Overview of SORNA: Prosecution Legal Issues in Indian Country

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Northwest Intertribal Court System
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Northwest Intertribal Court System

Working for the good of tribes in the Northwest.

The Northwest Intertribal Court System (NICS) is a consortium of Indian tribes based in Western Washington.

These tribes have joined their resources to insure that each tribe is able to have its own court by sharing judges, prosecutors, and related court services. NICS also assists member tribes in the development of their individual justice systems and provides personnel as needed to operate each tribal court.

In addition to providing services to its member tribes, NICS has provided services on a fee-for-service basis to tribes in California, Oregon, Alaska, Idaho, Montana, and Utah; and is available to provide consultation and court services to any tribe or first nation in the United States and Canada.

A non-profit organization established in 1979, NICS has a Governing Board composed of a representative from each member tribe. The Governing Board sets all policy for the organization and selects both the executive director and the judges.

NICS Mission

To assist the member tribes, at their direction, in a manner which recognizes the sovereignty, individual character, and traditions of those tribes in the development of tribal courts which will provide fair, equitable, and uniform justice for all who fall within their jurisdiction.

STATE OF WASHINGTON, Respondent,
v.
HOWARD JOHN EVANS SHALE, Appellant.

No. 90906-7.

Supreme Court of Washington, En Banc.

Filed: March 19, 2015.

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GONZÁLEZ, J.

We are asked to decide whether Washington State has the power to prosecute an enrolled member of the Yakama Nation living on the Quinault Indian Nation's reservation for failing to register with the county sheriff as a sex offender. We find the State has that power and affirm.

FACTS

Howard Shale is an enrolled member of the Yakama Nation. He has family in the Quinault Indian Nation as well. In 1997, Shale was convicted of raping a child under 12 in violation of 18 U.S.C. § 2241(c). After Shale was released from prison, he moved to Seattle and registered as a sex offender with the King County sheriff.

In 2012, a Jefferson County sheriff's detective began investigating whether Shale had moved to her county without reregistering as a sex offender. At least two officers assisted the detective in her investigation; a Jefferson County sheriff's deputy and a Quinault tribal police officer. One officer went to Shale's father's home, which may have been in Clallam County, and spoke to Shale himself. Shale told the officer he had been living in his father's home for at least three months. The tribal police officer went to the Quinault reservation in Jefferson County and spoke to several people there. They told him Shale had been living on the reservation for approximately a year. Shale later testified that he was living on the reservation with his grandmother. Taken together, the police reports suggest Shale was dividing his time between the two family homes. Based on the detective's report, the Jefferson County prosecutor charged Shale with failure to register with the county sheriff as a sex offender under RCW 9A.44.130(1)(a).

Shale moved to dismiss the charges, arguing that "Jefferson County has no jurisdiction for the charged crime, as it is alleged to [have been] committed by a tribal member in Indian Country." Clerk's Papers

(CP) at 3.[1] According to his counsel's declaration, Shale said he had registered as a sex offender with the Quinault Indian Nation but the record does not establish whether that was before or after these charges were brought. The State did not dispute that Shale was an Indian living on the Quinault reservation but argued that he was still subject to prosecution because he was not a member of the Quinault Indian Nation. Judge Harper agreed and denied the motion to dismiss, concluding that RCW 37.12.010 carved out from state authority only "Indians when on *their* tribal lands," not tribal members while on another tribe's land. RCW 37.12.010 (emphasis added), *quoted in* CP at 9, 18. Nothing in the record establishes the Quinault Indian Nation's views on this prosecution.[2]

Shale stipulated to the police records and was convicted at a bench trial. Shale appealed, initially raising only two assignments of error: that "[t]he trial court lacked jurisdiction because Mr. Shale is a member of a federally recognized Indian tribe and his offense occurred on the Quinault reservation" and "[t]he trial court erred by finding Mr. Shale guilty and sentencing him for failure to register as a sex offender." Appellant's Opening Br. at 1. A Court of Appeals commissioner considered the appeal on the merits and affirmed. Ruling Affirming J. & Sentence (No. 44654-5-II) at 3-4. Shale successfully moved to modify the Commissioner's ruling, and, after another round of briefing where Shale raised several new issues,[3] the Court of Appeals certified the case for our consideration, which we accepted. The Washington Association of Prosecuting Attorneys and the Washington State attorney general have filed separate amicus briefs supporting the State and raising new issues.[4]

ANALYSIS

Until the 1950s, "criminal offenses by Indians in Indian country were subject to only federal or tribal jurisdiction," not state. *State v. Cooper,* 130 Wn.2d 770, 773, 928 P.2d 406 (1996) (citing *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation,* 439 U.S. 463, 470, 99 S.Ct. 740, 58 L. Ed. 2d 740 (1979) (*Yakima Indian Nation*)). States had little lawful authority on tribal lands—so little that the United States Supreme Court observed that "[t]he policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson,* 324 U.S. 786, 789, 65 S. Ct. 989, 89 L. Ed. 1367 (1945) (citing *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832), *abrogation recognized by Nevada v. Hicks,* 533 U.S. 353, 361, 121 S. Ct. 2304, 150 L. Ed. 2d 398 (2001)). To that end, the enabling act that brought Washington State into the union limited the state's authority over Indian lands, which "`remain[ed] under the absolute jurisdiction and control of the Congress of the United States.'" *State v. Paul,* 53 Wn.2d 789, 790-91, 337 P.3d 33 (1959) (emphasis omitted) (quoting Enabling Act, ch. 180, 25 Stat. 676 (1889)). However, Washington State did assert jurisdiction over some crimes committed on tribal land involving only non-Indians. *State v. Lindsey,* 133 Wash. 140, 144, 233 P. 327 (1925) (citing *State v. Williams,* 13 Wash. 335, 43 P. 15 (1895)).

The formal relationship between the states and the tribal nations changed dramatically in 1953, when Congress enacted Public Law 280 (Pub. L. No. 83-280, 67 Stat. 588 (1953)). That act required some states and authorized others to "assume . . . jurisdiction over Indians" within a State's borders. *Paul,* 53 Wn.2d at 791. In 1957, our state "opted for state jurisdiction . . . for any tribe that would give its consent." DUANE CHAMPAGNE & CAROLE GOLDBERG, CAPTURED JUSTICE: NATIVE NATIONS AND PUBLIC LAW 280 at 17-18 (2012) (citing *Yakima Indian Nation,* 439 U.S. 463); *see also* LAWS OF 1957, ch. 240. Soon afterwards, a group purporting to represent the Quinault Tribal Council requested the State assume civil and criminal jurisdiction over the Quinault reservation, and Governor Rosellini, on behalf of the State, agreed. *Quinault Tribe of Indians v. Gallagher,* 368 F.2d 648, 652 (9th Cir. 1966).

In 1963, the state "assert[ed] *nonconsensual* civil and criminal jurisdiction over all Indian country with certain exceptions" not relevant here, *Cooper,* 130 Wn.2d at 773 (citing ch. 37.12 RCW); CHAMPAGNE & GOLDBERG, *supra,* at 17-18. The legislature may have been motivated by an attorney general report that concluded few of the tribes at the time had tribal judicial systems prepared for the change. *See* Allen Lane Carr & Stanley M. Johnson, Comment, *Extent of Washington's Criminal Jurisdiction over Indians,* 33 WASH. L. REV. & ST. B. J. 289, 292 n.16 (1958) (citing Richard F. Broz, Office of Att'y Gen., Legal

Problems Concerning Indians and Their Rights under Federal and State Laws) (Oct. 20, 1954) (unpublished manuscript)). While the available legislative history of RCW 37.12.010 is sparse, there was debate on the senate floor on a proposed amendment that would have conditioned acceptance of jurisdiction on a promise of reimbursement to the affected counties for the costs associated with the assumption of jurisdiction from the United States Bureau of Indian Affairs. SENATE JOURNAL, 38th Leg., Reg. Sess., at 213 (Wash. 1963). This amendment may have been inspired by the fact that Public Law 280 did not include "any federal funding support for the states' new law enforcement and criminal justice duties." CHAMPAGNE & GOLDBERG, *supra,* at 13. The amendment failed, and Governor Rosellini signed the bill into law.

Soon afterwards, our State began to reconsider its broad, nonconsensual assertion of authority over Indian tribes. In 1965, at the request of the Quinault Indian Nation, Governor Rosellini attempted to withdraw his early acceptance of state jurisdiction and return jurisdiction to the federal government. *Comenout v. Burdman,* 84 Wn.2d 192, 198, 525 P.2d 217 (1974). This return of jurisdiction from the state to the federal government in the aftermath of Public Law 280 is commonly referred to as "retrocession." *E.g., id.* Three years later, Congress passed legislation that explicitly allowed states to request to retrocede previously claimed jurisdiction over tribes to the federal government and required tribal consent for future extension of state jurisdiction over Indians and Indian tribes. *Cooper,* 130 Wn.2d at 774 (citing 25 U.S.C. §§ 1321-1323); Pub. L. 90-284, 82 Stat. 77; 33 Fed. Reg. 17339 (1968). The 1968 act did not invalidate prior assumptions of state jurisdiction. *Cooper,* 130 Wn.2d at 774 (citing *In re Estate of Cross,* 126 Wn.2d 43, 47, 891 P.2d 26 (1995)).

Setting up the question we need to answer today, the federal government accepted only partial retrocession. *Comenout,* 84 Wn.2d at 198. Specifically, the Department of the Interior Secretary Walter Hickel, on behalf of the federal government, "accept[ed] . . . retrocession to the United States of all jurisdiction exercised by the State of Washington over the Quinault Indian Reservation, *except as provided under Chapter 36, Laws of 1963* (RCW 37.12.010-37.12.060)." Notice of Acceptance of Retrocession of Jurisdiction, 34 Fed. Reg. 14288 (Aug. 30, 1969) (emphasis added). Chapter 37 RCW says in most relevant part that "[t]he state of Washington hereby obligates and binds itself to assume criminal . . . jurisdiction over Indians and Indian territory . . ., *but such assumption of jurisdiction shall not apply to Indians when on their tribal lands.*" RCW 37.12.010 (emphasis added).

Some decades later, the United States Supreme Court concluded that the tribal courts of one tribe did not have jurisdiction over members of other tribes. In response, Congress enacted legislation "permitting a tribe to bring certain tribal prosecutions against nonmember Indians. . . . [by] enlarg[ing] the *tribes*' own `powers of self-government'" to include "`exercis[ing] criminal jurisdiction over *all* Indians,' including nonmembers." *United States v. Lara,* 541 U.S. 193, 198, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004) (quoting 25 U.S.C. § 1301(2) and citing *Duro v. Reina,* 495 U.S. 676, 110 S. Ct. 2053, 109 L. Ed. 2d 693 (1990); Act of Oct. 28, 1991, Pub L. 102-137, 105 Stat. 646). This legislation was upheld by the court in *Lara* on the theory that Congress has the power to "relax restrictions on the bounds of the inherent tribal authority that the United States recognizes." *Id.* at 207. Nothing in the act itself addressed whether this post-*Duro* tribal jurisdiction is exclusive of any state jurisdiction.

In 2008, our Court of Appeals partially synthesized this history and ruled that "except for the enumerated categories listed in RCW 37.12.010, the State lacks criminal jurisdiction over members of the Quinault Tribe while on tribal lands within the reservation." *State v. Pink,* 144 Wn. App. 945, 952, 185 P.3d 634 (2008) (citing *Cooper,* 130 Wn.2d at 774). Pink was a member of the Quinault Indian Nation, and the court had no occasion to consider whether the State lacked criminal jurisdiction over members of other tribes while on Quinault tribal lands. In 2012, the Washington Legislature passed a bill that formalized a process for full or partial retrocession of state jurisdiction over members of a tribe back to the federal government. LAWS OF 2012, ch. 48, *codified as* RCW 37.12.160-.180.[5]

It is against this backdrop that we consider the question presented: whether the State has jurisdiction to prosecute Shale, a member of the Yakama Nation, for failing to register as a sex offender while living on the Quinault reservation. We review jurisdictional questions de novo. *State v. Jim,* 173 Wn.2d 672, 678, 273 P.3d 434 (2012) (citing *State v. Squally,* 132 Wn.2d 333, 340, 937 P.3d 1069 (1997)). Both the state and a tribe may have jurisdiction in any given criminal case, and prosecution by one does not bar the other from also charging an offender with a crime arising out of the same conduct. *State v. Moses,* 145 Wn.2d 370, 374, 37 P.3d 1216 (2002) (citing *State v. Schmuck,* 121 Wn.2d 373, 381, 850 P.2d 1332 (1993)). Washington's assumption of criminal jurisdiction provides in most relevant part:

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked. . . .

[Eight specific civil subject areas omitted.]

. . . PROVIDED FURTHER, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

RCW 37.12.010 (reviser's note omitted). This statute limits state jurisdiction over crimes committed on trust or allotment land within reservation borders. *See State v. Clark,* 178 Wn.2d 19, 25, 308 P.3d 590 (2013).[6] Since the federal government accepted retrocession of the state's previously asserted jurisdiction over the Quinault Indian Nation subject to this provision, the question turns in large part on whether this statute retains or retrocedes criminal jurisdiction over crimes committed on Quinault tribal lands by members of other tribes, and on whether asserting jurisdiction would undermine tribal sovereignty.

We find the State does have criminal jurisdiction in this case. Asserting jurisdiction is consistent with the "`two independent but related barriers'" that the United States Supreme Court observes limit "the assertion of state authority over tribal reservations." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, PC,* 467 U.S. 138, 147, 104 S.Ct. 2267, 81 L. Ed. 2d 113 (1984) (quoting *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136, 142, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980)). "First, a particular exercise of state authority may be foreclosed because it would undermine `the right of reservation Indians to make their own laws and be ruled by them.'" *Id.* (internal quotation marks omitted) (quoting *White Mountain,* 448 U.S. at 142); *see also Yakima Indian Nation,* 439 U.S. at 470-71 (quoting *Williams v. Lee,* 358 U.S. 217, 219-20, 79 S. Ct. 269, 3 L. Ed. 2d 251 (1959)); *Clark,* 178 Wn.2d at 26. "Second, state authority may be pre-empted by incompatible federal law." *Wold,* 467 U.S. at 147 (citing *White Mountain,* 448 U.S. at 142).

We are not persuaded that prosecuting Shale infringes on the right of the tribe to make its own laws and be ruled by them. No treaty protection against state jurisdiction is asserted. The tribe is free to bring its own prosecution if it wishes, and there is nothing in the record that suggests the tribe feels that this prosecution infringes on its rights. Allowing the State to assert jurisdiction is consistent with United States Supreme Court precedent. For example, the high court has found that imposing Washington state tax law on nonmember Indians living on a reservation does not undermine tribal sovereignty. The court observed:

Federal statutes, even given the broadest reading to which they are reasonably susceptible, cannot be said to pre-empt Washington's power to impose its taxes on Indians not members of the Tribe. We do not so read the Major Crimes Act, 18 U. S. C. § 1153, which at most provides for federal-court jurisdiction over crimes committed by Indians on another Tribe's reservation. Cf. *United States* v. *Antelope,* 430 U.S.

641, 646-647, n. 7[, 97 S. Ct. 1395, 51 L. Ed. 2d 701] (1977). Similarly, the mere fact that nonmembers resident on the reservation come within the definition of "Indian" for purposes of the Indian Reorganization Act of 1934, 48 Stat. 988, 25 U. S. C. § 479, does not demonstrate a congressional intent to exempt such Indians from state taxation.

Nor would the imposition of Washington's tax on these purchasers contravene the principle of tribal self-government, for the simple reason that nonmembers are not constituents of the governing Tribe. For most practical purposes those Indians stand on the same footing as non-Indians resident on the reservation.

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134, 160-61, 100 S. Ct. 2069, 65 L. Ed. 2d 10 (1980); *accord Montana v. United States,* 450 U.S. 544, 565-66, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) ("[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.") Similarly, we have recently held that it does not infringe on a tribe's right to self-rule to respect a tribal enterprise's consent to state court jurisdiction. *Outsource Servs. Mgmt., LLC v. Nooksack Bus. Corp.,* 181 Wn.2d 272, 277, 333 P.3d 380 (2014).

We also note that the tribe is very concerned about sexual assault and may well welcome the State's assistance in prosecuting unregistered sex offenders who come to its land. The Quinault Indian Nation's criminal code states that "[a]n astounding thirty percent of Indian and Alaska Native women will be raped in their lifetimes. Tribal nations are disproportionately affected by violent crime and Sex Offenses in particular from both Indian and Non-Indian perpetrators." State's Resp. to Appellant's Suppl. Br. App. A (Quinault Tribal Code § 12.11.103). "According to federal health statistics, one in every four Native girls and one in every seven Native boys will be sexually abused." Virginia Davis & Kevin Washburn, *Sex Offender Registration in Indian Country,* 6 OHIO ST. J. CRIM. L. 3, 3 (2008) (citing United States Department of Health and Human Service's Indian Health Service Child Abuse Project). In this case, a tribal officer assisted in the criminal investigation, which suggests the tribe knew about the prosecution, had an opportunity to intervene, and made the deliberate decision not to. In the absence of evidence in the record that the tribe feels this prosecution undermines its sovereignty, we conclude that this prosecution does not undermine the tribe's ability to make its own laws and be ruled by them.[7]

Second, whether state authority is preempted by incompatible federal law primarily turns on the scope of the authority that remained after the federal government accepted partial retrocession of jurisdiction over the Quinault Indian Nation, which, in this case, largely depends on the meaning of RCW 37.12.010, since the federal acceptance of retrocession was subject to that statute. 34 Fed. Reg. 14288.[8] Our "fundamental objective" in statutory interpretation "is to ascertain and carry out the Legislature's intent." *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (citing *State v. J.M.,* 144 Wn.2d 472, 480, 28 P.3d 720 (2001)). While we recognize that there is some dispute in the historical record, the weight of the evidence persuades us that in 1957 and 1963, when the Washington Legislature passed and amended RCW 37.12.010, and in 1969, when Secretary Hickel accepted retrocession, neither this state nor the federal government would have understood that one tribe's courts could have jurisdiction over members of another tribe. In 1978, the United States Supreme Court observed that Indian tribes did not have the jurisdiction to try members of other tribes. *See United States v. Wheeler,* 435 U.S. 313, 326, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978) (citing *Oliphant v. Suquamish Indian Tribe,* 435 U.S. 191, 98 S. Ct. 1011, 55 L. Ed. 2d 209 (1978)).[9] Finally, in 1990, the United States Supreme Court squarely held that tribal courts did not have jurisdiction over other members of other tribes. *Duro,* 495 U.S. at 679.[10] Taken together, we find that the federal government accepted retrocession of state jurisdiction over members of the Quinault Indian Nation only while on their Quinault reservation. 34 Fed. Reg. 14288; RCW 37.12.010-.060.[11] Since Shale is not a member of the Quinault Indian Nation, the State has jurisdiction.

CONCLUSION

We affirm the courts below and hold that the State has jurisdiction to prosecute Shale for failure to register as a sex offender while living on the Quinault reservation.

Madsen, Johnson, Owens, Fairhurst, Stephens, Wiggins, McCloud, and Yu, J. Concur.

[1] The State did not dispute that it was charging Shale with a crime committed on "Indian country," which is relevantly defined in 18 U.S.C. § 1151(a) as "all land within the limits of any Indian reservation under the jurisdiction of the United States Government."

[2] At oral argument, counsel for Shale suggested that the tribe's attorney consulted on one of the supplemental briefs.

[3] As these new issues were not raised to the trial court or designated in his initial brief, we largely decline to consider them. RAP 2.4(a); RAP 2.5(a). To the extent that his newly raised arguments are jurisdictional, we reject them for the reasons below.

[4] While we are grateful for amici's assistance, we decline to reach the issues that only they raise. *See State v. Evans,* 154 Wn.2d 438, 457, 114 P.3d 627 (2005).

[5] We are unaware of any steps taken by the Quinault Indian Nation to initiate this process.

[6] We note that Shale bears the "`burden of contesting'" jurisdiction, which "requires only that the defendant point to evidence that has been produced and presented to the court, which, if true, would be sufficient to defeat state jurisdiction." *State v. L.J.M.,* 129 Wn.2d 386, 395, 918 P.2d 898 (1996) (citing *State v. L.J.M.,* 79 Wn. App. 133, 141, 900 P.2d 1119 (1995)). It is questionable whether Shale has met that burden. Shale's attorney conceded at oral argument before this court that nothing in the police reports to which Shale stipulated establishes whether he resided on fee, trust, or allotment land. Wash. Supreme Court oral argument, *State v. Shale,* No. 90906-7 (Feb. 12, 2015), at 38 min., 58 sec. through 39 min., *audio recording by* TVW, Washington State's Public Affairs Network, *available at* http://www.tvw.org. However, the State has not chosen to raise this issue and so we assume without deciding that Shale was living on trust or allotment land within the tribe's jurisdictional boundaries at the relevant time.

[7] Shale also suggests that the sex offender registration statute is in essence a civil regulatory system that is beyond the State's power to enforce on Indian tribal land. Appellant's Suppl. Br. at 4-5 & n.1 (citing *Smith v. John Doe,* 538 U.S. 84, 105, 123 S. Ct. 1140, 155 L. Ed. 2d 164 (2003); *State v. Ward,* 123 Wn.2d 488, 496-507, 869 P.2d 1062 (1994)). Both *Smith* and *Ward* considered whether the registration requirement *itself* was punitive in nature and therefore could not be applied to offenders who committed their crimes before it was enacted without violating the ex post facto clause. *Smith,* 538 U.S. at 97; *Ward,* 123 Wn.2d at 510-11. Both courts rejected the argument. *Smith,* 538 U.S. at 97; *Ward,* 123 Wn.2d at 510-11. Neither case suggests that prosecution for failure to register was in essence the enforcement of a civil regulatory scheme that would run afoul the principal that states lack civil regulatory jurisdiction except as explicitly set forth by statute. *See California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 206-07, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987).

[8] For the first time after his appeal had been rejected below, Shale argued that the federal Sex Offender Registration and Notification Act (SORNA), Pub. L. 109-248, 120 Stat. 590, as applicable to this case deprives the State of jurisdiction. While we do not mean to forestall a more timely and better developed challenge in some future case, nothing in SORNA that has been called to our attention by the parties in this case preempts state law or deprives the State of jurisdiction.

[9] *Wheeler,* of course, was decided before Congress permitted tribes to exercise "`criminal jurisdiction over *all* Indians,' including nonmembers." *Lara,* 541 U.S. at 198 (quoting 25 U.S.C. § 1301(2) and citing Act of Oct. 28, 1991, 105 Stat. 646). We cite it only as evidence of what the Washington legislature and Secretary Hickel would have understood chapter 37.12 RCW to mean at the time.

[10] We recognize that the authorities are not unanimous. For example, *Duro* resolved a circuit split between the Ninth Circuit, which (by a divided panel) held that tribal courts did have such jurisdiction over nonmember Indians, and the Eight Circuit, which held they did not. *Duro,* 495 U.S. at 683-84 (citing *Duro v. Reina,* 860 F.2d 1463 (9th Cir. 1988); *Greywater v. Joshua,* 846 F.2d 486 (8th Cir. 1988)).

[11] For this reason, we find Shale's argument that State courts only have concurrent jurisdiction with tribal courts when such jurisdiction has been explicitly granted by statute unavailing. Appellant's Resp. to Br. of Amicus Curiae at 1 (citing *State ex rel. Adams v. Superior Court,* 57 Wn.2d 181, 186, 356 P.2d 985 (1960)). Public Law 280 and RCW 37.12.010 together do grant such jurisdiction.

756 F.3d 1125 (2013)

UNITED STATES of America, Plaintiff-Appellee, v. Pedro CABRERA-GUTIERREZ, Defendant-Appellant.

No. 12-30233.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted April 11, 2013.
Filed June 3, 2013.
Amended March 17, 2014.

Rebecca L. Pennell, Federal Defenders of Eastern Washington & Idaho, Yakima, WA, for Defendant-Appellant.

Michael C. Ormsby, United States Attorney, and Alison L. Gregoire (argued), Assistant United States Attorney, Yakima, WA, for Plaintiff-Appellee.

Before: A. WALLACE TASHIMA and CONSUELO M. CALLAHAN, Circuit Judges, and RANER C. COLLINS, District Judge.[*]

Opinion by Judge Tashima; Partial Concurrence and Partial Dissent by Judge Callahan.

TASHIMA, Circuit Judge:

ORDER

Defendant-Appellant's petition for panel rehearing is granted. The Opinion, filed June 3, 2013, and reported at 718 F.3d 873, is withdrawn and replaced by the Amended Opinion and concurring and dissenting opinion filed concurrently with this Order. The petition for rehearing en banc is denied as moot. Further petitions for panel rehearing and/or rehearing en banc may be filed with respect to the Amended Opinion.

OPINION

Our original Opinion was filed on June 3, 2013. *See United States v. Cabrera-Gutierrez,* 718 F.3d 873 (9th Cir.2013). Shortly thereafter, on June 20, 2013, the Supreme Court decided *Descamps v. United States,* ___ U.S. ___, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), which worked a substantial change in sentencing law. We therefore granted the petition for panel rehearing and withdrew our Opinion. We now affirm the conviction, but vacate the sentence and remand for resentencing.

Pedro Cabrera-Gutierrez ("Cabrera") appeals his conviction and sentence for failing to register under the Sex Offender Registration and Notification Act ("SORNA"). On appeal he advances two arguments. First, he contends that Congress lacked authority under the Commerce Clause to compel his registration as a sex offender. Second, he contends that the district court erred in sentencing him as a Tier III sex offender based on his prior conviction of second degree sexual abuse.[1]

We reject Cabrera's first argument, but agree with his second. We hold that Congress has authority under the Commerce Clause to compel Cabrera, a convicted sex offender who traveled interstate, to register under SORNA. But, following the Supreme Court's recent decision in *Descamps,* we hold that the district court erred when it applied the modified categorical approach in sentencing Cabrera as a Tier III sex offender. *Descamps* precludes application of the modified categorical approach in this case.

I.

Cabrera was born in Mexico and has been removed from the United States several times. In 1998, Cabrera was convicted in Oregon of second degree sexual abuse. In his guilty plea statement, Cabrera admitted:

I on May 2, 1998 did knowingly have sexual intercourse with [redacted] and she was unable to legally consent to having sexual intercourse with me because she was under the influence of alcohol at the time of the sexual intercourse. Further [redacted] was 15 years old on May 2, 1998.

Cabrera was sentenced to 36 months' imprisonment and required to register as a sex offender. When Cabrera was released from custody in September 2000, he was advised of his responsibility to register as a sex offender under Oregon law and promptly removed to Mexico.

On February 3, 2012, Cabrera was arrested for a traffic violation in Yakima, Washington. He was subsequently charged with failing to register as a sex offender in violation of 18 U.S.C. § 2250. The indictment alleged that Cabrera was an individual who was required to register under SORNA, and having traveled in interstate commerce, did knowingly fail to register in violation of 18 U.S.C. § 2250. It further alleged that Cabrera failed to meet his registration obligation during the period February 3, 2011, through February 3, 2012.

Cabrera filed a motion to dismiss the indictment, arguing that Congress lacked authority to require him to register as a sex offender. The district court denied the motion, noting that although *United States v. George,* 625 F.3d 1124 (9th Cir. 2010), had been vacated, 672 F.3d 1126 (9th Cir.2012), "the Court finds the reasoning in *George* persuasive and notes that the opinion was vacated on different grounds." Thereafter, Cabrera entered a conditional plea of guilty, preserving his right to appeal the denial of his motion to dismiss.

The Pre-Sentence Investigation Report ("PSR") listed Cabrera's offense level as 16 under U.S.S.G. § 2A3.5(a)(1) because he was required to register as a Tier III sex offender. Cabrera objected to the PSR. He argued that his prior conviction only qualified him as a Tier I sex offender, not a Tier III offender, because his Oregon conviction was not comparable to, or more severe than, "aggravated sexual abuse or sexual abuse," as defined in 42 U.S.C. § 16911. The district court rejected this argument, noting that Cabrera's guilty plea admitted that the girl was intoxicated and fifteen years old. The court sentenced Cabrera to seventeen months' imprisonment and three years' supervised release. Cabrera timely appeals from his conviction and sentence.

II.

We review the district court's denial of Cabrera's motion to dismiss the indictment *de novo. United States. v. Milovanovic,* 678 F.3d 713, 719-20 (9th Cir. 2012) (en banc); *United States v. Marks,* 379 F.3d 1114, 1116 (9th Cir.2004).

SORNA requires sex offenders to, among other things, register their names, addresses, employment or school information, update that information, and appear in person at least once a year for verification of the information. 42 U.S.C. § 16901 *et seq.* These obligations, Cabrera asserts, are an unconstitutional

regulation of his inactivity under the Supreme Court's recent opinion in *National Federation of Independent Business v. Sebelius,* ___ U.S. ___, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012). Cabrera accepts that Congress has broad powers under the Commerce Clause, but points out that in *Sebelius,* the Court stated that "[c]onstruing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority." *Id.* at 2587. Cabrera further argues that, unlike the Affordable Care Act at issue in *Sebelius,* SORNA has nothing to do with commerce. Its purpose is to "protect the public from sex offenders and offenders against children." 42 U.S.C. § 16901. He argues that this purpose, while laudable, is not an appropriate purpose under the Commerce Clause because public safety measures lie exclusively in the realm of the States.

In anticipation of the government's reliance on "an additional jurisdictional hook," such as travel across state lines, Cabrera argues that SORNA requires all sex offenders to register, regardless of travel, and that the duty to register under SORNA precedes any act of travel. Thus, he continues, "SORNA would hold an individual who fails to register, travels and then registers equally responsible as an individual who never registers, before or after travel." He argues, citing *Sebelius,* 132 S.Ct. at 2590, that "the proposition that Congress may dictate conduct of an individual today [i.e., registering as a sex offender] because of prophesied future activity [i.e., interstate travel] finds no support in [the applicable Commerce Clause] precedent." Cabrera concludes that because Congress lacks the power to require an individual to register as a sex offender, it follows that it cannot penalize him for failing to register, even if he has traveled in interstate commerce.

We are not persuaded. In *United States v. Lopez,* 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), the Supreme Court recognized Congress's "broad" power under the Commerce Clause to regulate: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce." *Id.* at 558-59, 115 S.Ct. 1624 (citations omitted). The government asserts that the requirement of interstate travel meets "the first two categories of Congress" Commerce Clause authority, because an interstate traveler is both a person "in interstate commerce" and one who uses the "channels of interstate commerce."

We held in *George,* 625 F.3d at 1130, *vacated on other grounds,* 672 F.3d 1126, that "Congress had the power under its broad commerce clause authority to enact the SORNA," and we now reaffirm that holding, which has been embraced by our fellow circuits. In *George,* we explained:

SORNA was enacted to keep track of sex offenders. *See Carr v. United States,* 560 U.S. 438, 455 [130 S.Ct. 2229, 176 L.Ed.2d 1152] (2010) ("[SORNA was] enacted to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks."). Such offenders are required to "register, and keep registration current, in each jurisdiction" where the offender lives, works, or goes to school. 42 U.S.C. § 16913(a). As stated by the Eighth Circuit, "[t]his language indicates Congress wanted registration to track the movement of sex offenders through different jurisdictions." *United States v. Howell,* 552 F.3d 709, 716 (8th Cir.2009). "Under § 2250, Congress limited the enforcement of the registration requirement to only those sex offenders who were either convicted of a federal sex offense or who move in interstate commerce." *Id.* (citing 18 U.S.C. § 2250(a)(2)). The requirements of § 16913 are reasonably aimed at "regulating persons or things in interstate commerce and the use of the channels of interstate commerce." *Id.* at 717 (quoting [*United States v.*] *May,* 535 F.3d [912,] 921 [(8th Cir. 2008)]) (quotation marks omitted).

625 F.3d at 1129-30 (emendations, except in the last sentence, in the original).

George noted that, in addition to the Eighth Circuit, the Fourth, Fifth, Tenth, and Eleventh Circuits had upheld SORNA's constitutionality under the Commerce Clause.[2] *Id.* at 1130. The Second Circuit has also affirmed the constitutionality of SORNA under the Commerce Clause.[3] In at least two extant opinions, we

have approvingly referenced *George.*[4] Moreover, the Supreme Court's opinions in *Reynolds v. United States,* ___ U.S. ___, 132 S.Ct. 975, 181 L.Ed.2d 935 (2012), and *Carr v. United States,* 560 U.S. 438, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010), affirming but limiting SORNA, implicitly affirm SORNA's constitutionality.

We recognize, as Cabrera observes, that only SORNA's penalty provision, 18 U.S.C. § 2250, and not its registration provision, 42 U.S.C. § 16913, contains an interstate travel requirement. But we reject the significance of the distinction for several reasons. First, because Cabrera was charged and convicted of failing to register *after* having traveled in interstate commerce, it is questionable whether he may properly challenge the duty to register without interstate travel. More importantly, such a parsing of SORNA has been rejected by the Supreme Court and the circuit courts that have considered the issue. In *Carr,* the Court explained that "Section 2250 is not a stand-alone response to the problem of missing sex offenders; it is embedded in a broader statutory scheme enacted to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks." 560 U.S. at 455, 130 S.Ct. 2229 (citation omitted). The Seventh Circuit explained the symbiotic relationship between the two sections in *United States v. Sanders,* 622 F.3d 779, 783 (7th Cir.2010), stating:

[S]ection 16913 cannot be divorced from section 2250 in evaluating whether the Commerce Clause gives Congress the authority to require anyone convicted of a sex offense to register. Imposing a duty to register as a matter of federal law would do little to solve the problem of sex offenders slipping through the cracks absent the enforcement mechanism supplied by section 2250. Interstate travel by a sex offender is not merely a jurisdictional hook but a critical part of the problem that Congress was attempting to solve, for whenever sex offenders cross state lines they tend to evade the ability of any individual state to track them and thereby "threaten the efficacy of the statutory scheme...." [*Carr,* 130 S.Ct.] at 2239; *see also id.* at 2238 (it was reasonable for Congress to give States primary responsibility to supervise and ensure compliance among state sex offenders and subject such offenders to federal criminal liability only when "they use the channels of interstate commerce in evading a State's reach"); *id.* at 2240 (act of travel by sex offender is not merely a jurisdictional predicate but is "the very conduct at which Congress took aim"); *id.* at 2241 (section 2250 "subject[s] to federal prosecution sex offenders who elude SORNA's registration requirements by traveling in interstate commerce").

The Second, Fifth, Eighth, and Eleventh Circuits are in accord.[5] Because SORNA's registration requirement is necessary to the effectuation of the broader SORNA scheme, we agree with our sister circuits[6] in concluding that the Necessary and Proper Clause provided Congress ample authority to enact § 16913 and to punish a state sex offender who, like Cabrera, traveled interstate, for failing to register. *Cf. United States v. Kebodeaux,* ___ U.S. ___, 133 S.Ct. 2496, 2502-05, 186 L.Ed.2d 540 (2013) (holding that the Necessary and Proper Clause enabled SORNA's application to a pre-enactment federal offender); *United States v. Elk Shoulder,* 738 F.3d 948, 958-59 (9th Cir.2013) (same).

Finally, unlike *Sebelius,* SORNA does not regulate individuals "precisely because they are doing nothing." 132 S.Ct. at 2587. SORNA applies only to individuals who have been convicted of a sexual offense. Thus, registration is required only of those individuals who, through being criminally charged and convicted, have placed themselves in a category of persons who pose a specific danger to society. Moreover, SORNA's application to Cabrera is based on his further admitted activities of traveling in interstate commerce and then failing to register. Thus, SORNA does not punish the type of inactivity addressed in *Sebelius.*

In sum, agreeing with our sister circuits, we see no reason to depart from our previously expressed reasoning in *George.* We thus conclude that Congress had the authority to enact SORNA and that SORNA's application to Cabrera is constitutional.

III.

In considering Cabrera's challenge to his sentence, we review a district court's interpretation of the Sentencing Guidelines *de novo,* and its factual findings for clear error. *United States v. Swank,* 676 F.3d 919, 921 (9th Cir.2012); *United States v. Laurienti,* 611 F.3d 530, 551-52 (9th Cir. 2010).[7]

A.

As applied to Cabrera's situation, 42 U.S.C. § 16911(4) defines a "tier III sex offender" as "a sex offender whose offense is punishable by imprisonment for more than 1 year and ... is comparable to or more severe than ... aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18)."[8] Section 2242 defines the crime of sexual abuse to include knowingly (1) causing another to engage in a sexual act "by threatening or placing that person in fear," or (2) engaging in a sexual act with another who is "(A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act."[9]

The Oregon statute under which Cabrera was convicted provided:

A person commits the crime of sexual abuse in the second degree when that person subjects another person to sexual intercourse, deviate sexual intercourse or, [with certain exceptions], penetration of the vagina, anus or penis with any object not a part of the actor's body, and the victim does not consent thereto.

Or.Rev.Stat. § 163.425 (1998).

B.

Our task is to determine whether Cabrera's prior state conviction under § 163.425 may properly serve as a predicate for his classification as a Tier III sex offender under 42 U.S.C. § 16911(4). That is, we must decide whether the conviction is "comparable to or more severe than" the federal crime of sexual abuse.

In making this comparison, we follow the categorical approach established in *Taylor v. United States,* 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), as recently refined in *Descamps*.[10] Under that approach, a sentencing court must begin by comparing the statutory definition of the prior offense with the elements of the "generic" federal offense specified as a sentencing predicate. *Descamps,* 133 S.Ct. at 2283 (quoting *Taylor,* 495 U.S. at 599-600, 110 S.Ct. 2143). The prior conviction may operate as a predicate if it is defined more narrowly than, or has the same elements as, the generic federal crime. *Id.* If, however, the statute defining the prior offense "sweeps more broadly than the generic crime," the prior offense cannot serve as a statutory predicate. *Id. Descamps* affirms that the "key" to this comparison is "elements, not facts." *Id.* A sentencing court may not consult "extra-statutory materials," *id.* at 2287, "even if [the materials show that] the defendant actually committed the [predicate] offense in its generic form," *id.* at 2283. The crime's elements are all that is relevant. *Id.*

Applying the categorical approach, we conclude that the statute of Cabrera's conviction, Or.Rev.Stat. § 163.425, is broader than the federal crime of sexual abuse.[11] The Oregon statute requires the subjection of another to certain types of sexual activity and "the victim does not consent thereto." Or.Rev.Stat. § 163.425(1). The statute's non-consent element applies broadly, both where a victim does not actually consent and where the victim lacks capacity to consent. *See State v. Ofodrinwa,* 353 Or. 507, 300 P.3d 154, 167 (2013) (en banc).

By contrast, the generic federal crime of sexual abuse requires that a defendant cause another to engage in a sexual act by certain types of threat or fear or to engage in a sexual act with a victim who is mentally

or physically incapable. 18 U.S.C. § 2242. The Oregon statute, therefore, penalizes a broader class of behavior than the federal statute. Nonconsensual intercourse with a mentally and physically capable individual not involving a threat or the use of fear might violate Or.Rev.Stat. § 163.425, but it would not violate 18 U.S.C. § 2242.

Oregon and federal law also diverge on the age at which an individual gains legal capacity to consent to a sexual act. *Compare* Or.Rev.Stat. § 163.315 (stating that anyone under eighteen years of age is legally incapable of consent), *with* United States *v. Acosta-Chavez,* 727 F.3d 903, 908-09 (9th Cir.2013) (recognizing that federal law defines a minor as someone under sixteen years of age). Thus, sexual intercourse with a person under eighteen, but not under sixteen, would violate Or.Rev. Stat. § 163.425, but not necessarily 18 U.S.C. § 2242. In this respect also, § 163.425 sweeps more broadly than § 2242.

Because Or.Rev.Stat. § 163.425 "sweeps more broadly" than 18 U.S.C. § 2242, Cabrera's statute of conviction is not a categorical match to the federal crime of sexual abuse. Absent an exception to this categorical rule, Cabrera's prior conviction cannot serve as a predicate for his classification as a Tier III sex offender under 42 U.S.C. § 16911(4).

C.

The government contends that such an exception applies in this case. *Taylor* and *Descamps* recognize that, in a "narrow range of cases," courts may look beyond the statutory definition of a prior offense to certain other documents, including a defendant's plea agreement. *Descamps,* 133 S.Ct. at 2283-84 (quoting *Taylor,* 495 U.S. at 602, 110 S.Ct. 2143). Cabrera admitted in his plea statement that the victim of his crime was both intoxicated and a minor. The district court relied on those admissions in determining that Cabrera committed a crime "comparable to or more severe than" sexual abuse and that Cabrera qualified as a Tier III offender.

While our previous case law might have permitted the district court's approach — known as the "modified categorical approach" — in this case, we conclude that *Descamps* now forecloses it. *Descamps* clarifies that the modified categorical approach is available only when a defendant is convicted of violating a statute that sets out multiple, "divisible" elements. *Id.* at 2281, 2285. In such cases, the statute "effectively creates `several different... crimes'" pertaining to the possible combinations of alternative elements. *Id.* (quoting *Nijhawan v. Holder,* 557 U.S. 29, 41, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009)). Thus, a sentencing court may consult certain extra-statutory materials to identify the defendant's actual crime of conviction and to compare the elements of that crime with the generic crime. *Id.* at 2284-85. Where, however, a statute states a single, indivisible set of elements, the modified categorical approach "has no role to play." *Id.* In such cases, the sentencing court need not — indeed, cannot — consult extra-statutory materials to determine "which crime formed the basis of the defendant's conviction," *id.* at 2284, because only the single set of indivisible elements could apply.

We hold that Or.Rev.Stat. § 163.425 is not divisible within the meaning of *Descamps.* The statute, by its terms, states only two elements: (1) the subjection of another to certain types of sexual activity and (2) non-consent. These elements are indivisible, not alternative; a conviction under § 163.425 requires that both elements are satisfied. As in *Descamps,* then, "[w]e know [Cabrera's] crime of conviction" — the subjection of another to intercourse without that person's consent — and the modified approach has "no role to play." *Descamps,* 133 S.Ct. at 2285-86.

In support of its position that § 163.425 states divisible elements, the government points to Or.Rev.Stat. § 163.315, which lists four types of legal incapacity to consent. Or.Rev.Stat. § 163.315 (1998) (stating that a person is incapable of consenting if that person is under eighteen years of age, mentally defective, mentally incapacitated, or physically helpless); *see also* United States *v. Beltran-Munguia,* 489 F.3d 1042, 1045 (9th Cir.2007). The government contends that the listing of "several alternative modes" of non-consent in Or.Rev.Stat. § 163.315 renders Or.Rev. Stat. § 163.425 divisible.

We reject the government's argument for the simple reason that Cabrera was convicted of violating § 163.425, not § 163.315. Even if § 163.315 establishes four "alternative modes" of proving lack of consent, none of these four modes need be proven in order to convict a defendant of second degree sexual abuse. A statute cannot state elements of a crime if none of those "elements" need apply to secure a conviction. *See* *Beltran,* 489 F.3d at 1045 ("To constitute an element of a crime, the particular factor in question needs to be `a constituent part' of the offense [that] must be proved by the prosecution *in every case* to sustain a conviction under a given statute.'" (alteration and emphasis in original) (citing *United States v. Hasan,* 983 F.2d 150, 151 (9th Cir.1992) (per curiam))).

Neither the text of the statute nor Oregon case law supports the position that the phrase "does not consent" in § 163.425 is limited to the forms of non-consent delineated in § 163.315. Section 163.425 does not reference § 163.315, and no provision of the Oregon criminal code purports to define the phrase "does not consent." Contrary to the government's contention, § 163.315 is not a "definitional provision."[12] As we have recognized elsewhere, § 163.315, entitled "Incapacity to consent," merely "delineates four types of legal incapacity that apply to all sexual offenses listed in the Oregon criminal code." *Beltran,* 489 F.3d at 1045. The "four types" are alternative avenues of proving non-consent in all cases. But they are not the exclusive means of doing so, including in cases of victims who do *not* lack capacity to consent.[13] Indeed, it would be odd for the Oregon legislature to have defined § 163.425's non-consent requirement in § 163.315 without having so much as referenced § 163.315 or employed the same terminology in each.

Further, the government cites no support for its position that § 163.315 defines the non-consent element of § 163.425. To the contrary, Oregon appears routinely to charge and convict defendants of second degree sexual abuse without reference to any one of the four "alternative modes" contained in § 163.315.[14] Oregon's model jury instructions listing the "elements" of second degree sexual abuse reflect that practice. *See* Or. Uniform Crim. Jury Instr. No. 1613 (omitting mention of § 163.315 or its four modes).

A recent decision of the Oregon Supreme Court further reinforces our reading of § 163.425. In *Ofodrinwa,* 300 P.3d 154, the court was confronted with the question of whether the phrase "does not consent" in § 163.425 refers "only to those instances in which [a] victim does not actually consent" or whether it also "includes instances in which the victim lacks the capacity to consent." *Id.* at 155. The fact that the Supreme Court had to ask whether legal incapacity can satisfy the "does not consent" requirement strongly suggests that that requirement neither naturally refers to nor is limited to legal incapacity. It would be odd, again, for the Oregon legislature to have defined "does not consent" by a provision entitled "Incapacity to consent," especially where nothing in § 163.315 clearly encompasses actual non-consent. We do not attribute to the Oregon legislature such an oddity. The most logical reading of the statute is that non-consent under § 163.425 is broader than the forms of non-consent specified in § 163.315. Thus, § 163.315 cannot state elements of second degree sexual abuse, because none needs to apply to sustain a conviction.

