him he must register as a sex offender both show Defendant was aware of the registration requirement. The enactment of SORNA imposed no new duties upon Defendant as to registration, where § 16913(a) merely requires a sex offender to "register, and keep the registration current, in each jurisdiction where the offender resides," or is an employee or student. Therefore, Defendant's failure to register as required where his interstate travel gave rise to federal jurisdiction results in Defendant being criminally liable under 18 U.S.C. § 2250.

A district court in the Middle District of Florida recently rejected a non-delegation doctrine challenge to the Adam Walsh Act. *United States v. Madera*, No. 6-06-cr-202-Orl-18KRS (M.D.FL. Jan. 16, 2007)(Order)(Attach. 6). Noting that the non-delegation doctrine found in Article I , § 1 of the U.S. Constitution forms an integral part of the separation of powers of our system of government, the court pointed out that the separation of powers principle and the non-delegation doctrine do not prevent Congress from obtaining the assistance of the other branches of government. *Madera*, No. 6-06-cr-202-Orl-18KRS, at 5-6 (Attach. 6)(citing *Mistretta v. United States*, 488 U.S. 361, 372 (1989)). So long as Congress's legislative act lays down an intelligible principle to which the entity authorized to exercise the delegated authority is directed to conform, the legislative action does not constitute a forbidden delegation of legislative power. *Mistretta*, 488 U.S. at 372. The *Madera* court observed that only twice has the Supreme Court found the required "intelligible principle" lacking in a challenged statute, preferring to "uph[o]ld again without deviation, Congress' ability to delegate power under broad standards." *Madera*, No. 6-06-cr-202-Orl-18KRS, at 6 (Attach. 6)(quoting *Mistretta*, 488 U.S. at 373).

The authority given to the Attorney General in 42 U.S.C. § 16913(d) of the Adam Walsh Act allows sex offenders within SORNA's registration categories to be registered even if they could not register initially as specified in § 16913(b). This expansive authority in relation to these sex offenders provides no basis for a defense argument that sex offenders convicted prior to enactment of the Adam Walsh Act are completely excluded form the Act's requirements until rules are promulgated. The law is clear: "A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides . . . ." 42 U.S.C. § 16913.

V. NEITHER THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT NOR THE FEDERAL FAILURE TO REGISTER AS A SEX OFFENDER STATUTE VIOLATE THE EX POST FACTO CLAUSE.

Defendant argues his Arizona conviction is not a qualifying conviction under SORNA or the federal failure to register as a sex offender statute because his offense occurred before July 27, 2006, the date the Adam Walsh Act was signed into law. (Doc. 22 at 30). The Supreme Court has held that sex offender registration requirements are non-punitive regulatory measures. Therefore, there is no constitutional problem in applying them retroactively on the basis of sex offenses committed at an earlier time, or in imposing criminal sanctions for failure to register in such cases. *See Smith v. Doe*, 538 U.S. 84, 105-06 (2002). The only thing that 18 U.S.C. § 2250 penalizes is failing to register or update a registration after July 27, 2006.

Article I, § 9 of the U.S. Constitution states: "No Bill of Attainder or ex post facto Law shall be passed." For a law to violate the Ex Post Facto Clause, the "law must apply to events occurring before its enactment and must disadvantage the offender affected by it." *United States v. Heredia-Cruz*, 328 F.3d 1283, 1290 (10th Cir. 2003)(internal quotation marks and citation omitted). The Ex Post Facto Clause limits the powers of the legislature, and, by its own terms, does not apply to courts. *Rogers v. Tennessee*, 532 U.S. 451, 456, 460 (2001).

The United States Constitution, therefore, prohibits the passage of ex post facto laws. U.S. Const. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed."). A law violates the Ex Post Facto Clause only if it (1) punishes as a crime an act that was not criminal when it was committed; (2) makes a crime's punishment greater than when the crime was committed; or (3) deprives a defendant of a defense available at the time the act was committed. *Collins v. Youngblood,* 497 U.S. 37, 52 (1990).

The ex post facto doctrine does not apply in this case because 18 U.S.C. § 2250(a) does not serve to punish Defendant for an act that was not a crime when allegedly performed; nor does it make the punishment greater for a crime committed before the law's enactment. Further, § 2250(a) does not deprive Defendant of a defense available before its enactment. Therefore, Defendant is not protected by the ex post facto doctrine.