Finally, our dissenting colleague argues that § 163.425 is divisible because — as *Ofodrinwa* makes clear — the statute "covers the offense of sexual intercourse where the victim, although capable of consenting, does not consent, as well as the offense of sexual intercourse where the victim is incapable of consenting." Partial Dissent at 1141-42. But the fact that § 163.425 "covers" multiple means of commission, and that a separate provision of the Oregon code specifies one of those means (legal incapacity), does not render § 163.425 divisible. Indeed, *Descamps* rejects our dissenting colleague's approach almost exactly. Like the partial dissent, the lower court in *Descamps* defended application of the modified categorical approach based on the court's conclusion that the statute at issue in that case "create[d] an *implied* list of every means of commission," even though the statute did not *explicitly* state those means. *Descamps,* 133 S.Ct. at 2289 (alterations in original) (quoting *United States v. Aguila-Montes de Oca,* 655 F.3d 915, 927 (9th Cir.2011) (en banc)) (internal quotation marks omitted).[15] Similarly, the dissent here argues that the phrase "does not consent" in § 163.425 is divisible because the phrase *implicitly* covers both actual non-consent and incapacity to consent. *Descamps,* however, rejects that approach because it would not "enable a sentencing court to conclude that a jury (or judge at a plea

hearing) has convicted the defendant of every element of the generic crime." *Id.* at 2290. In other words, *implied* means of commission cannot render a statute divisible because, unlike with an explicitly divisible statute, they do not allow the sentencing court to home in on the defendant's actual crime of conviction; "[a]s long as the statute itself requires only an indeterminate [element]," like non-consent, "that is all the indictment must (or is likely to) allege and all the jury instructions must (or are likely to) mention." *Id.* To use this case's example, to convict a defendant under § 163.425, the state need prove only that a defendant has engaged in intercourse with another and that the other "does not consent thereto." In the general run of cases, then, a sentencing court cannot tell whether the jury or judge convicted a defendant of intercourse with a victim who did not actually consent or a victim who lacked capacity to consent. The partial dissent's approach thus creates just the problem that *Descamps* identified and that motivated the Court specifically to reject it. We also note that our dissenting colleague's approach would render every criminal statute divisible in which a separate provision of the criminal code specified one or more means of commission. We would hesitate before adopting a rule with such sweeping implications, even if *Descamps* did not already squarely foreclose it.[16]

In short, Cabrera's statute of conviction, Or.Rev.Stat. § 163.425, is not divisible. The statute states "a single, indivisible set of elements," and the modified categorical approach does not apply. *Descamps,* 133 S.Ct. at 2282; *see also Acosta-Chavez,* 727 F.3d at 909 (holding that where the state statute's age element is broader than the federal definition and "is not divisible ... we may not apply the modified categorical approach").

IV.

Cabrera, having been convicted in Oregon of the crime of second degree sexual abuse and having been ordered to register as a sex offender, chose to travel interstate and failed to register under SORNA. We conclude, as have our sister circuits, that Congress has the authority under the Commerce Clause to enact SORNA and to require Cabrera to register under SORNA as a sex offender.

The district court erred, however, in applying the modified categorical approach to determine that Cabrera qualified as a Tier III sex offender. Cabrera's prior conviction under Or.Rev.Stat. § 163.425 is categorically overbroad and cannot serve as a sentencing predicate under 42 U.S.C. § 16911(4). The government has made an inadequate showing of harmlessness.[17] *See Acosta-Chavez,* 727 F.3d at 909 (recognizing that the government bears the burden of establishing harmlessness). Therefore, we vacate Cabrera's sentence and remand to the district court pursuant to 18 U.S.C. § 3742(f)(1) for resentencing proceedings consistent with this opinion.

CONVICTION AFFIRMED, SENTENCE VACATED and REMANDED FOR RESENTENCING.

CALLAHAN, Circuit Judge, concurring and dissenting:

I agree with my brethren that Congress had the authority to enact the Sex Offender Registration and Notification Act ("SORNA") and that SORNA's application to Pedro Cabrera-Gutierrez ("Cabrera") is constitutional. We part company, however, in our reading of the Supreme Court's opinion in *Descamps v. United States,* ___ U.S. ___, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), and its application to Cabrera's state conviction. Because I read the relevant Oregon statutes to be "divisible" as that term is defined by the Supreme Court in *Descamps,* I would affirm Cabrera's conviction and his sentence as a Tier III sex offender.

I

The federal statute that concerns Cabrera's situation is 42 U.S.C. § 16911(4) which defines a "tier III sex offender" as "a sex offender whose offense is punishable by imprisonment for more than 1 year and... is

comparable to or more severe than... aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18)."[1] Section 2242 defines the crime of sexual abuse to include knowingly engaging "in a sexual act with another person if that other person is — (A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act."[2]

Two Oregon statutes govern Cabrera's prior conviction. He was convicted under Or.Rev.Stat. § 163.425 (1998), which states: "(1) A person commits the crime of sexual abuse in the second degree when that person subjects another person to sexual intercourse, deviate sexual intercourse... and the victim does not consent thereto." Or.Rev.Stat. § 163.425 (1998). In addition, Or.Rev.Stat. § 163.315 provides that "does not consent thereto" includes instances where "(1) A person is considered incapable of consenting to a sexual act if the person is: (a) Under 18 years of age; (b) Mentally defective; (c) Mentally incapacitated; or (d) Physically helpless." *See* State v. Ofodrinwa, 353 Or. 507, 300 P.3d 154 (2013) (en banc).

A careful reading of *Ofodrinwa* and the Oregon statutes reveals that the Oregon scheme is divisible and that Cabrera pled guilty to sexual assault as that term is defined in 18 U.S.C. § 2242.

II

Our task, as refined by the Supreme Court's opinion in *Descamps,* is to determine whether Cabrera's state conviction is a crime of sexual abuse as that term is defined in 18 U.S.C. § 2242. Following *Taylor v. United States,* 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), we first determine whether the state statute has the same elements as the generic federal crime or defines the crime more narrowly. *Descamps,* 133 S.Ct. at 2283. The Supreme Court held: "But if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as a ... predicate [for the enhancement], even if the defendant actually committed the offense in its generic form. The key, we emphasized, is elements, not facts." *Id.*

Here, the Oregon statutory statute is broader than the federal crime of sexual abuse. The federal statute requires that the victim be incapable of appraising the nature of the conduct, of declining to participate, or communicating unwillingness. *See* 18 U.S.C. § 2242. But Or.Rev.Stat. § 163.315 requires only that the victim "does not consent." In addition, the Or. Rev.Stat. § 163.315 provides that anyone under 18 years of age is considered incapable of consenting to a sexual act. However, we have held that under federal law a minor is someone under the age of 16. *See United States v. Acosta-Chavez,* 727 F.3d 903, 908-09 (9th Cir.2013). Because Or. Rev.Stat. §§ 163.315 and 163.425 are broader than the definition of sexual abuse in 18 U.S.C. § 2242, we turn to the modified categorical approach.

In *Descamps,* the Supreme Court clarified that under the modified categorical approach, the focus is not on what the defendant did, but on "which statutory phrase was the basis for the conviction." *Descamps,* 133 S.Ct. at 2285 (quoting *Johnson v. United States,* 559 U.S. 133, 144, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010)). The Court explained:

Applied in that way — which is the only way we have ever allowed — the modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute. The modified approach thus acts not as an exception, but instead as a tool. It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's. All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates "several different ... crimes." *Nijhawan* [*v. Holder*], 557 U.S. [29], at 41 [129 S.Ct. 2294, 174 L.Ed.2d 22 (2009)]. If at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of. That

is the job, as we have always understood it, of the modified approach: to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense.

Id. (parallel citation omitted).

The Court's definition of divisible is shaped by its response to Justice Alito's dissent. Justice Alito wrote:

My understanding is that a statute is divisible, in the sense used by the Court, only if the offense in question includes as separate elements all of the elements of the generic offense. By an element, I understand the Court to mean something on which a jury must agree by the vote required to convict under the law of the applicable jurisdiction.

Id. at 2296. He then goes on to observe that the Court's decisions in *Shepard v. United States,* 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), *Johnson,* 559 U.S. 133, 130 S.Ct. 1265, and *Taylor,* 495 U.S. 575, 110 S.Ct. 2143, suggest a generous definition of divisible. He commented:

Shepard concerned prior convictions under two Massachusetts burglary statutes that applied not only to the entry of a "building" (as is the case with generic burglary) but also to the entry of a "ship, vessel, or vehicle." Mass. Gen. Laws Ann., ch. 266, § 16 (West 2000). *See also* § 18; 544 U.S. at 17, 125 S.Ct. 1254. And the Shepard Court did not think that this feature of the Massachusetts statutes precluded the application of the modified categorical approach. *See id.,* at 25-26, 125 S.Ct. 1254; *ante,* at 2283-2284. *See also Nijhawan,* 557 U.S. at 35, 129 S.Ct. 2294 (discussing *Shepard*).

In today's decision, the Court assumes that "building" and the other locations enumerated in the Massachusetts statutes, such as "vessel," were alternative elements, but that is questionable. It is quite likely that the entry of a building and the entry of a vessel were simply alternative means of satisfying an element.

Id. at 2297. Justice Alito continued:

Johnson, like *Shepard,* involved a statute that may have set out alternative means, rather than alternative elements. Under the Florida statute involved in that case, a battery occurs when a person either "1. [a]ctually and intentionally touches or strikes another person against the will of the other; or 2. [i]ntentionally causes bodily harm to another person." Fla. Stat. § 784.03(1)(a) (2010). It is a distinct possibility (one not foreclosed by any Florida decision of which I am aware) that a conviction under this provision does not require juror agreement as to whether a defendant firmly touched or lightly struck the victim. Nevertheless, in *Johnson,* we had no difficulty concluding that the modified categorical approach could be applied.

Id. at 2298.[3]

The Court responded to Justice Alito's concerns in its footnote 2.

But if, as the dissent claims, the state laws at issue in those cases set out "merely alternative means, not alternative elements" of an offense, *post,* at 2298, that is news to us. And more important, it would have been news to the *Taylor, Shepard,* and *Johnson* Courts: All those decisions rested on the explicit premise that the laws "contain[ed] statutory phrases that cover several different ... crimes," not several different methods of committing one offense. *Johnson,* 559 U.S. at 144 [130 S.Ct. 1265] (citing *Nijhawan,* 557 U.S. at 41 [129 S.Ct. 2294]).

Id. at 2298 n. 2 (parallel citations omitted).

Thus, in determining whether a state statute is divisible, we may take as our mark the Supreme Court's indication that the statutes in *Shepard,* which defined burglary to include entry of a building or a ship, and in *Johnson,* which defined battery as either a touching of a person against his will or intentionally causing bodily harm, were divisible.

III

Applying *Descamps* to Cabrera's case, we learn that although Or.Rev.Stat. § 163.425 is broader than 18 U.S.C. § 2242, the Oregon Supreme Court has interpreted § 163.425 as covering convictions based either on the victim's lack of consent or on the victim's incapacity to consent.

In *Ofodrinwa,* 300 P.3d 154, the Oregon Supreme Court ruled that "does not consent" as used in § 163.425 covers both lack of capacity to consent and lack of actual consent. *Id.* at 166. In *Ofodrinwa,* the defendant argued that "does not consent" in § 163.425 referred only to instances in which the victim does not actually consent. He asserted that there was no evidence that his victim had not consented, and that the victim's lack of capacity to consent was not sufficient to prove a violation of the statute. *Id.* at 155. The Oregon Supreme Court rejected that interpretation holding that the state could prove sexual abuse under § 163.425 either by showing the victim's lack of actual consent or by showing that the victim lacked the capacity to consent pursuant to Or.Rev.Stat. § 163.315. *Id.* at 167.

Thus, the Oregon statutory scheme is divisible as that term is defined in *Descamps.*[4] Section 163.425 covers the offense of sexual intercourse where the victim, although capable of consenting, does not consent, as well as the offense of sexual intercourse where the victim is incapable of consenting. Furthermore, Or.Rev. Stat. § 163.315 provides for distinct definitions of incapable. The victim may be shown to be incapable because she is under the age of 18, mentally defective, mentally incapacitated, or physically helpless. Although under 18 years of age would not qualify for incapacity under 18 U.S.C. § 2242, the other grounds of incapacity are covered by § 2242.

In *Shepard,* 544 U.S. at 26, 125 S.Ct. 1254, the Supreme Court held that in determining whether a plea of guilty to a nongeneric statute necessarily admitted elements of the generic offense, a court's review "is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *See also* *Young v. Holder,* 697 F.3d 976, 983 (9th Cir.2012) (en banc) ("we may review only the charging instrument, transcript of the plea colloquy, plea agreement, and comparable judicial record of this information").

Here, the district court had Cabrera's handwritten "Petition to Enter Plea of Guilty" to sexual abuse in the second degree. The petition states:

I on May 2, 1998 did knowingly have sexual intercourse with [redacted] and she was unable to legally consent to having sexual intercourse with me because she was under the influence of alcohol at the time of the sexual intercourse. Further [redacted] was 15 years old on May 2, 1998.

Thus, Cabrera freely admitted to violating Or.Rev.Stat. § 163.425 by having sexual intercourse with a victim who was mentally incapacitated as the term is defined in Or.Rev.Stat. § 163.315(1)(c).[5]

It is true that Cabrera also stated that his victim was a minor, and perhaps a conviction based solely on his violation of Or.Rev.Stat. § 163.315(1)(a) (lack of consent because victim was under 18 years of age), would not fit within the generic definition of sexual assault. However, Cabrera chose to first admit to his victim's actual incapacity to consent, a violation of a divisible portion of the state statutes that fall well within the federal definition of sexual abuse.[6]

Because: (1) Or.Rev.Stat. §§ 163.425 and 163.315 are divisible state statutes as that term is defined by the Supreme Court in *Descamps;* (2) Cabrera's guilty plea unquestionably shows that he pled guilty to sexual intercourse with a person who was mentally incapacitated, as that term is defined in Or.Rev.Stat. 163.315(1)(c); and (3) sexual intercourse with a person who was mentally incapacitated falls well within the generic definition of the crime of sexual abuse set forth in 18 U.S.C. § 2242, I would hold that the district court properly sentenced Cabrera as a Tier III sex offender.

[*] The Honorable Raner C. Collins, Chief United States Judge for the District of Arizona, sitting by designation.

[1] Cabrera raises a third issue: whether the government improperly denied him a third level of reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b). While our precedents foreclosed Cabrera's contention at the time of our original Opinion, *see United States v. Johnson,* 581 F.3d 994, 1001 (9th Cir.2009), § 3E1.1 was amended, effective November 1, 2013, to clarify that "the government should not withhold ... a motion [for reduction for acceptance of responsibility] based on interests not identified in § 3E1.1, such as whether the defendant agrees to waive his or her right to appeal." U.S.S.G. § 3E1.1, comment n. 6. This amendment applies to this case. *See United States v. Catalan,* 701 F.3d 331, 333 (9th Cir.2012) ("When an amendment to the Guidelines clarifies, rather than alters, existing law, we use the amendment to interpret the Guidelines provision retroactively."). Because we vacate Cabrera's sentence and remand for resentencing based on Cabrera's erroneous classification as a Tier III offender, *see infra,* we need not consider the effect of this amendment. The district court, however, should consider on remand whether Cabrera should receive a third level of reduction for acceptance of responsibility in light of this amendment.

[2] *See United States v. Gould,* 568 F.3d 459, 471 (4th Cir.2009) (holding "that § 2250(a) does not violate the Commerce Clause"); *United States v. Whaley,* 577 F.3d 254, 258 (5th Cir.2009) ("Through § 2250, Congress has forbidden sex offenders from using the channels of interstate commerce to evade their registration requirements, and we have no doubt that it was within its power under the Commerce Clause to do so."); *United States v. Hinckley,* 550 F.3d 926, 940 (10th Cir.2008) ("By requiring that a sex offender travel in interstate commerce before finding a registration violation, SORNA remains well within the constitutional boundaries of the Commerce Clause."), *abrogated on other grounds by Reynolds v. United States,* U.S. , 132 S.Ct. 975, 978, 181 L.Ed.2d 935 (2012); *United States v. Ambert,* 561 F.3d 1202, 1210 (11th Cir.2009) ("Section 2250 is a proper regulation falling under either of the first two *Lopez* categories because it regulates both the use of channels of interstate commerce and the instrumentalities of interstate commerce.").

[3] *See United States v. Guzman,* 591 F.3d 83, 90 (2d Cir.2010) ("We have no difficulty concluding that § 2250(a) is a proper congressional exercise of the commerce power under *Lopez.*").

[4] *See United States v. Fernandes,* 636 F.3d 1254, 1256 n. 2 (9th Cir.2011) (per curiam) (noting the argument that SORNA "is an invalid exercise of Congress' power under the Commerce Clause was rejected by this court" in *George*); *United States v. Valverde,* 628 F.3d 1159, 1161 (9th Cir.2010) (noting that *George*'s holding of constitutionality was binding).

[5] *See Guzman,* 591 F.3d at 90 ("Sections 2250 and 16913 were enacted as part of the Adam Walsh Child Protection and Safety Act of 2006, and are clearly complementary...." (internal quotation mark omitted)); *Whaley,* 577 F.3d at 259 (same); *United States v. Howell,* 552 F.3d 709, 716 (8th Cir.2009) ("[T]he statutory scheme Congress created to enforce § 16913 demonstrates Congress was focused on the interstate movement of sex offenders, not the intrastate activity of sex offenders."); *Ambert,* 561 F.3d at 1212 (commenting that "an examination of § 16913 and § 2250 makes the interstate focus abundantly clear," and "the only federal enforcement provision against individuals is found in § 2250, which explicitly subjects state sex offenders to federal prosecution under SORNA only if they travel in interstate or foreign commerce and fail to register under § 16913" (internal quotation marks and emphasis omitted)).

[6] *See Guzman,* 591 F.3d at 91 (stating "[t]o the extent that § 16913 regulates solely intrastate activity, its means are reasonably adapted to the attainment of a legitimate end under the commerce power" (internal quotation marks omitted)); *United States v. Pendleton,* 636 F.3d 78, 88 (3d Cir.2011) (holding that "§ 16913 is a law made in pursuance of the constitution because it is necessary and proper for carrying into execution Congress's power under the Commerce Clause" (internal quotation marks and citations omitted)); *Gould,* 568 F.3d at 475 (stating "[r]equiring all sex offenders to register is an integral part of Congress' regulatory effort and the regulatory scheme could be undercut unless the intrastate activity were regulated" (internal quotation marks omitted)); *Whaley,* 577 F.3d at 261 (concluding that "requiring sex offenders to register both before and after they travel in interstate commerce ... is `reasonably adapted' to the goal of ensuring that sex offenders register and update previous registrations when moving among jurisdictions"); *United States v. Vasquez,* 611 F.3d 325, 331 (7th Cir.2010) (holding that "[t]o the extent that § 16913 regulates solely intrastate activity, the regulatory means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power" (internal quotation marks omitted)); *Ambert,* 561 F.3d at 1212 ("Section 16913 is reasonably adapted to the attainment of a legitimate end under the commerce clause.").

[7] We have noted "an intracircuit conflict as to whether the standard of review for application of the Guidelines to the facts is de novo or abuse of discretion." *Swank,* 676 F.3d at 921-22. As in those cases, however, we need not resolve this conflict because our conclusion is the same under either standard. *See id.* at 922; *Laurienti,* 611 F.3d at 552.

[8] 42 U.S.C. § 16911(4) defines a Tier III offender as follows:

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and —

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

[9] 18 U.S.C. § 2242 reads:

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly —

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is —

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

[10] *Descamps* applies to this case because the Supreme Court issued its opinion while this case was still "pending direct review [and] not yet final." *Griffith v. Kentucky,* 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).

[11] The government concedes as much in its briefing, as does the partial dissent. *See* Partial Dissent at 1139-40.

[12] This fact distinguishes this case from *Ganzhi v. Holder,* 624 F.3d 23 (2d Cir.2010), on which the government relies. *Ganzhi* held, as the government observes, that an otherwise indivisible statute could be rendered divisible by a "separate definitional provision" setting out alternative means of accomplishing an element of the indivisible crime. *Id.* at 29-30. But in both examples at play in *Ganzhi,* the language of the definitional provisions indicated that the provisions exhaustively defined, in all cases, the meaning of the indivisible element. *See id.* at 29 (citing N.Y. Penal Law § 135.00 (stating that "[r]estrain" — an element of the relevant crime — "*means*" certain acts (emphasis added))); *id.* at 30 (citing N.Y. Penal Law § 130.05 (stating that "lack of consent" — an element of the relevant crime — "*results from*" certain acts (emphasis added))). Here, no language in Or.Rev.Stat. § 163.315 purports to *define* the phrase "does not consent" in § 163.425. Section 163.315 merely lists four possible ways of demonstrating a lack of consent — those involving legal incapacity. In any case, *Ganzhi* predated *Descamps,* limiting its relevance to our analysis.

[13] Thus, for example, intercourse perpetrated by the use of force — the subject of *Beltran*'s analysis — might not implicate any of the "four types" listed in § 163.315. We doubt that Oregon would be unable to convict a defendant of second degree sexual abuse if the defendant forcibly raped another person but that person was not a minor, mentally defective, mentally incapacitated, or physically helpless. Or.Rev. Stat. § 163.315; *id.* § 163.305(5) (defining "physically helpless" as "unconscious or for any other reason ... physically unable to communicate"). We understand "does not consent" in § 163.425 to encompass such abuses.

[14] A quick search of second degree sexual abuse convictions and the underlying indictments yields, *e.g., State v. Steltz,* 259 Or.App. 212, 313 P.3d 312, 313-16 (2013), *State v. Roquez,* 257 Or.App. 827, 308 P.3d 250, 252-53 (2013), *State v. Calhoun,* 250 Or.App. 474, 280 P.3d 1045 (2012), and *State v. Jackson,* 178 Or.App. 233, 36 P.3d 500, 500-01 (2001). None of the convictions in these cases — all reversed on unrelated grounds — involved victims who were argued to be minors, mentally defective, mentally incapacitated, or physically helpless.

[15] *Aguila-Montes de Oca* was abrogated by *Descamps,* as recognized in *United States v. Flores-Cordero,* 723 F.3d 1085, 1089 (9th Cir. 2013).

[16] The partial dissent's divisibility argument loses sight of the fact that, under *Descamps,* what must be divisible are the elements of the crime, not the mode or means of proving an element. *See Descamps,* 133 S.Ct. at 2293 (noting that we "may use the modified approach only to determine which *alternative element* in a divisible statute formed the basis of the defendant's conviction"); *id.* at 2283 ("The key, we emphasized, is elements, not facts."). All of the partial dissent's arguments focus on one of the means of proving the element of "does not consent." *See* Partial Dissent at 1141-42 n. 4 ("§ 163.315 sets forth divisible definitions of legal incapacity"); *id.* at 1142-43 (§ 163.315 is a "divisible state statute as that term is defined ... in *Descamps*"). Moreover, Cabrera's crime of conviction was under § 163.425 — not § 163.315 — and the partial dissent does not respond to our discussion that a violation of § 163.425 can be proved without resort to § 163.315. *See* Maj. Op., *supra,* at 1135-37.

[17] The government states conclusorily that even if Cabrera were classified as a Tier I offender, his actual sentence (17 months) would fall within the adjusted Guideline range, properly construed (15-21 months, instead of 27-33 months as a Tier III offender). This argument ignores that the district court gave Cabrera a 16-month downward variance for time served. Assuming the district court would have applied the same or a similar variance, Cabrera's sentence would have fallen well below the 17 months to which the court sentenced him.

[1] 42 U.S.C. § 16911(4) defines a Tier III offender as follows:

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and —

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

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[2] 18 U.S.C. § 2242 reads:

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(1) engages in a sexual act with another person if that other person is —

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

[3] Justice Alito further noted that *Taylor* "may also have involved a statute that was not divisible, but the situation is less clear." *Id.* at 2298 n. 2. The Missouri burglary provisions "applied not only to buildings but also to `any booth or tent,' `any boat or vessel,' or a `railroad car.'" *Id.* Justice Alito notes that "[i]t is not entirely clear whether a Missouri court would have required jurors to agree on a particular choice from this list." *Id.*

[4] This conclusion is consistent with our opinion in *United States v. Beltran-Munguia,* 489 F.3d 1042 (9th Cir.2007). In *Beltran,* the issue was whether a conviction under § 163.425 qualifies as a crime of violence

under United States Sentencing Guideline § 2L1.2. *Id.* at 1043. In determining that the conviction did not qualify as a crime of violence, we noted that Oregon Rev. Stat. § 165.315 "delineates four types of legal incapacity that apply to all sexual offenses listed in the Oregon criminal code, including second-degree sexual abuse." *Id.* at 1045. We wrote:

Given the applicability of ORS section 163.315 to ORS section 163.425, a perpetrator could commit second-degree sexual abuse by surreptitiously adding to his victim's drink a drug that affects one's judgment, thereby rendering her "mentally incapacitated." She would then be legally incapable of consent even if she participated fully in the sex act. Similarly, the victim could be "mentally defective," yet fully physically cooperative. Under both those circumstances, a perpetrator would not necessarily have to use, attempt to use, or threaten to use any force above and beyond the force inherent in the act of penetration, *see infra* p. 1047, to commit second-degree sexual abuse. In other words, under such circumstances, a perpetrator would not have categorically committed a "crime of violence," as the term is defined for purposes of § 2L1.2(b)(1)(A)(ii).

489 F.3d at 1046. Of course, *Beltran* concerned a different feature of the Oregon statute than the question raised by Cabrera, but our opinion recognized both the relationship between § 163.425 and § 163.315 and that § 163.315 sets forth divisible definitions of legal incapacity.

[5] Intoxication can be the cause of a victim's incapacity to consent. *See United States v. Smith,* 606 F.3d 1270, 1281-82 (10th Cir. 2010) (noting that victim was heavily intoxicated before the assault); *United States v. Carter,* 410 F.3d 1017, 1027 (8th Cir.2005) (holding that evidence the victim smoked marijuana and drank alcohol, and felt drowsy and really tired, was sufficient to conclude that the victim was unable to appraise the nature of the perpetrator's conduct).

[6] Our opinion in *Young,* 697 F.3d 976, is not to the contrary. There we were concerned with a plea that implied a conviction for "A" *or* "B." *Id.* at 986-87. Here, Cabrera pled guilty to "A" *and* "B."

769 F.3d 1221 (2014)

UNITED STATES of America, Plaintiff-Appellee, v. Wesley A. BEAR, Defendant-Appellant.

No. 13-6207.

United States Court of Appeals, Tenth Circuit.

October 31, 2014.

Submitted on the briefs:[*]

Brooke A. Tebow, Assistant Federal Public Defender, Oklahoma City, OK, for Appellant.

Sanford C. Coats, United States Attorney, and Timothy W. Ogilvie, Assistant United States Attorney, Oklahoma City, OK, for Appellee.

Before HARTZ, PHILLIPS, and McHUGH, Circuit Judges.

McHUGH, Circuit Judge.

Defendant, Wesley A. Bear, pled guilty to one count of failing to register or update a registration as a sex offender in violation of 18 U.S.C. § 2250. At sentencing, the district court imposed certain special sex offender conditions of supervised release in addition to its standard conditions of supervised release. Mr. Bear objected to the conditions restricting his contact with children and requiring him to submit to sex offender mental health assessment and treatment. The district court overruled his objections, and Mr. Bear now appeals.

This case requires us to resolve three disputes. First, Mr. Bear argues it was an abuse of discretion for the district court to impose sex offender conditions where his conviction of the prior sex offense occurred twelve years before this conviction. Second, Mr. Bear contends the conditions involve a greater deprivation of liberty than reasonably necessary to achieve the purposes of sentencing. Third, Mr. Bear claims the special conditions are not consistent with pertinent policy statements issued by the Sentencing Commission. Exercising jurisdiction under 28 U.S.C. § 1291, we AFFIRM in part, VACATE in part, and REMAND to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

In 2001, Mr. Bear was convicted in Iowa state court on two counts of committing lascivious acts with a child. According to the criminal complaint, from 1994 to 1996, Mr. Bear forced one female under the age of twelve to engage in oral and sexual intercourse with him and fondled the genitals of another female child. As a result of his conviction for these sex offenses, Mr. Bear is required to register as a sex offender by the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250. Nine years after his sex offenses, in 2010, Mr. Bear was convicted of a sex offender registration violation in a different part of Iowa.

Following his 2010 SORNA conviction, Mr. Bear married and purchased a trailer, which he placed on tribal land in Tama, Iowa. He used the trailer's address in his Iowa sex offender registration. Shortly

thereafter, Mr. Bear, his wife, and their three young children moved to his mother-in-law's house in Oklahoma City. Mr. Bear did not update his registration. When this omission was discovered, Mr. Bear was arrested and charged with the present failure to comply with SORNA, to which Mr. Bear pled guilty.

The district court sentenced Mr. Bear to twenty-three months of imprisonment and five years of supervised release. In addition to the standard conditions of supervised release, the court imposed sex offender conditions of supervised release. One condition required Mr. Bear to "submit to a sex offender mental health assessment and a program of sex offender mental health treatment, as directed by the U.S. Probation Officer, until such time as the defendant is released from the program by the probation officer." R. Vol. 1 at 31. Two other conditions prohibited Mr. Bear from being "at any residence where children under the age of 18 are residing without the prior written permission of the U.S. Probation Officer" or associating "with children under the age of 18 except in the presence of a responsible adult who is aware of the defendant's background and current offense, and who has been approved by the U.S. Probation Officer." R. Vol. 1 at 31.

Mr. Bear objected to the imposition of these conditions, asserting they violated 18 U.S.C. § 3583(d).[1] Specifically, he claimed the underlying sex offenses, which he committed seventeen years prior to sentencing, were too remote in time to be reasonably related to the imposition of conditions of supervised release. He also argued the conditions improperly restricted his right to see and parent his own children, and the assessment and treatment condition was unnecessary because he underwent an assessment and completed treatment around the time of his sex offense conviction.

The district court overruled Mr. Bear's objections and imposed the special conditions of supervised release. The court reasoned that an assessment and further treatment based on that assessment were appropriate because there was no record evidence of a prior assessment or treatment.[2] It also rejected Mr. Bear's objection to the restrictions on his contact with his children, noting the condition was not a total ban — Mr. Bear could still parent in the presence of an approved adult supervisor — and Mr. Bear's prior sex offense, though old, involved minor children.

Mr. Bear now appeals from the imposition of the challenged sentencing conditions.

II. DISCUSSION

A. Standard of Review

"When the defendant objects to a special condition of supervised release at the time it is announced, this Court reviews for abuse of discretion." *United States v. Dougan,* 684 F.3d 1030, 1034 (10th Cir.2012). Thus, "we will not disturb the district court's ruling absent a showing it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error of judgment." *United States v. Batton,* 602 F.3d 1191, 1196 (10th Cir.2010) (internal quotation marks omitted).

B. Governing Law

District courts have broad discretion to impose special conditions of supervised release. *See United States v. Mike,* 632 F.3d 686, 692 (10th Cir.2011). The limits of that discretion are prescribed by 18 U.S.C. § 3583(d), which requires the conditions (1) be reasonably related to the nature and circumstances of the offense, the defendant's history and characteristics, the deterrence of criminal conduct, the protection of the public from further crimes of the defendant, or the defendant's educational, vocational, medical, or other correctional needs; (2) involve no greater deprivation of liberty than is reasonably necessary to achieve the purpose of deterring criminal activity, protecting the public, and promoting the defendant's rehabilitation; and (3) be consistent with any pertinent policy statements issued by the Sentencing Commission. *See* 18 U.S.C. § 3583(d) ("Statutory Sentencing Factors"); *id.* § 3553(a); *Mike,* 632 F.3d at 692. Sex offender conditions of supervised release may be imposed, even at

sentencing for crimes which are not sex crimes, if supported by § 3583(d). *United States v. Hahn,* 551 F.3d 977, 983-86 (10th Cir.2008); *United States v. King,* 431 Fed. App'x. 630, 635-36 (10th Cir. 2011)[3] (unpublished) (affirming sex offender conditions of supervised release where the defendant was convicted of violating SORNA); *see also United States v. Morales-Cruz,* 712 F.3d 71, 72 (1st Cir. 2013) (affirming sex offender conditions imposed at sentencing for SORNA violation where the defendant had an extensive criminal record and two prior convictions for violating SORNA); *United States v. Brogdon,* 503 F.3d 555, 563-66 (6th Cir. 2007) (affirming sex offender conditions imposed at sentencing for being a felon in possession of a firearm where the defendant had seven convictions for indecent exposure, some of which involved minors, and a conviction of assault based on allegations that he had "plac[ed] his intimate parts on his three-year old son").

Mr. Bear raises three challenges to the assessment and treatment condition and the restrictions on his contact with children, which we address in turn. First, he argues his underlying sex offense conviction is too old to be reasonably related to the sex-offender conditions imposed. Second, he contends the conditions involve a greater deprivation of liberty than reasonably necessary in violation of § 3583(d)(2). Third, he claims the conditions are not consistent with pertinent policy statements issued by the Sentencing Commission.

C. Mr. Bear's prior conviction is reasonably related to his special conditions of supervised release.

Prior sex offenses can be too temporally remote for sex-offender conditions of supervised release to be reasonably related to the nature and circumstances of the offense, the defendant's history and characteristics, the deterrence of criminal conduct, the protection of the public from further crimes of the defendant, or the defendant's educational, vocational, medical, or other correctional needs. *United States v. Dougan,* 684 F.3d 1030, 1034 (10th Cir.2012). There is no bright-line rule for the outer limit of temporal remoteness, in part because district courts must consider more than just the age of a defendant's prior conviction. *Id.* at 1034-35. In addition to the time that has passed since the prior conviction, the district court must consider whether the special conditions are "reasonably related to" the Statutory Sentencing Factors in 18 U.S.C. § 3553(a). *Id.* at 1035; 18 U.S.C. §§ 3583(d)(1); 3553(a)(1), (a)(2)(B)-(D); *see also United States v. Vinson,* 147 Fed.Appx. 763, 771-75 (10th Cir.2005) (unpublished) (upholding sex offender conditions based on a nine-year-old conviction where there was no evidence the defendant had undergone mental health treatment and he had an intervening conviction for failure to register under SORNA).

In *United States v. Mike,* we addressed the imposition of special conditions following an assault conviction, when a defendant's sexual offense occurred nine years before the assault, and twelve years prior to his assault conviction. 632 F.3d 686, 689 (10th Cir.2011). One condition limited Mr. Mike's access to computers. *Id.* at 693. Although we remanded to have the condition clarified on other grounds, we held it was reasonably related to both protecting the public from future crimes and providing Mr. Mike with correctional treatment because he had committed a gruesome sex offense, he continued to have sexual deviance problems, and he had serious mental health problems. We held those factors justified restricting his access to computers and thereby, the material available on the internet that appeals to individuals prone to committing sexual offenses. *Id.* at 693-94.

We have also recognized significantly older sexual offenses, "viewed in the factual context in which they arose," can be too remote to be reasonably related to a subsequent offense. *Dougan,* 684 F.3d at 1031. The defendant in *Dougan* pled guilty to robbery sixteen years after being convicted of an aggravated battery, which was originally charged as sexual battery, and thirty-three years after being convicted of sexual battery. *Id.* Mr. Dougan had not shown any proclivity toward sexual violence between the aggravated battery and robbery convictions, did not manifest a propensity to do so in the future, and the government had presented no evidence of a predilection toward sexual interactions with children. *Id.* at

1037. In light of those facts, we held Mr. Dougan's sexual offenses were too remote in time to be reasonably related to his later offenses and did not justify special sex-offender conditions of release. *Id.*

In *Dougan,* we identified two other factors relevant to the consideration of whether old offenses could support the imposition of sex offender conditions of supervised release. First, we noted Mr. Dougan had interim convictions for failure to register as a sex offender under SORNA. *Id.* While we did not find those convictions determinative, standing alone, we explained they made the issue "a much closer question." *Id.* As a second relevant factor, we acknowledged the case could have been resolved differently if it had involved "more troubling facts," such as a defendant with "an extensive history of committing sex crimes" or "a history of sexual offenses involving minors." *Id.* at 1035-36.

Applying this analysis to the present case, we note the age of Mr. Bear's prior offenses falls between that of the twelve-year-old conviction in *Mike* and the seventeen-year-old conviction in *Dougan.* Mr. Bear's prior sex offense conviction was twelve years prior to sentencing here, and his criminal conduct underlying that conviction occurred seventeen years before the present SORNA conviction. Nonetheless, this case presents "more troubling facts" than *Dougan.* Mr. Bear's sex offenses occurred multiple times over the course of two years, involved two child victims, and included oral and sexual intercourse with a child under the age of twelve.[4] Although the facts in the record here are less graphic than those described in *Mike,* Mr. Bear's conduct is at least as troubling. Thus we hold Mr. Bear's prior sex offense was reasonably related to the imposition of the special sex offender conditions and survive his § 3583(d)(1) challenge.

The assessment and treatment condition is also reasonably related to Mr. Bear's history and characteristics, the need to protect the public from future crimes, and his need for correctional treatment. Mr. Bear engaged in sexual acts with minors, at least one of whom was under twelve. Although Mr. Bear argues he completed mental health treatment after his sex offense conviction, he has not supported that allegation with documentation. Furthermore, Mr. Bear's intervening sex offender registration conviction and current SORNA conviction, while fundamentally different than the underlying sex offenses, are not entirely unrelated and raise concerns that Mr. Bear may not comply with his ongoing SORNA obligations. This justifies special conditions related to rehabilitation and monitoring. *See Dougan,* 684 F.3d at 1037; *Vinson,* 147 Fed.Appx. at 772-73 (affirming an assessment and treatment condition where the defendant could not establish he had previously been assessed, so long as treatment was required only if supported by the assessment). Accordingly, the assessment and treatment condition also survives Mr. Bear's § 3583(d)(1) challenge.

D. The special condition of supervised release restricting Mr. Bear's contact with his children creates a greater deprivation of liberty than reasonably necessary, but the special condition requiring mental health assessment and treatment does not.

Special conditions of supervised release must "involve no greater deprivation of liberty than is reasonably necessary" to achieve the purpose of deterring criminal activity, protecting the public, and promoting the defendant's rehabilitation. 18 U.S.C. § 3583(d)(2); *see also United States v. Mike,* 632 F.3d 686, 692 (10th Cir.2011). Mr. Bear argues the challenged conditions here impose an unreasonable deprivation of his liberty. We begin our analysis of this claim by addressing the conditions of supervised release limiting Mr. Bear's contact with children. We then turn to the assessment and treatment condition and consider both Mr. Bear's statutory challenge and his argument, advanced for the first time on appeal, that the district court improperly delegated its sentencing authority to Mr. Bear's probation officer.

1. Restrictions on Mr. Bear's Contact with Children

Mr. Bear argues the restrictions on his contact with children are improper because they prevent him from being alone with his own children. When a defendant has committed a sex offense against children or other vulnerable victims, general restrictions on contact with children ordinarily do not involve a greater

deprivation of liberty than reasonably necessary. *United States v. Smith,* 606 F.3d 1270, 1282-83 (10th Cir.2010). But restrictions on a defendant's contact with his own children are subject to stricter scrutiny. "[T]he relationship between parent and child is constitutionally protected," and "a father has a fundamental liberty interest in maintaining his familial relationship with his [children]." *United States v. Edgin,* 92 F.3d 1044, 1049 (10th Cir.1996). Given the importance of this liberty interest, "special conditions that interfere with the right of familial association can do so only in compelling circumstances," *Smith,* 606 F.3d at 1284, and it is imperative that any such restriction "be especially fine-tuned" to achieve the statutory purposes of sentencing. *Edgin,* 92 F.3d at 1049.

The present record does not provide compelling evidence that could support restrictions on Mr. Bear's contact with his own children. The government presented no evidence that in the twelve years since Mr. Bear's sex offense conviction he has committed any sexual offense, displayed a propensity to commit future sexual offenses, or exhibited a proclivity toward sexual violence. Nor is there any evidence in the record that Mr. Bear has continuing deviant sexual tendencies, fantasizes about having sex with children, or has otherwise displayed a danger to his own three children. Under these circumstances, Mr. Bear's 2001 conviction for sex offenses is simply too remote in time, standing alone, to provide compelling evidence justifying infringement upon Mr. Bear's right of familial association. Thus we vacate the conditions limiting Mr. Bear's ability to be at his children's residence and his ability to be alone with his children without supervision.

2. Mental Health Assessment and Treatment

We next consider Mr. Bear's challenge to the assessment and treatment condition. Although conditions requiring a mental health evaluation and treatment affect a liberty interest and must be supported by particularized findings by the district court, we have generally found a defendant's commission of a sex crime enough to require an initial mental health assessment and treatment consistent with that assessment. *See Mike,* 632 F.3d at 698-99. Where the district court was unable to confirm whether Mr. Bear had been assessed and treated at the time of his sex offense convictions, it did not impermissively invade Mr. Bear's liberty interests by requiring a mental health assessment and treatment as a condition of supervised release.

For the first time on appeal, Mr. Bear raises a related but distinct issue. He argues the assessment and treatment condition unconstitutionally delegates sentencing authority to the probation officer. We review this argument for plain error. *United States v. Teague,* 443 F.3d 1310, 1314 (10th Cir.2006). To prevail on this unpreserved claim, Mr. Bear "must establish (1) that the district court committed error, (2) that the error was plain, and (3) that the error affected his substantial rights." *United States v. Charles,* 576 F.3d 1060, 1065 (10th Cir.2009). Because we conclude the district court did not err, we do not reach the other requirements of plain error review.

Article III of the United States Constitution confers the authority to impose punishment on the judiciary, and the judiciary may not delegate that authority to a nonjudicial officer. *Mike,* 632 F.3d at 695; *United States v. Kent,* 209 F.3d 1073, 1078 (8th Cir.2000). To decide whether a condition of supervised release improperly delegates judicial authority to a probation officer, we "distinguish between [permissible] delegations that merely task the probation officer with performing ministerial acts or support services related to the punishment imposed and [impermissible] delegations that allow the officer to decide the nature or extent of the defendant's punishment." *Mike,* 632 F.3d at 695. This inquiry focuses on the liberty interest affected by the probation officer's discretion. "Conditions that touch on significant liberty interests are qualitatively different from those that do not." *Id.* As a result, allowing a probation officer to make the decision to restrict a defendant's significant liberty interest constitutes an improper delegation of the judicial authority to determine the nature and extent of a defendant's punishment. *Id.*

In *Mike,* we explained that certain mental health treatment tools like residential treatment, penile plethysmograph testing, and the involuntary administration of psychotropic drugs constitute greater

infringements on a defendant's liberty than outpatient mental health care or other more routine treatment and assessment tools. *Id.* at 695-96; *see also* *Addington v. Texas,* 441 U.S. 418, 425, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); *United States v. Bradley,* 417 F.3d 1107, 1113 (10th Cir. 2005); *United States v. Stoterau,* 524 F.3d 988, 1005-06 (9th Cir.2008); *United States v. Weber,* 451 F.3d 552, 563 (9th Cir.2006). However, where a broad condition of supervised release is ambiguous and could be read as restricting a significant liberty interest, we construe the condition narrowly so as to avoid affecting that significant liberty interest. *Mike,* 632 F.3d at 696 (construing mental health assessment and treatment conditions of supervised release narrowly so as not to implicate the defendant's significant liberty interests).

Here, the district court required Mr. Bear to "submit to a sex offender mental health assessment and a program of sex offender mental health treatment, as directed by the U.S. Probation Officer, until such time as the defendant is released from the program by the probation officer." R. Vol. 1 at 31. Although the condition is broadly worded, we interpret it to reflect the probation officer's representation to the district court that the results of the assessment would dictate the scope of any treatment plan. Similarly, we read the condition as not delegating to the probation officer the authority to impose conditions that implicate Mr. Bear's significant liberty interests, such as residential treatment, penile plethysmograph testing, or the involuntary administration of psychotropic drugs. Construed narrowly, the trial court did not err in imposing the mental health assessment and treatment conditions of supervised release because they do not improperly delegate judicial authority to Mr. Bear's probation officer.

E. The conditions of supervised release were consistent with pertinent policy statements issued by the Sentencing Commission.

Mr. Bear's final argument is that the conditions of supervised release were not consistent with policy statements issued by the Sentencing Commission. Because there is nothing in the policy statements supporting a prohibition on association and contact with children, he contends we must reverse those conditions.[5] As support for that position, Mr. Bear relies on 18 U.S.C. § 3583(d)(3), which requires special conditions to be "consistent with any pertinent policy statements issued by the Sentencing Commission." But we do not read this provision as requiring the conditions to be expressly covered by policy statements. Rather, § 3583(d)(3) mandates only that the conditions not directly conflict with the policy statements. Therefore, when considering challenges to supervised release conditions brought under § 3583(d)(3), courts tend to evaluate them under § 3583(d)(1), which requires that conditions be reasonably related to certain § 3553(a) factors. *United States v. Kent,* 209 F.3d 1073, 1077-78 (8th Cir. 2000); *see United States v. Hopson,* 203 Fed.Appx. 230, 232-33 (10th Cir.2006) (unpublished); *see also United States v. Majors,* 426 Fed.Appx. 665, 668-69 (10th Cir. 2011) (unpublished) (citing the Sentencing Guidelines in reviewing a condition requiring mental health treatment, but primarily deciding the issue as a challenge to sufficiency of § 3553(a) justifications).

As explained above, we reject Mr. Bear's § 3583(d)(1) challenges and see nothing in the policy statements that compels a different result. U.S.S.G. § 5D1.3(d)(5) recommends mental health program participation if a court has reason to believe the defendant is in need of treatment. Evidence that a defendant has committed sex crimes can show a defendant needs mental health treatment. *United States v. Miles,* 411 Fed.Appx. 126, 129 (10th Cir.2010) (unpublished) (concluding that e-mail messages and chat room comments supported imposition of sex offender mental health assessment and treatment). Mr. Bear has also failed to identify any policy statements that discourage limiting his contact with children other than his own, due to his prior sexual offenses against two child victims.

Accordingly, we reject Mr. Bear's claim that the special conditions are not consistent with policy statements issued by the Sentencing Commission.

III. CONCLUSION

For the foregoing reasons, Mr. Bear's sentence is AFFIRMED in part, VACATED in part, and we REMAND for further proceedings consistent with this order.

[*] After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). This case is therefore ordered submitted without oral argument.

[1] 18 U.S.C. § 3583(d) authorizes further conditions of supervised release if each condition:

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)....

[2] Mr. Bear was unable to produce records of the alleged prior assessment and treatment because the doctor who had allegedly performed the treatment had moved and was unresponsive to Mr. Bear's inquiries.

[3] Although not precedential, we find the reasoning of this court's unpublished opinions instructive. *See* 10th Cir. R. 32.1 ("Unpublished decisions are not precedential, but may be cited for their persuasive value."); *see also* Fed. R.App. P. 32.1.

[4] Although we typically rely on evidence introduced at trial or in an evidentiary hearing, rather than facts alleged in a criminal complaint, the district court relied on these allegations at sentencing and Mr. Bear has not disputed them for purposes of appeal.

[5] Mr. Bear also reiterates his argument that there was no evidence that he needed mental health treatment. As discussed, the absence of any verification that Mr. Bear had undergone a mental health assessment and treatment after his sex offense conviction and Mr. Bear' subsequent SORNA conviction provided a sufficient connection between this condition and Mr. Bear's current SORNA offense.

766 F.3d 884 (2014)

UNITED STATES of America, Plaintiff-Appellee
v.
Kevin Lamont BREWER, Defendant-Appellant.

No. 13-1261.

United States Court of Appeals, Eighth Circuit.

Submitted: April 16, 2014.
Filed: September 10, 2014.

James Pierce, AFPD, argued, Fort Smith, AR, (Angela Lorene Pitts, AFPD, Fayetteville, AR, on the brief), for Plaintiff-Appellee.

Candace L. Taylor, AUSA, argued, Fort Smith, AR, for Defendant-Appellant.

Before WOLLMAN, BYE, and KELLY, Circuit Judges.

KELLY, Circuit Judge.

Kevin Brewer was convicted of failing to register as a sex offender under 18 U.S.C. § 2250(a) and sentenced to 18 months in prison and 15 years of supervised release. Brewer moved to vacate his conviction under 28 U.S.C. § 2255. The district court denied the motion. Brewer then moved to reconsider and requested a certificate of appealability. The district court denied Brewer's motion to reconsider but granted Brewer a certificate of appealability on two issues. Having jurisdiction under 28 U.S.C. § 1291, we reverse and remand for further proceedings.

I. Background

In 2006, Congress enacted the Sex Offender and Registration Notification Act ("SORNA"), which established a national registration system for persons convicted of sex offenses under state and federal laws. 42 U.S.C. §§ 16901-16991. SORNA "requires those convicted of certain sex crimes to provide state governments with (and to update) information, such as names and current addresses, for inclusion on state and federal sex offender registries." *Reynolds v. United States,* ___ U.S. ___, 132 S.Ct. 975, 978, 181 L.Ed.2d 935 (2012). Specifically, under SORNA, a person is criminally liable for failure to register if he (1) is required to register under SORNA; (2) is a sex offender by reason of a federal conviction or, alternatively, is a person who "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 SORNA. 18 U.S.C. § 2250(a).

SORNA's registration requirements were not immediately applicable to persons who, like Brewer, were convicted of a sex offense prior to the enactment of SORNA. *Reynolds,* 132 S.Ct. at 978. SORNA mandated that the registration requirements would not apply to "pre-Act offenders until the Attorney General specifies that they do apply." *Id.*; *see also* 42 U.S.C. § 16913(d) (granting the Attorney General rule-making authority regarding applicability). On February 28, 2007, the Attorney General promulgated an Interim Rule that made registration requirements applicable to all pre-Act offenders. *See* 72 Fed.Reg. 8894, 8897 (Feb. 28, 2007). The Attorney General did not establish a period for pre-promulgation notice and comment and bypassed the 30-day publication requirement because, he asserted, there was "good

cause" to waive those requirements. *See* 72 Fed.Reg. 8894, 8896-97. Three months later the Attorney General published the proposed "SMART" Guidelines to "interpret and implement SORNA." 72 Fed.Reg. 30,210 (May 30, 2007); *see* *United States v. Knutson,* 680 F.3d 1021, 1023 (8th Cir.2012). The "SMART" Guidelines became effective on August 1, 2008, and "reaffirmed the interim rule applying SORNA to pre-Act offenders." *Knutson,* 680 F.3d at 1023; see 73 Fed. Reg. 38,030 (July 2, 2008).[1] Though the Attorney General maintained that SORNA had been effective to all pre-Act offenders all along, the Supreme Court in *Reynolds* rejected that position and held that SORNA's registration requirements did not apply to pre-Act offenders until the Attorney General issued a rule saying so. *See* *Reynolds,* 132 S.Ct. at 984.

Brewer currently is required to register under SORNA because of a 1997 conviction for a sex offense in Hawaii. At the time of SORNA's enactment, Brewer was living in South Africa. In December 2007, he moved back to the United States and settled in Arkansas, but he did not register as a sex offender. He was arrested in March 2009 and pleaded guilty in September 2009.

Following his release from prison, Brewer moved to vacate his sentence under 28 U.S.C. § 2255. As relevant to this appeal, Brewer argued that (1) the Attorney General lacked "good cause" and thereby violated the Administrative Procedures Act (APA) when he promulgated and made effective the Interim Rule without allowing for the required public notice-and-comment period and minimum 30-day publication period, and (2) SORNA violates the nondelegation doctrine by providing the Attorney General with the authority to determine when, and if, SORNA will apply to pre-SORNA offenders. The district court adopted the magistrate judge's report and denied Brewer's motion to vacate on all grounds. Brewer then moved for reconsideration and asked the district court for a certificate of appealability. The district court declined to reconsider its earlier ruling but certified for appeal the two issues stated above.

II. Discussion

We review de novo the district court's denial of a motion under section 2255. *United States v. Hernandez,* 436 F.3d 851, 855 (8th Cir.2006). Any underlying factual findings are reviewed for clear error. *Id.*

On appeal Brewer maintains that the Attorney General's Interim Rule is invalid and, therefore, his conviction is illegal. Brewer presses the same grounds for vacating his conviction that he argued in the district court: (1) the "Interim Rule violated the [APA] because Appellant was prejudiced by the Attorney General's failure to comply with the required procedures for substantive rulemaking and failure to provide sufficient good cause for avoiding those procedures";[2] and (2) "[c]ontrary to Circuit precedent, [SORNA] violates nondelegation doctrine with regards to state sex offenders whose prior conviction pre-dates the enactment or implementation of the Act." We address each of his arguments in turn.

A. Good Cause[3]

As a state-law sex offender, Brewer is guilty of failing to register under SORNA if he "travels in interstate or foreign commerce" while knowingly failing to register or update his registration. 18 U.S.C. § 2250(a)(2)(B). Brewer suggests, however, that SORNA was not yet effective as to him when he traveled from Africa to Arkansas in December 2007 because, he argues, the Interim Rule, which for the first time made SORNA applicable to sex offenders convicted before the Act's enactment, is invalid. Because the "final rule" did not become effective until August 2008, Brewer cannot be guilty under that rule for his December 2007 move. Thus, if the Interim Rule is invalid, then Brewer's conviction also is invalid.

Brewer asserts that the Interim Rule is invalid because the Attorney General failed to comply with the APA rulemaking procedures without good cause. We review de novo whether an agency has complied with the APA's procedural requirements because compliance "is not a matter that Congress has committed to the agency's discretion." *Iowa League of Cities v. EPA,* 711 F.3d 844, 872 (8th Cir. 2013). "Agencies must conduct `rule making' in accord with the APA's notice and comment procedures." *Id.* at

855 (citing 5 U.S.C. § 553(b), (c)). "The APA's rulemaking provisions require three steps to enact substantive rules: notice of the proposed rule, a hearing or receipt and consideration of public comments, and the publication of the new rule." *United States v. DeLeon,* 330 F.3d 1033, 1036 (8th Cir.2003). The third step, publication of a new substantive rule, must be completed "not less than 30 days before [the rule's] effective date." *See* 5 U.S.C. § 553(d).

An agency may waive the requirements of a notice and comment period and the 30-day grace period before publication if the agency finds "good cause" to do so. *See* 5 U.S.C. § 553(b)(B), (d)(3). We have cautioned, however, that courts should not conflate the pre-adoption notice-and-comment requirements, listed in § 553(b) and (c), with the post-adoption publication requirements, listed in § 553(d). *United States v. Gavrilovic,* 551 F.2d 1099, 1104 n. 9 (8th Cir.1977). Because these are separate requirements, the agency must have good cause to waive each.

We note that there is a conflict among the circuits regarding the appropriate standard of review for an agency's assertion of good cause under § 553(b)(B). We have in the past deferred to the agency's determination and reviewed only "whether the agency's determination of good cause complies with the congressional intent" in § 553(d). *Gavrilovic,* 551 F.2d at 1105. This deferential standard appears similar to the approach taken by the Fifth and Eleventh Circuits, which each used an arbitrary-and-capricious standard found in 5 U.S.C. § 706(2)(A). *See United States v. Reynolds (Reynolds II),* 710 F.3d 498, 506-07 (3d Cir.2013) (collecting and reviewing conflicting standards of review). The Fourth and Sixth Circuits, however, applied de novo review and cited § 706(2)(D). *Id.* at 507. While we recognize that this division is unhelpful, we agree with the Third Circuit that the Attorney General's assertion of good cause fails under any of the above standards.

In promulgating the Interim Rule, the Attorney General asserted good cause to waive the procedural requirements and make the rule effective immediately:

The immediate effectiveness of this rule is necessary to eliminate any possible uncertainty about the applicability of the Act's requirements — and related means of enforcement, including criminal liability under 18 U.S.C. 2250 for sex offenders who knowingly fail to register as required — to sex offenders whose predicate convictions predate the enactment of SORNA. Delay in the implementation of this rule would impede the effective registration of such sex offenders and would impair immediate efforts to protect the public from sex offenders who fail to register through prosecution and the imposition of criminal sanctions. The resulting practical dangers include the commission of additional sexual assaults and child sexual abuse or exploitation offenses by sex offenders that could have been prevented had local authorities and the community been aware of their presence, in addition to greater difficulty in apprehending perpetrators who have not been registered and tracked as provided by SORNA. This would thwart the legislative objective of "protect[ing] the public from sex offenders and offenders against children" by establishing "a comprehensive national system for the registration of those offenders," SORNA § 102, because a substantial class of sex offenders could evade the Act's registration requirements and enforcement mechanisms during the pendency of a proposed rule and delay in the effectiveness of a final rule.

It would accordingly be contrary to the public interest to adopt this rule with the prior notice and comment period normally required under 5 U.S.C. 553(b) or with the delayed effective date normally required under 5 U.S.C. 553(d).

72 Fed.Reg. 8894, 8896-97. Thus, the Attorney General offered two rationales for waiving the requirements: (1) the need to eliminate "any possible uncertainty" about the applicability of SORNA; and (2) the concern that further delay would endanger the public. *Id.*

The appellate courts are divided over whether the Attorney General's justifications for extending SORNA to all pre-Act offenders without adhering to the requirements of the APA were sufficient. The parties'

arguments in this appeal largely track the divide in the circuits. Two circuits, the Fourth and the Eleventh, have held that the Attorney General had good cause to bypass the notice and comment provisions.[4] In *United States v. Gould,* the Fourth Circuit noted that there was some ambiguity about SORNA's effectiveness and reasoned that the Interim Rule was necessary to provide "legal certainty about SORNA's `retroactive' application." 568 F.3d 459, 469-70 (4th Cir.2009). Similarly, in *United States v. Dean,* the Eleventh Circuit held that the Interim Rule served to promote public safety and that the public safety exception applied not only to true "emergency situations" but also to situations "where delay could result in serious harm." 604 F.3d 1275, 1281 (4th Cir.2010) (quoting *Jifry v. F.A.A.,* 370 F.3d 1174, 1179 (D.C.Cir.2004)). The court found that despite the long delay between SORNA's passage and the promulgation of the Interim Rule, the Attorney General "reasonably determined that waiting thirty additional days for the notice and comment period to pass would do real harm." *Id.* at 1282-83.

In contrast, four circuits — the Third, Fifth, Sixth, and Ninth — have found that the Attorney General's stated reasons for finding good cause to bypass the 30-day advance-publication and notice-and-comment requirements — alleviating uncertainty and protecting the public safety — were insufficient. *See Reynolds II,* 710 F.3d at 509; *United States v. Johnson,* 632 F.3d 912, 928 (5th Cir.2011); *United States v. Valverde,* 628 F.3d 1159, 1168 (9th Cir. 2010); *United States v. Cain,* 583 F.3d 408, 421-24 (6th Cir.2009). We agree with these circuits that the Attorney General lacked good cause to waive the procedural requirements.

The Attorney General's first rationale, the need to eliminate "uncertainty" about the law, simply reflects a generalized concern that exists any time an act requires further substantive rulemaking. There always will be some level of uncertainty about the breadth and timing of applicability until the agency has promulgated a rule. *See Reynolds II,* 710 F.3d at 510 ("[S]ome uncertainty follows the enactment of any law that provides the agency with administrative responsibility."). But in this situation, "[t]he desire to eliminate uncertainty, by itself, cannot constitute good cause." *Id.* "If good cause could be satisfied by an Agency's assertion that normal procedures were not followed because of the need to provide immediate guidance and information[,] ... then an exception to the notice requirement would be created that would swallow the rule." *Valverde,* 628 F.3d at 1166 (internal quotation marks omitted). Congress could have alleviated this uncertainty by providing that SORNA be immediately applicable to all pre-Act offenders. Instead, Congress granted the Attorney General discretion to decide how, and if, SORNA would apply to pre-Act offenders. As such, this level of uncertainty inherent in the Congressional directive itself cannot constitute an emergency or public necessity.

We also note that the Attorney General did not actually find a concrete uncertainty to remedy but rather was acting to "eliminat[e] any *possible* uncertainty." 72 Fed. Reg. 8894, 8896-97 (emphasis added). There is a difference between addressing present legal uncertainty and addressing the possibility of future legal uncertainty. Although the risk of future harm may, under some circumstances, justify a finding of good cause, that risk must be more substantial than a mere possibility.

Similarly, the Attorney General's "public safety rationale cannot constitute a reasoned basis for good cause because it is nothing more than a rewording of the statutory purpose Congress provided in the text of SORNA." *Reynolds II,* 710 F.3d at 512. The Attorney General posited that delay in implementing the Interim Rule "would impair immediate efforts to protect the public from sex offenders who fail to register." 72 Fed.Reg. 8894, 8896-97. But delay in implementing a statute always will cause additional danger from the same harm the statute seeks to avoid. And the Attorney General's stated concern for public safety further is undermined by his own seven-month delay in promulgating the Interim Rule. Moreover, just as the Attorney General failed to show any substantial risk of uncertainty about SORNA's application to pre-Act offenders, his concern for public safety fails to "point to something specific that illustrates a particular harm that will be caused by the delay required for notice and comment." *Reynolds II,* 710 F.3d at 513.

We thus conclude that, even under an arbitrary and capricious standard of review, there is an insufficient showing of good cause for bypassing the APA's requirements of notice and comment and pre-enactment publication.

B. Prejudice

In the alternative, the government argues that any violation of the APA's procedural requirements was harmless to Brewer. The APA instructs courts reviewing agency action to take "due account ... of the rule of prejudicial error." 5 U.S.C. § 706; *see* *Shinseki v. Sanders,* 556 U.S. 396, 406-07, 129 S.Ct. 1696, 173 L.Ed.2d 532 (2009) (explaining that intent of APA's reference to "prejudicial error" is to summarize harmless-error rule applied by courts). Because the underlying matter in this case involves a criminal conviction, the government bears the burden of showing that there was no prejudicial error. *See* *Reynolds II,* 710 F.3d at 515-16; *see also* *Sanders,* 556 U.S. at 410-11, 129 S.Ct. 1696 (noting that in criminal matters, the government has the burden of showing harmless error because of the defendant's liberty interest at stake).

The minimum publication period required prior to a rule becoming effective is 30 days. 5 U.S.C. § 553(d). Since the Interim Rule was issued on February 28, 2007, the government argues that if it had observed proper procedure, the Interim Rule would have become effective 30 days later on March 30, 2007. Because Brewer did not violate the act until December 2007, the government contends, it is irrelevant to Brewer's conviction whether the rule became effective immediately in February or later in March. We agree. Brewer's violation of the Interim Rule occurred nine months after it would have gone into effect. The absence of those extra thirty days between effectuation and violation did not result in any prejudice to him.

But the Attorney General also bypassed the requirement of a period for notice and comment. To support its position that this error also was harmless, the government primarily relies on the Fifth Circuit's decision in *United States v. Johnson,* 632 F.3d 912. In *Johnson,* the Fifth Circuit found that any procedural error as to the notice-and-comment provision was not prejudicial because the Attorney General had "thoroughly engage[d] the issues and challenges inherent in the regulation" when enacting the Interim Rule. 632 F.3d at 931. Because the Attorney General had "considered the arguments ... asserted and responded to those arguments during the interim rulemaking," albeit without notice and comment, the Fifth Circuit held that "the error in failing to solicit public comment before issuing the rule was not prejudicial." *Id.* at 932.

In its brief on appeal, the government here argues:

Like *Johnson,* Brewer fails to show he involved himself in the post-promulgation comment period. Neither does Brewer allege or show that he participated in the Attorney General's subsequent rulemaking process that crafted regulations regarding the more detailed provisions of SORNA, in which the Attorney General also considered the retroactivity of SORNA, free of APA error. Finally, because Brewer makes no showing that the outcome of the process would have differed had notice and comment been proper, it is clear that the Attorney General's alleged APA violations would be harmless error as applied to him.

We disagree with the government. We first note that the Attorney General's failure to follow the APA's pre-promulgation requirements was a "complete failure," compared to a "technical failure." *See* *Reynolds II,* 710 F.3d at 516-17. It is not that the method of allowing notice and comment was flawed; rather, there was no method at all. Because there was no period during which Brewer, or anyone else, could have offered comments before the Interim Rule was promulgated, he does not need to show that any hypothetical comments would have changed the rationale underlying that rule. *Id.* at 516 (citing *Shell Oil Co. v. EPA,* 950 F.2d 741, 752 (D.C.Cir.1991)).

Second, the government's argument improperly shifts to Brewer the burden to show that the outcome of the process would have been different with the proper procedures. Moreover, it is irrelevant that Brewer

did not participate in the post-promulgation comment period. As we earlier noted, his only movement in interstate or foreign commerce occurred after the Interim Rule had been promulgated but before the Final Rule was published. Thus, Brewer could not be guilty of violating the final rule, which is the only rule that may have been affected by the post-promulgation comments. The only notice-and-comment period relevant to his conviction is the one that the Attorney General failed to provide before promulgation of the Interim Rule.

Nor can we accept the government's assumption that the enacted rule certainly would have been the same. Contrary to the government's contention, the Attorney General did not face a simple "yes or no" decision. *Compare Johnson,* 632 F.3d at 932, *with Reynolds II,* 710 F.3d at 520-21. In fact, the Attorney General had a range of options: from applying SORNA to all pre-Act offenders to applying SORNA to no pre-Act offenders. The Attorney General also had the opportunity to distinguish between "`offenders who have fully left the system and merged into the general population'" and those "`who remain in the system as prisoners, supervisees, or registrants, or reenter the system through subsequent convictions.'" *Reynolds II,* 710 F.3d at 521 (quoting the "SMART" Guidelines, 73 Fed.Reg. 38,030, 38,035 (July 2, 2008), which note the Attorney General's ability to distinguish between prior offenders on the basis of status). Given this range of choices, we do not believe that the Attorney General's final choice was inevitable or that the outcome certainly would have been the same had there been a period for notice and comment.

Brewer argues that "even if confronted with just a binary question, the Attorney General did not give both options full consideration." We agree. As Brewer notes, at the time the Interim Rule was promulgated, the Attorney General was persisting in his view that no rulemaking was needed for SORNA to apply to pre-Act offenders. *See United States v. May,* 535 F.3d 912, 919 (8th Cir.2008) ("The Attorney General did not believe a rule was even needed to confirm SORNA's applicability to defendants [including pre-Act offenders]. Rather, the Attorney General only promulgated the rule as a precautionary measure to `*foreclose* such claims [of pre-Act offenders] by making it *indisputably clear* that SORNA applies to all sex offenders (as the Act defines that term) regardless of when they were convicted.'" (first alteration in original) (quoting 72 Fed.Reg. at 8896)), *abrogated in part by Reynolds,* 132 S.Ct. 975. The Attorney General's attempt to foreclose the possible claims of pre-Act offenders seems incompatible with his duty seriously to consider whether SORNA applies to those offenders, and if so, which ones. Such an approach certainly does not suggest the sort of "flexible and open-minded attitude towards its own rules," that is generally required for the notice-and-comment period. *See Prometheus Radio Project v. FCC,* 652 F.3d 431, 449 (3d Cir.2011) (internal quotation marks omitted). Based on the record before us, we cannot say the immediate effectiveness of the Interim Rule was harmless as to Brewer.

In sum, the Attorney General lacked good cause to waive the procedural requirements of notice and comment when promulgating the Interim Rule, and this procedural error prejudiced Brewer. As a result, SORNA did not apply to Brewer in 2007, so his conviction for failing to register is invalid.

C. Nondelegation Doctrine

Because we conclude that the Attorney General lacked good cause to bypass the APA's procedural requirements, we need not address Brewer's second argument that SORNA violates the nondelegation doctrine. We note, however, that Brewer acknowledges that his argument is contrary to this circuit's precedent. *See United States v. Kuehl,* 706 F.3d 917 (8th Cir. 2013) (concluding that SORNA did not violate the nondelegation doctrine).

III. Conclusion

For the reasons discussed above, we reverse the district court's denial of Brewer's motion under § 2255 and remand. The district court is ordered to vacate Brewer's conviction.

[1] Subsequently, the Attorney General has issued a "Final rule," which mirrors the language of the Interim Rule. 75 Fed.Reg. 81,849 (Dec. 29, 2010); *see also Knutson,* 680 F.3d at 1023.

[2] The government asserted in the district court that Brewer had procedurally defaulted this argument by failing to raise it on direct appeal. The magistrate judge did not consider the issue defaulted and recommended addressing the merits of Brewer's argument. The government did not object to the magistrate judge's recommendation, did not cross-appeal the district court's order adopting the magistrate judge's report, and does not maintain on appeal that Brewer's APA argument is defaulted. Thus, we believe the government has waived procedural default as an affirmative defense and will not further address the issue. *See Jones v. Norman,* 633 F.3d 661, 666 (8th Cir.2011).

[3] Brewer argues on appeal not only that the Attorney General lacked good cause but also that the issue of good cause is foreclosed on appeal because the government failed to object to the magistrate judge's report and recommendation or cross-appeal the district court's adoption of that ruling. As a result, Brewer asserts that he must prevail on this issue. But the district court did not explicitly find that the Attorney General had good cause. Rather, the district court held that even if the Attorney General lacked good cause, the error was harmless. Thus, we address this issue on appeal.

[4] The Seventh Circuit also has suggested that the Interim Rule was effective immediately. *See United States v. Dixon,* 551 F.3d 578 (7th Cir.2008), *rev'd on other grounds sub nom., Carr v. United States,* 560 U.S. 438, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010). The court rejected the defendant's APA argument as "frivolous" but did not elaborate on its reasoning. *Id.* at 583.

773 F.3d 25 (2014)

UNITED STATES of America, Plaintiff-Appellee,
v.
Dwaine Allen COLLINS, a/k/a Dwaine Allen Cline, Defendant-Appellant.

No. 14-4019.

United States Court of Appeals, Fourth Circuit.

Argued: October 30, 2014.
Decided: December 8, 2014.

ARGUED: Jonathan D. Byrne, Office of the Federal Public Defender, Charleston, West Virginia, for Appellant. Jennifer Rada Herrald, Office of the United States Attorney, Charleston, West Virginia, for Appellee. ON BRIEF: Brian J. Kornbrath, Acting Federal Public Defender, Lex A. Coleman, Assistant Federal Public Defender, Charleston, West Virginia, for Appellant. R. Booth Goodwin, II, United States Attorney, Office of the United States Attorney, Charleston, West Virginia, for Appellee.

Before WILKINSON, MOTZ, and FLOYD, Circuit Judges.

Affirmed in part; vacated and remanded in part by published opinion. Judge FLOYD wrote the opinion, in which Judge WILKINSON and Judge MOTZ joined.

FLOYD, Circuit Judge:

Dwaine Allen Collins was convicted of knowingly failing to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA). The district court sentenced Collins to 30 months' imprisonment and ten years of supervised release. On this direct appeal, Collins contests his conviction primarily on the grounds that the government failed to prove an essential element of a SORNA violation: that he knew he had an obligation to register.

In support, he points to comments made by a state court judge in a separate proceeding, which in Collins's view suggest that his obligation to register had expired. We agree with the district court, however, that the state judge appeared to be giving advice rather than a binding legal opinion. Moreover, there is substantial evidence in the record to support the district court's conclusion that Collins knowingly avoided an obligation to register as a sex offender. We thus find Collins's claim unpersuasive and affirm his conviction.

Collins also appeals his sentence. We find his 30-month term of imprisonment, which is within the applicable Guidelines range, to be reasonable and thus affirm the district court's sentence in that respect. As to the term of supervised release, however, the United States Sentencing Commission recently issued a clarifying amendment stating that a failure to register under SORNA is not a "sex offense" for the purposes of the Guidelines. Consequently, we vacate the supervised release portion of Collins's sentence and remand for further proceedings.

I.

In 1998, Dwaine Allen Collins pleaded guilty to two counts of taking indecent liberties with a child in North Carolina. Upon his conviction, both North Carolina and federal law required him to register as a sex offender.

After his release from prison in 2001, Collins moved to Ohio, where he registered as a sex offender. As part of the registration procedures, Collins signed a form, titled "Explanation of Duties to Register as a Sex Offender," which explained that he was required to register annually for ten years and verify his residence annually. Despite signing this form, Collins failed to re-register in 2002. Thus a warrant was issued in Ohio for his arrest. Before he could be apprehended, he moved to Parkersburg, West Virginia, where he remained until 2011. He did not register his sex offender status in West Virginia during that time.

In January 2011, Collins was arrested while attempting to steal a television in Ohio. After being released, he was detained on the 2002 warrant for failing to update his registration. While in custody, Collins signed another form, titled "Notice of Registration Duties of Sexually Oriented Offender or Child-Victim Offender." J.A. 145. The form listed Collins's expected address as Parkersburg, West Virginia, but did not identify the sheriff's office where Collins was to register. The form also stated that: (i) Collins was classified as a Tier II sex offender, a more serious category than his original Tier I status; and (ii) he was required to register for 25 years. The 25-year requirement conflicts with his original 10-year requirement.[1]

In March 2011, Collins pleaded no contest to the single count indictment in Ohio state court charging him with failing to verify his address. In the state court proceeding, the judge suggested that a recent Ohio Supreme Court case rendered the increase from a 10-year registration period to a 25-year registration period "void."[2] J.A. 78. The judge further suggested that the original ten-year registration requirement applied. *Id.; see also* J.A. 78 (stating that he thought "this period was a ten year period dating from the time he would have been released"). Thus the judge sentenced Collins to time served for the outstanding 2002 warrant. J.A. 79-80.

After being released from custody in Ohio, Collins returned to West Virginia. He again did not register as a sex offender with West Virginia authorities, despite signing forms expressly stating that he was required to do so.

In May 2013, Collins was again charged for failing to register as a sex offender — this time under federal law (SORNA), a violation separate from the one underlying the first indictment in Ohio. In the federal proceeding, the parties agreed to a bench trial on a single issue: whether Collins had knowingly failed to register as a sex offender.

Collins agreed to a bench trial. Collins primarily argued that he had not "knowingly" failed to register as a sex offender in light of the Ohio state court judge's comments that his 10 year registration period had expired. The district court rejected this argument. Notwithstanding any requirement to register under *state* law, the district court concluded that Collins had a separate obligation to register under *federal* law — namely SORNA. The district court found that the knowledge element was satisfied as long as Collins knew he was required to register "under some scheme" — that is, any state or federal law, but not necessarily SORNA specifically. J.A. 147. The district court also rejected Collins's reliance on the Ohio state judge's statements, concluding that the judge "did not make a definite legal ruling during the sentencing hearing as to whether [Collins] was no longer required to register at all" and that the judge was merely "stating his opinion." J.A. 146.

The presentence investigation report (PSR) calculated the Guideline range for Collins's conviction as 30-37 months based on a base offense level of 12 and Category VI criminal history. The district court granted Collins's request for a two-level reduction (to level 10) for acceptance of responsibility, thus

reducing the Guideline range to 24-30 months. Emphasizing Collins's long criminal history, the district court imposed a 30-month sentence, finding that a sentence at the upper limit of the Guidelines was "appropriate to protect the community." J.A. 180. Although both Collins and the government agreed that a five-year supervised release period was appropriate, the district court imposed ten years of supervised release.

II.

A.

We first address Collins's challenge to his SORNA conviction. Following a bench trial, this Circuit reviews findings of fact for clear error and findings of law de novo. *United States v. Leftenant,* 341 F.3d 338, 342-43 (4th Cir.2003).[3] A guilty verdict must be affirmed if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Poole,* 640 F.3d 114, 121 (4th Cir.2011) (quoting *United States v. Madrigal-Valadez,* 561 F.3d 370, 374 (4th Cir.2009)). "This standard is met when there is substantial evidence in the record, viewed in the light most favorable to the government, to support the district court's judgment." *Id.* (internal quotation marks omitted).

B.

Under SORNA, 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." 42 U.S.C. § 16913(a). Failure to register triggers an array of potential penalties, but only if the offender has knowledge of the registration requirement. 18 U.S.C. § 2250(a)(3) ("Whoever ... 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.").

The parties do not dispute that Collins was a sex offender under federal law, that he was required to register under SORNA, and that he failed to do so. Appellee Br. at 12; Appellant Br. at 13. The only issue regarding his conviction is whether Collins *knowingly* failed to register, as required under 18 U.S.C. § 2250(a)(3).

In criminal trials, the government can "establish a defendant's guilty knowledge by either of two different means." *Poole,* 640 F.3d at 121. "The government may show that a defendant actually was aware of a particular fact or circumstance, or that the defendant knew of a high probability that a fact or circumstance existed and deliberately sought to avoid confirming that suspicion." *Id.*

Here, the government relies on the latter means, arguing that Collins's previous failure to register in Ohio and West Virginia showed, as the district court found, "his state of mind and intention to avoid registration requirements." J.A. 144. In further support of its argument that Collins knew he had a duty to register, the government also cites: (i) the fact that Collins registered as a sex offender several times in North Carolina and Ohio between 2002 and 2011; (ii) Collins's signed notification forms reminding him of his registration obligations; (iii) his statements to the police that he disliked registering as a sex offender because he had previously been assaulted after doing so; and (iv) his use of an alias, which the government contends he used to avoid being identified as a sex offender.

Although Collins disputes much of this evidence, he primarily seeks reversal based on the Ohio state judge's statement that he had no further registration requirements. In Collins's view, the state judge assured him that his obligations to register as a sex offender had lapsed and therefore he could not have knowingly failed to register. Collins believes the state judge's statements override much of the government's other evidence, including his signed registration forms, because Collins cannot read or write and needs others' help to understand documents. In contrast, the government argues, and the district court found, that the Ohio state judge "was merely stating his opinion that the Ohio registration

period may have lapsed." J.A. 146. We find no reason to part from the district court's interpretation of the state judge's comments. The state judge appeared to be couching his comments as advice to Collins rather than as a binding legal ruling. Pursuant to the deferential standard of review for convictions in this Circuit, the district court's interpretation of the state judge's comments was not clear error.

Even if we accepted Collins's assertion that the state judge issued a substantive legal ruling as to his registration requirements, we would still affirm. Collins argues that the state judge's comments show a form of entrapment by estoppel, which stands for the proposition that the state's prosecution of "someone for innocently acting upon ... mistaken advice is akin to throwing water on a man and arresting him because he's wet." *People v. Studifin,* 132 Misc.2d 326, 504 N.Y.S.2d 608, 610 (1986). The Supreme Court narrowly defined entrapment by estoppel in *Cox v. Louisiana,* 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965), and *Raley v. Ohio,* 360 U.S. 423, 79 S.Ct. 1257, 3 L.Ed.2d 1344 (1959). Unlike here, the defendants in both of those cases relied upon state officials' prior interpretation of state law and then were charged with a violation of *state* law. In contrast, here Collins relied on a state official's interpretation of state law, but was later charged with a violation of *federal* law. In other words, Collins effectively asks us to extend the reach of entrapment by estoppel to cases with two different sovereigns.[4]

We have previously held that entrapment by estoppel occurs only when the *same* sovereign advises that certain conduct is permissible, but later initiates a prosecution based on that conduct. In *United States v. Etheridge,* 932 F.2d 318, 320-21 (4th Cir.1991), we held that a convicted felon violated federal law by possessing two shotguns used for hunting, even though a state judge had advised him that he was permitted to possess the shotguns for that purpose. The *Etheridge* court quoted at length from an Eleventh Circuit case, *United States v. Bruscantini,* 761 F.2d 640, 642 (11th Cir.1985), which distinguished *Cox* and *Raley* by finding that when "the government that advises and the government that prosecutes are not the same, the entrapment problem is different."

Etheridge controls the outcome in this case: here, as there, the defendant was convicted for violating federal law despite receiving conflicting advice from a state official about similar state law. We of course are not free to disregard binding precedent. And even if we were, we would reach the same result. Entrapment by estoppel is a narrow exception to the general principle that ignorance of the law is no excuse, and it would be unwise to extend its application here.

Having disposed of Collins's reliance on the Ohio state judge's comments, it is readily apparent that his conviction should be affirmed. Over the years, Collins signed several forms acknowledging his obligations to register. J.A. 143, 145. Upon his arrest, he also made comments to federal marshals about his reluctance to register due to the threats and assault he received upon registering. J.A. 101-102. Taken together, these facts constitute "substantial evidence in the record ... to support the district court's judgment," *Poole,* 640 F.3d at 121 (internal quotation marks omitted), that Collins knew he was required to register as a sex offender. Consequently, we affirm Collins's conviction.

III.

Collins also argues that his 30-month sentence is excessive and should be reduced. When using the Sentencing Guidelines, "[t]he courts of appeals review sentencing decisions for unreasonableness." *United States v. Booker,* 543 U.S. 220, 264, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). The reasonableness of a sentence "is not measured simply by whether the sentence falls within the statutory range, but by whether the sentence was guided by the Sentencing Guidelines and by the provisions of [18 U.S.C.] § 3553(a)." *United States v. Green,* 436 F.3d 449, 456 (4th Cir.2006). In this Circuit, the reasonableness inquiry "focuses on whether the sentencing court abused its discretion in imposing the chosen sentence." *United States v. Pauley,* 511 F.3d 468, 473 (4th Cir.2007).

After applying a two-level reduction in light of Collins's accepting responsibility for his crime, the district court found that Collins's base offense level was 10. After the reduction, Collins's criminal history was

determined to be in Category VI, leading to an advisory guidelines range of 24-30 months. In ultimately ordering a 30-month sentence, the district court found that Collins's criminal history included "extremely serious crimes ... [that] reflect the type of conduct that would make one fear that this defendant is some type of a predator." J.A. 179. The district court went on to conclude "that the defendant pretty much stays in trouble, irrespective of his illiteracy, other problems." J.A. 180; *see also id.* (noting that Collins was "very prone to breaking the law" and that he will "probably commit other offenses after he serves his prison term here"). Because the 30-month sentence is within the Guidelines range, we find it is entitled to a presumption of reasonableness. *Rita v. United States,* 551 U.S. 338, 347, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007); *United States v. Wright,* 594 F.3d 259, 268 (4th Cir.2010).

That is especially true because Collins actually requested a sentence between 24-30 months in his presentencing memorandum, thus clearly signaling that he believed such a sentence was reasonable. In light of this request, his argument on appeal that a 30-month term of imprisonment is excessive rings hollow. Simply put, the district court's decision was within the applicable Guidelines range, was heavily influenced by the § 3553(a) factors, and was thorough. Accordingly, the sentence is affirmed.

IV.

A.

Collins also contests the district court's imposition of a ten-year supervised release period. Specifically, he argues that the district court used an incorrect Guidelines calculation when making that determination. In support, he cites *United States v. Goodwin,* 717 F.3d 511, 520 (7th Cir.2013), which held the correct Guidelines calculation for a SORNA violation was a single "point" of five years, rather than five years to life (as stated in the PSR here). At oral argument, the government agreed with Collins's position. More importantly, in May 2014, the Sentencing Commission published proposed amendments to the Sentencing Guidelines that affects Collins's case. Sentencing Guidelines for United States Courts, 79 Fed.Reg. 25,996 (proposed May 6, 2014). Due to a lack of congressional action, those amendments became effective on November 1, 2014. U.S.S.G. § 5D1.2 cmt. nn. 1 & 6 (text of amendments).[5]

In *Goodwin,* the Court considered whether failure to register was a "sex offense" for the purposes of the Guidelines, concluding that it was not because it was not "perpetrated against a minor" as required by the Guidelines. *Goodwin,* 717 F.3d at 520. Congress enacted SORNA to protect the population at large rather than the victim of the underlying crime. *See United States v. W.B.H.,* 664 F.3d 848, 854 (11th Cir.2011) ("SORNA plainly states that its purpose is to protect society ... from sexual offenders, 42 U.S.C. § 16901...."). Other circuits have adopted the reasoning in *Goodwin. United States v. Segura,* 747 F.3d 323, 329-30 (5th Cir.2014); *United States v. Herbert,* 428 Fed.Appx. 37 (2d Cir.2011).

The Sentencing Commission amended the Guidelines to implement *Goodwin's* holding. The Commission may generally enact two types of amendments: clarifying and substantive. *See generally United States v. Butner,* 277 F.3d 481, 489 (4th Cir.2002) (explaining how to distinguish clarifying amendments from substantive amendments). Clarifying amendments "change nothing concerning the legal effect of the guidelines, but merely clarif[y] what the Commission deems the guidelines to have already meant." *United States v. Capers,* 61 F.3d 1100, 1109 (4th Cir.1995). A substantive amendment, by contrast, "has the effect of changing the law in this circuit." *Id.* at 1110.

The amendment does not change the law of this Circuit because we do not have a published opinion addressing whether the failure to register is itself a sex offense. Previous unpublished opinions are contradictory. *Compare United States v. Nelson,* 400 Fed.Appx. 781, 782 (4th Cir.2010) (per curiam) (Guidelines range is five years to life) *with United States v. Acklin,* 557 Fed.Appx. 237, 240 (4th Cir.2014) (per curiam) (remanding for reconsideration in light of DOJ memo endorsing a "single point" of five years). We find that this amendment to the Guidelines is a clarifying amendment rather than a substantive

amendment. The amendment resolves an uncertainty created by contradictory language in the Guidelines and § 2250 rather than revising a preexisting rule.

This Circuit has previously held that "a clarifying amendment must be given effect at sentencing and on appeal, even when the sentencing court uses an edition of the guidelines manual that predated adoption of the amendment." *United States v. Goines,* 357 F.3d 469, 474 (4th Cir.2004) (citations omitted); U.S.S.G. § 1B1.11(b)(2) ("[I]f a court applies an earlier edition of the Guidelines Manual, the court shall consider subsequent amendments, to the extent that such amendments are clarifying rather than substantive changes.").

Accordingly, we must give effect to the amendment here. We find that failing to register as a sex offender under SORNA is not a "sex offense" for the purposes of the Guidelines.

B.

Because the maximum term of imprisonment for failing to register under SORNA is ten years under § 2250(a), such a failure constitutes a Class C felony. 18 U.S.C. § 3559(a)(3) (defining a Class C felony as an offense with a maximum term of imprisonment of "less than twenty-five years but ten or more years"). The Guidelines recommend a term of supervised release between one and three years for Class C felonies. U.S.S.G. § 5D1.2(a)(2). Thus, this entire Guidelines range is below the statutory minimum of five years of supervised release. 18 U.S.C. § 2250(a).

Our sister circuits disagree as to how to resolve the situation when a Guidelines range for supervised release is below the statutory minimum. In *Goodwin,* the Seventh Circuit relied on a rule developed in another case, *Gibbs,* to construe the Guidelines to recommend a single "point" at the statutory minimum: five years. 717 F.3d at 520 (citing *United States v. Gibbs,* 578 F.3d 694, 695 (7th Cir.2009)). The *Gibbs* rule holds that when the Guidelines range is below the statutory minimum, the Guidelines should be read to recommend a `single point' at the statutory minimum, rather than a range. *Gibbs,* 578 F.3d at 695. The Eighth Circuit in *Deans* took a different approach in which the statutory requirement entirely supplants the Guidelines range. *United States v. Deans,* 590 F.3d 907, 911 (8th Cir.2010). Under the *Deans* rule, the Guidelines are construed to recommend the full statutory range irrespective of the lower Guidelines range. *Id.*

The Sentencing Commission adopted the *Gibbs* rule as part of its amendment on sex offenders. Cf. U.S.S.G. § 5D1.2 cmt. n. 6. As noted above, this Circuit has not ruled definitively on this issue and has not adopted either the *Gibbs* rule or the *Deans* rule. Consequently, this change is also a clarifying amendment because it does not change our substantive law. *Butner,* 277 F.3d at 489; *Capers,* 61 F.3d at 1109. We must give effect in this direct appeal to the clarifying amendment adopting the *Gibbs* rule on appeal. *Goines,* 357 F.3d at 474; U.S.S.G. § 1B1.11(b)(2).

C.

This Circuit's practice is to vacate and remand for resentencing when the Sentencing Commission enacts a clarifying amendment. *See, e.g., Goines,* 357 F.3d at 480-81; *United States v. Ross,* 352 Fed. Appx. 771, 773 (4th Cir.2009) (per curiam). Because clarifying amendments simply elucidate existing law rather than create new law or modify existing Circuit precedent, Collins should benefit from reconsideration of his term of supervised release in light of the Sentencing Commission's recent amendment. Although it is possible that the district court will re-impose ten years of supervised release, this time as an upward variance, the importance of the Guidelines' recommended range to sentencing merits vacatur and remand. *See United States v. Turner,* 548 F.3d 1094, 1099 (D.C.Cir.2008) ("Practically speaking, applicable Sentencing Guidelines provide a starting point or `anchor' for judges and are likely to influence the sentences judges impose.").

V.

For the reasons provided above, we affirm Collins's conviction and his term of imprisonment, and remand for further proceedings consistent with this opinion as to his term of supervised release.

AFFIRMED IN PART; VACATED AND REMANDED IN PART

[1] The district court later found that the Notice of Registration form mandating 25 years of registration was inaccurate.

[2] Specifically, the state court judge cited *State v. Bodyke,* 126 Ohio St.3d 266, 933 N.E.2d 753 (2010). In that case, the Ohio Supreme Court held the Ohio Attorney General could not change the classification of sex offenders and therefore severed the provision giving the Attorney General the power to reclassify sex offenders from the Ohio sex offender statute.

[3] Collins's appeal of his conviction pertains only to the sufficiency of the prosecution's evidence. There is no issue of law in this case for knowingly failing to register under SORNA.

[4] Collins concedes that entrapment by estoppel does not formally apply but urges that then "animating principle behind it ... still applies" here. Appellant's Br. at 19. Even if that were true, his argument is foreclosed by our prior precedent, including *Etheridge.*

[5] The amendments became effective after briefing and oral argument in this case.

750 F.3d 263 (2014)

UNITED STATES of America
v.
Keith Allen COOPER, Appellant.

No. 13-2324.

United States Court of Appeals, Third Circuit.

Argued January 8, 2014.
Filed: April 10, 2014.

Ilana H. Eisenstein, [argued], Edward J. McAndrew, Office of the United States Attorney, Wilmington, DE, Counsel for Appellee.

Edson A. Bostic, Daniel I. Siegel, [argued], Office of Federal Public Defender, Wilmington, DE, Counsel for Appellant.

Peter Goldberger, Ardmore, PA, Counsel for Amicus Appellant.

Before: SMITH, SHWARTZ, and SCIRICA, Circuit Judges.

OPINION

SMITH, Circuit Judge.