Contrary to the claims in Defendant's brief, (Doc. 22 at 30-39), SORNA's requirements do not differ in any constitutionally significant way from the requirements of the Alaska registration system whose retroactive application the Supreme Court upheld in *Smith v. Doe*. Congress in SORNA made clear its purpose to create a regulatory system for tracking and notifying the public about sex offenders "in order to protect the public from sex offenders," in light of the danger this class of offenders poses to others. *See* 42 U.S.C. § 16901. Moreover, in § 16913(d) Congress expressly authorized the Attorney General to specify the applicability of SORNA's requirements to sex offenders convicted before its enactment and to prescribe rules for their registration. This is inconsistent with any punitive purpose, since retroactive application of punitive measures would be entirely foreclosed in relation to persons convicted of the predicate sex offenses prior to the their enactment.

Changes to Title 18 of the United States Code under SORNA to create § 2250 do provide criminal penalties for failure to register, but so does the Alaska registration system whose retroactive application the Supreme Court upheld in *Smith*, 538 U.S. at 101-02, and so does every other state sex offender registration program. SORNA's requirements for periodic in-person appearances to provide a current photograph and verify registration information do not imply SORNA is punitive either in intent or effect, because they further the regulatory objective of having accurate and current information regarding the identities, current physical appearances, and locations of sex offenders who have been released into the community.

Moreover, this issue is irrelevant to the present case, because Defendant does not complain about being required to appear periodically for photographing and updating information. Rather, Defendant simply refused to register at all after moving to Oklahoma, even though he was clearly informed he is legally required to do so. The public exposure of sex offenders under SORNA standards does not differ significantly from the website posting of the Alaska system, which makes information about sex offenders available online to everyone.

Related administrative functions under SORNA are assigned to the Department of Justice, which has a mixture of criminal and civil functions, not to any criminal investigation or prosecution component. Pretrial release conditions and potential criminal penalties for 18 U.S.C. § 2250 cases, to which Defendant alludes, represent a reasonable legislative response to the danger to the public posed by sex offenders like Defendant who flaunt their legal obligation to register. (Doc. 22 at 35). They have no rational tendency to establish that the registration requirements are themselves punitive.

As noted above, the Alaska system whose retroactive application was upheld by the Supreme Court in *Smith* , as well as all other sex offender registration programs, provide criminal penalties

for failure to register. *See Smith*, 538 U.S. at 101-02. Defendant is simply arguing with the Supreme Court's decision in *Smith v. Doe* and asking this Court to overrule the Supreme Court.

A federal district court in the Middle District of Florida recently rejected an ex post facto argument very similar to that Defendant poses. (*See* Order, *United States v. Madera*, No. 6-06-cr-202-Orl-18KRS (M.D.FL. Jan. 16, 2007)(Attach. 6). The Florida court framed the issue as whether Congress meant the statute to establish civil proceedings. (Order at 9)(Attach. 6). The court cited *Smith v. Doe*, 538 U.S. 84, 92 (2003), in which the Supreme Court considered for the first time whether an Alaska sex offender registration and notification law constituted retroactive punishment forbidden by the Ex Post Facto Clause.

To make this determination, a court must "ascertain whether the legislature meant the statute to establish 'civil' proceedings." *Smith*, 538 U.S. at 92 (quoting *Kansas v. Hendricks,* 521 U.S. 346, 361 (1997)). If the legislature intended to impose punishment, the inquiry is complete. "If, however, the intention was to enact a regulatory scheme that is civil and non-punitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [Congress's] intention to deem it civil." *Id.* (internal quotation marks and citation omitted). Because Congress's stated intent is entitled to deference, "only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *Id.* (citing *Hudson v. United States,* 522 U.S. 93, 100 (1997) (internal quotation marks omitted)).

The district court in *Madera* found the Alaska statute considered by the Supreme Court in *Smith* to be remarkably similar to SORNA, including the requirements and the method used to disseminate information on the internet. *Madera*, No. 6-06-cr-202-Orl-18KRS, at 10 (Attach. 6)(citing *Smith*, 538 U.S. at 89-91; Alaska Stat. §§ 12.63.010 *et. seq*.) The *Madera* court noted that after considering the text and structure of the Alaska statute, the Supreme Court concluded that "the

intent of the Alaska Legislature was to create a civil, nonpunitive regime." *Id.* (quoting *Smith*, 538 U.S. at 96-97).