Keith Allen Cooper ("Cooper") is a sex offender who was convicted of rape in Oklahoma and paroled prior to the enactment of the Sex Offender Registration and Notification Act ("SORNA" or the "Act"), Pub.L. No. 109-248, 120 Stat. 587, 590-611 (2006) (codified primarily at 18 U.S.C. § 2250 & 42 U.S.C. § 16901 *et seq.*). After Congress enacted SORNA, Cooper was convicted of failing to comply with the sex offender registration requirements set forth in SORNA. In bringing this appeal, Cooper invokes the nondelegation doctrine, challenging the constitutionality of the provision of SORNA in which Congress delegated to the Attorney General the authority to determine the applicability of the Act's registration requirements to pre-SORNA sex offenders.

We conclude that SORNA does not violate the nondelegation doctrine. Accordingly, we will affirm Cooper's conviction.

I

In 1999, Cooper was convicted in Oklahoma state court on three counts of rape in the first degree. Cooper was paroled in January 2006. As required by pre-SORNA law, he registered as a sex offender in Oklahoma on or around January 20, 2006.

In July 2006, Congress enacted SORNA, which requires sex offenders to comply with specific registration requirements and to update registration information in the event of a change of name, address, employment, or student status. Pursuant to the promulgation of an administrative rule on February 28, 2007, and subsequent issuance of a final rule, the Attorney General made SORNA's registration

requirements applicable to individuals (such as Cooper) who were convicted of sex offenses prior to the enactment of SORNA.

In or around early 2011, Cooper moved from Oklahoma to Delaware. Although SORNA required Cooper to notify authorities of this change in residence, Cooper did not provide either Oklahoma or Delaware authorities with his updated residence information, nor did he separately register as a sex offender in Delaware after moving there.

In 2012, Cooper was arrested and charged with one count of failure to register as a sex offender, in violation of 18 U.S.C. § 2250(a), in the United States District Court for the District of Delaware. On November 2, 2012, Cooper moved to dismiss the indictment on the basis that, *inter alia,* SORNA's delegation of authority to the Attorney General to determine the applicability of the Act's registration requirements to pre-SORNA sex offenders violates the nondelegation doctrine and thus is unconstitutional. The District Court denied Cooper's motion to dismiss.

Cooper pled guilty but reserved his right to appeal from the denial of the motion to dismiss. The District Court sentenced him to eighteen months' imprisonment, ten years of supervised release, and a special assessment of $100.00. Cooper then brought this timely appeal.

II

Congress enacted SORNA as Title I of the Adam Walsh Child Protection and Safety Act of 2006, Pub.L. No. 109-248, §§ 101-155, 120 Stat. 587, 590-611 (2006). As set forth in the statute's declaration of purpose, Congress enacted SORNA "to protect the public from sex offenders and offenders against children" by "establish[ing] a comprehensive national system for the registration of [sex] offenders." 42 U.S.C. § 16901. SORNA "reflects Congress' awareness that pre-Act registration law consisted of a patchwork of federal and 50 individual state registration systems." *Reynolds v. United States,* ___ U.S. ___, 132 S.Ct. 975, 978, 181 L.Ed.2d 935 (2012). Thus, "[t]he SORNA reforms are generally designed to strengthen and increase the effectiveness of sex offender registration and notification for the protection of the public, and to eliminate potential gaps and loopholes under the pre-existing standards by means of which sex offenders could attempt to evade registration requirements or the consequences of registration violations." The National Guidelines for Sex Offender Registration and Notification, 72 Fed.Reg. 30210-01, 30210 (May 30, 2007).

SORNA specifies that all sex offenders "shall register, and keep the registration current," in each state where the offender lives, works, or attends school. 42 U.S.C. § 16913(a). When an offender changes his name, residence, employment, or student status, within three business days the offender is required to appear in person in at least one jurisdiction where the offender lives, works, or is a student to notify that jurisdiction of the change in registration information. 42 U.S.C. § 16913(c). SORNA requires that the jurisdiction receiving this information immediately provide it to all other jurisdictions in which the offender is required to register in order to achieve a comprehensive national registry. *Id.*

Relevant to this appeal, SORNA makes it a federal crime for any person who is required to register, and who travels in interstate or foreign commerce, to knowingly fail to register or to update registration. 18 U.S.C. § 2250(a).[1] Once a sex offender is subject to SORNA's registration requirements, that offender can be convicted under § 2250 if he thereafter engages in interstate or foreign travel and then fails to register. *See Carr v. United States,* 560 U.S. 438, 447, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010).

The statute defines "sex offender" to include individuals who were convicted of sex offenses prior to the enactment of SORNA. 42 U.S.C. § 16911(1) (defining "sex offender" as "an individual who was convicted of a sex offense"); *see also Reynolds,* 132 S.Ct. at 978 (noting that SORNA "defines the term `sex offender' as including these pre-Act offenders"). However, SORNA does not set forth the registration procedures for pre-SORNA sex offenders. Instead, in 42 U.S.C. § 16913(d), Congress delegated to the

United States Attorney General the authority to determine whether SORNA's registration requirements would apply retroactively to pre-SORNA sex offenders. Section 16913(d) provides:

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders....

42 U.S.C. § 16913(d).

On February 28, 2007, pursuant to the authority delegated to it by § 16913(d), the Attorney General issued an immediately effective rule establishing that "[t]he requirements [of SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of the Act." Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894-01, 8897 (Feb. 28, 2007) (codified at 28 C.F.R. § 72.3). The Attorney General subsequently issued proposed guidelines for the interpretation and implementation of SORNA on May 30, 2007, reiterating that SORNA's registration requirements apply retroactively to pre SORNA offenders. *See* The National Guidelines for Sex Offender Registration and Notification, 72 Fed.Reg. 30210-01, 30212 (May 30, 2007). Additional rules, repeating that SORNA's registration requirements apply to pre-SORNA sex offenders, were promulgated on July 2, 2008. *See* The National Guidelines for Sex Offender Registration and Notification, 73 Fed.Reg. 38030-01, 38035-36 (July 2, 2008). The Attorney General subsequently issued a Final Rule, which became effective as of January 28, 2011. *See* Applicability of the Sex Offender Registration and Notification Act, 75 Fed.Reg. 81849-01 (Dec. 29, 2010).[2]

III

The District Court had original jurisdiction pursuant to 18 U.S.C. § 3231. We have appellate jurisdiction pursuant to 28 U.S.C. § 1291.

We exercise plenary review over this challenge to the constitutionality of SORNA. *United States v. Pendleton,* 636 F.3d 78, 82 (3d Cir.2011).

IV

Cooper's sole argument on appeal is that his conviction should be vacated because Congress violated the nondelegation doctrine when it delegated its authority to the Attorney General to determine the applicability of SORNA's registration requirements to pre-SORNA sex offenders. *See* 42 U.S.C. § 16913(d).

The nondelegation doctrine "is rooted in the principle of separation of powers that underlies our tripartite system of Government." *Mistretta v. United States,* 488 U.S. 361, 371, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). Article I, Section 1 of the Constitution provides: "All legislative powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Thus, to safeguard the separation of powers enshrined in the Constitution, "`the integrity and maintenance of the system of government ordained by the Constitution' mandate that Congress generally cannot delegate its legislative power to another Branch." *Mistretta,* 488 U.S. at 371-72, 109 S.Ct. 647 (quoting *Field v. Clark,* 143 U.S. 649, 692, 12 S.Ct. 495, 36 L.Ed. 294 (1892)).

Yet the history of the nondelegation doctrine reveals a wide gulf between the considerations rooted in the text of the Constitution and the jurisprudence that has since developed in the courts. In one of the first cases to give significant attention to the issue, *Wayman v. Southard,* 23 U.S. 1, 10 Wheat. 1, 6 L.Ed. 253 (1825), the Supreme Court considered a constitutional challenge to Congress' delegation to the judicial branch of authority to establish procedural rules for service of process and execution of judgments.

Upholding the constitutionality of this delegation, Chief Justice Marshall distinguished between the nondelegable "powers which are strictly and exclusively legislative" and "those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." *Id.* at 42-43. Marshall's opinion noted also that the line between the delegable and nondelegable powers of Congress "has not been exactly drawn," *id.* at 43, concluding that the delegation in that suit did not implicate impermissible delegation of Congress' legislative powers.

A similar analysis is found in *Marshall Field & Co. v. Clark,* 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294 (1892). That case involved a challenge to the constitutionality of an act authorizing the President to suspend tariff provisions for duty-free importation of certain goods in the event the President determined that such action was necessary to ensure reciprocal trade with foreign nations. The Supreme Court again recognized the importance of the prohibition against delegation of legislative power as essential to constitutional separation of powers. *Id.* at 692, 12 S.Ct. 495. However, the Court reasoned that the delegation raised no constitutional violation because the President was acting only as "the mere agent of the law-making department to ascertain and declare the event upon which [Congress'] expressed will was to take effect." *Id.* at 693, 12 S.Ct. 495.

United States v. Grimaud, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563 (1911), involved a nondelegation doctrine challenge to an act authorizing the executive branch to make regulations for the use and occupancy of forest reservations. Defendants were charged with violating regulations promulgated by the Secretary of Agriculture prohibiting the grazing of sheep on reservation land without permit. Upholding the delegation, the Court held:

From the beginning of the government, various acts have been passed conferring upon executive officers power to make rules and regulations, — not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions `power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done.

Id. at 517, 31 S.Ct. 480. Thus, where a violation of an offense has been made punishable by Congress, the Court concluded, there is no constitutional violation in the coordinate branch establishing regulations governing implementation and execution of the law, so long as the coordinate branch "confin[es itself] within the field covered by the statute ... in order to administer the law and carry the statute into effect." *Id.* at 518, 31 S.Ct. 480.

From these early cases, the modern nondelegation doctrine took shape in *J.W. Hampton, Jr., & Co. v. United States,* 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624 (1928). In *Hampton,* the Supreme Court considered a challenge to the constitutionality of a tariff act in which Congress delegated to the executive branch the authority to modify tariff levels when the President determined that prevailing rates were unequal between the United States and foreign countries. Upholding the constitutionality of the act, the Court emphasized the value of delegation of authority for the efficient operation of government. Nonetheless, the Court held that such delegated authority must be constrained by "defined limits, to secure the exact effect intended by [Congress'] acts of legislation," and "the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." *Id.* at 406, 48 S.Ct. 348. In order to guide this analysis, *Hampton* established what became known as the "intelligible principle" test: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* at 409, 48 S.Ct. 348. The Court determined that the delegation in that case raised no constitutional problem, because the act merely authorized the President to carry out the purpose established by Congress and provided the Executive with an intelligible principle to guide this execution.

On only two occasions has the Court invalidated legislation based on the nondelegation doctrine, and both occurred in 1935.[3] First, in *Panama Refining Co. v. Ryan,* 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935) (Hughes, C.J.), the Court invalidated Section 9(c) of the National Industrial Recovery Act of 1933, which authorized the President to prohibit the shipment of oil produced in excess of state-imposed quotas. The Court held that this portion of the Act was an impermissible delegation because it lacked any standard whatsoever to limit the President's discretion:

Section 9(c) does not state whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in section 9(c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment.

Id. at 415, 55 S.Ct. 241. The Court concluded that this provision of the Act violated the constitutional maxim that "Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested," *id.* at 421, 55 S.Ct. 241, because it provided no guidance whatsoever to limit the discretion of the President in executing the power delegated to him. *Id.* at 430, 55 S.Ct. 241.

Similarly, in *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570 (1935) (Hughes, C.J.), the Court struck down Section 3 of the National Industrial Recovery Act, which authorized the President to approve "codes of fair competition" for trades or industries, as an unconstitutional delegation of authority. The Court emphasized that the statute completely failed to define "fair competition" and thus impermissibly transferred to the executive branch the power to create law: "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry." *Id.* at 537-38, 55 S.Ct. 837.

Panama Refining and *Schechter Poultry* establish the "outer limits of [the] nondelegation precedents." *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 474, 121 S.Ct. 903, 149 L.Ed.2d 1 (2001). These decisions make clear that Congress cannot "provide literally no guidance for the exercise of discretion" and cannot "confer authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring `fair competition.'" *Id.*

But however bold these decisions may have been, they failed to alter the trajectory of the nondelegation doctrine. Shortly after the Hughes Court gave way to the Stone Court,[4] the case of *Yakus v. United States,* 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944), upheld a delegation to the Price Administrator (an executive official appointed by the President) to fix commodity prices at a "generally fair and equitable" level to effectuate the objectives of the Emergency Price Control Act. The Court noted that Congress had enacted the Emergency Price Control Act "in pursuance of a defined policy and required that the prices fixed by the Administrator should further that policy and conform to standards prescribed by the Act." *Id.* at 423, 64 S.Ct. 660. Distinguishing *Schechter Poultry,* which prescribed no method for attaining the objective sought by Congress, the majority concluded that "Congress has stated the legislative objective, has prescribed the method of achieving that objective ... and has laid down standards to guide the administrative determination" in exercising the delegated authority. *Id.* at 423, 64 S.Ct. 660. Further, the Court announced that invalidation of the delegation would only be proper if the act had a total "absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed...." *Id.* at 426, 64 S.Ct. 660.

Writing in dissent, Justice Owen Roberts argued that the statute in *Yakus* was an unconstitutional delegation of congressional power. In Justice Roberts's view, "the Act sets no limits upon the discretion or judgment of the Administrator. His commission is to take any action with respect to prices which he believes will preserve what he deems a sound economy...." *Yakus,* 321 U.S. at 451, 64 S.Ct. 660 (Roberts, J., dissenting). Justice Roberts plaintively argued that, in effect, the majority's decision "le[ft] no doubt that [*Schechter Poultry*] is now overruled." *Id.* at 452, 64 S.Ct. 660 (Roberts, J., dissenting). However, the fate of *Schechter Poultry* that Justice Roberts predicted did not come to pass. The Supreme Court's continued attention to *Panama Refining* and *Schechter Poultry* signals that — while their continued existence is hardly robust — they nonetheless have continuing precedential force. *See, e.g., Whitman,* 531 U.S. at 474-75, 121 S.Ct. 903; *Mistretta,* 488 U.S. at 373 n. 7, 109 S.Ct. 647.

In a similar move away from *Panama Refining* and *Schechter Poultry, American Power & Light Co. v. Securities & Exchange Comm'n,* 329 U.S. 90, 67 S.Ct. 133, 91 L.Ed. 103 (1946), addressed a nondelegation challenge to Section 11 of the Public Utility Holding Company Act, which authorized the Securities and Exchange Commission to require companies to take steps the Commission deemed necessary to prevent holding companies from "unduly or unnecessarily complicat[ing] the [holding-company system] structure" or "unfairly or inequitably distribut[ing] voting power among security holders." *Id.* at 97, 67 S.Ct. 133. Rejecting the contention that these phrases had no meaning (and thus provided no directives to guide the delegation of authority), the Court suggested that the larger context of the act itself could imbue these terms with sufficient meaning to guide the Commission, *i.e.* these terms "derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *Id.* at 104, 67 S.Ct. 133. Looking to the "express recital of evils" in the earliest sections of the statute, the policy declarations set forth by Congress, and standards and conditions established in sections of the statute apart from Section 11, the Court concluded "a veritable code of rules reveals itself for the Commission to follow in giving effect to the standards of § 11(b)(2)." *Id.* at 105, 67 S.Ct. 133. Driven by a recognition that "judicial approval accorded these `broad' standards for administrative action is a reflection of the necessities of modern legislation dealing with complex economic and social problems," *id.,* the Court determined that the statute posed no nondelegation problem.

The Supreme Court has not invalidated a statute for violating the nondelegation doctrine in the nearly 80 years since *Panama Refining* and *Schechter Poultry.* In *Mistretta v. United States,* 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), a criminal defendant challenged the constitutionality of Congress' delegation of authority to the Sentencing Commission to promulgate determinative-sentence guidelines. The Court upheld this delegation on the basis of the intelligible principle test. *Id.* at 372-74, 109 S.Ct. 647. *Mistretta* reiterated that, in a modern society, delegations of authority are necessary to accommodate the technical and complex decisions that can accompany the implementation of legislation. *Id.* at 372, 109 S.Ct. 647. Upholding the delegation, the Court concluded that the grant of authority to the Sentencing Commission contained sufficient guidance and details in order to pass constitutional muster. *Id.* at 374, 109 S.Ct. 647.

Under modern application of the nondelegation doctrine, as long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Mistretta,* 488 U.S. at 372, 109 S.Ct. 647 (quoting *Hampton,* 276 U.S. at 406, 48 S.Ct. 348) (brackets omitted); *see also Whitman,* 531 U.S. at 472, 121 S.Ct. 903 (2001) (noting that Congress may not abdicate legislative power, but specifying that Congress may delegate "decisionmaking authority" to a coordinate branch of government as long as Congress lays down by legislative act an intelligible principle to which the coordinate branch is directed to conform). Under this test, a delegation is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." *Mistretta,* 488 U.S. at 372-73, 109 S.Ct. 647 (quoting *American Power & Light Co.,* 329 U.S. at 105, 67 S.Ct. 133). Thus, the Supreme Court has "`almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing

or applying the law.'" *Whitman,* 531 U.S. at 474-75, 121 S.Ct. 903 (quoting *Mistretta,* 488 U.S. at 416, 109 S.Ct. 647 (Scalia, J., dissenting)).

V

A. Cooper Urges Application of a "Meaningfully Constrains" Standard

Cooper argues that we should move the nondelegation jurisprudence in a new direction. Relying on *Touby v. United States,* 500 U.S. 160, 111 S.Ct. 1752, 114 L.Ed.2d 219 (1991), and *United States v. Amirnazmi,* 645 F.3d 564 (3d Cir.2011), Cooper urges us to apply a heightened "meaningfully constrains" standard to assess the delegation to the Attorney General in SORNA, arguing that a more rigorous standard must apply when Congress delegates discretion to impose criminal liability.

Whatever benefits may inhere in a heightened standard for cases in which Congress delegates authority to create criminal liability, we are mindful that the Supreme Court "has expressly refrained from deciding whether Congress must provide stricter guidance than a mere `intelligible principle' when authorizing the Executive `to promulgate regulations that contemplate criminal sanctions.'" *Amirnazmi,* 645 F.3d at 575 (quoting *Touby,* 500 U.S. at 165-66, 111 S.Ct. 1752). The "meaningfully constrains" standard has been referenced in only a handful of cases, none of which set forth factors or a substantive analytical framework against which to assess whether a specific delegation satisfies that standard. In *Amirnazmi,* we did not resolve "the unsettled question of whether something more demanding than an `intelligible principle' is necessitated within the context of delegating authority to define criminal conduct." *Id.* at 577. We likewise decline to do so here. Until the Supreme Court gives us clear guidance to the contrary, we assess the delegation of authority to the Attorney General in 42 U.S.C. § 16913(d) under an intelligible principle standard.

B. Analysis Under the Intelligible Principle Test

Applying the intelligible principle test, we conclude that Congress did not violate the nondelegation doctrine in delegating responsibility to the Attorney General to determine the applicability of SORNA's registration requirements for pre-Act offenders in 42 U.S.C. § 16913(d). In enacting SORNA, Congress laid out the general policy, the public agency to apply this policy, and the boundaries of the delegated authority. This is all that is required under the modern nondelegation jurisprudence. *Mistretta,* 488 U.S. at 372-73, 109 S.Ct. 647.

SORNA contains a general policy goal to guide the Attorney General in applying the discretion delegated by the Act. The first section of SORNA makes clear that the Act's aim is to establish a comprehensive national sex offender registry in order to protect children and the public at large from sex offenders. 42 U.S.C. § 16901. The Attorney General's discretion, established in § 16913(d), is governed by this general policy statement.[5] Although we acknowledge that SORNA's policy statement is broad and does not contain directives specifically aimed at the Attorney General, review of the history of the nondelegation doctrine reveals that far less precise policy statements have still passed muster. *See, e.g., American Power & Light Co.,* 329 U.S. at 105, 67 S.Ct. 133; *Yakus,* 321 U.S. at 420-23, 64 S.Ct. 660.

Second, the intelligible principle test requires that Congress identify the recipient of the delegated authority. Section 16913(d) unambiguously designates the Attorney General as the recipient of the delegation. 42 U.S.C. § 16913(d).

Finally, while § 16913(d) itself contains no limitations on the Attorney General's discretion, we understand the discretion delegated to the Attorney General in § 16913(d) to be constrained by the legislative determinations that Congress made in other sections of SORNA. *See American Power & Light Co.,* 329 U.S. at 104-05, 67 S.Ct. 133. In SORNA, Congress identified the crimes that require registration, 42 U.S.C. § 16911; where the offender must register, 42 U.S.C. § 16913(a); the time period in which

registration must be completed, 42 U.S.C. § 16913(b); the method of registration, 42 U.S.C. § 16913(b)-(c); the information that sex offenders must provide in order to register, 42 U.S.C. § 16914(a); and the elements of the crime of failure to register, 28 U.S.C. § 2250. Further, the boundaries of the Attorney General's authority are constrained by the task delegated by Congress. In responding to the directive in Section 16913(d), the Attorney General can only determine the specific question of whether SORNA's registration requirements apply to pre-SORNA sex offenders.

VI

It may well be, as Justice Scalia has written, that in delegating this responsibility to the Attorney General, Congress "sail[ed] close to the wind with regard to the principle that legislative powers are nondelegable." *Reynolds v. United States,* ___ U.S. ___, 132 S.Ct. 975, 986, 181 L.Ed.2d 935 (2012) (Scalia, J., dissenting). Indeed, we are puzzled as to why Congress decided to delegate to the Attorney General the authority to determine the applicability of SORNA's registration requirements to pre-SORNA offenders. The decision to make SORNA's registration requirements applicable to pre-Act offenders is a weighty one — particularly for the class of pre-SORNA offenders affected by that decision. Although we find Congress' delegation of this important decision curious at best, we hold that it does not amount to an unconstitutional abdication.

Under controlling nondelegation doctrine jurisprudence, the hurdle for the government in this case is not high.[6] Applying the precedential authority on the nondelegation doctrine, we conclude that SORNA's delegation to the Attorney General in 42 U.S.C. § 16913(d) does not violate the nondelegation doctrine. Accordingly, we will affirm.

[1] 18 U.S.C. § 2250(a) provides:

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.

[2] Cooper does not contest that by the time he moved to Delaware in or around early 2011, the Attorney General had validly promulgated rules requiring pre-SORNA sex offenders to register and keep their registration current. Cooper challenges only the constitutionality of the section of SORNA that delegated the authority to promulgate such rules to the Attorney General.

[3] Thus, it has been said that the nondelegation doctrine "has had one good year, and 211 bad ones (and counting)." Cass Sunstein, *Nondelegation Canons,* 67 U. Chi. L.Rev. 315, 322 (2000).

[4] Chief Justice Hughes retired, and former Associate Justice Harlan Fiske Stone succeeded him as Chief Justice, in 1941.

[5] We do not agree with the argument made by Cooper and the Amicus Curiae that our decision in *United States v. Reynolds,* 710 F.3d 498 (3d Cir.2013), indicates that SORNA's general policy rationale is constitutionally insufficient. In *Reynolds,* we determined that the Attorney General failed to show good cause for waiving the Administrative Procedure Act's notice and comment requirements in the issuance of the interim rule regarding retroactivity of SORNA's registration requirements in February 2007. In so holding, we noted that the Attorney General's restatement of SORNA's public safety rationale by itself did not constitute good cause to ignore the advance comment period required by the Administrative

Procedure Act. *Id.* at 512. Our reasoning in *Reynolds* is not directly applicable to this appeal. Here we assess the constitutionality of SORNA in light of Supreme Court precedent on the nondelegation doctrine. Thus, we decline to deviate from that precedent based on our discussion in *Reynolds* of the Attorney General's action in issuing rules under the Administrative Procedure Act.

[6] Each of our sister circuits to have considered the issue has concluded that SORNA does not violate the nondelegation doctrine. *See, e.g., United States v. Goodwin,* 717 F.3d 511, 516-17 (7th Cir.2013), *cert. denied,* ___U.S. ___, 134 S.Ct. 334, 187 L.Ed.2d 234 (2013); *United States v. Kuehl,* 706 F.3d 917, 919-20 (8th Cir.2013); *United States v. Parks,* 698 F.3d 1, 7-8 (1st Cir.2012), *cert. denied,* ___U.S. ___, 133 S.Ct. 2021, 185 L.Ed.2d 889 (2013); *United States v. Rogers,* 468 Fed.Appx. 359, 362 (4th Cir.2012) (not precedential), *cert. denied,* ___U.S. ___, 133 S.Ct. 157, 184 L.Ed.2d 78 (2012); *United States v. Felts,* 674 F.3d 599, 606 (6th Cir. 2012); *United States v. Guzman,* 591 F.3d 83, 92-93 (2d Cir.2010), *cert. denied,* ___U.S. ___, 130 S.Ct. 3487, 177 L.Ed.2d 1080 (2010); *United States v. Whaley,* 577 F.3d 254, 263-64 (5th Cir.2009); *United States v. Ambert,* 561 F.3d 1202, 1213-14 (11th Cir.2009).

779 F.3d 55 (2015)

UNITED STATES of America, Appellee, v. Moisés MEDINA, Defendant, Appellant.

No. 13-1936.

United States Court of Appeals, First Circuit.

March 4, 2015.

Edward J. O'Brien, with whom O'Donnell, Trossello & O'Brien, LLP was on brief, for appellant.

Marshal D. Morgan, Assistant United States Attorney, with whom Juan Carlos Reyes-Ramos, Assistant United States Attorney, Rosa Emilia Rodríguez-Vélez, United States Attorney, and Nelson Pérez-Sosa, Assistant United States Attorney, Chief, Appellate Division, were on brief, for appellee.

Before TORRUELLA, THOMPSON, and BARRON, Circuit Judges.

BARRON, Circuit Judge.

Moisés Medina failed to register as a sex offender when he moved to Puerto Rico in May of 2012, even though he had been convicted of a state sex offense four years earlier. As a result, Medina was arrested for violating the Sex Offender Notification and Registration Act, also known as SORNA, 18 U.S.C. § 2250. He then pled guilty and was sentenced to a thirty-month prison term, to be followed by a twenty-year term of supervised release.

The supervised release portion of the sentence included various conditions that Medina must follow or face returning to prison. Medina now challenges two of those conditions as well the length of the supervised release term. One of the two conditions restricts Medina from accessing or possessing a wide range of sexually stimulating material. The other requires Medina to submit to penile plethysmograph testing — a particularly intrusive procedure — if the sex offender treatment program in which he must participate as a condition of his supervised release chooses to use such testing.

We hold that the District Court erred in setting the length of the supervised release term. We further hold that the District Court inadequately justified the imposition of the supervised release conditions that Medina challenges. We therefore vacate Medina's supervised release sentence term and the conditions challenged on this appeal, and remand for re-sentencing.

I.

Medina has a long criminal history, including robbery, attempted robbery, and (non-domestic) battery convictions. His only sex offense, and the source of his registration obligations under SORNA, is a 2008 conviction in Indiana for sexual battery of a minor. The pre-sentence report's description of the circumstances of the Indiana offense — a description Medina did not dispute — is very disturbing.

According to the report, Medina's three-year-old stepdaughter told his then-wife in 2007 that Medina had "`peed' in her mouth." Medina's then-wife proceeded to ask her three other children if Medina had "had

any inappropriate contact with them." The report stated that Medina's then-wife learned that Medina had "fondled" his seven-year-old stepdaughter on "three or four separate occasions."

Medina ultimately pled guilty to a single count of sexual battery of a minor. The conviction was based on Medina's abuse of the seven-year-old stepdaughter. Medina was sentenced to seven-and-a-half years in prison, of which he served three years before he was released on probation in July of 2011.

After release on probation, Medina lived in Indiana and held a job there. On April 29, 2012, however, he quit that job. Then, on May 3, he failed to report for a polygraph examination that the terms of his probation required. On May 11, he was suspended from Indiana's Sex Offender Treatment Program. Some time that same month, Medina moved to Puerto Rico.

On January 10, 2013, Medina was arrested in Puerto Rico for violating SORNA because he had failed to register there as a sex offender, as he was required to do as a consequence of his earlier Indiana conviction. *See* 18 U.S.C. § 2250(a). Two months later, on April 5, 2013, Medina entered into a plea agreement. The District Court accepted Medina's plea to the SORNA offense that same day. On July 8, 2013, the District Court sentenced Medina to thirty months of incarceration, followed by twenty years of supervised release.

Medina now appeals to this court.[1] He challenges certain aspects of the supervised release portion of his sentence. We consider those challenges in turn.

II.

Medina first argues that the District Court erred when it imposed a supervised release term of twenty years. Medina traces that error to the District Court's classification of his failure-to-register offense under SORNA as a "sex offense."

Under the Sentencing Guidelines, a conviction for a "sex offense" results in a recommended range for a term of supervised release that spans from a lower bound of the statutory minimum of five years to an upper bound of life. *See* 18 U.S.C. § 3583(k); U.S.S.G. § 5D1.2(b)(2). But Medina argues that the guidelines do not actually treat a SORNA violation as a "sex offense." And thus Medina argues that, under the guidelines, the actual recommended term of supervised release for the SORNA offense is only the statutory minimum of five years, with no higher maximum term. *See* *United States v. Goodwin,* 717 F.3d 511, 520 (7th Cir.2013).

The guidelines are not binding on the District Court. *United States v. Booker,* 543 U.S. 220, 245, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005). A mistaken application of the guidelines, however, can constitute a reversible sentencing error. That is because "[o]nly after a court has correctly calculated the applicable [guidelines recommendation]... can it properly exercise its discretion to sentence a defendant within or outside the applicable Guidelines range." *United States v. Millán-Isaac,* 749 F.3d 57, 66 (1st Cir.2014). Thus, Medina contends, we must vacate his supervised release sentence because the District Court mis-classified his SORNA offense as a "sex offense" and thus committed a guidelines calculation error.

In determining the appropriate standard of review, we note that Medina did object to the recommended term of supervised release set forth in the probation office's pre-sentence report. That report classified Medina's SORNA offense as a "sex offense." That report thus recommended that Medina receive a term of supervised relief somewhere within a range from five years to life. Medina did not, however, press that same objection to the District Court at the sentencing hearing. And Medina failed to do so even though he had an opportunity to make that objection, and even though the District Court adopted the same guidelines calculation as the report.

In consequence, the government argues that we may review Medina's challenge to the proper classification of his SORNA offense only under the strict, plain error standard. Medina disputes that. For purposes of this appeal, however, we may assume the plain error standard applies without prejudicing Medina.[2] And that is because Medina's challenge succeeds even under that more onerous standard.

The District Court set the term of supervised release after calculating the guidelines range for that term to be five years to life. That calculation was erroneous, as the government now concedes. The term "sex offense" in section 5D1.2(b) of the sentencing guidelines does not encompass a SORNA violation for failing to register as a sex offender. Our reasons for so concluding are the same as those set forth in the Seventh Circuit precedent that the government invokes in conceding the District Court's error. *See Goodwin,* 717 F.3d at 519-20.

Further, the District Court's contrary interpretation of the meaning of "sex offense" was — as the Seventh Circuit also held in *Goodwin,* and as the government also now concedes — "(1) an error or defect (2) that is clear or obvious (3) affecting the defendant's substantial rights." *Id.* at 518. And while the government does not specifically make the further concession that the error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings," *Johnson v. United States,* 520 U.S. 461, 467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) — the last prong of the plain-error test — we believe that the District Court's error necessarily had that effect on the sentencing, and the government does not argue otherwise.

By mis-classifying Medina's SORNA offense, the District Court imposed a supervised release term that it believed fell within the guidelines-recommended range. In fact, however, the term imposed was four times longer than the term the guidelines actually recommend. *See Goodwin,* 717 F.3d at 520-21 (explaining the proper calculation, and finding the fourth plain-error prong met under similar circumstances); *cf. United States v. Farrell,* 672 F.3d 27, 37 (1st Cir.2012) (finding the fourth prong met where the government did not argue it was not met, and where the district court imposed a sentence based on erroneous statutory minimum and guidelines determinations).

We thus conclude that the District Court did commit plain error. And, accordingly, we vacate and remand so that the District Court may take account of the guidelines' actual recommendation regarding the appropriate term of supervised release for Medina's SORNA offense.

III.

Medina also challenges two conditions that he must obey for the duration of his supervised release term, however long it may turn out to be. In particular, Medina challenges a condition prohibiting him from possessing or accessing sexually stimulating materials and a condition mandating his compliance with penile plethysmograph testing if his sex offender treatment program requires such testing.

There are two basic kinds of supervised release conditions. The first kind are mandatory conditions. By operation of statute, mandatory conditions are automatically imposed in every case in which a defendant receives supervised release as part of his sentence. *See* 18 U.S.C. § 3583(d). The second kind are special conditions. These conditions are imposed at the discretion of the district court. *See id.* The two conditions that Medina challenges are of this latter kind.

Although district courts have significant discretion to impose special conditions of supervised release, that discretion is not unlimited. A district court may impose a special condition only if the district court first determines that the condition:

(1) is reasonably related to the factors set forth in [18 U.S.C. §] 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in [18 U.S.C. §] 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. [§] 994(a).

18 U.S.C. § 3583(d).

In this way, the governing statute directs district courts, before imposing a special condition, to take account of "the nature and circumstances of the offense and the history and characteristics of the defendant," *id.* § 3553(a)(1), the need "to afford adequate deterrence to criminal conduct," *id.* § 3553(a)(2)(B), the need "to protect the public from further crimes of the defendant," *id.* § 3553(a)(2)(C), and the need "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," *id.* § 3553(a)(2)(D). By requiring consideration of these factors, the statute ensures that district courts will impose a special condition only if the condition will further at least one of "the three legitimate statutory purposes of deterrence, protection of the public, and rehabilitation."[3] *United States v. Gementera,* 379 F.3d 596, 600 (9th Cir.2004); *accord United States v. York,* 357 F.3d 14, 20 (1st Cir.2004).

But the statute does more than instruct district courts to ensure a "reasonabl[e] relat[ion]" between the condition and the sentencing goals the condition is intended to serve with respect to the individual defendant. 18 U.S.C. § 3583(d). The statute also requires district courts to ensure the condition "involves no greater deprivation of liberty than is reasonably necessary" given who the defendant is, the defendant's offense and criminal history, and the ends of supervised release.[4] *See United States v. Roy,* 438 F.3d 140, 144 (1st Cir.2006); *United States v. Smith,* 436 F.3d 307, 311 (1st Cir.2006). And finally, our precedent further requires that the special condition "have adequate evidentiary support in the record." *Roy,* 438 F.3d at 144.

With that framework in mind, we now consider the two special conditions that are at issue in this appeal. With respect to each, Medina contends that the District Court failed to provide the statutorily required justification.

IV.

We first address Medina's challenge to the District Court's imposition of the special condition concerning sexually stimulating material. That condition provides that Medina may not:

view, use, possess, purchase, distribute and/or subscribe to any form of pornography, erotica or sexually stimulating visual or auditory material, electronic media, computer programs or services including but not limited to videos, movies, pictures, magazines, literature, books, or other products depicting images of nude adults or minors in a sexually explicit manner.

The condition further forbids Medina from entering any location where such material can be accessed, and from "accessing any material that relates to the activity in which the defendant was engaged in committing the instant offense, namely child pornography."[5]

Medina challenges this condition as a whole. But Medina first argues that the last sentence of this condition must be vacated. He argues that the text of this last sentence reveals that it is designed for a defendant who has been convicted of a "child pornography" offense, a type of offense for which Medina was not even charged. The government concedes as much — in part, no doubt, because striking this portion of the condition has no practical consequence. That is because a separate, mandatory condition of supervised release already prohibited Medina from committing "another Federal, State, or local crime

during the term of supervision." 18 U.S.C. § 3583(d). That condition thus necessarily prohibited Medina from possessing illegal material, including, for example, child pornography. *See* 18 U.S.C. § 2252.

With that portion of the condition out of the way, our attention focuses on the remainder of the condition, which would prohibit Medina from possessing and accessing "any form of pornography, erotica or sexually stimulating visual or auditory material." In practical effect, this condition restricts only "legal material involving consenting adults," *United States v. Perazza-Mercado,* 553 F.3d 65, 76 (1st Cir.2009), and the government does not argue otherwise to us.[6]

The government argues, as it did with respect to Medina's challenge to the length of his supervised release term, that we may review the imposition of this condition only for plain error and not for abuse of discretion as would otherwise be the case. *See id.* at 69. Medina responds that he objected when the probation office recommended the condition in the pre-sentence report. However, Medina did not raise his objection at the sentencing hearing, despite the opportunity that he had to do so and despite the fact that he raised other issues. Thus, here, too, we will assume that the plain error standard applies, as, once again, we find reversible error even under that more demanding standard.

In challenging the condition, Medina relies primarily on our decision in *Perazza-Mercado.* There, we vacated on plain-error review a supervised release condition that imposed a complete ban on a defendant's possession of pornographic materials. We explained that a district court must "provide a reasoned and case-specific explanation for the sentence it imposes." *Id.* at 75 (quoting *United States v. Gilman,* 478 F.3d 440, 446 (1st Cir.2007)). And we concluded that the district court had failed to do so. *See id.*

We did observe in *Perazza-Mercado* that "`a court's reasoning can often be inferred' after an examination of the record." *Id.* (quoting *United States v. Jiménez-Beltre,* 440 F.3d 514, 519 (1st Cir.2006) (en banc)). But we concluded that no adequate explanation for the pornography restriction could be inferred from the record. *Id.* at 76. In particular, we observed, there was no evidence in the record sufficient to support the conclusion that pornography had "contributed to [Perazza's] offense or would be likely to do so in the future." *Id.* That was so even though Perazza's crime of conviction ("knowingly engaging in sexual contact with a female under the age of twelve") and admitted past behavior (which included a "pattern of illicit conduct toward young girls") were "cause for great concern." *Id.* at 66, 76. We therefore concluded that the district court had committed plain error in imposing the condition. *Id.* at 75.

Here, we are bound by *Perazza-Mercado.* The District Court did not expressly justify the condition in terms of the statutory considerations of deterrence, protection of the public, and rehabilitation — or in any other terms. *See id.* Nor can the District Court's unarticulated reasoning "`be inferred' after an examination of the record." *Id.* As in *Perazza-Mercado,* "there is no evidence in the record" to indicate that such material "contributed to [Medina's] offense or would be likely" to contribute to recidivism in the future given Medina's particular history and characteristics. *Id.* at 76.

The probation officer here did recommend the condition in the pre-sentence report, unlike in *Perazza-Mercado,* where the report did not mention such a condition at all, *see id.* at 74. But the probation officer provided no explanation for the condition — not even in response to Medina's objection. She simply left the decision whether to impose the condition "to the sound discretion of the [District] Court."

Nor, under *Perazza-Mercado,* can the required explanation be derived from Medina's criminal history. Medina's failure-to-register offense did not itself, quite obviously, involve the use of pornographic or other sexually stimulating materials. And, revolting as the actions that led to Medina's 2008 conviction are, the record here, under the controlling reasoning of *Perazza-Mercado,* fails to reveal a link between Medina's commission of that offense and the prohibited adult materials. *See id.* at 66, 76.

The government responds by identifying one distinction between this case and *Perazza-Mercado.* There, we noted that "there was no suggestion in the [pre-sentence report] or at sentencing that appellant had abused *or even possessed* pornography in the past." *Id.* at 76 (emphasis added). Here, by contrast, as the government points out, the pre-sentence report does contain a reference to the defendant's use of pornography at approximately the same time as his underlying sex offense. Specifically, the report notes that Medina's ex-wife "indicated that they often watched pornography together while having intercourse."

But nothing in the record links this single reference, involving lawful adult behavior, to the criminal acts that serve as the basis for the special supervised release condition. *See United States v. Ramos,* 763 F.3d 45, 64 n. 28 (1st Cir.2014) (declining to distinguish *Perazza-Mercado* based on a similar reference to adult pornography in the pre-sentence report, because "nothing in the record justifies, as far as we can tell, the conclusion that viewing adult pornography was a habit that `contributed to [the defendant's] offense or would be likely to do so in the future'"). Nor can it suffice for the government to assert, as it does, that the condition may be inferentially justified because there is a general correspondence between sex offender recidivism and the use of pornography. If such an asserted correspondence sufficed, we would not have invalidated the pornography ban in *Perazza-Mercado. See* 553 F.3d at 78. We thus conclude that, given our controlling precedent, the record before us "simply does not support the conclusion that the condition would promote the goals of supervised release without effecting a greater deprivation of liberty than reasonably necessary to achieve those goals." *Id.* at 75.

The government's final attempt to defend the condition also fails. The government contends that our decision in *United States v. Sebastian,* 612 F.3d 47 (1st Cir. 2010), indicates that the District Court was not obliged to offer more of an explanation for this special condition than was given. But that case, unlike this one and unlike *Perazza-Mercado,* did not involve a "total ban on ... possession of any pornography in the home." *Id.* at 52. The condition in *Sebastian* instead prohibited possession of pornography only "if [Sebastian's] [sex offender] treatment program mandated such a ban." *Id. Sebastian* thus explained that this "conditional limitation" was "hardly the same" as the blanket ban in *Perazza-Mercado,* and did "little more than require Sebastian to follow the rules of any program he may be required to attend" as part of his supervised release. *Id.* In consequence, we concluded that the District Court's explanatory obligations had been met, as they were not the same as they had been in *Perazza-Mercado. Id.*

Here, though, the ban is total, as in *Perazza-Mercado,* rather than conditioned on the requirements imposed by a sex offender treatment program, as in *Sebastian.* And thus, we believe, as we recently held in a similar case, that *Perazza-Mercado* sets forth the appropriate standard for determining whether the condition is justified. *See Ramos,* 763 F.3d at 64 n. 29 (following *Perazza-Mercado,* and distinguishing *Sebastian,* where the case involved a total ban on pornography possession).

Under that controlling precedent, the imposition of this condition, on this record, is plain error. *See id.* at 64; *Perazza-Mercado,* 553 F.3d at 76. There "may well be a reason to impose a pornography ban" in this case. *Perazza-Mercado,* 553 F.3d at 76. But if so, the District Court has not yet provided it. Thus, we vacate the District Court's imposition of this special condition.

V.

We now turn to Medina's remaining challenge. Medina objects to the District Court's requirement that he submit to penile plethysmograph, or PPG, testing, if the sex offender treatment program he must participate in as a condition of his supervised release requires such testing.

In bringing this challenge, Medina does not contest the requirement that he undergo sex offender treatment as a special condition of supervised release. *See United States v. Morales-Cruz,* 712 F.3d 71, 75-76 (1st Cir.2013) (finding no abuse of discretion in that case in the imposition of a sex offender treatment special condition in connection with a SORNA conviction). And the treatment condition that the District Court imposed does not require, by its terms, that the sex offender treatment program Medina

must complete actually use PPG testing.[7] In fact, the condition does not address at all how the treatment program may use such testing. But the condition does specifically oblige Medina to comply with PPG testing if his particular treatment program chooses to order such testing. And it is that mandatory compliance obligation to which Medina objects.

PPG testing "involves placing a pressure-sensitive device around a man's penis, presenting him with an array of sexually stimulating images, and determining his level of sexual attraction by measuring minute changes in his erectile responses." *United States v. Weber,* 451 F.3d 552, 554 (9th Cir.2006) (quoting Jason R. Odeshoo, *Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders,* 14 Temp. Pol. & Civ. Rts. L.Rev. 1, 2 (2004)). Thus, where the pornography-ban condition seeks to limit Medina's viewing of pornographic material, PPG testing affirmatively requires it, and in extremely invasive circumstances. *See id.* Testing may take as long as several hours to complete per session. *Id.* at 563.

The testing is controversial, both as to whether it is effective and as to whether it is unduly invasive and thus degrading. *See id.* And, in consequence of such concerns, two of our sister circuits have imposed substantial explanatory obligations on district courts that choose to mandate submission to PPG testing if prescribed by a required sex offender treatment program. *See United States v. McLaurin,* 731 F.3d 258, 263 (2d Cir.2013); *Weber,* 451 F.3d at 568-69.

Medina relies on these precedents in contending that the District Court failed to offer a sufficient justification for the PPG condition here. Before directly addressing that contention, however, we must first address the government's argument that this Circuit's precedent limits the scope of our review until such time as the treatment program actually requires Medina to submit to PPG testing.

A.

In arguing that our review is limited, the government does not dispute that Medina properly preserved his objection to this condition. Medina first objected to the pre-sentence report's recommendation that he be required to submit to PPG testing if ordered to do so as part of a sex offender treatment program. Medina lodged that objection "on *Daubert*/*Frye* unreliability standards"[8] as well as by contending that PPG testing "is physically invasive and scientifically questionable." Medina went on to explain that such testing "is degrading and violates the defendant's right to be free from cruel, degrading, inhuman treatment and his right to privacy and to be protected from medical abuse."

Then, at sentencing, Medina's counsel renewed the objection. Medina's counsel emphasized that she "object[ed] to the imposition of that treatment, in particular to the PPG. We understand it's invasive, it's humiliating, it hasn't even passed the *Daubert* standard."

Confronted with a timely objection to a special condition of supervised release, we ordinarily would review a district court's imposition of that aspect of the sentence for abuse of discretion. *See Perazza-Mercado,* 553 F.3d at 69. But the government argues that Medina's burden to show error in the imposition of the sentence is even greater here because there is necessarily uncertainty over how and why PPG testing would actually be used on Medina — if, that is, it ever is used at all.

Under our decision in *Sebastian,* the government argues, the contingent nature of this condition requires Medina to show that PPG testing is "facially unreasonable" in order to invalidate it on direct appeal. 612 F.3d at 52. And that means, the government further contends, that Medina's challenge must fail for one of two reasons.

First, the government argues that the challenge is premature because the actual application of the testing will occur, if at all, only in the future, and will depend on the procedures that the sex offender treatment

program chooses to use. Second, the government argues that, to the extent the challenge is not premature, it is still without merit because PPG testing is "widely used for evaluating and treating sex offenders like" Medina and thus the requirement to submit to it if prescribed by a treatment program cannot possibly be deemed unreasonable on its face at present. But we do not find persuasive either of the government's contentions about why Medina's challenge necessarily fails under that "facially unreasonable" standard.

1.

The government does not use the word "ripeness" in making the argument that Medina's challenge is premature. But the argument would seem to be a close cousin of a ripeness argument that two circuits have accepted in this context. *See United States v. Rhodes,* 552 F.3d 624 (7th Cir. 2009); *United States v. Lee,* 502 F.3d 447 (6th Cir.2007).

Those circuits emphasized that contingent PPG-testing conditions like this one "implicate only the *potential* use of a penile plethysmograph," and that "there is no guarantee that [the defendant] will ever be subject to plethysmograph testing." *Lee,* 502 F.3d at 450; *see also Rhodes,* 552 F.3d at 628. Moreover, the Sixth and Seventh Circuits emphasized that the defendants in those cases were still serving long prison sentences and would not potentially face PPG testing for many years, *see Rhodes,* 552 F.3d at 628 (at least eight-and-a-half years); *Lee,* 502 F.3d at 450 (not before 2021), and thus that scientific or legal developments might render the testing an anachronism by the time the defendants were released from prison, *see Rhodes,* 552 F.3d at 628 ("[T]he development of science or the law may render the PPG testing irrelevant or even illegal, or maybe the movement will be in a different direction altogether ...."); *Lee,* 502 F.3d at 451 ("We cannot speculate on what will happen by 2021 with respect to penile plethysmograph testing. For example, by then, the test may be held to violate due process rights. Or, its reliability will have been debunked. Or, perhaps a less intrusive test will have replaced it.").

But this Circuit concluded in *United States v. Davis,* 242 F.3d 49, 51 (1st Cir. 2001) (per curium), that a challenge to even a contingent supervised release condition was ripe, and "not hypothetical," where the judgment explicitly spelled out the condition and the defendant challenged "the special condition itself, not its application or enforcement." *Id.* We explained that "[t]he judgment imposing sentence, of which the challenged special condition is a part, is a final judgment." *Id.* And we permitted the challenge to proceed even though the condition at issue merely required the defendant to cooperate with hypothetical future "investigations and interviews" by his probation officer, noting that "Davis's term of supervised release will commence in less than two months." *Id.* at 50-51.

We conclude the challenge in this case, like the one in *Davis,* is ripe. As in *Davis,* the judgment imposing the sentence in this case expressly spells out the condition that the defendant challenges.[9] Moreover, Medina was sentenced to thirty months in prison in July of 2013. That means he, too, could be subject to the condition he challenges in the near term, when he is released from prison and the treatment program commences.

Finally, consistent with the requirement imposed by *Sebastian's* "facially unreasonable" standard, Medina does not argue that PPG testing is impermissible because it will be used against him in some unusually inappropriate or ineffective way. *See* 612 F.3d at 52. And thus his challenge does not depend on the particular way in which his treatment program may choose to use PPG testing. Medina instead contends that PPG testing is so inherently invasive and unreliable that the requirement that he submit to its use, on the record before the District Court, is unlawful however the testing may be used. *Cf. Davis,* 242 F.3d at 51-52 (upholding a conditional condition on direct appeal since it had "obvious relevance" to the defendant's "probationary status" and would not "necessarily" raise the problems that the defendant was concerned about); *Sebastian,* 612 F.3d at 52 (emphasizing that the defendant had a limited basis on which to challenge a contingent condition on direct review, as "what [pornography] ban, if any, may be imposed is uncertain"). And, indeed, *Sebastian* applied the "facially unreasonable" standard to adjudicate

on direct review such a facial challenge to a contingent condition of supervised release, even though that condition would not take effect for another decade. *See* 617 F.3d at 52 (finding the condition adequately justified).[10]

2.

That leaves only the government's argument that *Sebastian's* "facially unreasonable" standard requires that we reject Medina's facial challenge as meritless due to the "widespread" use of PPG testing in sex offender treatment programs and the fact that Medina will be forced to submit to such testing, if at all, only in connection with such a program. But we do not find this argument for rejecting Medina's challenge persuasive either.

Sebastian's application of the "facially unreasonable" standard did take account of the fact that the challenged condition might facilitate a sex offender treatment program. *See* 612 F.3d at 52. And *Sebastian* further took account of the importance of allowing the district court to mandate compliance with such a treatment program in advance. *Id.* Applying those considerations, *Sebastian* concluded (on review for plain error) that a limited justification rooted in the value of ensuring compliance with treatment-program rules sufficed to uphold the conditionally imposed pornography ban there at issue, even though there was a factual dispute about the efficacy of the use of such bans in general. *See id.*

But *Sebastian* did not hold that a minimal justification relating to compliance with treatment-program rules would suffice to ward off a challenge to the facial reasonableness of every condition connected with a treatment program that a district court might choose to impose, no matter its nature. *See id.* And Medina contends that PPG testing raises distinct issues because it is so invasive and of such questionable reliability. There is no question that, in combination, these concerns do make his challenge to PPG testing distinguishable from the challenge to the condition at issue in *Sebastian* itself. For that reason, we do not believe *Sebastian* compels us to reject Medina's challenge, even if, as the government asserts, PPG testing is widely used in sex offender treatment programs. Instead, Medina's challenge must be confronted on its own terms and in light of the particular arguments the government makes about the reasonableness of this condition on the record in this case.

Likewise, the case on which *Sebastian* relied in setting forth the "facially unreasonable" standard — *United States v. York,* 357 F.3d 14, 23 (1st Cir.2004) — does not dictate rejection of Medina's facial challenge to this condition. In rejecting a challenge to a requirement that the defendant in that case submit to polygraph testing as part of his supervised release, *York* focused largely on considerations unique to polygraph testing and on arguments the government advanced about the condition's reasonableness that are not relevant here. *See id.* For example, in rejecting the defendant's challenge to polygraphy as "inherently unreliable," *York* emphasized that even an unreliable lie-detector test could deter the defendant from lying and thus further the goals of supervised release. *Id.*

In this case, however, the government (for good reason) makes no similar contention that PPG testing would be useful in treating Medina even assuming that Medina was right that such testing is both unusually invasive and unreliable. Thus, the particular rationale that *York* relied on to uphold the polygraph condition's facial reasonableness in that case is not applicable here.

Finally, we emphasize, that in *Sebastian,* the defendant had made no objection to the condition below. 612 F.3d at 50. We thus applied the strict plain error standard to the defendant's contention that the pornography-ban condition was facially unreasonable. *Id.* And we referenced that strict standard in explaining why we saw no need to resolve the "empirical question" of whether pornography bans assist in sex offender treatment. *See id.* at 52. Similarly, in *York,* our review of the reasonableness of the polygraph condition also took place without there having been "[a] timely objection and the creation of a record [that] would have permitted both the district court and this court to review York's claims with the benefit of that information." 357 F.3d at 19.

By contrast, here the defendant did make a timely objection that the contingent supervised release condition was inherently humiliating and unreliable and thus impermissible — an objection that clearly asserted the condition was unreasonable on its face. Our review, therefore, is not circumscribed in this case, as it was in *Sebastian* and *York,* by the defendant's lateness in raising the challenge.

Thus, for all of these reasons, we do not believe our prior precedent, whether *Sebastian* or *York,* forecloses Medina's challenge to the PPG aspect of the supervised release portion of his sentence. And so we turn to the merits of his challenge to the PPG testing condition.

B.

Our Circuit has not yet decided a case involving a challenge to the imposition of PPG testing as part of a condition of supervised release — whether contingent on a treatment program's prescription or otherwise. And thus we have not considered before whether such a condition may be successfully challenged under *Sebastian's* "facially unreasonable" standard. But other circuits have addressed whether and when this type of condition may be imposed, and thus their analysis informs our assessment of Medina's facial challenge to the condition.

The Fourth Circuit has held that the "plethysmograph test is `useful for treatment of sex offenders,'" and thus that a district court "clearly act[s] within its discretion in imposing" it as a condition, even, it seems, without offering much of an explanation for doing so. *United States v. Dotson,* 324 F.3d 256, 261 (4th Cir.2003) (quoting *United States v. Powers,* 59 F.3d 1460, 1471 (4th Cir.1995)). But while the government urges us to follow *Dotson* here, and thus to reject Medina's facial challenge to the condition, two other circuits have taken a very different approach. And their analyses support the conclusion that, at least on this record, the condition at issue in this case is facially unreasonable.

The Second Circuit, in *United States v. McLaurin,* identified significant constitutional concerns with PPG testing and thus required that a district court satisfy strict scrutiny before imposing a PPG testing obligation as a supervised release condition.[11] 731 F.3d 258, 261 (2d Cir.2013). The Second Circuit did so, moreover, even though the condition did not directly mandate PPG testing and instead made submission to such testing contingent on the treatment program's decision to require it. *Id.*

Seeing a "clear distinction between penis measurement and other conditions of supervised release," *id.* at 264, the court held that PPG testing is so invasive that "it could be justified only if it is narrowly tailored to serve a compelling government interest," *id.* at 261. *McLaurin* explained that "the procedure inflicts the obviously substantial humiliation of having the size and rigidity of one's penis measured and monitored by the government under the threat of reincarceration for a failure to fully cooperate." *Id.* at 263. Thus, before requiring compliance with PPG testing prescribed by a treatment program, *McLaurin* held that a district court must, "at a minimum, make findings, sufficiently informative and defendant-specific for appellate review, that the test is therapeutically beneficial, that its benefits substantially outweigh any costs to the subject's dignity, and that no less intrusive alternative exists." *Id.*

The Ninth Circuit reached a similar result in *United States v. Weber,* although it relied exclusively on the justificatory requirements imposed by the statute governing the imposition of special conditions of supervised release. 451 F.3d at 552-53 (citing 18 U.S.C. § 3583(d)). The court emphasized that "[p]lethysmograph testing not only encompasses a physical intrusion but a mental one, involving not only a measure of the subject's genitalia but a probing of his innermost thoughts as well." *Id.* at 562-63. Because such testing is "exceptionally intrusive in nature and duration," the Ninth Circuit held that "the procedure implicates a particularly significant liberty interest." *Id.* at 563. The Ninth Circuit further explained that there were serious concerns about both the testing's reliability and efficacy, including its "susceptibility to manipulation via faking," *id.* at 564, and the "lack [of] `uniform administration and scoring guidelines,'" *id.* at 565 (quoting Walter T. Simon & Peter G.W. Schouten, *The Plethysmograph Reconsidered: Comments on Barker and Howell,* 21 Bull. Am. Acad. Psychiatry & L. 505, 510 (1993)).

On the basis of those concerns, the Ninth Circuit construed the statute governing the imposition of special conditions of supervised release to require "heightened procedural protections" before a district court could mandate submission to PPG testing if a sex offender treatment program chose to use the procedure. *Id.* at 570. These protections included the requirement that the district court undertake a "consideration of evidence that plethysmograph testing is reasonably necessary for the *particular* defendant based upon his specific psychological profile." *Id.* at 569-70.

Weber further explained that, under the governing statute, a district court needed to give consideration to available alternatives to PPG testing, such as self-reporting interviews, polygraph testing, and "Abel testing," which measures the amount of time a defendant looks at particular photographs. *Id.* at 567-68. And finally, *Weber* explained that, before imposing such a condition, the district court must "support its decision on the record with record evidence that the condition of supervised release sought to be imposed is `necessary to accomplish one or more of the factors listed in § 3583(d)(1)' and `involves no greater deprivation of liberty than is reasonably necessary.'"[12] *Id.* at 561 (quoting *United States v. Williams,* 356 F.3d 1045, 1057 (9th Cir.2004)).

The concerns raised by the Second and Ninth Circuits accord with those we have previously raised about PPG testing, although we raised them outside the context of a supervised release condition mandating sex offender treatment. In two cases in the 1990s, we addressed the use of PPG testing as a prerequisite for continued public employment for employees who came under suspicion for, respectively, sexually abusing children and possessing child pornography. *See Berthiaume v. Caron,* 142 F.3d 12 (1st Cir.1998); *Harrington v. Almy,* 977 F.2d 37 (1st Cir. 1992). And, in doing so, we acknowledged in each case the unusually invasive nature of such testing and the debate over its reliability. *Berthiaume,* 142 F.3d at 17; *Harrington,* 977 F.2d at 44.

In *Harrington,* we described the practice as involving "bodily manipulation of the most intimate sort," and explained that "[o]ne does not have to cultivate particularly delicate sensibilities to believe degrading the process of having a strain gauge strapped to an individual's genitals while sexually explicit pictures are displayed in an effort to determine his sexual arousal patterns." *Harrington,* 977 F.2d at 44. We also remarked on the lack of evidence regarding both "the procedure's reliability" and the availability of any "less intrusive means of obtaining the relevant information." *Id.* We thus held that it was a jury question whether the testing requirement had violated a public employee's constitutional rights such that the employee was entitled to damages. *Id.* And the Second and Ninth Circuits relied on *Harrington* in vacating PPG-testing supervised release conditions. *See McLaurin,* 731 F.3d at 261; *Weber,* 451 F.3d at 563.

In *Berthiaume,* we did back away somewhat from the conclusion in *Harrington* about the plaintiff's right to damages based on PPG testing. *See Berthiaume,* 142 F.3d at 15-17. We concluded that PPG testing's acceptance by some in the treatment community at that time entitled a public official, who was a layperson, to qualified immunity from being liable for damages. *Id.* at 18. But we explained that it was "highly pertinent" that the plaintiff there had, to some extent, consented to the test. *Id.* And, we were careful to say that "[f]orcible administration" of PPG testing "would be an entirely different case." *Id.*

C.

Here, we are confronted with the "[f]orcible administration" of PPG testing, *id.,* as we are reviewing a challenge involving a defendant's forced submission to such testing in connection with a criminal sentence. And now faced with such a challenge to PPG testing, we conclude that the Second and Ninth Circuits were right to require a district court to provide a substantial justification before making submission to PPG testing part of a condition of supervised release. And we further conclude that, absent such a justification, the condition is facially unreasonable.

In reaching this conclusion, we, like the Ninth Circuit, are not prepared to "say categorically that, despite the questions of reliability, [PPG] testing can never reasonably" be imposed as a special condition of

supervised release. *Weber,* 451 F.3d at 556. But, like the Second Circuit, we "see a clear distinction" between the invasiveness of PPG testing "and other conditions of supervised release." *McLaurin,* 731 F.3d at 264. And the disputes regarding the procedure's reliability reinforce the concern raised by its distinctive invasiveness and unusual physical intrusion into an individual's most intimate realm. *See Weber,* 451 F.3d at 564-65.

We thus conclude that the condition in this case cannot be deemed reasonable merely because of the general interest in ensuring in advance that a treatment program's rules will be followed. Nor can the condition be deemed reasonable simply because the condition concerns a procedure that arguably may facilitate the treatment program.

Instead, in order for the condition to be deemed facially reasonable, district courts must provide a more substantial justification, at least once a defendant objects. *See* 18 U.S.C. § 3583(d)(2) (mandating that special conditions "involve no greater deprivation of liberty than is reasonably necessary"); *see also United States v. Malenya,* 736 F.3d 554, 560 (D.C.Cir.2013) (explaining that § 3583(d)(2) requires "balancing" the sentencing "goals against the defendant's liberty," and vacating a set of challenged conditions); *id.* at 566 (Kavanaugh, J., dissenting) (agreeing with the majority that PPG testing in particular "implicates significant liberty interests and would require, at a minimum, a more substantial justification than other typical conditions of supervised release," but disagreeing with the vacatur of the other challenged conditions). Specifically, in such circumstance, a district court may not impose the condition unless it can justify it through "a thorough, on-the-record inquiry into whether the degree of intrusion caused by such testing is reasonably necessary `to accomplish one or more of the factors listed in § 3583(d)(1)' and `involves no greater deprivation of liberty than is reasonably necessary,' given the available alternatives." *Weber,* 451 F.3d at 568-69 (quoting *Williams,* 356 F.3d at 1057).

In conducting that inquiry, district courts must explain why the imposition of the PPG testing condition would be reasonable given the individual characteristics of the particular defendant who would be subject to the condition. *See Weber,* 451 F.3d at 569-70. And district courts must base that justification on "adequate evidentiary support in the record." *Roy,* 438 F.3d at 144. At least when confronted with a defendant's objection, we will not infer a district court's unexpressed justification for this particularly fraught condition from the record, as we have done with regard to other conditions. *See Perazza-Mercado,* 553 F.3d at 75 (explaining that "`there are limits' to our willingness to supply our own justification for a particular sentence" (quoting *United States v. Gilman,* 478 F.3d 440, 446 (1st Cir.2007))).

D.

In this case, the District Court made no effort to respond seriously and on the record to Medina's objections to the PPG testing condition. The District Court failed to do so even though Medina apprised first the probation office and then the District Court that he had serious concerns about the reliability of PPG testing and about its degrading nature. Instead, when Medina's counsel objected to the requirement to comply with a treatment program decision to use PPG testing, the District Court's response was curt. "The PPGs and all that. Yes, I am going to allow that. That's for sure." Medina's counsel then responded:

[Medina's Counsel]: Okay. And just for purposes of the record, we object to the imposition of that treatment, in particular to the PPG. We understand it's invasive, it's humiliating, it hasn't even passed the *Daubert* standard.

THE COURT: What he has done in his life is humiliating.

[Medina's Counsel]: Excuse me?

THE COURT: What he has done in his life is humiliating to victims. Now we're talking about humiliating him.

The District Court did not then elaborate on this unusually dismissive response.

The District Court thus said nothing specific about the required statutory considerations of deterrence, protection of the public, and rehabilitation in imposing the PPG condition. *But see* 18 U.S.C. §§ 3553(a), 3583(d). And, similarly, the District Court did not address whether the condition "involve[d] no greater deprivation of liberty than [was] reasonably necessary to" promote the statutory factors of deterrence, protection of the public, and rehabilitation, as related to the characteristics of the defendant and his criminal history. *Id.* § 3583(d). Nor did the District Court engage in an evidentiary inquiry into any of the relevant considerations or point to anything in the record that could have supplied an evidentiary basis for its imposition of the condition. *See Roy,* 438 F.3d at 144 (requiring "adequate evidentiary support in the record")." We thus vacate the imposition of the PPG testing portion of this special condition of supervised release, as in the absence of an on-the-record explanation for it, the condition was unreasonable on its face.

On remand, we emphasize, any decision to reimpose the PPG testing condition would require further factual development to show its reasonableness. The record presently contains no evidence that would support the sweeping judgment that the PPG testing condition was justified. For while the pre-sentence report does refer to PPG testing, the report says nothing about the reliability or efficacy of PPG testing in particular. Nor does the report offer any explanation for how PPG testing would help to address concerns about recidivism given Medina's particular psychological profile and criminal history. And the report does not consider whether alternative methods such as self-reporting interviews, polygraph testing, and Abel testing would be equally effective. *See Weber,* 451 F.3d at 567-68.

In fact, the only "evidence" concerning PPG testing contained in the pre-sentence report is the conclusory statement that such testing is "a standard condition for this type of case." But that bare assertion is not adequate to show the condition was reasonable given the serious liberty and reliability concerns that PPG testing presents and that Medina specifically raised about such testing in objecting to the condition at sentencing.

Even in defending the condition on appeal, we note, the government "makes no distinct argument" that PPG testing "would be justified as a deterrent measure." *McLaurin,* 731 F.3d at 264. The government simply asserts to us that the testing would have a deterrent effect. The government does argue that the testing is justified by the interest in providing Medina treatment and protecting the public from possible future recidivism. But the government bases that assertion on the conclusory statement that PPG testing "is widely used for evaluating and treating sex offenders like" Medina. That statement comes unadorned, however, with any explanation of what "widely used" means in practice or in context. Thus, "[t]he Government is unable to say, except with vague generalities, how the use of the device amounts to `treatment,' and is unable to point to any expected, much less tangible, benefits to [Medina or the public] from the testing." *Id.* at 262. In that regard, the government offers no more in defense of the condition on appeal than was offered on behalf of the condition at sentencing. But the "showing" provided below, as we have explained, was insufficient to overcome Medina's contention that the condition is unreasonable on its face, and thus without regard to the particular way in which it may be applied to him.

VI.

A district court has significant discretion in setting a term of supervised release. A district court also has significant discretion to craft special supervised release conditions. But a district court's exercise of its discretion must still accord with the statutory framework governing supervised release.

Here, we conclude that the District Court improperly determined the relevant guidelines range in setting the term of supervised release; imposed a blanket pornography ban without explanation and contrary to directly applicable precedent; and then imposed an extraordinarily invasive supervised release condition without considering the condition's efficacy in achieving the statutory purposes of such conditions, given

both the particular defendant whose liberty was at stake and the evident concerns he directly raised about the appropriateness and reliability of the condition to which he was being required to submit. Although we have been deferential in reviewing district courts crafting of special conditions of supervised release, Congress and our precedent required more of the district court in this instance. We thus *vacate* the supervised release sentence term, as well as the conditions challenged on this appeal, and remand the case for re-sentencing.

[1] Medina's plea agreement included a waiver-of-appeal clause, but the government concedes that Medina never knowingly waived his right to challenge the supervised release term and conditions on appeal since the District Court assured Medina at the plea hearing that such challenges would be preserved.

[2] This Circuit has never decided what standard of review applies when a defendant objects to a pre-sentence report but does not reassert that objection at sentencing, and other circuits have diverged. *Compare United States v. Hurst,* 228 F.3d 751, 760-61 (6th Cir.2000) (holding that a sentencing court need not address a defendant's objections to a pre-sentence report where the defendant "did not expressly call them to the court's attention during the sentencing hearing") *with United States v. Sager,* 227 F.3d 1138, 1148 (9th Cir.2000) ("It is technically enough, of course, to file a written objection to the [pre-sentence report], but an astute attorney filing such an objection would also raise the issue again at sentencing if it appears to have gone unaddressed.").

[3] The retributive purpose, which sentencing generally may also serve, is reflected in the following sentencing factor set forth in 18 U.S.C. § 3553(a)(2)(A): "the need for the sentence imposed ... to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." *See Tapia v. United States,* ___ U.S. ___, 131 S.Ct. 2382, 2387-88, 180 L.Ed.2d 357 (2011) (explaining that § 3553(a)(2)(A) concerns "retribution"). But the statute governing the imposition of a special condition of supervised release specifically omits this factor from the ones that a district court may consider in imposing a special condition. *See* 18 U.S.C. § 3583(d)(1); *Tapia,* 131 S.Ct. at 2388 ([A] court may *not* take account of retribution (the first purpose listed in § 3553(a)(2)) when imposing a term of supervised release."). That omission reflects the distinct purposes that supervised release aims to accomplish.

[4] The statute additionally requires consideration of "any pertinent policy statements issued by the Sentencing Commission," 18 U.S.C. § 3583(d)(3), but the parties identify no policy statements that are pertinent to the issues before us.

[5] Medina does not challenge this condition as vague, and so we do not express any opinion on whether it presents a vagueness problem. *Cf. United States v. Perazza-Mercado,* 553 F.3d 65, 81 (1st Cir.2009) (Howard, J., dissenting in part) (raising vagueness concerns with respect to a condition that prohibited a defendant from possessing "any kind of pornographic material").

[6] In their briefs, Medina and the government address their arguments to the validity of the special condition as a whole. They do not separately discuss the parts of the condition that refer to "erotica" and "sexually stimulating visual and auditory material." Neither party therefore addresses whether the condition, in addition to prohibiting Medina from possessing or accessing adult pornography, also prohibits Medina from possessing or accessing otherwise legal erotic materials involving simulated sexual depictions of children, such as "virtual child pornography." *See Ashcroft v. Free Speech Coalition,* 535 U.S. 234, 250-56, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002) (holding unconstitutional a criminal prohibition on "virtual child pornography" which does not involve images of actual children). In the absence of briefing from the parties, we will not address here whether the condition is properly interpreted to prohibit Medina from possessing such material, nor whether that particular aspect of the condition might be adequately explained on this record by the nature of Medina's prior offense. *See Perazza-Mercado,* 553 F.3d at 74-

79 (vacating a condition that prohibited "possession of any kind of pornographic material" without addressing this issue).

Likewise, the parties' briefs do not separately address the portion of the condition prohibiting Medina from entering locations where sexually stimulating materials may be accessed. That portion of the condition was not present in *Perazza-Mercado,* and it may raise distinct issues. *Cf. id.* at 79-80 (Howard J., dissenting) (expressing concern that "allowing unfettered access to adult pornography could lead [a defendant] ... to places where opportunities may exist to commit other crimes against minors").

Given the parties' lack of attention to those aspects of this supervised release condition, we will leave them to the District Court on remand.

[7] The condition provides:

The defendant shall undergo a sex-offense-specific evaluation and participate in a sex offender treatment/and or [sic] mental health program arranged by the Probation Officer. The defendant shall abide by all rules, requirements, and conditions of the sex offender treatment program(s), including submission to testing; such as polygraph, penile plethysmograph (PPG), Abel Assessments, visual reaction testing or any other testing available at the time of his release.

[8] The references presumably were to *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Frye v. United States,* 293 F. 1013 (D.C.Cir.1923), which set forth the inquiry into scientific reliability that a district court must undertake before admitting expert testimony into evidence. Although neither *Daubert* nor *Frye* has a direct application to conditions of supervised release, the defendant appears to have invoked those cases as a shorthand way of attacking the reliability of PPG testing. And the Ninth Circuit has observed that "[c]ourts have uniformly declared that the results of [PPG] tests are `inadmissible as evidence'" under the *Daubert* standard because "`there are no accepted standards for this test in the scientific community.'" *Weber,* 451 F.3d at 565 n. 15 (quoting *Doe ex rel. Rudy-Glanzer v. Glanzer,* 232 F.3d 1258, 1266 (9th Cir.2000)).

[9] Because the conditional condition challenged in this case, as in *Davis,* is explicitly spelled out in and allowed by the District Court's judgment, we need not address here the distinct ripeness issues that could arise if a defendant sought to challenge the possibility of PPG testing in connection with a special condition that required only that the defendant comply with a sex offender treatment program's rules without discussing PPG testing in particular. *Cf. Weber,* 451 F.3d at 561 n. 12 (distinguishing a case involving a special condition requiring only compliance with a program's rules and not mentioning PPG testing specifically).

[10] Of course, as *Sebastian* shows, the requirement that the defendant challenge the condition itself and not the nature of its future implementation may mean that a defendant's "facially unreasonable" challenge to a contingent condition will fail. *See Sebastian,* 612 F.3d at 52. And when that occurs, "[i]t remains open to [the defendant] to challenge specific applications of" the contingent condition "when actually imposed in the future." *Id.* (citing *York,* 357 F.3d at 23); *see also* 18 U.S.C. § 3583(e)(2) (allowing a district court to "modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release"). But the availability of that distinct form of challenge to a condition of supervised release provides no basis for denying Medina the right to challenge this significant part of his sentence on direct appeal. *See Weber,* 451 F.3d at 569-70.

[11] Because we conclude that the District Court's justification for the condition in this case was inadequate as a statutory matter, we need not address the existence of a separate, substantive due process limitation on supervised release conditions. *Cf. United States v. Smith,* 436 F.3d 307, 310 (1st Cir.2006) ("It is beyond hope of contradiction that those who are convicted of crimes against society lose a measure of constitutional protection.").

[12] Judge Noonan, who concurred, would have gone further "to hold the Orwellian procedure at issue to be always a violation of the personal dignity of which prisoners are not deprived." *Weber,* 451 F.3d at 570 (Noonan, J., concurring).

752 F.3d 517 (2014)

UNITED STATES of America, Appellee, v. James ROBERSON, Defendant, Appellant.

No. 13-1925.

United States Court of Appeals, First Circuit.

May 21, 2014.

Thomas J. O'Connor. Jr., for appellant.

Alex J. Grant, Assistant United States Attorney, with whom Carmen M. Ortiz, United States Attorney, was on brief, for appellee.

Before LYNCH, Chief Judge, TORRUELLA and HOWARD, Circuit Judges.

LYNCH, Chief Judge.

This case addresses an important question of interpretation of first impression in the federal courts of appeals. Defendant James Roberson appeals from a district court denial of his motion to dismiss and from his criminal conviction for his failure to register as a sex offender under SORNA, the Sex Offender Registration and Notification Act. 18 U.S.C. § 2250.

At the time of his federal indictment in July 2012, Roberson stood convicted, in 1998, of the Massachusetts crime of indecent assault and battery on a child under the age of 14. Mass. Gen. Laws ch. 265, § 13B. He did not appeal from that conviction; nor did he ever register as a sex offender at any time between 2010 and 2012, though he had been notified of his obligation to do so.

Four months after his federal SORNA indictment, on November 16, Roberson moved to withdraw his guilty plea to the sex crime in the state court. Roberson did not and does not allege that he was innocent of the indecent assault. But he did allege that his guilty plea had entered after a constitutionally defective procedure. The local prosecutor did not oppose the motion because the plea judge had utilized incomplete and inadequate plea-colloquy procedures before June 16, 2000 and there was no independent evidence that the proper plea procedures were followed during Roberson's March 4, 1998 plea hearing.[1] The local state district court allowed the unopposed motion on January 11, 2013. We assume arguendo that Roberson's plea colloquy was constitutionally defective.

On February 15, 2013, Roberson moved to dismiss his federal charges on the basis that he no longer had a predicate sex offense to support a SORNA violation. More specifically, he argued that because of the constitutional defect, he was never "validly" convicted. He argued that his case is governed by *Burgett v. Texas,* 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), and not by *Lewis v. United States,* 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980).

Agreeing with the district court, we hold that SORNA's registration requirement applied to Roberson as a person who "was convicted" of a sex offense, 42 U.S.C. § 16911(1), *enforced* by 18 U.S.C. § 2250, regardless of whether that conviction is later vacated, when federal charges have been brought for conduct before the vacation of conviction. We also reject Roberson's additional challenges.

I.

On March 4, 1998, pursuant to a guilty plea, Roberson was convicted of indecent assault and battery on a child under the age of 14, in violation of Chapter 265, § 13B of the Massachusetts General Laws. Roberson was sentenced to three years' probation. A week later, Roberson signed a notice informing him of his duties to register as a sex offender. In 2001, a Massachusetts arrest warrant was issued for Roberson for a probation violation.

In 2006, Roberson obtained a Florida driver's license. Over the next three years, the Florida Department of Law Enforcement mailed Roberson notices regarding his obligation to register as a sex offender. The Department proceeded to place Roberson on the Florida sex offender registry. Roberson did not register himself.

On July 14, 2010, a Vermont detective spoke to Roberson about his obligation to register as a sex offender. Roberson claimed that he was only visiting the state.

Between May and June 2011, Roberson worked in Massachusetts. Again, he did not register as a sex offender. After leaving the state and traveling to Nicaragua, Roberson returned to Massachusetts in April 2012. Roberson was arrested on May 18, 2012 on the outstanding warrant for his probation violation. Roberson did not register as a sex offender while living in Massachusetts during April and May 2012.

On July 12, 2012, a federal grand jury indicted Roberson on one count of failing to register under SORNA, in violation of 18 U.S.C. § 2250. Section 2250 makes it a crime for an individual who is "required to register under [SORNA]" to "travel in interstate or foreign commerce" and to "knowingly fail to register or update a registration" pursuant to SORNA's requirements. 18 U.S.C. § 2250(a). The indictment alleged a violation "[f]rom in or about February, 2010 to on or about May 18, 2012, in the District of Massachusetts and elsewhere." We have described his post-indictment recourse to the Massachusetts state court.

On February 15, 2013, Roberson filed a motion to dismiss his federal indictment, challenging the Government's reliance on his now-vacated prior predicate conviction.[2] The Government opposed, arguing that the indictment was based upon Roberson's failure to register at a time when his Massachusetts conviction was "still in effect" and, as such, when he was still under an obligation to register. The Government relied upon *Lewis,* 445 U.S. at 65-68, 100 S.Ct. 915, in which the Supreme Court held that a defendant's indictment and conviction for being a felon in possession of a firearm were not undermined by the defendant's later producing evidence which the Court assumed showed that the predicate felony conviction was obtained in violation of the defendant's Sixth Amendment right to counsel. The conviction was affirmed.

On April 8, 2013, the district court orally denied Roberson's motion to dismiss the indictment, but said it would consider the state court's action at sentencing. Roberson entered a conditional guilty plea on May 22, 2013, reserving his right to appeal the district court's denial of his motion. On July 22, 2013, the district court sentenced Roberson to six months' imprisonment with no supervision to follow.

II.

The question of whether a defendant's prior conviction qualifies as a predicate offense under a federal criminal statute is an issue of federal law that this court reviews de novo. *See Aguiar v. Gonzáles,* 438 F.3d 86, 88 (1st Cir.2006).

In our view, the Supreme Court's decisions in *Lewis* and *United States v. Mendoza-Lopez,* 481 U.S. 828, 107 S.Ct. 2148, 95 L.Ed.2d 772 (1987), require us to affirm, as does our post-*Lewis* caselaw. Other circuits have reached similar conclusions as to other statutes.

Congress enacted SORNA in 2006 "to establish a comprehensive national system for the registration of sex offenders." *United States v. Whitlow,* 714 F.3d 41, 43 (1st Cir.2013), *cert. denied,* ___ U.S. ___, 134 S.Ct. 287, 187 L.Ed.2d 207; *accord* 42 U.S.C. § 16901. "SORNA's general changes were designed to make more uniform what had remained `a patchwork of federal and 50 individual state registration systems,'" *United States v. Kebodeaux,* ___ U.S. ___, 133 S.Ct. 2496, 2505, 186 L.Ed.2d 540 (2013) (quoting *Reynolds v. United States,* ___ U.S. ___, 132 S.Ct. 975, 978, 181 L.Ed.2d 935 (2012)), beset with "`loopholes and deficiencies' that had resulted in an estimated 100,000 sex offenders becoming `missing' or `lost,'" *id.* (quoting H.R.Rep. No. 109-218, pt. 1, at 20, 26 (2005)).

Under SORNA, "[a] sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides [or] where the offender is an employee." 42 U.S.C. § 16913(a). In turn, SORNA, defines "sex offender" as "an individual who was *convicted* of a sex offense." *Id.* § 16911(1) (emphasis added). Roberson concedes that the crime to which he pled guilty in March 1998 is a "sex offense." He does not contest that he traveled and had not registered. The question is whether, under the language of SORNA, he "was convicted" of that crime for conduct before the vacation of that conviction.

We start with the language of the statute. In *Lewis,* the Supreme Court interpreted a statute in a similar regulatory system, where the federal crime of being a felon in possession of a firearm depended on the defendant being a person who "has been convicted by a court ... of a felony." 445 U.S. at 60, 100 S.Ct. 915 (internal quotation marks omitted) (quoting Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90-351, 82 Stat. 197, Tit. VII, § 1202(a)(1)). It was faced with a claim that the predicate felony was based on a constitutional error under *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), which the Court assumed to be true. Nonetheless, it affirmed the conviction under section 1202(a)(1) and rejected a claim that its reading violated the Constitution. The Court characterized the language "convicted by a court" as "unambiguous" and "sweeping." *Lewis,* 445 U.S. at 60, 100 S.Ct. 915. The Court looked to the plain language and then considered the fact that the statute contained numerous exceptions, none of which provided an exception for convictions which might turn out later to be invalidated for any reason. *Id.* at 61-62, 100 S.Ct. 915. The Court also contrasted section 1202(a)(1) with other statutes which explicitly provided a defense of challenging the validity or constitutionality of a predicate felony. *Id.* at 62, 100 S.Ct. 915.

As for the sparse legislative history, the Court concluded it reflected "an intent to impose a firearms disability on any felon based on the fact of conviction." *Id.* It stressed the fact of conviction, and not a "valid" conviction. *Id.*

In *Mendoza-Lopez,* the Supreme Court considered a similarly worded statute which made it a felony to enter the country after having been "deported." The Court held that "deported" could not be read to refer just to "lawful" deportations, despite serious constitutional concerns, which are not at issue in this case.[3] 481 U.S. at 833-837, 841-42, 107 S.Ct. 2148; see *also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.").

In looking to the language of federal statutes referring to those "convicted" of a crime, this court has observed that "[b]y its normal meaning a defendant has been `convicted by a court' even though the conviction may sometime be reversed." *United States v. Samson,* 533 F.2d 721, 722 (1st Cir.1976) (holding that prohibition against receiving firearms in commerce after having "been convicted by a court ... of a felony" does not require final predicate conviction); *accord United States v. Currier,* 821 F.2d 52, 59-

60 (1st Cir.1987) (holding that conviction then pending "on appeal and so, at the time of the hearing, subject to vacation or reversal" constitutes a predicate conviction for purposes of repeat offender provision applying to those "previously `convicted' of two offenses" (quoting 18 U.S.C. § 3575(e)(1))).

Congress has, in the definition of the offense, stated that "convicted" refers to the historical fact of the conviction, regardless of whether that conviction might later be vacated. *See Lewis,* 445 U.S. at 60-61, 100 S.Ct. 915 ("[The] plain meaning [of `has been convicted by a court of the United States or of a State ... of a felony'] is that the fact of a felony conviction imposes a ... disability until the conviction is vacated or the felon is relieved of his disability by some affirmative action....").

Using the same mode of analysis as *Lewis,* we conclude Roberson's challenge must fail. The language is plain. The term "was convicted" refers to the fact of conviction and does not refer just to a "valid" conviction. Instead, Roberson asks this court not to give "was convicted" its normal meaning. *See Black's Law Dictionary* 383 (9th ed.2009) (defining "convict" as "vb. To find (a person) guilty of a criminal offense upon a criminal trial, a plea of guilty, or a plea of nolo contendere (no contest)").

He argues "was convicted" must refer only to what he calls a "valid" conviction.[4] But *Lewis* expressly rejects that reading of almost identical language. Roberson points to no additional statutory language indicating that Congress intends the more restrictive reading of "was convicted by a court" that he proposes.[5]

To the contrary, as did the statute in *Lewis,* SORNA has exceptions to its coverage. *See* 42 U.S.C. § 16911(5)(B)-(C); *see also* 18 U.S.C. § 2250(b) (providing as affirmative defense in § 2250 prosecution that defendant was prevented from registration by "uncontrollable circumstances"). But none of the exceptions is for a later vacated conviction, even when the vacation is on constitutional grounds. This analysis also involves the two considerations utilized by the *Lewis* Court: when Congress has provided limited exceptions within the same statute, courts will not read in additional exceptions. *See Lewis,* 445 U.S. at 61-62, 100 S.Ct. 915. And that conclusion is only strengthened by the existence of other statutes that show Congress knew how to create such an exception when it wished to do so. *See id.*

Congress did not create the "loophole" Roberson wishes. *Kebodeaux,* 133 S.Ct. at 2505. Where Congress is clear, there is no role for the rule of lenity.[6] And, as in *Lewis,* this congressional scheme is entirely constitutional.[7] *See, e.g., Whitlow,* 714 F.3d at 44; *United States v. Parks,* 698 F.3d 1, 4-8 (1st Cir. 2012), cert. denied, ___ U.S. ___, 133 S.Ct. 2021, 185 L.Ed.2d 889 (2013).

At the heart of Roberson's case is his reliance on *Burgett v. Texas* for the proposition that an unconstitutionally obtained conviction ordinarily cannot be used "either to support guilt or enhance punishment for another offense." 389 U.S. 109, 115, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967).

Roberson's *Burgett*-based argument was explicitly considered and rejected in *Lewis.* Recognizing that an uncounseled felony conviction cannot be used for certain purposes, and citing *Burgett, United States v. Tucker,* 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972), and *Loper v. Beto,* 405 U.S. 473, 92 S.Ct. 1014, 31 L.Ed.2d 374 (1972), the *Lewis* Court held:

Use of an uncounseled felony conviction as the basis for imposing a civil firearms disability, enforceable by a criminal sanction, is not inconsistent with *Burgett, Tucker,* and *Loper.* In each of those cases, this Court found that the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction. The federal gun laws, however, focus not on reliability, but on the mere fact of conviction, or even indictment, in order to keep firearms away from potentially dangerous persons. Congress' judgment that a convicted felon, even one whose conviction was allegedly uncounseled, is among the class of persons who should be disabled from dealing in or possessing firearms because of potential dangerousness is rational. Enforcement of that essentially civil disability through a criminal sanction does not "support guilt or enhance punishment," *see Burgett,* 389

U.S., at 115,[88 S.Ct. 258] on the basis of a conviction that is unreliable when one considers Congress' broad purpose. Moreover, unlike the situation in *Burgett,* the sanction imposed by § 1202(a)(1) attaches immediately upon the defendant's first conviction.

Lewis, 445 U.S. at 67, 100 S.Ct. 915 (footnote omitted).

As we held in *Parks,* 698 F.3d at 5, SORNA is "a civil regulatory measure aiming at forestalling future harm." We observed "[r]egistration is frequently part of civil regulation, including car licensing, social security applications, and registering for selective service," and may be enforced by a criminal sanction. *Id.* at 6. As *Lewis* makes clear, where a civil disability "focus[es] not on reliability, but on the *mere fact of conviction,*" enforcement of that disability through criminal sanction does not implicate the constitutional concern at issue in *Burgett.* 445 U.S. at 67, 100 S.Ct. 915 (emphasis added). By its plain language, SORNA has precisely that focus. For that reason, *Burgett* has no application here.

As to Roberson's invocation of *Boykin v. Alabama,* 395 U.S. 238, 243 n. 5, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and *Lubben v. Selective Serv. Sys. Local Bd. No. 27,* 453 F.2d 645, 649 (1st Cir.1972), that argument also fails under circuit precedent which postdates *Boykin* and *Lubben.* In *United States v. Snyder,* 235 F.3d 42, 51-53 (1st Cir.2000), we held that the later vacating of a state court conviction did not invalidate the defendant's federal conviction as a felon in possession of a firearm under 18 U.S.C. § 922(g)(1) because he was a felon at the time of the charged possession.[8] We drew a distinction between the use of a vacated conviction in the sentencing context and in the context of predicate offenses. *Id.* at 52-53. We observed that laws that condition a civil disability on the historical fact of conviction "reflect the desirability of having a clear, bright line in respect to [that disability]: one who has a... conviction on the books, a conviction not yet set aside, should simply know" that the disability applies. *Id.* at 53 (quoting *United States v. Paleo,* 9 F.3d 988, 989 (1st Cir.1992)) (internal quotation mark omitted).

As *Lewis* notes, an individual subject to a civil disability may challenge a predicate conviction "in an appropriate proceeding" *before* engaging in the prohibited conduct. 445 U.S. at 64, 100 S.Ct. 915; *cf. Mendoza-Lopez,* 481 U.S. at 841, 107 S.Ct. 2148 ("It is precisely the unavailability of effective judicial review of the administrative determination at issue here that sets this case apart from *Lewis.*"). In the present context, there is no reason to think that Congress would willingly engender uncertainty concerning to whom SORNA's registration requirement applies by permitting those who fail to register to challenge their predicate convictions after the fact. Roberson flouted the registration law for twelve years, and had ample time to seek to vacate his conviction.

III.

The judgment of the district court is *affirmed.*

TORRUELLA, Circuit Judge, Concurring.

Faced with statutory language highly analogous to that now on appeal, the Supreme Court has held that Congress may impose civil disabilities, enforceable via criminal sanctions, based on the existence of a constitutionally infirm prior predicate conviction. *Lewis v. United States,* 445 U.S. 55, 65-68, 100 S.Ct. 915, 63 L.Ed.2d 198 (1980). Doing so, the Supreme Court concluded, does not threaten the rights of individuals so disabled. *Id.* at 67, 100 S.Ct. 915 ("Enforcement of [an] essentially civil disability through a criminal sanction does not `support guilt or enhance punishment....'" (quoting *Burgett v. Texas,* 389 U.S. 109, 115, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967))). I disagree, being fully persuaded by the existence of significant constitutional concerns as articulated by the dissenting justices in that case. *Id.* at 72, 100 S.Ct. 915 (Brennan, J., dissenting) ("Here, petitioner could have not been tried and convicted for violating [SORNA] in the absence of his previous felony conviction. It could not be plainer that his constitutionally void conviction was therefore used `to support guilt' for the current offense."); *see also Burgett,* 389 U.S.

at 115, 88 S.Ct. 258 (holding that constitutionally infirm convictions may not be used to "support guilt or enhance punishment for another offense").