As the *Madera* court ruled, the same decision the Supreme Court reached in *Smith* should apply to SORNA. *Madera*, No. 6-06-cr-202-Orl-18KRS, at 10 (Attach. 6). The *Smith* Court stated that "an imposition of restrictive measures on sex offenders adjudged to be dangerous is " legitimate nonpunitive governmental objective and has been historically so regarded." *Smith*, 538 U.S. at 93 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997)). In *Smith*, as in *Hendricks*, the Supreme Court observed that "[n]othing on the face of the statute suggests that the legislature sought to create anything other than a civil . . . scheme designed to protect the public from harm." S*mith, 538* U.S. at 93 *(quoting Hendricks*, 521 U.S. at 361). The same result should be reached in this case.

Simply put, § 2250 is not an ex post facto law because it does not criminalize or increase the penalties for a defendant's acts that occurred before its passage. The only thing that it penalizes is failing to register or update a registration after July 27, 2006, and the registration requirement itself can validly be given retroactive effect because it is a nonpunitive regulatory measure.

VI. NEITHER THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT NOR THE FEDERAL FAILURE TO REGISTER AS A SEX OFFENDER STATUTE VIOLATE THE DUE PROCESS CLAUSE.

Defendant claims that SORNA and the federal failure to register statute violate due process. He appears to base this claim on that fact that he is no longer required to register in Arizona. Defendant cites cases in which a qualifying sex offense conviction either never existed or was set aside. Here, Defendant was convicted of a qualifying sex offense. He traveled interstate. He was required to register in Oklahoma and was notified to register. He did not.

The Due Process Clause of the Fifth Amendment provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V. In the

district court's Order denying a motion to dismiss the indictment in *United States v. Madera*, No. 6-06-cr-202-Orl-18KRS, 11-13 (M.D.FL. Jan. 16, 2007)(Attach. 6), the district court rejected the argument that SORNA violated the Due Process Clause. Citing *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1 (2003), the *Madera* court ruled that no procedural due process right was violated, because there is no requirement for a hearing to determine dangerousness prior to classification as a sex offender and inclusion on the sex offender registry. *Madera*, No. 6-06-cr-202-Orl-18KRS, at 12 (Attach. 6). The Supreme Court in *Connecticut Department of Public Safety* held that because the Connecticut law required all sex offenders to register based on the offender's conviction alone, "a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest," there was no need to inquire into an individual offender's dangerousness. *Connecticut Department of Public Safety v. Doe*, 538 U.S. at 7-8

Neither did the district court in *Madera* find a violation of substantive due process in SORNA. *Madera*, No. 6-06-cr-202-Orl-18KRS, at 12 (Attach. 6). The court noted that several circuits have expressly held that sex offender registration statutes do not violate substantive due process rights. *Id.* In *Doe v. Moore,* 410 F.3d 1337, 1345 (11th Cir. 2005), the Eleventh Circuit stated it could find "no history or tradition that would elevate the issue here to a fundamental right." Further, "a state's publication of truthful information that is already available to the public does not infringe the fundamental constitutional rights of liberty and privacy." *Id.* In *Doe v. Tandeske*, 361 F.3d 594, 597 (9th Cir. 2004), the Ninth Circuit stated that "persons who have been convicted of serious sex offenses do not have a fundamental right to be free from the registration and notification requirements set forth in the Alaska statute." The Eighth Circuit rejected a claim that a sex offender registration statute infringed on the fundamental right of presumption of innocence. *See Gunderson*

v. Hvass, 339 F.3d 639, 643 (8th Cir. 2003)("The presumption of innocence is only implicated by a statute that is punitive or criminal in nature, however, not a regulatory law.").

Defendant's due process rights have not been violated either procedurally or substantively. He was required by Oklahoma law to register as a sex offender, he received notice of this requirement, and he failed to do so. Whether Arizona still required Defendant to register as a sex offender is irrelevant.

CONCLUSION

Accordingly, this Court should deny Defendant's Motion to Dismiss Indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on JANUARY 29, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to ECF registrant:

Paul Antonio Lacy
Assistant Public Defender
Counsel for Defendant.

s/RANDAL A. SENGEL
Randal A. Sengel
Assistant U.S. Attorney