I am also troubled by the thought that this exception, borne out of a civil disability seen as relatively insignificant by reviewing courts, may apply uniformly to validate disabilities far more severe. *Compare Lewis,* 445 U.S. at 66, 100 S.Ct. 915 (highlighting that there are "activities far more fundamental than the possession of a firearm"), *and United States v. Samson,* 533 F.2d 721, 722 (1st Cir.1976) (calling firearm dispossession "slight compared with the gravity of the public interest sought to be protected"), *with Samson,* 533 F.2d at 722 ("[I]f the disability imposed by the statute is sufficiently serious to the defendant, it might be appropriate to [adopt a] more restricted meaning [of the phrase `convicted by a court'].''), *and United States v. Parks,* 698 F.3d 1, 5 (1st Cir.2012) ("SORNA is surely burdensome for those subject to it.").

Nonetheless, it is the job of an appellate judge to faithfully apply the law as articulated by the Supreme Court. *See Lewis,* 445 U.S. at 65-68, 100 S.Ct. 915. And that faithful respect extends, in equal measure, to prior precedent from this court. *See United States v. Snyder,* 235 F.3d 42, 51-53 (1st Cir.2000). Here, although troubled by the result, I believe the majority's conclusion is consistent with our binding precedent. Accordingly, I concur. I write separately, however, to urge that we hold the line where we now stand (already on ground both slippery and sloping) so that the protections of *Burgett,* 389 U.S. 109, 88 S.Ct. 258, and its progeny are not further eroded.

[1] The tape recording of Roberson's plea colloquy could not be located. The state judge who accepted Roberson's guilty plea was publicly reprimanded in 2005 for failing to follow proper plea-colloquy procedure before June 16, 2000.

[2] Roberson also raised before the trial court and raises again on appeal certain Ex Post Facto Clause, Due Process Clause, Equal Protection Clause, Commerce Clause, and separation of powers challenges to SORNA. Roberson concedes that those challenges are foreclosed by binding circuit precedent, *see, e.g., United States v. Whitlow,* 714 F.3d 41, 44 (1st Cir.2013), *cert. denied,* ___U.S. ___, 134 S.Ct. 287, 187 L.Ed.2d 207 (2013); *United States v. Parks,* 698 F.3d 1, 4-8 (1st Cir.2012), *cert. denied,* ___U.S. ___, 133 S.Ct. 2021, 185 L.Ed.2d 889, but raises them in order to preserve them for eventual Supreme Court review.

[3] As the Court explained in *Mendoza-Lopez,* the constitutional defect in the reentry statute resulted from "the unavailability of effective judicial review" of the administrative determination resulting in the predicate deportation. 481 U.S. at 841-42, 107 S.Ct. 2148. As Roberson's successful challenge to his predicate conviction demonstrates, SORNA suffers from no such infirmity.

[4] By "valid," Roberson means a conviction that is not "void." He argues that a conviction obtained in violation of due process is void, *Boykin v. Alabama,* 395 U.S. 238, 243 n. 5, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), and that "[a] void judgment is one which, from its inception, was a complete nullity and without legal effect," *Lubben v. Selective Serv. Sys. Local Bd. No. 27,* 453 F.2d 645, 649 (1st Cir.1972).

[5] Roberson does cite 42 U.S.C. § 16911(5)(B), which states that "[a] foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established" by the Attorney General. From this, Roberson argues Congress intends SORNA registration to be required only on the basis of an individual conviction that is consistent with due process. He fatally makes no distinction between judicial systems and individual case outcomes. As the Attorney General interpreted this provision pursuant to his statutory mandate, Congress intends that a conviction triggers the SORNA registration requirement only if it is the product of a judicial *system* which, like that of the United States, contains "sufficient safeguards for fundamental fairness and due process." *See* 73 Fed Reg. 38,030, 38,050 (July 2, 2008) ("Sex offense convictions under the laws of Canada, United Kingdom, Australia,

and New Zealand are deemed to have been obtained with sufficient safeguards for fundamental fairness and due process, and registration must be required for such convictions on the same footing as domestic convictions."). Congress did not intend for federal courts, in the context of applying SORNA, to engage in *case-by-case* due process review of predicate state court convictions.

[6] Nor, if we were free to consult legislative history despite the plain language of the statute, has Roberson identified any history that lends support to his interpretation.

[7] Roberson attempts to distinguish *Lewis* by arguing that Congress' intent in enacting the felon-in-possession statute at issue there was broader than its intent in enacting SORNA. Specifically, he notes that the felon-in-possession statute does not apply solely to individuals with prior convictions but also to those merely *indicted* for a felony charge, as well as fugitives, aliens unlawfully in the United States, and individuals who have renounced U.S. citizenship, among others. See 18 U.S.C. § 922(n), (g)(2), (g)(5), (g)(7). From this, Roberson argues that the statute in *Lewis* has a broader prophylactic rationale than SORNA.

This argument fails. While the firearms statute does reach groups aside from convicted felons, the *Lewis* Court did not rely on that structure in its analysis of "was convicted." *See* 445 U.S. at 60, 100 S.Ct. 915 ("[The statute's] proscription is directed *unambiguously* at any person who `has been convicted by a court of the United States or of a State... of a felony.'" (emphasis added)). Moreover, Roberson's argument essentially asks us to read the absence of categories unrelated to individuals with prior convictions to imply the phrase "provided that the conviction is valid." There is simply no basis for that reading in SORNA's text. The plain language encompasses Roberson's conduct and properly subjects him to criminal penalties for failing to register.

[8] Other circuits have followed similar reasoning. *See, e.g., United States v. Padilla,* 387 F.3d 1087, 1090-92 (9th Cir.2004) (holding defendant not entitled to new trial on felon in possession conviction based on vacatur of the predicate felony after his conviction); *Burrell v. United States,* 384 F.3d 22, 27-28 (2d Cir. 2004) (explaining "the determinate factor [in a felon in possession prosecution] is [the] defendant's criminal record at the time of the charged possession" without regard to whether it is later set aside); *United States v. Lee,* 72 F.3d 55, 58 (7th Cir.1995) (holding fact that defendant's predicate conviction was vacated shortly before trial did not undermine prosecution for being felon in possession); *United States v. Cabrera,* 786 F.2d 1097, 1098 (11th Cir.1986) (per curiam) (similar).

MICHAEL A. McGUIRE, Plaintiff,

v.

LUTHER STRANGE, in his official capacity, et al., Defendants.

Case No. 2:11-CV-1027-WKW(WO).

United States District Court, M.D. Alabama, Northern Division.

February 5, 2015.

MEMORANDUM OPINION AND ORDER

W. KEITH WATKINS, District Judge.

I. INTRODUCTION

Michael A. McGuire was born in Montgomery, Alabama, where he graduated from high school in 1971. Eventually, he left the community for many years. In 2010, at the age of 57, he and his wife returned to his hometown to be with his aging mother and other family in the area. Unbeknownst to Mr. McGuire, his arrival coincided with the 2011 promulgation of the Alabama Sex Offender Registration and Community Notification Act ("ASORCNA"). Ala. Code § 15-20A-1 *et seq.*

Mr. McGuire has one criminal conviction, a serious one: In 1985, he raped and otherwise assaulted his 30-year-old girlfriend of five years. In May 1986, he was convicted of sexual assault in a Colorado state court. Mr. McGuire spent his next three years in prison and a fourth year on parole, successfully completing his prison sentence. He then had a multi-decade career as a hair stylist and jazz musician in the Washington, D.C. area. Prior to relocating to Montgomery in 2010, he had never been required to register as a sex offender. He was, in his brother's words, "a free American." (Trial Tr. I, at 14.)

After resettling in his hometown and on the advice of his brother, a local attorney, Mr. McGuire voluntarily visited the Montgomery Police Department to inquire about the scope of Alabama's sex-offender laws, hoping to confirm his belief that he would not be subject to the state's restrictions. That belief was erroneous by multiples. Mr. McGuire now lives homeless and unemployed under a bridge in his hometown. Pursuant to ASORCNA, he is required to register as a homeless sex offender in-person at both the City of Montgomery Police Department and the Montgomery County Sheriff's Department every week. In fact, for the rest of his life, he is subject to the most comprehensive, debilitating sex-offender scheme in the land, one that includes not only most of the restrictive features used by various other jurisdictions, but also unique additional requirements and restrictions nonexistent elsewhere, at least in this form. He challenges ASORCNA as violating the Ex Post Facto Clause of the United States Constitution.

The court held a four-day bench trial and received post-trial briefing on the constitutional issue. This opinion constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52.

II. JURISDICTION AND VENUE

Subject-matter jurisdiction is exercised pursuant to 28 U.S.C. §§ 1331, 1343, and 2201. The parties do not contest personal jurisdiction or venue.

III. PROCEDURAL HISTORY

Mr. McGuire filed his complaint challenging ASORCNA on December 2, 2011. Over the course of litigation, Mr. McGuire amended his complaint four times. In its final iteration, Mr. McGuire's Third Amended Complaint brought claims under federal law (Counts I-VII) and state law (Counts VIII-IX). It alleged liability under 42 U.S.C. § 1983 for an assortment of federal constitutional violations, including deprivations of due process and liberty, violations of equal protection, the application of ex post facto laws, and illegal seizure, and under state law for claims that included, among others, false imprisonment, false arrest, and negligence.[1]

Motions to dismiss the Third Amended Complaint were filed by all Defendants as to each of Mr. McGuire's claims. After a thorough period of briefing, the court reviewed each of Mr. McGuire's twelve causes of action as to each of the six remaining Defendants. On March 29, 2013, a Memorandum Opinion and Order was issued, granting in part and denying in part Defendants' motions to dismiss, ultimately leaving only Mr. McGuire's ex post facto challenge to proceed. The six remaining Defendants are the City of Montgomery, Montgomery Police Chief Ernest Finley in his official capacity, Montgomery Mayor Todd Strange in his official capacity, Montgomery County Sheriff Derrick Cunningham in his official capacity, Acting Director of the Alabama Department of Public Safety John Richardson in his official capacity, and Alabama Attorney General Luther Strange in his official capacity.[2]

On March 31, 2014, through April 3, 2014, a four-day bench trial was held on Mr. McGuire's ex post facto challenge to ASORCNA. At the close of trial, all parties were ordered to submit additional briefing on certain topics. After considering the briefs filed in connection with pretrial motions, the post-trial briefs, and the arguments and evidence presented at trial, the court finds that judgment is due to be entered in favor of Mr. McGuire on his challenge to ASORCNA's provisions requiring dual weekly registration for in-town homeless registrants and dual travel permit applications for all in-town registrants, and in favor of Defendants on the remaining ex post facto claims.

IV. FINDINGS OF FACT

A. ASORCNA

On July 1, 2011, ASORCNA became effective and repealed all prior iterations of Alabama's sex offender registration and notification laws. 2011 Ala. Acts, No. 640. ASORCNA's provisions apply to adult offenders convicted of one of thirty-one offenses defined as a sex offense under Alabama law, as well as those convicted in another jurisdiction of a crime that, "if it had been committed in [Alabama] under the current provisions of law, would constitute" one of the enumerated offenses. Ala. Code § 15-20A-5(33). The entire scheme is retroactive, capturing any enumerated or similar offense regardless of when it was committed.

ASORCNA restricts where a registrant may live and work,[3] *id.* §§ 15-20A-11, -13, requires the distribution of community-notification flyers to those living near a registrant's residence, *id.* § 15-20A-21, and provides for a "public registry website maintained by the Department of Public Safety." *Id.* § 15-20A-8. The website is required to include specific information regarding each registrant. Registrants must "appear in person to verify all required registration information" quarterly. *Id.* § 15-20A-10(f). The law also requires each registrant to "obtain, and always have in his or her possession, . . . a driver's license or identification card bearing a designation that enables law enforcement officers to identify the licensee as a sex offender." *Id.* §§ 15-20A-18(a), (d).

Additionally, ASORCNA requires registrants who intend to be away from their county of residence for three or more consecutive days to "report such information in person immediately prior to leaving" and to complete a travel permit form providing "the dates of travel and temporary lodging information." *Id.* §§ 15-20A-15(a), (b). The permit form explains the duties of the registrant regarding travel, and registrants must

sign the form, acknowledging their duties, or "the travel permit shall be denied." *Id.* § 15-20A-15(d). When a registrant obtains a permit, the registrant's local sheriff must "immediately notify local law enforcement" in the registrant's destination. *Id.* § 15-20A-15(e). Importantly, registrants who reside in municipalities ("in-town registrants") must obtain travel permits from both the local police and county sheriff. The forms for obtaining travel permits, which were developed by the Alabama Department of Public Safety, are virtually identical for the local police and the sheriff.

ASORCNA's provisions apply for life and without regard to the nature of the offense, the age of the victim, or the passage of time since the underlying sex offense. *Id.* § 15-20A-3. ASORCNA does contain three general relief provisions, none of which is applicable to Mr. McGuire.[4] A violation of ASORCNA's requirements potentially subjects the offender to one of 115 Class C felonies, 82 of which are applicable to Mr. McGuire.[5] *See, e.g., id.* § 15-20A-15(h). Class C felonies in Alabama carry a sentence from one to ten years. *Id.* § 13A-5-6.[6]

ASORCNA's registration scheme requires offenders to register in-person four times a year, both with "[t]he sheriff of the county and the chief of police if the location subject to registration is within the corporate limits of any municipality." *Id.* §§ 15-20A-4, -10. For homeless offenders who reside within the city limits of any municipality, the registration requirement is enhanced to once a week with both law enforcement jurisdictions ("dual registration"). *Id.* §§ 15-20A-4(13), -12(b). Thus, in-town homeless offenders must register in-person a minimum of 112 times a year. The county and city forms to be completed by homeless registrants are substantively identical. Montgomery currently has three homeless offenders out of roughly 500 registrants.

Finally, the Legislature delegated rule-promulgating authority for ASORCNA to the Director of the Alabama Department of Public Safety. *Id.* § 15-20A-44. This accounts for the strong similarity in the ASORCNA forms used by local police departments and county sheriffs.

The Alabama Legislature made the following findings relevant to its intent in enacting the scheme:

(1) Registration and notification laws are a vital concern as the number of sex offenders continues to rise. The increasing numbers coupled with the danger of recidivism place society at risk. Registration and notification laws strive to reduce these dangers by increasing public safety and mandating the release of certain information to the public. This release of information creates better awareness and informs the public of the presence of sex offenders in the community, thereby enabling the public to take action to protect themselves. Registration and notification laws aid in public awareness and not only protect the community, but serve to deter sex offenders from future crimes through frequent in-person registration. Frequent in-person registration maintains constant contact between sex offenders and law enforcement, providing law enforcement with priceless tools to aid them in their investigations including obtaining information for identifying, monitoring, and tracking sex offenders.

(3) Homeless sex offenders are a group of sex offenders who need to be monitored more frequently for the protection of the public. Homeless sex offenders present a growing concern for law enforcement due to their mobility. As the number of homeless sex offenders increases, locating, tracking, and monitoring these offenders becomes more difficult.

(5) Sex offenders, due to the nature of their offenses, have a reduced expectation of privacy. In balancing the sex offender's rights, and the interest of public safety, the Legislature finds that releasing certain information to the public furthers the primary governmental interest of protecting vulnerable populations, particularly children. Employment and residence restrictions, together with monitoring and tracking, also further that interest. The Legislature declares that its intent in imposing certain registration, notification, monitoring, and tracking requirements on sex offenders is not to punish sex offenders but to protect the public, and most importantly, promote child safety.

Id. §§ 15-20A-2(1), (3), (5). With regard to the branding of one's sex-offender status on the ASORCNA-required driver's license or official identification card, the Legislature intended "a designation that enables law enforcement officers to identify the licensee as a sex offender" but did not specify the method of notice on the license. *Id.* § 15-20A-18.

B. Mr. McGuire's Experience

Mr. McGuire turned 60 years old during the course of this trial. He is a sex offender under ASORCNA, and, as a result, he is required to register with the City of Montgomery Police Department and the Montgomery County Sheriff's Department on a regular basis. Mr. McGuire is one of more than 500 registered sex offenders residing in Montgomery County, over 430 of whom live within the Montgomery city limits.

Mr. McGuire's registry information has been available to the public via the Alabama and federal sex-offender registries since May of 2010. Additionally, pursuant to ASORCNA's community-notification provision, persons within the statute's prescribed proximity to Mr. McGuire's registered residence were notified by flyer in June of 2010 that Mr. McGuire is a registered sex offender. During each quarterly registration at the Montgomery Police Department and the Montgomery County Sheriff's Office, Mr. McGuire is supposed to pay a $10 fee. Due to his "homeless status," however, Mr. McGuire's fee has been waived. (Doc. # 251, at 40:12-14.)

Mr. McGuire is currently one of three homeless offenders in Montgomery County, and he lists his residence as being under a bridge in the City of Montgomery. Mr. McGuire's wife of eleven years is not homeless; she lives in the house that the couple rents from Mr. McGuire's brother. Because the house is not in an ASORCNA-compliant area, Mr. McGuire is prohibited from residing in the house with his wife. He may, however, stay in the house not more than two consecutive nights, not to exceed nine nights a month. *Id.* § 15-20A-11(e).

Mr. McGuire asked local law enforcement about the suitability of fifty to sixty other homes in the City, but none complied. It is undisputed that Mr. McGuire and his wife lived in the Regency Inn from April 27, 2010, until July 19, 2010, paying a weekly rent. Eventually, however, he depleted his savings, and the couple moved out. The testimony of Mr. McGuire's expert established that, conservatively, 80 percent of the city's housing stock was not ASORCNA-compliant, thereby creating a large, residential "zone of exclusion." The City of Montgomery has over 96,000 parcels of real estate. (Trial Tr. I, at 61.) The precise extent of the zone of exclusion is an ever-moving target, changing almost daily with the ebb and flow of real estate transactions. It is undisputed, however, that much of the City's housing is not available for sale or rent at any one time, and Mr. McGuire's expert testified that some of the available housing stock is in expensive neighborhoods and some is in undeveloped rural areas. The expert testified that 76.8 percent of the parcels "are off limits to people subject to ASORCNA" and that "80 percent of where the people are actually living in the city is off limits to people subject to the statute." (Trial Tr. I, at 46.) Accurately accounting for housing availability for sex offenders is, in short, an unresolvable nightmare for law enforcement. For registrants, who bear the burden of locating such housing under the penalty of several felony offenses should they make the wrong decision, keeping track is impossible, period. Nevertheless, all but three of the more than 430 sex offenders registered in the City of Montgomery have found compliant homes, are grandfathered into non-compliant areas, or no longer reside in the City.

Because Mr. McGuire is homeless, he registers quarterly and weekly with both the Montgomery County Sheriff's Office and the Montgomery City Police Department. The two offices are located five miles apart. On occasion, Mr. McGuire has had to walk as far as twenty miles to register with both jurisdictions.

Before moving to Alabama in 2010, Mr. McGuire was employed as a hair stylist and musician. Since moving to Alabama, ASORCNA has prevented Mr. McGuire from accepting or applying for a number of jobs, including music-related engagements.[7] He is occasionally able to arrange to play in a compliant

zone, for which he is paid $125 per event. As a result of the employment restrictions, Mr. McGuire lives mostly on a fixed income comprised of disability benefits.

Mr. McGuire is subject to other ASORCNA requirements as well. For example, he has had to replace his driver's license with a new ASORCNA-compliant license. On the front of his new license is the inscription "CRIMINAL SEX OFFENDER" in red lettering. Mr. McGuire has also had to limit his travel — a hobby he enjoyed prior to moving to Alabama — because of the three-day travel permit requirement. Applying for the permit requires registration at two jurisdictions for all in-town offenders, homeless or not.

V. CONCLUSIONS OF LAW

A. Proper Defendants

In challenging ASORCNA, Mr. McGuire brought this lawsuit against a number of individuals and governmental entities. The viability of his claims against each Defendant will be addressed in turn.

1. *City of Montgomery, the Mayor, and the Chief of Police*

Mr. McGuire's § 1983 ex post facto claims for injunctive and declaratory relief remain pending against the City of Montgomery, the Mayor in his official capacity, and the Chief of Police in his official capacity. For the reasons that follow, the claims against the City, the Mayor, and the Chief of Police are due to be dismissed.

a. Official-Capacity Suit Against the Mayor and the Chief of Police

For purposes of § 1983, suits against the Mayor and the Chief of Police in their official capacities are suits against the City itself. *See* *McMillian v. Monroe Cnty., Ala.,* 520 U.S. 781, 785 n.2 (1997); *see also* *Cooper v. Dillon,* 403 F.3d 1208, 1215 (11th Cir. 2005) (noting that a § 1983 suit against a municipal police chief is "the same as a suit against the municipality"). Because the City is also a defendant, the § 1983 ex post facto claims against the Mayor and Chief of Police in their official capacities are due to be dismissed as redundant.[8] *See* *Gray v. City of Eufaula,* 31 F. Supp. 2d 957, 965 (M.D. Ala. 1998) (dismissing as redundant a § 1983 official-capacity claim where the plaintiff also brought a § 1983 claim against the city).

b. City of Montgomery

For a city to be liable under § 1983, "the plaintiff has the burden to show that a deprivation of constitutional rights occurred as a result of an official government policy or custom." *Cooper v. Dillon,* 403 F.3d 1208, 1221 (11th Cir. 2005) (defining "custom" and "policy"). "`Only those officials who have final policymaking authority may render the municipality liable under § 1983.'" *Id.* (quoting *Hill v. Clifton,* 74 F.3d 1150, 1152 (11th Cir. 1996)).

In *Cooper,* the Eleventh Circuit addressed whether a city could be held liable under § 1983 for a police chief's enforcement of an unconstitutional state statute. *Id.* at 1222. In that case, the police chief had ordered the arrest of the plaintiff, who was a newspaper publisher, for publishing news articles "disclosing . . . information he obtained as a participant in an internal investigation." *Id.* at 1213. The court determined that the state statute under which the publisher was arrested was "an unconstitutional abridgment of core First Amendment rights," *id.* at 1219, and that "state law demonstrate[d] that [the police chief] was the ultimate policymaker for police procedure" for the city." *Id.* at 1222. Rejecting the police chief's argument that the city could not "be liable for enforcing an unconstitutional *state* statute," the Eleventh Circuit held that the city had "adopt[ed] the unconstitutional proscriptions [of the statute] as its own" by enacting an ordinance that made it unlawful to commit a state-defined offense within the city limits. *Id.* Hence, the

Eleventh Circuit held that the city, "through the actions of [its police chief], adopted a policy that caused the deprivation of [the plaintiff's] constitutional rights which rendered the municipality liable under § 1983." *Id.* at 1223.

Unlike in *Cooper,* Mr. McGuire presents no evidence indicating that a City of Montgomery official has final policy-making authority over the provisions of ASORCNA. Rather, the Alabama Legislature delegated the interstitial policy-making function of ASORCNA to the Director of the Department of Public Safety. Additionally, no evidence has been offered indicating that any City official has discretionary authority over the promulgation of rules associated with ASORCNA, or that any such rules have been promulgated by the City. Because there is no evidence that the City has "consciously chosen [the methods in which ASORCNA has been implemented] from among various alternatives," *City of Oklahoma v. Tuttle,* 471 U.S. 808, 823 (1985), there has been no showing that any of the alleged actions in this case were a result of a *city* custom or policy. Accordingly, the City of Montgomery is due to be dismissed.

2. *State Officials*

Mr. McGuire also seeks prospective injunctive and declaratory relief against the State Attorney General, the Montgomery County Sheriff, and the Alabama Department of Public Safety Director in their official capacities ("State Officials"). As explained in the September 9, 2013 Order (Doc. # 134), these are viable avenues of relief under § 1983. *See generally Summit Med. Assocs., P.C. v. Pryor,* 180 F.3d 1326, 1336 (11th Cir. 1999) (The Eleventh Amendment, by application of the doctrine of *Ex parte Young,* 209 U.S. 123 (1908), does not bar § 1983 official-capacity suits for "*prospective* equitable relief to end *continuing* violations of federal law."). Accordingly, Mr. McGuire's lawsuit proceeds only as to his § 1983 claims seeking to enjoin the State Officials[9] in their official capacities from continuing to enforce an allegedly ex post facto law and for corresponding declaratory relief.

B. Standing

Mr. McGuire challenges ASORCNA's registration, notification, driver's license inscription, and registration-fee requirements, as well as its residency, employment, and travel restrictions. Of those challenges, the State[10] argues that Mr. McGuire lacks standing to challenge the employment and travel restrictions and the registration-fee requirements.[11]

The State argues that, because Mr. McGuire does not have definite plans to travel and has not tried to travel in the recent past, he has suffered no injury with regard to ASORCNA's travel-permit requirement. Similarly, the State argues that, because Mr. McGuire admitted at the hearing that he was not currently seeking employment, he does not have standing to challenge the employment restrictions. Finally, the State contends that Mr. McGuire cannot challenge the registration-fee requirement because his fee has often been waived in light of his "homeless" status. All three of the State's arguments are unpersuasive.

The right to travel is a fundamental right. *United States v. Guest,* 383 U.S. 745, 758 (1966) ("[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution."). Further, a plaintiff need not "first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters his exercise of constitutional rights." *Steffel v. Thompson,* 415 U.S. 452, 459 (1974). Because Mr. McGuire's right to travel is deterred by ASORCNA's travel-permit requirement and corresponding risk of felony convictions, Mr. McGuire has standing to challenge the requirement.

As to employment, while it is true that Mr. McGuire is not currently looking for work, he stated that work in the form of musical engagements often "come[s] to [him]." (Doc. # 251, at 39:13.) There is no question that Mr. McGuire's musical employment has been and will continue to be negatively impacted by ASORCNA. In particular, Mr. McGuire proved that he continues to turn down musical performances because the performances are scheduled in venues located in non-compliant areas. (Doc. # 251, at

25:13-25.) The fact that Mr. McGuire has had to decline offers to work at venues in non-compliant areas confers standing for purposes of challenging ASORCNA's employment restrictions.

Finally, as to the registration-fee requirement, "[a]n allegation of future injury may suffice [for a plaintiff to have standing] if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B. Anthony List v. Driehaus,* 134 S. Ct. 2334, 2341 (2014) (internal quotations omitted). While Mr. McGuire is not paying the fee currently, he is exempt only because he is homeless. (Doc. # 251, at 40:12-14.) Regardless of whether this is a decision made by law enforcement or an adjudication of indigence by a judge, the risk that Mr. McGuire may lose his homeless or indigent status and thus be required to pay the fee is substantial enough to confer standing to challenge the registration-fee requirement. *See, e.g., Blum v. Yaretsky,* 457 U.S. 991, 1000-01 (1982) (finding standing because respondents nursing home remained "free to determine independently that respondents' continued stay at current levels of care [was] not medically necessary," and based on analogous past decisions, the threat of such a decision was "quite realistic").

Accordingly, Mr. McGuire has standing to challenge ASORCNA's registration, notification, driver's license inscription, and registration-fee requirements, as well as its residency, employment, and travel restrictions.

C. Ex Post Facto Challenge

Mr. McGuire's sole remaining claim is that ASORCNA violates the Ex Post Facto Clause of the United States Constitution. The Ex Post Facto Clause "forbids the Congress and the States to enact any law `which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" *Weaver v. Graham,* 450 U.S. 24, 28 (1981) (quoting *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277, 325 (1866)). As the Supreme Court has explained, the Ex Post Facto Clause is but one expression of the "deeply rooted" jurisprudential "presumption against the retroactive application of new laws." *Lynce v. Mathis,* 519, U.S. 433, 439-40 (1997). This "limit[ation] on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects" protects "not only the rich and the powerful, but also the indigent defendant engaged in negotiations that may lead to an acknowledgement of guilt and a suitable punishment." *Id.* at 440 (internal citation omitted). The protection afforded by the Ex Post Facto Clause is limited, however, as the Supreme Court has held that its prohibition "applies only to criminal laws, not to civil regulatory regimes." *United States v. W.B.H.,* 664 F.3d 848, 852 (11th Cir. 2011) (citing *Kansas v. Hendricks,* 521 U.S. 346, 369 (1997)).

Because a civil regulatory regime is not subject to an ex post facto challenge, the issue is whether ASORCNA may fairly be characterized as criminal, imposing a retroactive punishment, or is more properly categorized as civil and nonpunitive. *Id.* The framework for this inquiry is well settled. *Smith v. Doe,* 538 U.S. 84, 92 (2003) (outlining the Court's two-step approach). First, a court must look to legislative intent. If it determines that "the intention of the legislature was to impose punishment, that ends the inquiry," and a plaintiff may proceed with the ex post facto challenge. *Id.* If, however, the legislature intended "to enact a regulatory scheme that is civil and nonpunitive," the court must proceed to step two and determine "whether the statutory scheme is `so punitive either in purpose or effect as to negate'" the Legislature's civil intent. *Id.* (quoting *United States v. Ward,* 448 U.S. 242, 248-49 (1980) (internal quotations and alterations omitted)).

1. *Step One: The Expressed Intent of the Alabama Legislature*

To determine the intent of the Alabama Legislature in enacting ASORCNA, the court is to consider the statute's text and structure, as well as the "[o]ther formal attributes of a legislative enactment, such as the manner of its codification or the enforcement procedures it establishes."[12] *Smith,* 538 U.S. at 92-94. Because "[a] conclusion that the legislature intended to punish would satisfy an ex post facto challenge

without further inquiry into its effects, . . . considerable deference must be accorded to the intent as the legislature stated it." *Id.* at 92-93. Here, the majority of considerations indicate that the Alabama Legislature's express intent was to enact a civil regulatory scheme, not to impose punishment.

First, just as the Supreme Court observed in *Smith v. Doe* — a leading case in which the Court analyzed whether Alaska's sex-offender legislation was criminal or civil — the Alabama Legislature "expressed the objective of the law in the statutory text itself." 538 U.S. at 93 (recognizing that the Alaska Legislature expressed a clear civil intent when it spoke to sex offenders' high recidivism rates and identified public safety as the government's primary motivator). In ASORCNA's legislative findings section, the Legislature "declares that its intent in imposing certain registration, notification, monitoring, and tracking requirements on sex offenders is not to punish registrants but to protect the public and, most importantly, promote child safety." Ala. Code § 15-20A-2(5). And specifically with regard to homeless sex offenders, the statute notes that their increased "mobility" necessitates more frequent monitoring "for the protection of the public." *Id.* § 15-20A-2(3). Because the Alabama Legislature expressly disavowed a penal motivation and, instead, highlighted its concern for public safety,[13] there is no doubt that the Alabama Legislature proffered a civil purpose and indicated its preference for a civil label. *See Smith,* 538 U.S. at 93 ("[C]ourts `must first ask whether the legislature, in establishing the penalizing mechanism, indicated whether expressly or impliedly a preference for one label or the other.'" (quoting *Hudson v. United States,* 522 U.S. 93, 99 (1997))).

Mr. McGuire argues that, based solely on the text of the statute, the Legislature's intent is, at most, ambiguous. As an example of one of ASORCNA's more criminal-like features, Mr. McGuire points out that it is codified in Alabama's criminal procedure code. Additionally, ASORCNA incorporates criminal penalties for enforcement purposes, which could indicate that the statute was intended as a criminal measure. The Court in *Smith,* however, faced similar statutory attributes it considered "open for debate" and still found that Alaska Legislature's purpose in enacting the statute was nonpunitive. *Id.* at 94.

In *Smith,* the Court discussed how the notification provisions of Alaska's sex-offender statute were codified in the state's "Health, Safety, and Housing Code" while the registration provisions were codified in Alaska's criminal procedure code. 538 U.S. at 95. It went on to note, however, that "[t]he location and labels of a statutory provision" are not dispositive factors and recognized that Alaska's Code of Criminal Procedure "contain[ed] many provisions that d[id] not involve criminal punishment, such as the civil procedures for disposing of recovered and seized property." *Id.* Additionally, the fact that Alaska "invoke[d] the criminal process in aid of" its regulatory scheme by providing notice of the act to defendants during their plea colloquies and incorporating criminal penalties, did "not render the statutory scheme itself punitive." *Id.* at 96. Rather, the Court "infer[red] that the legislature envisioned the Act's implementation to be civil and administrative" as it vested the authority to promulgate regulations in an administrative agency and did not include "any of the safeguards associated with the criminal process." *Id.*

Here, while all of ASORCNA is codified within the criminal procedure code, Alabama's criminal procedure code contains many provisions similar to the nonpunitive provisions highlighted in *Smith.* Specifically, Alabama's criminal procedure code contains provisions for "disposing of recovered and seized property [Ala. Code § 15-5-50-65] . . . and laws governing actions for writs of habeas corpus [*Id.* § 15-21-1-34], which under [Alabama] law are `independent civil proceeding[s].'" *Id.; see also Woods v. State,* 87 So. 2d 633, 636 (Ala. 1956) ("It seems to be the general opinion that habeas corpus is a civil, as distinguished from a criminal, remedy or proceeding, regardless of whether the prisoner is detained under civil or criminal process."). Further, other provisions within the criminal procedure code do not involve criminal punishment, such as procedures for using audio-video communications during criminal pre-trial proceedings, Ala. Code § 15-26-1-6; laws protecting child victims and witnesses in prosecutions for sexual offenses and exploitations involving children, *id.* §§ 15-25-1-6, -30-40; and laws governing the rights of crime victims generally, *id.* §§ 15-23-1-23, -40-46, -60-84, -100-04. Thus, as in *Smith,* the codification of ASORCNA within the criminal procedure code "is not sufficient to support a conclusion that the legislative intent was punitive." 538 U.S. at 95.

Additionally, ASORCNA's enforcement provisions do not support a conclusion that the Legislature's intent was punitive. No procedural safeguards associated with criminal law are included alongside ASORCNA's restrictions or requirements. Further, ASORCNA does not mandate any procedures, but rather vests the Alabama Department of Public Safety with the "authority to promulgate any rules as are necessary to implement and enforce" the Act. Ala. Code § 15-20-44. Accordingly, the fact that ASORCNA relies on criminal penalties for the Act's enforcement does not, in and of itself, indicate a legislative intent to create a punitive scheme.

In light of the guidance provided by the Supreme Court in *Smith,* the court finds that the Alabama Legislature clearly expressed its nonpunitive intent and ASORCNA's other formal attributes do not sufficiently discount the deference that must be given to the Legislature's stated intent. As a result, the second step of the analysis must be examined.

2. *Second Step: Effects Analysis*

If the analysis ended with the Legislature's stated intent, the legislative branch would have pitched a shutout to the judicial branch. But the Supreme Court has recognized for centuries that what something is *called* and what something actually *is* may be two different things. Just so, in double jeopardy and ex post facto law, allowance is made for guardedly going behind expressed legislative intent to the reality of a legislatively created thing by assessing the exposed purpose or effects of the thing. Hence, we have the ancient observation that "[t]he Constitution deals with substance not shadows. Its inhibition was levelled at the *thing,* not the *name.* It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however distinguished." *Weaver v. Graham,* 450 U.S. 24, 28 (1981) (quoting *Cummings v. Missouri,* 71 U.S. (4 Wall.) 277, 325 (1866)) (emphasis added). Thus, in the second step of the ex post facto analysis, the focus turns to whether this scheme is so punitive in purpose or effect as to negate the State's declared nonpunitive intent.

Admittedly, "[b]ecause we ordinarily defer to the legislature's stated intent, *only the clearest proof* will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty." *W.B.H.,* 664 F.3d at 855 (emphasis in original) (quoting *Smith,* 538 U.S. at 92). The *clearest proof* standard is a heavy burden to carry: "some evidence will not do; substantial evidence will not do; and a preponderance of the evidence will not do. `[O]nly the clearest proof' will do." *Id.* (quoting *Smith,* 538 U.S. at 92).

Illustrating, however, that courts are not entirely shut out from an inquiry that goes beyond a legislature's stated intent, the Supreme Court in *Smith* applied the *Mendoza-Martinez* "guideposts." 538 U.S. at 97 (citing *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168-69 (1963)). The *Mendoza-Martinez* factors, "which migrated into our ex post facto case law from double jeopardy jurisprudence," call on a court to analyze "whether, in its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection to a nonpunitive purpose; or is excessive with respect to this purpose." *Smith,* 538 U.S. at 97. These factors are only "guideposts" and are "neither exhaustive nor dispositive"; "[n]o one factor should be considered controlling as they `may often point in differing directions.'" *Hudson v. United States,* 522 U.S. 93, 101 (1997) (quoting *Mendoza-Martinez,* 372 U.S. at 169). These factors are useful and will be applied in the following analysis.

a. The Extent to Which Effects Are Analyzed

As a preliminary matter, the court must determine the extent to which ASORCNA's effects may be analyzed. The parties have taken diametrically opposed stands on this point. Mr. McGuire advocates for the consideration of each of ASORCNA's effects, including those felt by only one or two offenders at most, while Defendants argue that ASORCNA's implementation (a term used, in this context, synonymously with "effects") may not be considered at all in light of the requirement that a court look only

to the statute on its face.[14] The court declines to follow either approach, rather, finding sufficient guidance in *Smith* and other Supreme Court precedent to establish the level of consideration necessary.

As has been discussed, in *Smith,* the United States Supreme Court determined that the Alaska Sex Offender Registration Act did not violate the Ex Post Facto Clause of the Constitution.[15] The Alaska statute required a sex offender to register with law enforcement and required law enforcement to notify community members of the sex offender's presence. Of particular importance, the majority examined the impact of the state's dissemination of registrants' information over the internet, despite the absence of any provision detailing how to make registrants' information public within the statute. Specifically, the Court "acknowledged that notice of a criminal conviction subjects the offender to public shame, [with] the humiliation increasing in proportion to the extent of the publicity," but, because "[t]he purpose and the principal effect of notification are to inform the public for its own safety, [and] not to humiliate the offender, . . . the attendant humiliation [was] but a collateral consequence of a valid regulation." *Id.* The Court examined these *general* effects on offenders even though "[t]he Act [did] not specify the means by which the registry information [was to] be made public." *Id.* at 91.[16]

There is little difference between implementation of the internet-dissemination scheme in *Smith* and the Department of Public Safety's implementation of the travel-permit and license-notification requirements under ASORCNA. First, both statutes provide a grant of regulatory authority to the State's Department of Public Safety. *Id.* at 96 (stating that the Alaska Act "vest[ed] the authority to promulgate implementing regulations with the Alaska Department of Public Safety"); Ala. Code § 15-20-44(c) ("The Director of the Department of Public Safety shall have the authority to promulgate any new rules as are necessary to implement and enforce [ASORCNA]."). Second, both *Smith* and the present analysis involve an examination of the Department of Public Safety's chosen means of implementing a provision within the statute. *See* *Smith,* 538 U.S. at 90 (noting that the Alaska statute required certain information, including offenders' names and addresses, be made available to the public); Ala. Code § 15-20A-15 (establishing travel restrictions); *id.* § 15-20A-18 (establishing identification requirements). Based on the statutory delegation of regulatory authority and the specific provision in the statute under which the regulatory authority had been exercised, the *Smith* Court analyzed the actual means used to make the non-confidential material public, and this court will conduct a similar analysis regarding ASORCNA's travel-permit and license-notification requirements.

In contrast to the effects associated with the implementation of travel restrictions and license-notification requirements, the idiosyncratic effects[17] alleged by Mr. McGuire may not be used alone to uphold or defeat an ex post facto challenge. Consideration of such idiosyncratic effects alone has been expressly rejected by the Supreme Court. In *Seling v. Young,* the Court favorably quoted *Hudson v. United* States, in which it "expressly disapproved of evaluating the civil nature of an Act by reference to the effect that Act ha[d] on a single individual." 531 U.S. 250, 262 (2001). The *Seling* Court went on to note that courts must instead "evaluate the question by reference to a variety of factors considered in relation to the statute on its face." *Id.* (internal quotation marks omitted).

The *Seling* case signals why idiosyncratic effects cannot be used alone in upholding a challenge. In that case, the Court determined that a statute that had already been characterized as facially nonpunitive could not be rendered punitive solely by its application to a single individual. To hold otherwise, according to the Court, would be to "invite an end run around the [State] Supreme Court's [earlier] decision that the Act [was] civil." *Id.* at 264. Based on that analysis, it would be illogical to allow such a result in this case solely because Mr. McGuire presents the right set of idiosyncratic effects in ASORCNA's challenge before this court. If this were allowed, cases presenting idiosyncratic effects would have disparate results from those examining purely general effects.

That said, idiosyncratic effects have been used in the negative to bolster a finding that a statute does not violate the Ex Post Facto Clause. For example, the Supreme Court in *Hendricks* addressed the specific confinement to which the plaintiff in that case had been subjected by stating that, "[a]lthough the

treatment program initially offered Hendricks may have seemed somewhat meager, it must be remembered that he was the first person committed under the Act." 521 U.S. at 367-68. This statement acknowledged the idiosyncratic subpar treatment that the plaintiff received and cast the treatment as having only a minor impact on the overall analysis. Further, and as an additional example, the Third Circuit noted idiosyncratic effects in rejecting an ex post facto challenge to a sex offender registration scheme, stating that, "[a]lthough the record [in that case] reflect[ed] that personal injury and property damage from private violence ha[d] occurred, it also reflect[ed] that [those] occurrences [were] relatively rare." *E.B. v. Verniero,* 119 F.3d 1077, 1104 (3d Cir. 1997). By highlighting the idiosyncratic nature of specific persons' experiences, the *Hendricks* and *Verniero* courts provided additional support for rejecting the plaintiffs' ex post facto challenges.

The court finds that idiosyncratic effects may not be used alone to uphold or defeat Mr. McGuire's ex post facto challenge. Accordingly, the court will confine its consideration of such effects, *e.g.,* the "zones of exclusion" — Mr. McGuire's particular experience with homelessness, and Montgomery's lack of affordable or vacant housing — only to the extent that they explain or describe general effects flowing from the face or necessary operation of the statutory scheme.

A related but distinct consideration is the proper scope and focus of the examination of effects. As *Smith* pointed out, "we must . . . examine. . . the *statutory scheme*. . . ." 538 U.S. at 92 (emphasis added). This instruction is particularly important in the case of ASORCNA because, to put it bluntly, it is the most comprehensive scheme, by far, in the United States. It is unique and novel in scope. No other state combines in-person registration, community notification, driver's license branding, residency restrictions, employment restrictions, travel restrictions, association with related children restrictions, weekly registration for the homeless, dual registration for all offenders in municipalities, and dual weekly registration for all homeless offenders in municipalities (totaling up to 112 in-person registrations per year), undergirded by 115 felonious ways to violate the statutory scheme, life application, retroactive to infinity or eternity (whichever first occurs), and all of it (except very limited exceptions for relatively minor offenses) without risk assessments for general sex offenders (non-juvenile and non-predatory).

Alabama's scheme goes miles beyond the minimum federal requirements of the Sex Offender Registration Act ("SORNA"), recently reviewed in this Circuit in *United States v. W.B.H. See* 664 F.3d 848 (11th Cir. 2011). Many courts across the country have analyzed and ruled upon individual components that are included in Alabama's scheme, and in isolation, most have been upheld. But no court has ever been faced with analyzing *in toto* the general effects of a scheme this expansive.[18] Realizing this task early on, and in consideration of the court's reading of the law, the parties were notified that the court would examine the cumulative effects of the scheme as a whole to determine if the effects overrode stated intent.

Defendants objected to this approach. In fact, the State in particular objected to any trial on the facts: "[W]e believe this question is a purely legal one, not susceptible to courtroom fact-finding. . . . [W]e therefore object to holding a trial at all on the ground that it is unnecessary." (Trial Tr. I, at 18.) The court could find no controlling law holding that the "clearest proof" standard applies only to legislative facts. Because a burden of proof suggests evidence, and the court knowing of no way to gather facts about the general effects caused by the scheme on its face, nor a way to assess "*how effects of the Act are felt by those subject to it* . . .", *Smith,* 538 U.S. at 99-100 (assessing the affirmative disability or restraint prong) (emphasis added), the objections of the State were overruled at trial.

The State also took the position at trial that the effects must be examined exclusively as to each provision individually, instead of cumulatively:

THE COURT: Are you aware of any law in the United States that has as many effects on an offender as the Alabama statute?

MR. PARKER: I am unaware only because I have not spent much time researching these statutes. And I understand the plaintiffs have a chart.[19] We . . . obviously rely on the Court to do the research. It's time-consuming. I don't think it's necessary for purposes of this case.

THE COURT: You think that . . . because the State Legislature says it, that they can create unlimited effects and it not be excessive?

MR. PARKER: No, Your Honor. We — the question, again, is whether the regulatory means chosen are reasonable in light of the nonpunitive objective.

THE COURT: That doesn't answer the excessive [sic] question.

MR. PARKER: Well, what I'm trying to say, Your Honor, is if you take each of these provisions and look at them, they each are reasonable in light of the regulatory means chosen.

THE COURT: So then you can have unlimited [effects on offenders] as long as each one stands alone as individual [sic].

MR. PARKER: Yes. If that's your question, yes, that's how I see the law.

(Trial Tr. I, at 25-26.) The court was perplexed by the State's assertion that unlimited intersecting provisions and their effects would be constitutional. First, this position would effectively bar courts from truly analyzing an act's effects. What would there be for a court to do, then, but unquestioningly take the legislature at its word with regard to intent? Second, taken to its extreme, even daily double-registration of city-dwelling homeless offenders — totaling 730 in-person registrations a year per homeless offender — would be, under this analysis, perfectly constitutional. The argument ends in absurd results.

Wishing to avoid absurdity if at all possible, the court has settled on a blended analysis of the effects of ASORCNA. First, each of the relevant statutory provisions will be examined in light of the *Mendoza-Martinez* factors. Second, the scheme as a whole will be assessed for purpose and effects, taking into particular account its effect on homeless Alabama sex offenders. This is so because the Constitution deals in substance not shadows, the nature of things, not just the name of things.

With these analytical contours in mind, the court now turns to the *Mendoza-Martinez* guideposts.

b. Whether, in Their Necessary Operation, ASORCNA's Provisions Have Been Regarded in Our History and Traditions as Punishment

Mr. McGuire argues that ASORCNA's requirements resemble various traditional forms of punishment. Each suggested similarity will be addressed in turn.

i. Banishment

Mr. McGuire contends that ASORCNA's residency restrictions effectively create an "enormous zone of banishment." (Doc. # 256, at 9.) The Supreme Court in *Smith* recognized banishment as a traditional form of colonial punishment. 538 U.S. at 98. Since then several courts have had the opportunity to explore how sex offender residency restrictions compare to the historical practice. *See Doe v. Miller,* 405 F.3d 700, 719 (8th Cir. 2005) (differentiating residency restrictions from the practice of banishment); *Wallace v. New York,* No. 12-CV-5866, 2014 WL 4243564, at *30 (E.D.N.Y. Aug. 28, 2014) (same); *Doe v. Baker,* No. 1:05-CV-2265, 2006 WL 905368, *3 (N.D. Ga. Apr. 5, 2006) (same). In comparing the historical practice of banishment to Iowa's sex offender residency restrictions, the Eighth Circuit explained that "banished offenders historically could not `return to their original community.'" *Miller,* 405 F.3d at 719. Similarly, the Court in *Smith* noted that "the banishment of an offender expelled him from the community." 538 U.S. at 98.

As Mr. McGuire has testified in this case, he is not barred from frequenting any part of the city during the day. (Doc. # 256, at 13.) Rather, the restrictions only limit the places in which an offender can establish a residence or apply for and accept employment. There is no complete exile from the City of Montgomery or from any other location within Alabama. Thus, while Mr. McGuire is able to offer a troubling account of his inability to find viable housing, he cannot show that he has been the subject of banishment in its historical form.

ii. Public Shaming

Mr. McGuire next argues that two of ASORCNA's provisions resemble the traditional punishment of public shaming. First, Mr. McGuire asserts that by requiring the front of every registrant driver's license to be branded with the words "CRIMINAL SEX OFFENDER" in all capital, red letters, the State is subjecting registrants to "public embarrassment, humiliation, and shaming."[20] (Doc. # 256, at 25.) In *Smith,* the Supreme Court explored the historical practice of public shaming in light of Alaska's sex offender community notification provisions and recognized that "[s]ome colonial punishments indeed were meant to inflict public disgrace." 538 U.S. at 98. However, the Court narrowed its description of public shaming, noting that such punishments were historically carried out by holding "the person up before his fellow citizens for face-to-face shaming." *Id.*

The red-lettered labelling of registrant driver's licenses is no doubt an aggressive provision. Mr. McGuire illustrated how the required red lettering on his driver's license leads to shame and embarrassment in ordinary, everyday encounters with the public:

ANSWER: Well, first of all, without — just having the license itself is a reminder every day that you're being punished. You're being — I don't know if the correct word is "ostracized." But with that said, I had an experience just recently at a Dollar General Store. I used my credit card to purchase some groceries; and the clerk asked me for my driver's license, so I showed it to him. And he held it up to compare it with my credit card, and he looked at it and he looked at me again. And he handed it back to me. He said, how long have you been locked up? And I found that just to be repulsive. I felt very ashamed, very embarrassed.

QUESTION: In what kinds of situations do other folks have to look at your driver's license?

ANSWER: Cashing checks. Or I might pick up some items that my wife would order on line from Walmart, and I have to go to Walmart and show my identification.

QUESTION: In fact, you've had to show your driver's license here in the past three days to get into this very building; isn't that right, Mr. McGuire?

ANSWER: That's correct.

(Trial Tr. III, at 35.) In fact, the only other red lettering that appears on an Alabama driver's license is the State's name.

However, important differences exist between ASORCNA's license-labelling requirement and the "scarlet-letter-type punishment" referenced by the Eleventh Circuit in *W.B.H.* 664 F.3d at 855. Offenders have some degree of control over when and where to present an identification, unlike those during colonial times who had their transgressions aired publicly at all times, without any power to contain or control the extent or timing of the humiliation. Thus, while there may be other constitutional concerns with requiring registrants to carry a branded license, the court cannot say that the license-labelling provision is closely analogous to the historical practice of public shaming.

Mr. McGuire also contends that ASORCNA's community-notification provisions effectively amount to public shaming. Both the Supreme Court and the Eleventh Circuit have assessed the use of online, sex-offender registries in light of the traditional practice of public shaming, and each found sufficient differences between the historical punishment and modern registry regimes. *Smith,* 538 U.S. at 98 ("[T]he stigma of Alaska's Megan Laws results not from public display or ridicule and shaming but from the dissemination of accurate information about a criminal record, most of which is already public."); *W.B.H.* 664 F.3d at 855 ("The registries do not `stage a direct confrontation between the offender and the public.'"). Mr. McGuire, however, argues that ASORCNA far exceeds passive dissemination of truthful information, as authorized by *Smith* and *W.B.H.,* because ASORCNA requires law-enforcement officers to notify every resident within a specific distance that a registrant has moved into the neighborhood, as well as every school and childcare facility in a three-mile radius of the registrant's residency. Mr. McGuire notes that alongside the notification, each applicable party is also provided his picture, address, and a physical description.

It is true that the Court in *Smith* assessed a community-notification scheme that existed entirely online, with interested residents needing to take the "initial step" to search out information on registered sex offenders via the state's website. In the case of ASORCNA, members of law enforcement are required to actively disseminate community-notification flyers to geographically applicable residences, schools, and childcare facilities. But, just as in Alaska, the stigma that results from ASORCNA's community-notification scheme flows from the "dissemination of accurate information about a criminal record, most of which is already public" and not from organized episodes of "face-to-face shaming." 538 U.S. at 98. Additionally, the Court in *W.B.H.* expressly stated that "registries do not `stage direct confrontation between the offender and the public'" and the same is true of the dissemination of flyers. *W.B.H.,* 664 F.3d at 855. Accordingly, because ASORCNA's community-notification flyers, like the registries in *Smith* and *W.B.H.,* serve to inform the applicable public of truthful information in furtherance of public safety and do not initiate public displays of shaming, any comparison to the historical punishment of public shaming is attenuated.

iii. Parole and Probation

Mr. McGuire also contends that the requirements imposed by ASORCNA resemble the traditional punishments of parole and probation. To support his assertion, Mr. McGuire relies on a single Ohio district court case, *Mikaloff v. Walsh.*[21] No. 5:06-CV-96, 2007 WL 2572268 (N.D. Ohio Sept. 4, 2007). In *Mikaloff,* the court found Ohio's sex offender residency restriction to be sufficiently "analogous to the residency restrictions typical to probation and parole" because it gave law enforcement a perpetual, blanket veto power over registrants' housing and did not provide a grandfather clause. *Id.* at *9 (explaining that "subjecting a sex offender to constant ouster from his or her home seem[ed like] a significant deprivation of liberty and property interests," because "[i]t sentenced [him or her] to a life of transience [and] forc[ed] them to become nomads").

Mr. McGuire alleges that ASORCNA's requirements are equally analogous to parole and probation as the provision analyzed in *Mikaloff.* Specifically, he argues that ASORCNA gives Alabama's law enforcement veto power over where a sex offender may reside, requires registrants to maintain constant contact with law enforcement, provides for criminal punishment upon violation, and restricts employment and travel. Two important differences exist, however, between the residency restriction dissected in *Mikaloff* and ASORCNA's provisions. First, ASORCNA's residency restrictions do not create the risk that offenders will be "sentence[d] . . . to a life of transience" as Judge Gwin feared was possible in *Mikaloff.* 2007 WL 2572268, at *10. Unlike Ohio's residency restriction, ASORCNA explicitly states that "[c]hanges to property within 2,000 feet of a registered address of an adult sex offender which occur after the adult sex offender establishes residency shall not form the basis for finding that the adult sex offender is in violation" of the residency restrictions. Ala. Code § 15-20A-11(c). Second, while ASORCNA openly restricts a registrant's housing options and requires registrants to notify authorities of residential changes, no requirement exists that the offender must seek law-enforcement permission before making residency

decisions. As a result, law enforcement is not given the same discretionary "veto power" that was described in *Mikaloff.*[22]

Additionally, the Supreme Court provided some analytical assistance when it compared Alaska's registration scheme to probation and supervised release for the purpose of determining whether Alaska's statute imposed an affirmative restraint on sex offenders.[23] The Court noted that "[p]robation and supervised release entail a series of mandatory conditions and allow the supervising officer to seek the revocation of probation or release in the case of infraction," while Alaska registrants are free from direct supervision and any failure to comply with the reporting requirements would result in a criminal proceeding "separate from the individual's original offense." *Smith,* 538 U.S. at 101-02. Like the enforcement features in *Smith,* any prosecution for violating ASORCNA would occur in a proceeding entirely separate from the registrant's original offense. Indeed, "unlike the restraints imposed on those who are on probation or supervised release, [ASORCNA's requirements] are not conditions of release the violation of which could result in revocation and imposition of imprisonment without new criminal charges and another trial." *W.B.H.,* 664 F.3d at 857. This distinction, as highlighted by the Supreme Court, coupled with the aforementioned differences between ASORCNA and the *Milakoff* scheme, necessitates a finding that ASORCNA is insufficiently similar to parole and probation.

iv. Fines

Lastly, Mr. McGuire asserts that ASORCNA's registration fees are similar to the traditional punishment of fines. For support, Mr. McGuire relies on *Doe v. Raemisch,* 895 F. Supp. 2d 897 (E.D. Wisc. 2013), in which a $100 annual registration fee was determined to be a punitive fine that violated the Ex Post Facto Clause. According to the court in that case, although the funds were assessed "to offset the costs of monitoring the offenders," that nonpunitive purpose did "not eliminate the penal aspect of the assessment," and "singl[ing] out individuals who have prior convictions for sexual assaults as the sole source of such funds [could] only be seen as punitive." *Id.* at 909.

The Seventh Circuit, however, reversed the district court on that point, stating that:

[t]he burden of proving that [a registration fee] is a fine is on the plaintiffs, and since they [had] presented no evidence that [the registration fee] was intended as a fine, they [could not] get to first base without evidence that [the fee] was grossly disproportionate to the annual cost of keeping track of a sex offender registrant—and they have presented no evidence of that either.

Mueller v. Raemisch, 740 F.3d 1128, 1134 (7th Cir. 2014) (internal citations omitted). The Seventh Circuit went on note that "Wisconsin's $100 fee [was] the same as that of a neighboring state, Illinois, albeit higher than the fees charged by Idaho ($80) and Massachusetts ($75)." *Id.* Further, it stated that "[t]he state provides a service to the law-abiding public by maintaining a sex-offender registry, but there would be no service and hence no expense were there no sex offenders." *Id.* at 1135. Thus, because the registrants "are responsible for the expense, there is nothing punitive about requiring them to defray it." *Id.*

The *Mueller* court's reasoning is persuasive. Alabama assesses a $10 fee per quarterly registration, thus establishing a baseline fee of $40 per year. Ala. Code § 15-20A-22. Admittedly, if the registrant lives in a municipality, then the registrant will have to pay the fee to both the local police department and the sheriff's department, thus amounting to $80 per year. *Id.* And, as Mr. McGuire points out, if the registrant happens to work, live, and attend school at the same time in different counties, the registrant would presumably face a potential annual assessment of $240.[24] Despite the potential burden created by these fees, however, Mr. McGuire has presented no evidence suggesting that the fees are "so high that [they] must be . . . fine[s]." *Mueller,* 740 F.3d at 1134. In addition, the *Mueller* court's reasoning that "there is nothing punitive about requiring [offenders] to defray" costs for which the offenders are responsible is

persuasive. *Id.* at 1135. Because ASORCNA's fees are used to offset the costs of the regulatory scheme, they do not resemble the traditional punishment of fines.

In summary, while several of ASORCNA's provisions share features with some of our nation's traditional forms of punishment, this analysis has indicated that important variances also exist between ASORCNA's provisions and historical punishments. Ultimately, no ASORCNA provision is sufficiently analogous to an early form of punishment. Thus, the first factor points to a finding that ASORCNA is nonpunitive.

c. Whether, in Their Necessary Operation, ASORCNA's Provisions

Impose an Affirmative Disability or Restraint

The second guidepost requires a court to "consider whether [an act] subjects [its challenger] to an `affirmative disability or restraint.'" *Smith,* 538 U.S. at 100 (quoting *Mendoza-Martinez,* 372 U.S. at 168). At this stage, a court examines "how the effects of the [a]ct are felt by those subject to it." *Id.* at 100-01. The Supreme Court has noted that, "[i]f the disability or restraint is minor and indirect, its effects are unlikely to be punitive." *Id.* at 101.

When evaluating the effects of Alaska's act, the Supreme Court in *Smith* began by noting that Alaska's sex offenders were not physically restrained in any way, thereby distinguishing the statutory scheme from the "paradigmatic affirmative disability or restraint" — imprisonment. *Id.* In fact, the Court noted that the use of a public registry did not impose an affirmative restraint because it did not "restrain activities sex offenders may pursue" and instead left "them free to change jobs and residences." *Id.* Additionally, the act did not impose an affirmative disability in requiring registrants to provide periodic updates and notifications because there was nothing in the act's text that required the updates to be made in person. *Id.*

In *W.B.H.,* the Eleventh Circuit evaluated SORNA's federal registration requirements in light of the guidance provided by the Supreme Court in *Smith,* and ultimately held that, as in *Smith,* SORNA "impose[d] only a minor and indirect disability or restraint on adult sex offenders." *W.B.H.,* 664 F.3d at 856-57. Like Alaska's statute, the court noted that "SORNA does not prohibit changes, it only requires that changes be reported." *Id.* at 857. Further, the Eleventh Circuit expressly rejected the idea that *Smith* stood for the notion that in-person updates and notifications would amount to a per se affirmative disability. *Id.* Specifically, the court explained that "[a]ppearing in person may be more inconvenient" but the increased inconvenience did not make the requirement punitive. *Id.*

Mr. McGuire contends that ASORCNA's residency, employment, and travel restrictions, as well as its in-person registration requirements, go beyond the provisions analyzed in *Smith* and *W.B.H.* and impose affirmative disabilities or restraints on registrants.[25] In large part, the court agrees and finds that ASORCNA's residency, employment, and travel restrictions, as well as its in-person registration requirements, rise beyond the minor and indirect impositions examined in *Smith* and *W.B.H.* Accordingly, the second guidepost, unlike the first, weighs in favor of the conclusion that certain ASORCNA provisions are "`so punitive either in purpose or effect' [as] to override [Alabama's] intent that it be a civil regulatory statute." *Id.* at 858 (quoting *Smith,* 538 U.S. at 92).

While the Supreme Court in *Smith* noted that Alaska's requirements had not "led to substantial occupational or housing disadvantages for former sex offenders that would not have otherwise occurred," that is not the case here. 538 U.S. at 100. Rather, like the plaintiffs in *Doe v. Miller,* Mr. McGuire has shown that he would live with his wife and not under a bridge absent ASORCNA's residency restrictions. *See* 405 F.3d at 721. ("Although the [plaintiffs] did not present much evidence about housing within restricted areas that would have been available to them absent the statute, they did show that some sex offenders would have lived with spouses or parents in the restricted zones. . . ."). In *Miller,* the Eighth

Circuit considered the degree of the restraint on the sex offenders' residency options to conclude that Iowa's statute did "impose an element of affirmative disability or restraint." *Id.*[26]

Here, ASORCNA also bars offenders from living with most minors, including nieces and nephews, regardless of whether an offender's past crime involved children as victims. Moreover, Mr. McGuire testified that he has been forced to turn down employment at various venues because of their location within restricted zones.[27] Additionally, ASORCNA's requirement that an offender seek a permit before traveling restrains him or her from traveling spontaneously. These are direct, non-minor restraints and disabilities felt by those subject to them.

To keep idiosyncratic effects in their proper perspective, not *every* registrant will feel *every* restraint of the statute in the same way as *all* other registrants. However, Mr. McGuire's experience is illustrative of the general effects of ASORCNA's scheme in its necessary operation. For example, no registrant can stay, even one night, in a residence with minor nieces or nephews or in the home of a child or parent that is located in a restricted area. It is therefore reasonable to conclude that most registrants have been forced to deem certain residential options off limits in light of ASORCNA. Similarly, every registrant is barred from accepting employment within 2,000 feet of a school or daycare. Accordingly, every registrant has had the number of potential employers diminished based on nothing more than geographic proximity.

As to Mr. McGuire's contention that ASORCNA's in-person registration requirements impose an affirmative disability, *W.B.H.* forecloses the argument that an in-person registration requirement per se is an affirmative disability or restraint. But *W.B.H.* does not indicate that in-person registration, if required frequently enough, could never amount to an affirmative disability or restraint. While the court in *W.B.H.* analyzed the federal statutory regime that requires in-person registration on the same quarterly basis as ASORCNA, it did not speak to a statutory scheme that requires in-person, weekly dual registrations for in-town homeless registrants. Such a requirement amounts to 112 required registrations per year, when one includes the base-line quarterly registrations.[28] If requiring 112 in-person registrations per year does not amount to an affirmative disability, it is difficult to envision what, besides incarceration, would qualify.

As a result, the court finds that the residency, employment, and travel restrictions generally, as well as dual weekly registrations for in-town homeless registrants specifically, are affirmative disabilities and restraints, and thus this factor points in favor of finding those restrictions punitive.

d. Whether, in Their Necessary Operation, ASORCNA's Provisions Promote the Traditional Aims of Punishment

In cases challenging sex offender regulations, "traditional aims of punishment" means almost exclusively the concepts of deterrence[29]and retribution. The evidence, particularly the expert testimony presented by each side, was sharply, indeed irrevocably, contradictory. In the end, Mr. McGuire proved only one thing by the clearest proof regarding recidivism, namely, that nothing is clear. This lack of clarity was the foundation of the testimony of the expert witness for the state, Dr. Richard McCleary:

QUESTION: In your opinion, based on the research, do sex offender registration and notification laws have a general deterrent effect?

ANSWER: . . . . I'm an agnostic on it. . . . I've read everything that's out there. It's just too — too ambiguous to draw any conclusion from.

(Trial Tr. III, at 152.) Mr. McGuire's expert, Dr. James J. Prescott, testified that being listed on a sex offender registry actually *increases* recidivism. (Trial Tr. I, at 138.)

The confusion in the academy (social sciences, criminology, and even economics and law) points to the unreliability, and perhaps falsity, of some prominent statements in high-profile cases:

There are potentially other false messages that are so deeply entrenched in sex offender legislation that it will be difficult to lessen their impact or excise the sentiments from the jurisprudence. First is the claim that sex offenders recidivate in larger numbers than other offenders. In *Doe v. Poritz* [662 A.2d 367 (N.J. 1995)], the New Jersey Supreme Court endorsed studies that reported recidivism rates of sex offenders at upwards of 40% to 52%. The United States Supreme Court applied the *Poritz* gloss in [*Smith*] to conclude that recidivism posed by sex offenders generally is frighteningly high. Yet, Bureau of Justice Statistics for roughly the same timeframe as *Poritz* do not support the conclusion that sex offenders recidivate more than non-sex offenders. Of the 9,691 male sex offenders released from prison in 15 States in 1994, 5.3% were rearrested for a new sex crime within 3 years of release. In fact, sex offenders were less likely than non-sex offenders to be rearrested for any offense-43 percent of sex offenders versus 68 percent of non-sex offenders. And in a separate study detailing 272,111 former inmates who were discharged in 1994, the lowest re-arrest rates were for those previously in prison for homicide or rape, while the highest re-offense rates were for those previously convicted of property crimes.

Catherine L. Carpenter, *Legislative Epidemics: A Cautionary Tale of Criminal Laws that Have Swept the Country,* 58 Buff. L. Rev. 1, 57-58 (2010) (internal citations and quotations omitted).

In any event, Mr. McGuire did not meet his high burden required to establish that ASORCNA promotes the traditional aims of punishment. A review of the specific arguments of the parties confirms that conclusion.

Mr. McGuire argues that "[o]ne of ASORCNA's key objectives is to deter crime" while the "ASORCNA residency and other restrictions promote the traditional aim of retribution." (Doc. # 171, at 47.) In particular, based on the statute's language, only ASORCNA's registration and notification requirements act as a deterrent. Thus, the fact that "ASORCNA imposes additional residency, employment, and travel *restrictions* on registrants indiscriminately" has the sole function of "exact[ing] justice on the unpopular class [of sex offenders]." (Doc. # 171, at 49 (emphasis in original).) Because the additional restrictions are indiscriminate and "do nothing to affect future conduct or solve problems," those restrictions are retributive. (Doc. # 171, at 49.) Moreover, Mr. McGuire argues that ASORCNA's lack of a risk assessment, lack of a time limit, and inclusion of 115 felonies evidence a retributive purpose. (Doc. # 171, at 20, 49.) Further, Mr. McGuire argues that the relief provisions in ASORCNA promote retribution because "every provision under which a registrant may seek relief requires engagement of the prosecuting attorney in the jurisdiction where the registrant's sex crime was adjudicated, and for which he became subject to the statute," and because "ASORCNA mandates the state contact the victim of the registrant's original crime" before granting relief, "despite the fact that ASORCNA prohibits registrants from any contact with his or her victim." (Doc. # 171, at 49-50.) Finally, "[r]egistrants . . . are punished in ways they never were before [under ASORCNA]—even worse than parole," because, for example, Mr. McGuire "is forbidden from living with his own nieces, a punishment not in place while he was on parole." (Doc. # 256, at 46.)[30]

In response, the State argues that "the Legislature did not express a purpose of *general* deterrence as might motivate the passage of a criminal statute," but instead "spoke only of a goal to `deter *sex offenders* from future crimes.'" (Doc. # 167, at 42 (emphasis in original) (quoting Ala. Code § 15-20A-2(1)).) Indeed, according to the State's expert, "`[c]ompared to the threat of long-term incarceration, it seems unlikely that the incremental pain threated by a [sex-offender registration and notification] law . . . would weigh heavily in an individual's decision to commit (or not commit) a sex crime,'" and thus "`there is no theoretical reason to believe that [sex-offender registration and notification] laws have general deterrent effects.'" (Doc. # 263, at 20 (quoting Doc. # 166-21 at 29).) Further, the State argues that "the Court was correct to hold [in its opinion at the Motion-to-Dismiss stage] that `a deterrent purpose will not necessarily render a registration requirement punitive, and an incidental deterrent effect will not do so either.'" (Doc. # 167, at 42 (quoting Doc. # 112, at 17).) Thus, "to whatever extent ASORCNA promotes deterrence, that fact cannot supply the `clearest proof' McGuire needs to prevail." (Doc. # 167, at 42.)

Finally, the State contends that "McGuire would say that ASORCNA is retributive for the . . . reason that it regulates sex offenders as a single class, not based on the risk that they might individually pose." (Doc. # 167, at 43.) To the State, this anticipated argument is the opposite of *Smith,* where the plaintiff "argued that Alaska's law was retributive precisely because the length of the reporting requirement `appear[ed] to be measured by the extent of the wrongdoing, not by the extent of the risk posed.'" (Doc. # 167, at 43 (alteration in original) (quoting *Smith,* 538 U.S. at 102).) The State notes that the *Smith* Court "rejected this argument, concluding that `broad categories [of sex offender classification,] . . . and the corresponding length of the reporting requirement, are reasonably related to the danger of recidivism, and [were therefore] consistent with the regulatory objective.'" (Doc. # 167, at 43 (alterations in original) (quoting *Smith,* 538 U.S. at 102).) Thus, the State contends, "[a]rguments like this, of the `heads-I-win-tails-you-lose' variety, just underscore the importance of deferring to the legislature's stated purpose, and do not deserve to be taken seriously given their ease of manipulation." (Doc. # 167, at 43.)

The court finds that, to the extent there is some deterrent purpose in the statute, that deterrent purpose is similar to "[a]ny number of governmental programs [that] might deter crime without imposing punishment." *Smith,* 538 U.S. at 102. Further, the court finds that Mr. McGuire has failed in his burden to prove that the restriction, felony, and relief provisions serve a retributive purpose.

As to deterrence, the potential that the registration and notification scheme under ASORCNA might deter the general population arises from the theoretical argument that a potential offender would avoid committing a crime because he or she did not wish to be subjected to the regulatory requirements of ASORCNA. However, this is precisely the general deterrent effect of any governmental regulatory program. *See id.* It is not possible to distinguish between this theoretical probability and the probability of deterrence discussed in *Smith.* Thus, the court finds that any general deterrent purpose of the statute is unremarkable in a regulatory scheme.

As to retribution, Mr. McGuire did not prove that the restriction, felony, and relief provisions of ASORCNA clearly serve a retributive purpose. Using the parties' definition of retribution, "`[r]etribution is vengeance for its own sake. It does not seek to affect future conduct or solve any problem except realizing justice.'" *Mikaloff,* 2007 WL 2572268, at *11 (quoting *State v. Cook,* 700 N.E.2d 570, 583 (Ohio 1998)). "The absence of . . . a [scienter] requirement . . . is evidence that [restrictions] under [a] statute [are] not intended to be retributive." *Hendricks,* 521 U.S. at 362. Both the Supreme Court and the Eleventh Circuit have analyzed the retributive purpose of a statute in terms of whether the "regulatory regime as a whole . . . was `reasonably related to the danger of recidivism' and `consistent with the regulatory objective.'" *W.B.H.,* 664 F.3d at 858 (quoting *Smith,* 538 U.S. at 102).

The court first finds that the restrictions and felony consequences placed on registrants by ASORCNA cannot be said to be "`vengeance for its own sake.'" *Mikaloff,* 2007 WL 2572268, at *11 (quoting *Cook,* 700 N.E.2d at 583). ASORCNA seeks to regulate offenders' interactions with society and reduce recidivism. Specifically, the Alabama Legislature enacted employment and residency restrictions to "further the primary governmental interest of protecting vulnerable populations, particularly children." Ala. Code § 15-20A-2(5). The felony provisions serve to ensure guidance with the restrictions so that the regulatory purpose will be achieved. Thus, the restrictions and felony provisions "`seek to affect future conduct [and] solve [the] problem'" of protecting vulnerable populations. *Mikaloff,* 2007 WL 2572268, at *11 (quoting *Cook,* 700 N.E.2d at 583).[31] Importantly, there is no "increase [in the restrictions based on] the severity of the offender's prior conviction," and, to the extent that ASORCNA "seeks to `revisit past crimes,'" "all sex-offender registration statutes do so in the same sense," because "a conviction for a past crime is a predicate" for application of the regulatory regime. *W.B.H.,* 664 F.3d at 858.

The Legislature's finding that employment and residency restrictions help achieve these regulatory objectives by limiting the potential for isolated contact between offenders and vulnerable populations is due deference, especially in view of Mr. McGuire's heavy burden of proof. Further, the potential for Class C felonies encourages compliance. Thus, the restrictions and the felony provisions are consistent with the

statute's regulatory objective and "are reasonably related to the danger of recidivism." *Smith,* 538 U.S. at 102.

The court similarly finds that Mr. McGuire did not carry his burden to prove that ASORCNA's lifetime application and lack of any risk assessment are inconsistent with the statute's regulatory objective. The State made categorical determinations of how to regulate offenders. Although the risk of recidivism might be very low for an aged offender like Mr. McGuire whose only offense is nearly 30 years old, the Circuit has observed that, "a lower rate of recidivism is not the same thing as no recidivism." *W.B.H.,* 664 F.3d at 860. Further, the categorical approach, which lacks a scienter requirement, suggests a non-retributive purpose. *Hendricks,* 521 U.S. at 362. In light of the consequences attributable to sex-offender recidivism, the State's categorical approach has not been shown by the clearest proof to be unrelated to the danger of recidivism.

Finally, the court rejects Mr. McGuire's argument that the statute's relief provisions evidence a retributive purpose. Mr. McGuire's argument attacks the relief provisions as being so strictly confined as to show that the State meant the restrictions to be retributive. First, the State made the choice to include relief provisions, thus including certain situations in which a registrant could be relieved of the restrictions. The State's choice in this regard does not evidence a traditional aim of punishment; rather, the opposite is true: A State bent solely on punishment would be disinclined to allow for such relief. Second, any retributive purpose associated with the strict limitations on relief "are reasonably related to the danger of recidivism." *Smith,* 538 U.S. at 102. Indeed, one would necessarily question the efficacy of a regulatory regime that would make it easy for the regulated persons to escape the regulatory requirements. Here, the State enacted a number of relief provisions for various reasons, but the State also made those relief provisions narrow in order to retain the regulatory impact of the overall scheme. Thus, the court rejects Mr. McGuire's argument that the statute's relief provisions evidence a retributive purpose.[32]

In sum, Mr. McGuire failed to establish by the clearest proof that the restriction, felony provisions, and relief provisions evidence a retributive purpose. Further, to the extent ASORCNA has a deterrent purpose, that purpose is similar to the purpose of "[a]ny number of governmental programs [that] might deter crime without imposing punishment." *Smith,* 538 U.S. at 102. Therefore, this factor points to a finding that ASORCNA is nonpunitive.

e. Whether, in Their Necessary Operation, ASORCNA's Provisions Have Rational Connections to Nonpunitive Purposes

Whether the challenged provisions of an act have rational connections to the asserted nonpunitive purposes "is a `[m]ost significant' factor in [a court's] determination that the statute's effects are not punitive." *Smith,* 538 U.S. at 102 (quoting *United States v. Ursery,* 518 U.S. 267, 290 (1996)). Importantly, "[a] statute is not deemed punitive simply because it lacks a close or perfect fit with the nonpunitive aims it seeks to advance." *Id.* at 103. However, sufficient imprecision between the challenged provisions and the nonpunitive purpose may ultimately "suggest that the Act's nonpunitive purpose is a `sham or mere pretext.'" *Id.* (quoting *Hendricks,* 521 U.S. at 371 (Kennedy, J., concurring)).[33]

Mr. McGuire argues that several of ASORCNA's most prohibitive restrictions not only lack a close fit to the nonpunitive aims expressed by Alabama's Legislature, but, in actuality, entirely fail to further the aim of protecting the public and children.[34] Admittedly, Mr. McGuire is able to point to some questionable aspects of ASORCNA. For example, the residency and employment restrictions do not prohibit registrants from spending virtually unlimited amounts of time day or night within the restricted zones. While a registrant would be barred from sleeping at a residence within 2,000 feet of a school, nothing in ASORCNA would make it a crime for the registrant to spend all of his or her waking, daytime hours at that same residence, purportedly while school children would be nearby. Moreover, ASORCNA does not differentiate between registrants who committed sexual offenses against children and those who committed offenses against adults. All registrants are restricted from working or living within 2,000 feet of

schools and daycares regardless of whether they have ever been convicted of a crime against a child. And no one has attempted to rationalize why, in view of the public safety rationale, Mr. McGuire and married registrants like him may spend two consecutive nights, not to exceed nine a month, in a restricted residence with a spouse.

Further, the statute applies for life and does not include an individualized risk assessment. As a result, registrants who pose no discernable threat to public safety are subject to ASORCNA, notwithstanding evidence of post-conviction rehabilitation and subsequent years of non-offending. Mr. McGuire contends that such an extensive categorical approach harms public safety because it forces law enforcement to broadly distribute finite monitoring resources, leaving it unable to sufficiently focus on those who actually pose an ongoing risk. Lastly, Mr. McGuire takes issue with the dual registration scheme, arguing that such a duplicative process serves "no other purpose than embarrassment, humiliation, and shaming." (Doc. # 256, at 37.)

While Mr. McGuire highlights some very reasonable concerns, the court is unable to say that ASORCNA's provisions do not have a rational connection to the statute's nonpunitive purpose of increasing public safety. As an initial matter, the Supreme Court noted in *Smith,* that a state is capable of "conclud[ing] that a conviction for a sex offense provides evidence of substantial risk of recidivism." 538 U.S. at 103.[35] Further, the Court in *Smith* explained that "[t]he Ex Post Facto Clause does not preclude a State from making reasonable categorical judgments that conviction of specified crimes should entail particular regulatory consequences." *Id.* (italics omitted). Accordingly, as was the case in Alaska, Alabama's "determination to legislate with respect to convicted sex offenders as a class, rather than require individual determination of their dangerousness, does not make the statute a punishment under the Ex Post Facto Clause." *Id.* (italics omitted).

As to the employment and residency restrictions, Mr. McGuire has not carried his burden of proving that they are not rationally related to the aim of public safety. The argument that it is illogical for a registrant to be able to wander through restricted zones during the day while children are present but not to be able to sleep overnight or engage in employment in those areas, has some traction, but not enough. First, despite ultimately finding Ohio's sex offender residency restriction in violation of the Ex Post Facto Clause, the court in *Mikaloff* recognized that there was a rational purpose to the residency restriction because limiting where one spends his or her nights logically limits that individual's access to the children of that area. 2007 WL 2572268, at *12 ("The Court concludes that to restrict where an individual sleeps at night, even while it does not restrict where he or she spends her days, has some rational relation to restricting access or opportunity to children in those areas.").[36] Second, the restrictions limit the potential for an offender to be alone in an area that could conceal criminal conduct. Living alone and working alone could rationally be considered by the Legislature as providing the potential for periods of unnoticed activity. Further, the mere possibility that a registrant might be able to exploit loopholes in the regulatory structure does not render the scheme illogical per se. Thus, the court rejects Mr. McGuire's argument that the employment and residency restrictions are clearly irrational in relation to their stated nonpunitive purpose.

The court finds that, generally, an in-person registration requirement has a rational connection to the stated nonpunitive purpose as well. As highlighted in *W.B.H.,* registering in-person forces the offender to contact and engage with law-enforcement officers on a regular basis. *See* *W.B.H.,* 664 F.3d at 857 ("The in-person requirements help law enforcement track sex offenders and ensure that the information provided is accurate."). It is rational to believe that requiring this recurring, in-person relationship with law enforcement would foster increased transparency and decrease the likelihood of recidivism. Additionally, the Legislature made a rational argument in favor of increasing law enforcement's contact with homeless registrants, noting that the shifting nature of those registrants' residences could rationally be expected to increase the risk of concealed and spontaneous reoffending.

Further, the license-notification requirement provided for on the face of the statute is also rationally related to public safety aims. A notification immediately alerts law-enforcement officials to the registrant's status without delay, again increasing transparency between registrants and law enforcement. That said, the Legislature did not specify how that provision would be implemented. In no event did the Legislature require the printing of "CRIMINAL SEX OFFENDER" in bold, red lettering across the face of the license. But because the Legislature specifically stated the intent of this provision is to notify law enforcement, the provision itself is not excessive.

The travel-permit requirement per se also has a rational connection to the statute's nonpunitive purpose. First, the travel-permit requirement encourages personal contact with law enforcement, thus satisfying the same rational objective as the in-person registration requirement. *See* *W.B.H.,* 664 F.3d at 857 (citing *United States v. Powers,* 562 F.3d 1342, 1344 (11th Cir. 2009), for the proposition that registration is rational because it allows law enforcement to track registrants who travel to different jurisdictions). Second, the travel-permit requirement is rational in that it provides for continuity of contact between jurisdictions, which in turn provides for effective monitoring. Third, the court rejects Mr. McGuire's argument that, "if a registrant were intending to commit a crime in another county, ASORCNA's travel permit would serve no barrier." (Doc. # 256, at 31.) Punishing the failure of a registrant to obtain a travel permit utilizes the same method of ensuring compliance as the rest of the statutory regime, and, as was discussed previously, the possibility that a registrant may take advantage of loopholes does not render the scheme irrational. Finally, there is a rational purpose for the imposition of a three-day requirement to receive a travel permit. As Mr. McGuire acknowledges, the three-day window effectively reduces the possibility of engaging in spontaneous travel. By preventing spontaneous travel, the Legislature decreases opportunities for concerns such as absconding.

Finally, Mr. McGuire has failed to carry his substantial burden to prove that quarterly double-registration for in-town registrants is irrational. As has been stated, in-person registration increases contact with law enforcement. Indeed, this was the Legislature's stated purpose for requiring in-person registration. Ala. Code § 15-20A-2(1) ("Frequent in-person registration maintains constant contact between sex offenders and law enforcement, providing law enforcement with priceless tools to aid them in their investigations including obtaining information for identifying, monitoring, and tracking sex offenders.").[37] Thus, quarterly duplicative registration per se has a rational connection to the statute's nonpunitive purpose.

Ultimately, Mr. McGuire fails to prove that ASORCNA's provisions do not have rational connections to the scheme's stated nonpunitive purpose. This "significant" guidepost weighs in favor of finding that ASORCNA generally is nonpunitive. However, Mr. McGuire was able to draw out important inconsistencies between certain components and ASORCNA's stated nonpunitive intent. So while this guidepost ultimately highlights ASORCNA's nonpunitiveness, those inconsistencies carry some weight, especially as the analysis moves into the fifth and final guidepost.

f. Whether, in Their Necessary Operation, ASORCNA's Provisions are Excessive with Respect to the Provisions' Nonpunitive Purposes

The final *Martinez-Mendoza* guidepost requires the court to consider whether ASORCNA's provisions, in their necessary operation, are excessive with respect to their nonpunitive purposes. As a preliminary matter, ASORCNA's individual provisions represent single building blocks stacked to form the statutory scheme under which Alabama's sex offenders are regulated. Mr. McGuire is not merely subject to isolated provisions; rather, his life is controlled by each of ASORCNA's components operating in unison. The Legislature passed ASORCNA as a comprehensive scheme, so it is logical to consider the effects of that scheme in sum. Accordingly, consideration of ASORCNA's effects is not limited to the discrete effects of individual provisions as if they are operating in a vacuum. Both the Supreme Court in *Smith* and the Eleventh Circuit in *W.B.H.* considered the excessiveness factor in terms of the entire statutory scheme rather than in terms of each individual provision. *See* *Smith,* 538 U.S. at 104 (analyzing the excessiveness of universal registration and notification of sex offenders without individualized risk

assessments); *W.B.H.,* 664 F.3d at 859-60 (evaluating SORNA in a similar manner); *see also id.* at 859 ("The final [*Smith*] guidepost directs us to consider whether the regulatory *scheme* is excessive with respect to its non-punitive purpose.") (emphasis added). And both *Smith* and *W.B.H.* were dealing with schemes with only a fraction of the features embodied in ASORCNA. Thus, the cumulative effects of ASORCNA's provisions will be examined.

"The excessiveness inquiry of our ex post facto jurisprudence is not an exercise in determining whether the legislature has made the best choice possible to address the problem it seeks to remedy. The question is whether the regulatory means chosen are reasonable in light of the nonpunitive objective." *Smith,* 538 U.S. at 105 (italics omitted). To be sure, the majority of ASORCNA's regulations and restrictions are not novel creations, having been incorporated into various state sex-offender schemes across the country. And when challenged, these shared provisions have generally withstood excessiveness inquiries. For example, in-person registration has been held to increase contact between sex offenders and police officers and has been deemed reasonable for that purpose. *See W.B.H.,* 664 F.3d at 857 (citing *Powers,* 562 F.3d at 1344). Similarly, registration fees have been upheld, when used to defray the costs associated with maintaining a sex-offender regulatory regime. *See Mueller,* 740 F.3d at 1135. Residency restrictions, employment restrictions, and community-notification schemes have all been deemed individually to be reasonable measures for increasing public safety. *See Smith,* 538 U.S. at 99; *Miller,* 405 F.3d at 723. Finally, placing the sex-offender designation in red lettering on the front of the license is not *clearly* excessive, though it is subject to serious arguments that it is retributive. Because the lettering alerts law enforcement and the general public to the registrant's status without delay or potential for error, it passes ex post facto muster. Individually, none of these measures is clearly excessive in light of states' nonpunitive purposes in regulating sex offenders.

But ASORCNA does not stop there. Rather, it supplements in-person registration, registration fees, residency and employment restrictions, and community-notification measures with additional provisions creating a scheme that regulates sex offenders far beyond the scheme in any other state. For example, excluding legislation aimed at sexually violent predators, no other state has a scheme whereby sex offenders are retroactively regulated for life through residency, employment, and travel restrictions. In fact, only one other state — Tennessee — employs residency, employment, and out-of-county travel restrictions, and it tempers the effects of these provisions, providing for partial retroactivity and allowing offenders who have successfully complied with the act for ten years to petition for termination of participation in the registration program. T.C.A. § 40-39-207. No other state requires dual registration — or dual travel permits — for in-town sex offenders, instead allowing registrants to report to any single local law enforcement agency — whether municipal or county. *See, e.g.,* Colo. Rev. Stat. § 16-22-102(4.5); 739 Ill. Comp. Stat. 150/1 § 2(d); Kan. Stat. Ann. § 22-4902(m). Only five other states — Arizona, Delaware, Hawaii, Idaho, and South Carolina — join Alabama in applying sex-offender regulations retroactively for the entirety of a registrant's life, but not one of those five states imposes travel restrictions, and only one of the five imposes residency and employment restrictions. *See* Ariz. Rev. Stat. Ann. § 13-3821 *et seq.*; Del. Code Ann. § 4120 *et seq.*; Haw. Rev. Stat. § 846E-1 *et seq.*; Idaho Code Ann. § 18-8301 *et seq.*; S.C. Code. Ann. §23-3-400 *et seq.*

ASORCNA is the nation's most comprehensive sex offender regulatory scheme; it is designed to enhance public safety, prevent recidivism, and to protect vulnerable populations. Such a regulatory scheme, by its nature, will have a greater effect in its sum than when each of the scheme's individual components is examined in isolation, but that in and of itself does not make the scheme's cumulative effects unreasonable. That is not to say, however, that the features that overlay the entire scheme — no risk assessment, lifetime application, retroactive application for all-time, felony enforcement by the gross, border-to-border (rather than parcel-to-parcel), Ala. Code § 15-20A-11(g), residential and employment restrictions, and the chosen method of printing "SEX OFFENDER" in red lettering on the face of driver's licenses — are entirely nonpunitive and non-retributive. These provisions are, especially when considered *in toto,* in excess of every other scheme operating across the country, and such a stark comparison highlights areas where ASORCNA's effects have a very real potential to exceed their nonpunitive benefits.[38] But that is not enough — Mr. McGuire bears the burden of showing by the clearest proof that

ASORCNA's provisions are excessive with respect to the Legislature's stated nonpunitive purposes, and Mr. McGuire has failed to carry that heavy burden, with two important exceptions.

First, Mr. McGuire has shown that the provision requiring double, weekly registration for in-town homeless offenders — totaling up to 112 registrations in-person a year — is excessive. No credible reason was given in support of this requirement. The argument that such a provision increases contact with law enforcement begs the question and falls into the State's misplaced view of unlimited effects being constitutional: If *weekly* double registration is good, then *daily* double registration would be sevenfold better? Considering the additional burdens of felony enforcement for violations, lifetime residential and employment restrictions, and lifetime travel restrictions (with yet more double-registration requirements), the weekly double-registration feature of the scheme for in-town homeless offenders is clearly excessive in relation to ASORCNA's stated nonpunitive purposes. Requiring a homeless individual to travel to two different law enforcement agencies to complete a substantially identical check-in process every week is so excessive in effect as to be punitive, especially in view of the combined weight of the other features on a homeless offender. And as established in Section C.II.c, *infra,* this requirement is a direct, affirmative disability or restraint.

Second, Mr. McGuire has shown that the provision requiring the completion of two identical travel permit applications prior to any three-day or more trip outside an in-town registrant's county of residence is excessive. Again, no credible reason was given in support of this duplicative procedure. While the State could again point to increased communication with law enforcement, as was discussed above, this is an instance of highly diminished returns coupled with substantially increased burdens. Additionally, § 15-20A-15(e) already requires the sheriff in the registrant's county of residence (not the municipal jurisdiction) to "immediately notify local law enforcement in the county or the jurisdiction to which the" registrant will be traveling, so it would be logical to conclude that the sheriff could also inform any applicable municipal law enforcement entity of the impending travel once a singular permit is completed. Ala. Code § 15-20A-15(e). When considering the double travel permit requirement in light of the other burdens borne by those subject to ASORCNA and the absence of any increase in benefit to ASORCNA's state nonpunitive purpose, the requirement is excessive to the point of being punitive.[39]

As to all other of ASORCNA's provisions, Mr. McGuire has not shown that the Legislature's chosen regulatory means, individually or cumulatively, are clearly excessive in relation to the statute's nonpunitive purposes, and this factor does not point to a finding that ASORCNA as a whole is so punitive in purpose or effect as to negate the Legislature's stated intent. This finding is entered with serious reservations as to some features (especially the red-lettered branding of the face of required identification), but is consistent with the court's understanding of deference due to the judgment of the Alabama Legislature in regulating sex offenders in Alabama, and the State's discretion in implementing the various provisions of the scheme.

g. Concluding the *Mendoza-Martinez* Analysis

Based on the analysis of the five most pertinent *Mendoza-Martinez* factors, the court finds that Mr. McGuire has not shown by the clearest proof that ASORCNA's scheme as a whole is so punitive either in purpose or effect as to negate the Legislature's stated nonpunitive intent. Mr. McGuire has met this burden, however, with respect to two of ASORCNA's individual requirements. Using the *Mendoza-Martinez* factors as guideposts, the court finds that Mr. McGuire has shown that requiring dual, in-person weekly registration for in-town homeless registrants and dual applications for travel permits for all in-town registrants are affirmative disabilities or restraints excessive of their stated nonpunitive intent. In sum, these two requirements are so punitive in their effect as to negate the Alabama Legislature's stated nonpunitive intent by the clearest proof. Accordingly, those requirements violate the Ex Post Facto Clause of the United States Constitution, and Mr. McGuire is entitled to declaratory relief.

VI. RELIEF

Based on the foregoing, it is declared that ASORCNA is unconstitutional under the Ex Post Facto Clause of the United States Constitution to the extent that it requires (1) in-town homeless registrants to register (or check-in) on a weekly basis with two separate law-enforcement jurisdictions as provided by § 15-20A-12(b) in conjunction with § 15-20A-4(13) and (2) all in-town registrants to complete travel permit applications with two separate law-enforcement jurisdictions as provided by § 15-20A-15 in conjunction with § 15-20A-4(13). To clarify, the declaration's scope of relief is limited to invalidation of the dual-nature of ASORCNA's in-town homeless registration and travel permit application requirements. Defendants are capable of determining the appropriate situs for the remaining singular registration and travel permit application procedures.

In light of these constitutional infirmities, attention turns to matters of relief. These other matters are: (1) whether the unconstitutional requirements of ASORCNA may be severed, allowing the remainder of ASORCNA to remain in force; (2) whether declaratory relief, without an accompanying injunction, is a sufficient remedy; and (3) what is the proper scope of relief in accordance with principles undergirded by the Ex Post Facto Clause?

Severability is a matter of state law, and Alabama directs courts to "strive to uphold acts of the legislature." *State ex rel. Pryor ex rel. Jeffers v. Martin,* 735 So. 2d 1156, 1158 (Ala. 1999) (citing *City of Birmingham v. Smith,* 507 So. 2d 1312, 1315 (Ala. 1987)). Because the Alabama Legislature expressed its intention that ASORCNA's provisions be severable through the inclusion of a severability clause[40] and because ASORCNA can be given effect absent the constitutionally violate requirements, the remainder of ASORCNA remains "intact and in force." *See Jefferson Cnty. Comm'n v. Edwards,* 49 So. 3d 685, 693 (Ala. 2010) (quoting *Smith,* 507 So. 2d at 1315).

As to whether injunctive relief should accompany declaratory relief, there is generally little to no practical difference between the awarding of declaratory relief as opposed to injunctive relief. *Wooley v. Maynard,* 430 U.S. 705, 711-12 (1977). Accordingly, a court generally will "not enjoin the enforcement of a criminal statute even though unconstitutional." *Id.* Here, the court is confident that state officials will abide by the judgment of this court declaring that ASORCNA is unconstitutional under the Ex Post Facto Clause of the United States Constitution to the extent that it requires (1) in-town homeless registrants to register (or check-in) on a weekly basis with two separate law enforcement jurisdictions as provided by § 15-20A-12(b) in conjunction with § 15-20A-4(13) and (2) all in-town registrants to complete travel permit applications with two separate law-enforcement jurisdictions as provided by § 15-20A-15 in conjunction with § 15-20A-4(13).

Finally, the relief provided does not extend to sex offenders convicted after the passage of ASORCNA in 2011. While the State attempts to argue that ASORCNA is a mere reconfiguration or re-enactment of Alabama's prior sex-offender regulatory scheme — the Alabama Community Notification Act ("ACNA") — and that relief should be limited to those convicted prior to 1996, such an argument is disingenuous in that ASORCNA's revisions to the ACNA were so extensive and far-reaching as to relegate the prior statute to mere irrelevance. For numerous reasons scattered throughout this opinion, ASORCNA is far more than a mere reconfiguration of the prior scheme.

VII. CONCLUSION

For the foregoing reasons, it is ORDERED and DECLARED that ASORCNA is unconstitutional under the Ex Post Facto Clause of the United States Constitution to the extent that it requires (1) in-town homeless registrants to register (or check-in) on a weekly basis with two separate law-enforcement jurisdictions as provided by § 15-20A-12(b) in conjunction with § 15-20A-4(13) and (2) all in-town registrants to complete travel permit applications with two separate law-enforcement jurisdictions as provided by § 15-20A-15 in

conjunction with § 15-20A-4(13). It is further ORDERED that the Attorney General's oral Motion to Strike and Defendants' oral Motions for Judgment as a Matter of Law are DENIED AS MOOT.

[1] Mr. McGuire's Third Amended Complaint sought a declaratory judgment, injunctive relief, and compensatory and punitive damages. On September 9, 2013, however, an Order was issued clarifying the forms of relief available to Mr. McGuire should he prevail. Pursuant to the September 9, 2013 Order, all the individual Defendants had qualified immunity from Mr. McGuire's claims for monetary damages brought against them in their individual capacities. Additionally, the State Officials — the Montgomery County Sheriff, the Alabama Director of Public Safety, and the Alabama Attorney General — had Eleventh Amendment immunity from monetary claims against them in their official capacities, as well as from a declaratory judgment against them in their official capacities with respect to the alleged illegality of their past conduct. The Order, however, found that the Eleventh Amendment did not bar the official-capacity claims against the State Officers for prospective injunctive relief. Consequently, the Order left intact the following relief against the non-State Officers: monetary and equitable relief against the City of Montgomery; prospective injunctive and declaratory relief against the individual Defendants in their official capacities; and monetary damages against the individual city Defendants in their official capacities. On March 12, 2014, Mr. McGuire's contentions in the Order on the Pretrial Hearing further narrowed the relief sought to prospective injunctive and declaratory relief exclusively.

[2] In an apparent response to Defendants' motions to dismiss earlier iterations of his complaint, Mr. McGuire voluntarily dismissed his claims against the other Defendants, namely, the City of Montgomery Police Department and four affiliated detectives, the Montgomery County Sheriff's Department and one of its deputies, an Attorney with the Alabama Department of Public Safety, United States Attorney General Eric Holder, and the Alabama Department of Public Safety. (Docs. # 48, 88.)

[3] ASORCNA prohibits registrants from "maintaining" a residence within 2,000 feet of property containing "any school or childcare facility" and from living within 2,000 feet of the registrant's former victim or the victim's immediate family. *Id.* §§ 15-20A-11(a), (b). With no reference to the nature of the offense of conviction, it also prohibits registrants from sharing a residence with a minor, unless the registrant is "the parent, grandparent, stepparent, sibling, or stepsibling of the minor." *Id.* § 15-20A-11(d). If, however, any of the registrant's victims were the registrant's "minor children, grandchildren, stepchildren, siblings, or stepsiblings," or any other child, the exemption for living with immediate family members does not apply. *Id.*

ASORCNA also prohibits registrants from working or volunteering "at any school, childcare facility, or mobile vending business that provides services primarily to children, or any other business or organization that provides services primarily to children." *Id.* § 15-20A-13(a). Additionally, no registrant may "apply for, accept or maintain employment or volunteer for any employment or vocation" "within 2,000 feet of the property on which a school or childcare facility is located" or "within 500 feet of a playground, park, athletic field or facility, or any other business having a principal purpose of caring for, educating, or entertaining minors." *Id.* § 15-20A-13(c). The employment provisions — like most of the residency restrictions outlined above — apply with equal force regardless of whether the registrant's former victim was a minor.

[4] First, certain offenders are eligible for relief from the residency restrictions if they can convince a state circuit court that they are terminally ill or permanently immobile. *Id.* § 15-20A-23. Second, certain offenders convicted of relatively minor offenses can obtain circuit court relief from ASORCNA's registration and notification requirements. *Id.* § 15-20A-24. Finally, a similar provision allows for circuit court relief from ASORCNA's employment restrictions for a set of less serious crimes. *Id.* § 15-20A-25.

[5] Mr. McGuire has consistently argued that the Class C felonies imposed by ASORCNA are strict liability offenses. However, Mr. McGuire is incorrect in this regard; under Alabama law, "[a] statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, states a crime of mental

culpability." *Id.* § 13A-2-4(b). Because the felony provisions of ASORCNA do not explicitly state that the Class C felonies are strict liability offenses, some level of mental culpability is required for conviction. *See Sullens v. State,* 878 So. 2d 1216, 1221 (Ala. Crim. App. 2003) (finding that a criminal provision did not define a strict liability offense because the provision did "not expressly state that [the conduct was] a strict liability offense"); Ala. Code § 13A-2-4 cmt. ("Subsection (b) explicitly states a policy adverse to arbitrary use of `strict liability' concepts. An express statement is required in the statute defining the offense if strict liability is being imposed.").

[6] Defendants attempt to minimize the felony consequences: "Offenders who fail to comply with these requirements are subject to a *low-level felony conviction,*" Doc. # 255 at 15 (emphasis added), which the court likens to being shot with a smaller-caliber bullet.

[7] Indeed, under ASORCNA, approximately 85 percent of jobs in the city are barred to offenders (creating an employment "zone of exclusion"). Approximately 50 percent of the 500 offenders in Montgomery County are unemployed. Admittedly, a certain unspecified portion of that percentage is not actively seeking employment.

[8] Mr. McGuire does not appear to allege a claim against the former Mayor and Chief of Police in their individual capacities for injunctive and declaratory relief. (Doc. # 256, at 10 ("All of the Defendants in the matter — who are properly sued in their official capacities because they enforce ASORCNA — should be enjoined from enforcing the statute.").) But, even if the operative complaint could be construed to allege such a claim, Mr. McGuire cites no controlling or otherwise supportive authority for such a claim. At least one district court in this circuit has found that individual-capacity suits under § 1983 for equitable relief are not sustainable. *Jones v. Buckner,* 963 F. Supp. 2d 1267, 1281 (N.D. Ala. 2013) (citing *Brown v. Montoya,* 662 F.3d 1152, 1161 n.5 (10th Cir. 2011) ("Section 1983 plaintiffs may sue individual-capacity defendants only for money damages and official-capacity defendants only for injunctive relief."); *Greenawalt v. Ind. Dep't of Corrs.,* 397 F.3d 587, 589 (7th Cir. 2005) ("[S]ection 1983 does not permit injunctive relief against state officials sued in their individual as distinct from their official capacity.")); *see also Wolfe v. Straijman,* 392 F.3d 358, 360 n.2 (9th Cir. 2004) (noting that injunctive and equitable relief were not available in § 1983 individual capacity suits). The court envisions no reason, and none has been offered, for departing from the foregoing principles to the extent that Mr. McGuire has brought § 1983 individual-capacity claims for injunctive and declaratory relief against the former Mayor and Chief of Police.

[9] In Alabama, county sheriffs are state officials. *See McMillian v. Monroe Cnty., Ala.,* 520 U.S. 781, 793 (1997) ("Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties.").

[10] Arguments of the State are derived from the arguments and brief of the Attorney General. The other Defendants adopted the Attorney General's standing and ex post facto arguments in their entirety.

[11] The State challenges Mr. McGuire's standing to attack several other components of ASORCNA, such as the juvenile-offender and sexually-violent-predator provisions. Mr. McGuire does not challenge those provisions, however, so he is not asserting standing as to those provisions.

[12] Mr. McGuire argues that the court should also look beyond the Legislature's stated intent to what is implied by the statute's text. For support, Mr. McGuire points to *Doe v. Nebraska,* in which a Nebraska District Court found the state legislature's intent in enacting sex-offender legislation to be punitive in light of a state senator's anti-offender commentary, the distinctions between the state legislation and its federal counterpart, the legislation's impact, and "the blatant willingness of the Nebraska Legislature to violate [various other provisions of] the Constitution." 898 F. Supp. 2d 1126, 1125-27 (D. Neb. 2012). Unlike *Doe v. Nebraska,* however, Mr. McGuire does not have the "benefit" of a senator's disparaging commentary,

and any further comparison between this case and *Doe v. Nebraska* is better suited to the second-step of the analysis, where an examination of effects properly lies.

[13] Mr. McGuire argues that the legislative findings also indicate a punitive intent in light of the legislature's inclusion of the word *certain* in § 15-20A-2(5). Specifically, Mr. McGuire contends that because the Legislature only stated that its intent was nonpunitive when it "impos[ed] *certain* registration, notification, monitoring and tracking requirements on sex offenders," the employment and travel restrictions must be taken as punitive. (quoting Ala. Code § 15-20A-2(5)). While the court takes note of Mr. McGuire's linguistic argument, it is unable to find that the Legislature's use of the word *certain* negates its clear renunciation of a punitive intent.

[14] The State ultimately relents in its approach to an extent by stating that, "[a]t most, [Mr. McGuire's] testimony is relevant only insofar as it describes a typical sex offender's experience under ASORCNA." (Doc. # 255, at 34.) Generally speaking, however, the State argues that implementation is irrelevant to determining whether the statute is punitive in purpose or effect. (*Id.; see also id.,* at 36 (stating that "the actual means [the Department of Public Safety] chose to implement [the license-notification] requirement are irrelevant" because "[t]he Court should . . . evaluate ASORCNA `on its face'").)

[15] Interestingly, the Supreme Court of Alaska later invalidated the very same law upheld in *Smith,* as an ex post facto violation of *Alaska's* constitution. *See Doe v. Smith,* 189 P.3d 999 (Alaska 2008).

[16] In his concurrence, Justice Thomas took issue with the majority's decision to examine the effect of internet dissemination as part of the second-step analysis. Specifically, he stated that, "[b]y considering whether Internet dissemination renders [the Alaska Act] punitive, the Court has strayed from the statute." *Smith,* at 538 U.S. at 107. Because the Act did not "specify a means of making registry information available to the public," the Court was not confining its analysis to the statute's face, and thus Justice Thomas disagreed with that particular section of the majority's opinion. *Id.* at 106.

[17] "Idiosyncratic effects" is used as a synonym for those effects that are not experienced by all offenders, and which usually point to an "as-applied challenge." As-applied challenges in ex post facto cases are directly barred by *Seling.* To further distinguish idiosyncratic effects from the Department of Public Safety provisions mentioned above, idiosyncratic effects are not the result of statutorily authorized, general implementation.

[18] "Only 13 other states restrict residency . . ., only 15 other states restrict employment . . ., and only 9 restrict both residency and employment. No other state requires dual reporting to both the sheriff and the police department, and only one other state (Tennessee) contains travel restrictions. Only five other states are infinitely retroactive combined with lifetime application, meaning that the vast majority of states have some limit as to how far back or how far forward their provisions apply. Put together, there is not a single state that matches the cumulative and punitive effects of Alabama's ASORCNA — in fact, none even comes close." (Doc. # 256, at 37.)

[19] In the record as Mr. McGuire's Exhibit 3.

[20] Defendants object to the court's evaluation of the identification card requirement, arguing that the requirement that registrant driver's licenses be inscribed with "CRIMINAL SEX OFFENDER" is not a provision of ASORCNA on its face but a means of implementation as promulgated by the Department of Public Safety. The court, however, has already addressed this argument, finding that the Department's decision in this regard is indistinguishable from the implementation of the internet registry in *Smith* and may be considered among ASORCNA's other non-idiosyncratic effects.

[21] Importantly, the court in *Mikaloff* used a different standard than the one applicable in this case. In *Mikaloff,* the court initially determined that the Ohio Legislature's intent was ambiguous in enacting the residency restriction, and as a result, did not apply the "clearest proof" standard during the second step of the ex post facto analysis. 2007 WL 2572268, at *5.

[22] This distinction is important because permission connotes discretion by a law-enforcement official to grant or deny a request. Thus, requiring permission from a law-enforcement official would be similar to allowing direct and discretionary supervision over a parolee. The Supreme Court in *Smith* recognized the nuanced difference between permission and notification when it noted that, "[a]lthough registrants must inform the authorities after they change their facial features (such as growing a beard), borrow a car, or seek psychiatric treatment, they are not required to seek permission to do so." 538 U.S. at 101.

[23] The Supreme Court discussed the relative similarities at this juncture and not during the "historical forms of punishment" analysis, despite comparing other provisions of the Alaska statute to banishment and public shaming.

[24] This calculation assumes that registration would be required in both a city and county for each of the registrant's places of employment, schooling, and residence.

[25] In his pending motion for summary judgment, Mr. McGuire briefly argues that the registration fees also constitute an affirmative disability or restraint. Reviewing the record, however, Mr. McGuire, appears to have abandoned this argument.

[26] After acknowledging the presence of an affirmative disability or restraint, the Eighth Circuit in *Miller* qualified its analysis on this particular guidepost, believing that *Kansas v. Hendricks,* 521 U.S. 346 (1997), downplayed the restriction's relative level of restraint or disability in light of the importance of the restriction's rational relation to a nonpunitive purpose. 405 F.3d at 721. The latter inquiry, however, is a separate guidepost, distinct from the affirmative disability or restraint analysis.

[27] The decrease in employment opportunities mentioned here is a general effect arising from the explicit text of the statute — an effect that is necessarily faced by all offenders.

[28] Mr. McGuire asks the court to find that the in-person registration requirement is an affirmative disability in its own right because the statute allegedly "forc[es] [him] to walk or get a ride for 20 miles every week." (Doc. # 256, at 46.) The court, however, finds that ASORCNA has not "forced" Mr. McGuire to make such a long trek on foot, though on occasion he has been required to suffer that hardship. The circumstance of traveling 20 miles for registration is idiosyncratic to Mr. McGuire, and will not support a finding of affirmative restraint or disability.

[29] Specific deterrence, as opposed to general deterrence, is bound up in the science of recidivism. There is no uniform definition of recidivism, which makes accurate comparison and contrast of facially competing studies a virtual impossibility.

[30] Mr. McGuire briefly asserts, but fails to develop, an argument that registration and the license-notification requirements are retributive. (Doc. # 171, at 20.)

[31] This case differs from *Mikaloff* because ASORCNA does not require "[a] feeble, aging paraplegic [to] leave his home [upon a government action for ouster]." 2007 WL 2572268, at *11. This "lack of any case-by-case determination" was the focus of the *Mikaloff* court's retribution analysis. *Id.* By contrast, and to the extent this is a proper inquiry under this factor, ASORCNA does not force offenders to change residences because of subsequent property changes, and ASORCNA provides relief to terminally ill and permanently immobile persons. *See* Ala. Code §§ 15-20A-11(c), -23.

[32] To the extent Mr. McGuire argues that ASORCNA is more retributive than the statute in *Hendricks* because ASORCNA only punishes those who are convicted rather than including both persons who were convicted and who were not convicted (as was the case in *Hendricks*), the court disagrees. Instead, the statute in *Hendricks* is susceptible to an argument that the law sought to exact punishment for past conduct. Specifically, the statute in *Hendricks* would allow the State to exact retribution from conduct it deemed offensive without demanding a criminal conviction; indeed, *Hendricks* employs this reasoning in requiring additional safeguards to withstand constitutional scrutiny. *See* 521 U.S. at 368-69 ("Where the State has `disavowed any punitive intent'; limited confinement to a small segment of particularly dangerous individuals; *provided strict procedural safeguards*; directed that confined persons be segregated from the general prison population and afforded the same status as others who have been civilly committed; recommended treatment if such is possible; *and permitted release upon a showing that the individual is no longer dangerous or mentally impaired,* we cannot say that it acted with punitive intent." (emphasis added)). ASORCNA is less susceptible to such an attack because the regulatory regime is only triggered upon a conviction — after the State has already established the conduct as a violation and after exacting whatever sentence would therefore be attached — and is broadly applicable rather than focused on the actual nature of the past conduct.

[33] Mr. McGuire asserts that Defendants bear the burden of proving this factor. (Doc. # 256, at 14-15.) However, the language of the test appears to be an analytical feature, and a reading that puts the burden on Defendants would conflict with the heavy burden Mr. McGuire must overcome to show that, by the clearest proof, ASORCNA is so punitive in its purpose or effects as to override stated nonpunitive intent. Therefore, the proper inquiry is whether Mr. McGuire has shown the absence of a rational connection.

[34] Mr. McGuire highlights the testimony of a law-enforcement officer to establish a tenuous connection between ASORCNA and its stated nonpunitive purpose. (*See, e.g.,* Doc. # 256, at 51 ("Lieutenant Persky, for example, admitted confusion about a law that punishes registrants by preventing them from staying three nights at any home near a school when that same law allows registrants to be near the school during the day, when children are present.").) The testimony, however, is minimally helpful at best. Law-enforcement officials' responsibility is to enforce the law, not to interpret it or to pass judgment on its rationality.

[35] It is important to again reiterate the lack of clarity that now permeates the study of recidivism. Accordingly, the court follows precedent in deferring to state findings regarding recidivism, but does so very skeptically.

[36] Mr. McGuire attempts to distinguish this finding in *Mikaloff* by arguing that the *Mikaloff* case only involved injunctive relief. Mr. McGuire's distinction is unavailing; the connection in that case was determined to be rational, separate from any consideration of the threatened consequences for noncompliance. And this case also only involves potential injunctive relief.

[37] Only requiring city police registration in the statute is of course not an option. First, although unlikely, there could hypothetically be a county without municipal police departments. Second, city police generally have no jurisdiction outside the jurisdictional limits of the city and would have no presence in the county to monitor offenders living outside the city. A unified system, as a practical matter, would have to be under the control of the county sheriff, who has jurisdiction over the entire county, including municipalities.

[38] If he is not determined to be "terminally ill or permanently immobile," Ala. Code § 15-20A-23(a), Mr. McGuire will continue to be subject to all these restrictions until he is 90 or 100 years old.

[39] The objection that a municipal jurisdiction should know of such travel is easily resolved by simple communication between the two jurisdictions.

[40] The following clause was included in ASORCNA: "The Provisions of [ASORCNA] are severable. If any part of this act is declared invalid or unconstitutional, that declaration shall not affect the part which remains." Ala. Acts No. 2011-640, § 50. Additionally, each statute codified as part of the 1975 Code of Alabama is subject to a severability clause. Ala. Code § 1-1-16.

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Thomas H. QUISPE DEL PINO
v.
MARYLAND DEPARTMENT OF PUBLIC SAFETY AND CORRECTIONAL SERVICES et al.

No. 258, Sept. Term, 2012.

Court of Special Appeals of Maryland.

April 1, 2015.

Aindrea M. Conroy (Thomas M. DeGonia, Ethridge, Quinn, Kemp, on the brief) Rockville, MD, for appellant.

Michael O. Doyle (Christopher A. Hinrichs, Douglas F. Gansler, Atty. Gen., on the brief) Pikesville, MD, for appellee.

Panel: WOODWARD, GRAEFF, PAUL A. HACKNER (Specially Assigned), JJ.[*]

WOODWARD, J.

In this opinion, we set sail into waters left uncharted by the voyage that the Court of Appeals undertook in the case of *Doe v. Department of Public Safety & Correctional Services,* 430 Md. 535, 62 A.3d 123 (2013) ("*Doe I*"). In *Doe I,* the Court held that requiring Doe to register as a sex offender[1] as a result of the 2009 and 2010 amendments to the Maryland sex offender registration act ("MSORA") violated the prohibition against *ex post facto* laws contained in Article 17 of the Maryland Declaration of Rights.[2] *Id.* at 537, 62 A.3d 123 (interpreting Md.Code (2001, 2008 Repl.Vol., 2010 Cum.Supp.), §§ 11-701 *et seq.* of the Criminal Procedure Article ("CP 2010")). There, MSORA did not exist in 1983-84 when Doe committed the sexual offense at issue, nor was Doe required to register when he was convicted in 2006. *Doe I,* 430 Md. at 537-38, 62 A.3d 123. Here, at the time of his conviction in 2001 for a sex crime committed in 2000, appellant, Thomas H. Quispe del Pino, was required to register as a sex offender for a period of ten years. The 2010 amendment to MSORA, however, classified appellant as a "Tier II" offender and increased the period of registration from ten years to twenty-five years. The issue thus presented to this Court by the instant case is whether, under *Doe I,* the retroactive application of MSORA to appellant by the 2010 amendment, which results in the increase of his registration period from ten years to twenty-five years, violates the prohibition against *ex post facto* laws contained in Article 17 of the Declaration of Rights. We shall hold that it does.

BACKGROUND

On January 3, 2001, appellant pled guilty to one count of unlawful communication with a minor, one count of corruption of minors, and one count of loitering and prowling at nighttime, in the Court of Common Pleas in Pennsylvania ("the Pennsylvania Court"). These offenses were committed in 2000. On April 10, 2001, the Pennsylvania Court sentenced appellant to ten years of probation, with his earliest termination date being April 9, 2011.[3] Because appellant was a Maryland resident, his probation was transferred from Pennsylvania to Maryland. As a condition of his probation, appellant was required to register as a sex offender in Maryland for the duration of the ten-year period, under the supervising authority of the Montgomery County Police Department.

On September 25, 2010, appellant was notified that, due to the 2010 amendment to MSORA, appellant's registration requirements had been modified as follows:

As a result of your SEXUAL SOLICITATION OF A MINOR conviction and the Maryland law change your new registration category is Tier II and your registration term is 25 YEARS. . . .

In other words, following the 2010 amendment, appellant was reclassified as a "Tier II sex offender," and his registration term, which had been ten years, increased to twenty-five years.

On December 21, 2011, appellant filed a Petition for Writ of Prohibition in the Circuit Court for Montgomery County against appellees, Maryland Department of Public Safety and Correctional Services and Gary Maynard, Secretary of the Department (collectively, the "Department"). Appellant argued that requiring his continued registration would violate the prohibition against *ex post facto* laws under both the United States Constitution and the Maryland Declaration of Rights. The Department responded on February 15, 2012, by filing a Motion to Dismiss, or in the Alternative, Motion for Summary Judgment. On March 29, 2012, the circuit court held a hearing on appellant's petition and the Department's motion. At the close of the hearing, the court issued an oral ruling and signed two written orders, one denying appellant's petition and the other granting summary judgment in favor of the Department.

Appellant timely filed this appeal. Additional facts will be set forth below as necessary to resolve the issue presented.

STANDARD OF REVIEW

In the instant appeal, the dispositive issue is whether retroactive application of the 2010 MSORA amendment to appellant violates the prohibition on *ex post facto* laws by extending appellant's term of registration from ten to twenty-five years. "When the trial court's [decision] involves an interpretation and application of Maryland statutory and case law, [the appellate court] must determine whether the lower court's conclusions are legally correct." *Hillsmere Shores Improvement Ass'n, Inc. v. Singleton,* 182 Md.App. 667, 690, 959 A.2d 130 (2008) (alterations in original) (citations and internal quotation marks omitted). Interpretations of the Maryland Declaration of Rights are also reviewed *de novo. See Davis v. Slater,* 383 Md. 599, 604, 861 A.2d 78 (2004).

DISCUSSION

I.

The Maryland Sex Offender Registration Law

In 2010, the General Assembly made two changes to MSORA of particular relevance to the case *sub judice.* First, retroactive registration was required for all persons who were required to register on September 30, 2010, the day before the amendment went into effect. *See* CP 2010 § 11-702.1(a). Second, all sex offenders were placed into a tiered registration system: Tier I offenders were required to register for fifteen years, Tier II offenders were required to register for twenty-five years, and Tier III offenders were required to register for life. CP 2010 §§ 11-701(o)-(q), -707(a)(4).

Appellant contends that, based on *Doe I,* MSORA has become punitive after the 2009 and 2010 amendments, such that "retroactive application [to appellant] would violate not only the United States' Constitution's prohibition against *ex post facto* laws, but also Maryland's Declaration of Rights' prohibition against *ex post facto* laws." Specifically, appellant argues that the retroactive application of the statute disadvantages him, in violation of Article 17 of the Maryland Declaration of Rights ("Article 17"), by increasing the term of his registration from ten years to twenty-five years.

The Department responds that applying MSORA's new requirements to appellant does not violate the state and federal *ex post facto* clauses. The Department contends that the purpose of the Maryland statute "is remedial and its effects are non-punitive," because it "does not require a registrant to do anything other than keep law enforcement authorities (and in limited circumstances, school officials) updated on information that serves to keep the public safe."

It is undisputed that, "[t]o prevail in an *ex post facto* claim, [appellant] must first show that the law that [he is] challenging applies retroactively to *conduct that was completed before the enactment of the law in question.*" *Dep't of Pub. Safety & Corr. Servs. v. Demby,* 390 Md. 580, 593 n. 10, 890 A.2d 310 (2006). We thus must address first whether the 2010 amendment applies retroactively to appellant's criminal conduct for which he was originally sentenced in 2001.

A. Retroactive Application of MSORA

Appellant contends that Maryland "lacks the authority to require [him] to register" as a sex offender, because at the time appellant pled guilty in Pennsylvania, the "triggering event" that required him to register in Maryland, namely, his unlawful communication with a minor, was not a crime in Maryland. According to appellant, "[i]f not for the requirement of Pennsylvania, Maryland could not have required Appellant to register because Appellant had not been convicted of a qualifying crime under the Maryland Sex Offender Registry Act at the time Appellant pled guilty in Pennsylvania." In other words, appellant argues that, if he "had moved to Pennsylvania" during his ten-year registration period, "his period of registration would be over," because his Pennsylvania probation expired in 2011. Moreover, appellant claims that he is being punished unfairly, because his conduct, though merely a misdemeanor in Pennsylvania, is treated as a felony in Maryland. The Department responds by arguing that Maryland's unlawful solicitation of a minor statute has not "been applied to [appellant] in any manner that would constitute `punishment' under the federal or State Ex Post Facto clauses."

Preliminarily, we note that, at the time appellant was placed on probation in April 2001, the Pennsylvania charge of unlawful communication with a minor was not a crime in Maryland.[4] Effective October 1, 2004, sexual solicitation of a minor became a crime in Maryland for the first time as Section 3-324 of the Criminal Law Article. *See* Md.Code (2002, 2004 Cum.Supp.), § 3-324 of the Criminal Law (I) Article. Nevertheless, we disagree with appellant's contention that Section 3-324 was retroactively applied. First, as a condition of his Pennsylvania probation, appellant was required to "register with the appropriate law enforcement agency of another state within ten calendar days of moving outside the Commonwealth of Pennsylvania." Thus, as a Maryland resident, appellant was required to register in Maryland and become subject to the requirements of MSORA until April 9, 2011. Second, independent of the conditions of his Pennsylvania probation, appellant was required to register in Maryland, because he had been convicted in another state of "a crime that involves conduct that by its nature is a sexual offense against an individual under the age of 18 years." Md.Code (1957, 1996 Repl.Vol., 2000 Cum.Supp.), Article 27, § 792(a)(6)(viii), (x). Because appellant's conviction for unlawful communication with a minor in Pennsylvania specifically involved a sexual offense with a minor, *see* 18 Pa. Cons.Stat. § 6318(a)(1) (2000), appellant was required to register in Maryland for ten years. *See* Article 27, § 792(d)(5).

As a result of the 2010 amendment to MSORA, CP § 11-702.1 states that "this subtitle shall be applied retroactively to include a person who was subject to registration under this subtitle on September 30, 2010." CP 2010 § 11-702.1(a)(2); *see also Doe I,* 430 Md. at 546, 62 A.3d 123. Because appellant was subject to registration in Maryland from 2001 until April 9, 2011, it follows that he "was subject to registration . . . on September 30, 2010." Therefore, there is no question that appellant is subject to the retroactive application of the 2010 amendment to MSORA.

Having concluded that the 2010 MSORA amendment is being retroactively applied to appellant, we now must decide whether doing so violates the prohibition against *ex post facto* laws under Article 17 of the Maryland Declaration of Rights. To complete that analysis, we must consider the Court of Appeals's

decisions in *Doe I* and *Department of Public Safety & Correctional Services v. Doe,* 439 Md. 201, 94 A.3d 791 (2014) ("*Doe II*").

B. **Doe I**

In *Young v. State,* the Court of Appeals rejected a due process challenge to the sex offender registry statute as it existed in 2000, and held that the statute was a civil remedy designed to protect the public from sex offenders. 370 Md. 686, 712, 806 A.2d 233 (2002). Based on the Court of Appeals's decision in *Young,* the circuit court in the instant matter denied appellant's writ of prohibition and granted summary judgment in favor of the Department, stating:

Under [the] Supreme Court's decision, as I read it, in *Smith [v. Doe*], 538 U.S. 84 [123 S.Ct. 1140, 155 L.Ed.2d 164 (2003)], from which the Supreme Court has not departed, there is no ex post facto violation here under the Federal Constitution. And . . . unless the Court of Appeals changes its jurisprudence, as Judge Raker articulated in *Young,* 370 Md. 686 [806 A.2d 233], there is no ex post facto violation under the Maryland State Constitution [or] the Declaration of Rights.

(Emphasis added).

After the circuit court's ruling, the Court of Appeals considered an *ex post facto* challenge to the 2009 and 2010 amendments to MSORA in *Doe I,* 430 Md. at 537, 62 A.3d 123.

The pertinent facts in *Doe I* are as follows:

In 2006, Doe pled guilty to and was convicted in the Circuit Court for Washington County of a single count of child sexual abuse arising out of an incident involving inappropriate contact with a thirteen-year-old student that occurred during the 1983-84 school year when Doe was a junior high school teacher. Doe was sentenced to ten years incarceration, with all but four and one half years suspended, and three years supervised probation upon his release. Although Doe's plea agreement did not address registration as a sex offender as one of the conditions of probation, Doe was ordered at sentencing to "register as a child sex offender." He was also ordered to pay a $500 fine. Following his sentencing, Doe filed a Motion to Correct an Illegal Sentence challenging both the fine and the requirement that he register as a child sex offender. The Circuit Court agreed with Doe and issued an order striking the fine and the registration requirement. Doe was released from prison in December 2008. On October 1, 2009, Doe's probation officer directed him to register as a child sex offender. Doe maintained that he did not agree with the requirement, but, against the advice of counsel, he registered as a child sex offender in early October 2009.

Doe II, 439 Md. at 208, 94 A.3d 791.

The requirement that Doe register as a sex offender was a result of the 2009 amendment to MSORA retroactively requiring offenders who were convicted on or after October 1, 1995, but committed a sexual offense before that date, to register for the first time. *Doe I,* 430 Md. at 540, 62 A.3d 123. In October 2009, Doe brought a declaratory judgment suit in the circuit court, seeking an order that he was not required to register as a sex offender. *Id.* at 541, 62 A.3d 123. Doe argued that a registration requirement would make his plea invalid as involuntary, because he was not informed that he would have to register as a sex offender when he entered into the plea agreement in 2006. *Id.* The State argued that the requirement did not violate the prohibition against *ex post facto* laws. *Id.* at 541-42, 62 A.3d 123. The trial court agreed with the State and ordered that Doe "shall not be removed from the sex offender registry." *Id.* at 542, 62 A.3d 123 (footnote omitted).

After this Court affirmed the circuit court, the Court of Appeals granted *certiorari* and reversed our decision. *Id.* at 542, 569, 62 A.3d 123. In a plurality opinion, the Court of Appeals held that "requiring [Doe] to register as a result of the 2009 and 2010 amendments violates the prohibition against *ex post facto* laws contained in Article 17 of the Maryland Declaration of Rights." *Id.* at 537, 62 A.3d 123; *see also* *Doe II,* 439 Md. at 206, 94 A.3d 791. The three-judge plurality explained that "in many contexts," the Maryland Declaration of Rights offers broader protections than the United States Constitution. *Doe I,* 430 Md. at 547-49, 62 A.3d 123. The plurality further determined that *ex post facto* claims under Article 17 should be analyzed by using the "disadvantage" standard, under which "any law passed after the commission of an offense which . . . in relation to that offense, *or its consequences,* alters the situation of a party to his [or her] disadvantage" violates Article 17. *Id.* at 551-52, 559, 62 A.3d 123 (emphasis and alterations in original) (citations omitted).

Specifically, under the disadvantage standard, "Article 17 prohibits the retroactive application of laws that have the effect on an offender that is the equivalent of imposing a new criminal sanction or punishment." *Id.* at 561, 62 A.3d 123. The plurality determined that requiring Doe to register had "essentially the same effect" as placing him on probation, that "probation is a form of a criminal sanction," and that "applying the statute to [Doe] effectively imposes on him an additional criminal sanction" for a crime committed in the 1980s. *Id.* at 561-62, 62 A.3d 123. The plurality also concluded that the dissemination of Doe's information pursuant to MSORA was "tantamount to the historical punishment of shaming," and thus imposed an additional sanction for Doe's crime. *Id.* at 564, 568, 62 A.3d 123. Therefore, according to the plurality, the retroactive application of MSORA to Doe, which had the effect of imposing the additional sanction of probation and shaming, violated the *ex post facto* prohibition contained in Article 17 of the Maryland Declaration of Rights. *Id.* at 568, 62 A.3d 123.

Judge McDonald (joined by Judge Adkins) concurred with the plurality's conclusion that the statute violated Article 17, but, in contrast to the plurality, read Article 17 *in pari materia* with Article I, § 10 of the United States Constitution. *See id.* at 577-78, 62 A.3d 123 (McDonald, J., concurring). Judge McDonald's concurrence stated further that "the cumulative effect of [the] 2009 and 2010 amendments of the State's sex offender registration law took that law across the line from civil regulation to an element of the punishment of offenders." *Id.* at 578, 62 A.3d 123. Although his concurrence did not expressly state the test that was used, both the language of the concurrence and the two law review articles cited therein lead us to conclude that Judge McDonald analyzed the issue under the "intent-effects test." *See id.* (citing Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws,* 63 Hastings L.J. 1071, 1107-22 (2012); Corey Rayburn Yung, *One of These Laws is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions,* 46 Harv. J. Legis. 369, 386-400 (2009)).

The United States Supreme Court explained the "intent-effects" test in *Smith v. Doe:*

We must "ascertain whether the legislature meant the statute to establish `civil' proceedings." *Kansas v. Hendricks,* 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, we must further examine whether the statutory scheme is "`so punitive either in purpose or effect as to negate [the State's] intention' to deem it `civil.'" *Ibid.* (quoting *United States v. Ward,* 448 U.S. 242, 248-49, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)).

538 U.S. 84, 92, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003). Stated another way, the "intent-effects" test requires a reviewing court to engage in a two-part inquiry: "first, the court must consider the legislative intent of the statute; second, even if the statute's stated purpose is non-punitive, the court must assess whether its effect overrides the legislative purpose to render the statute punitive." *Doe,* 430 Md. at 570, 62 A.3d 123 (Harrell, J., concurring) (footnote and citation omitted). Therefore, by declaring that the 2009 and 2010 amendments "took that law across the line from civil regulation to an element of the punishment

of offenders," Judge McDonald's concurring opinion found a violation of the State and federal *ex post facto* clauses under the "intent-effects" test. *Id.* at 578, 62 A.3d 123 (McDonald, J., concurring).

Judge Harrell, writing separately, concurred in the judgment that Doe was entitled to relief, because his 2006 plea agreement "d[id] not indicate that sex offender registration was a term" of the agreement. *Id.* at 576, 62 A.3d 123 (Harrell, J., concurring). Judge Harrell, however, would have denied Doe's ex post facto claims under the "intent-effects" test established in *Smith v. Doe,* 538 U.S. at 84, 123 S.Ct. 1140. *See Doe I,* 430 Md. at 569-73, 62 A.3d 123. Lastly, Judge Barbera (now Chief Judge) dissented and, using the "intent-effects" test, would have upheld the 2009 and 2010 amendments to MSORA under both the State and federal constitutions. *See id.* at 578-79, 62 A.3d 123 (Barbera, J., dissenting).

Although the Court ultimately held that "the retroactive application to Doe of Maryland's sex offender registration statute violated Article 17 of the Maryland Declaration of Rights," *Doe II,* 439 Md. at 210, 94 A.3d 791 the divided Court did not reach a holding on whether to apply the "disadvantage" standard or the "intent-effects" test to future *ex post facto* challenges to MSORA.

C. Doe II

In *Doe II,* the Court of Appeals revisited *Doe I* for the purpose of addressing a subject that it had expressly left open in the plurality opinion of *Doe I. Doe II,* 439 Md. at 206-07, 94 A.3d 791. The subject was a sex offender's obligations under the federal Sex Offender Registration and Notification Act ("SORNA"), and the issue raised in that context was "whether a circuit court has the authority to direct the State to remove sex offender registration information in light of the provisions of SORNA specifically directing sex offenders to register in the state in which they reside, work, or attend school." *Id.* at 207, 94 A.3d 791. The Court held that, "notwithstanding the registration obligations placed directly on individuals by SORNA, circuit courts have the authority to direct the State to remove sex offender registration information from Maryland's sex offender registry when the inclusion of such information is unconstitutional as articulated in *Doe I.*" *Id.*

Doe II involved three individuals whose sex crime convictions pre-dated the 2009 and 2010 amendments to MSORA. First was Doe from *Doe I. Id.* at 208-11, 94 A.3d 791. Second was John Roe. Roe was convicted of a third degree sexual offense in 1997, "arising out of a series of sexual encounters" occurring from December 1994 to January 1996. *Id.* at 211, 94 A.3d 791. When the "course of conduct began," Roe was thirty-four years old and the victim was fourteen years old. *Id.* According to the Court, MSORA was in effect at the time of Roe's offenses and conviction. *Id.* at 212, 94 A.3d 791. Although the State conceded in the appeal to this Court that the registration law did not apply to Roe, Roe was required to register and was on the sex offender registry when the 2009 and 2010 amendments became effective.[5] *Id.* at 212-13, 94 A.3d 791.

Roe brought an action in the Circuit Court for Wicomico County, seeking a declaration that he was not required to register under MSORA, and an order directing the State to remove his name from the sex offender registry.[6] *Id.* at 212, 94 A.3d 791. The circuit court disagreed, concluding that Roe was required to register for twenty-five years as a Tier II sex offender, but credited him for the time he was previously listed on the registry. *Id.* at 212-13, 94 A.3d 791. On appeal, this Court, in an unreported opinion, vacated the judgment of the circuit court and remanded the case for further proceedings. *Id.* at 213, 94 A.3d 791. We held that, pursuant to *Doe I,* the 2009 and 2010 amendments to MSORA could not be applied retroactively to Roe. *Id.*

Finally, the Court of Appeals permitted a third individual to participate in the appeal as an amicus. *Id.* at 207-08, 94 A.3d 791. Amicus John Doe ("Amicus") was convicted of fifth degree criminal sexual conduct in Minnesota in July 2010, "arising out of an incident with a schoolmate that occurred in February 2009 while Amicus was enrolled in college in Minnesota." *Id.* at 214, 94 A.3d 791. Amicus was required to, and did in fact, register as a sex offender in Minnesota, but was removed in July 2011, because he no longer

resided in Minnesota. *Id.* at 214-15, 94 A.3d 791. Amicus completed his probation on July 21, 2012. *Id.* at 214, 94 A.3d 791.

When Amicus resumed residency in Maryland, he inquired about registration as a sex offender in September 2010, and was told that, as a result of the 2010 amendment to MSORA, he would be classified as a Tier I offender and required to register in Maryland for fifteen years. *Id.* at 215, 94 A.3d 791. Amicus filed suit in the Circuit Court for Baltimore City, seeking to be excluded from the sex offender registration requirements of the 2010 amendment. *Id.* The circuit court ruled in favor of the State, and Amicus appealed to this Court. *Id.* We stayed the appeal, pending the Court of Appeals's decision in *Doe I. Id.*

The issue in *Doe II* arose on remand of the Doe and Roe cases when the State objected to the orders of the circuit courts that required the State to remove sex offender registration information for Doe and Roe from "all federal databases." *Id.* at 210, 213, 94 A.3d 791. As previously stated, the Court of Appeals held in *Doe II* that the circuit courts had the authority to order the removal of all information about a registered sex offender from the Maryland sex offender registry and from any additional database where the State published such information, as well as to order notification of "all relevant federal agencies of the removal," where the inclusion of such information was unconstitutional under *Doe I. Id.* at 207, 238, 94 A.3d 791.

D. Applying* Doe I *and* Doe II *to the Instant Case

At the outset, the Department asks us to apply the "intent-effects" test of *Smith v. Doe,* 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164, in determining whether the retroactive application of the 2010 amendment to appellant violates the prohibition against *ex post facto* laws contained in Article 17 of the Declaration of Rights. The Department points to the landmark decision of the Supreme Court in *Marks v. United States,* wherein the Court held that, when no single rationale expressed by members of the Court commands the majority, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds." 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (citation and internal quotation marks omitted). According to the Department, because the "disadvantage" standard used by the plurality in applying Article 17 "did not command a majority of the Court, the holding of *Doe [I]* must be viewed as the narrower position taken by Judges McDonald and Adkins." As discussed previously, Judge McDonald's concurring opinion employed the "intent-effects" test and determined that, as applied to Doe, the 2009 and 2010 amendments to MSORA did constitute punishment in violation of the U.S. Constitution and the Maryland Declaration of Rights. *Doe I,* 430 Md. at 578, 62 A.3d 123 (McDonald, J., concurring).

In the case *sub judice,* we need not decide which test constitutes the "narrowest grounds" of *Doe I,* because under either the "disadvantage" standard or the "intent-effects" test, the same result is reached. In our view, the facts critical to the holding in *Doe I* are substantially the same as those in the instant case. We shall explain.

In *Doe I,* the plurality held that the retroactive application of MSORA to Doe "change[d] the consequences of [Doe's] crime to his disadvantage" by "placing him on probation and imposing the punishment of shaming for life," and thus violated the *ex post facto* prohibition contained in Article 17 of the Declaration of Rights. *Id.* at 559, 568, 62 A.3d 123. Judge McDonald's concurring opinion reached the same result by concluding that the retroactive application of MSORA by the 2009 and 2010 amendments "took that law across the line" from civil regulation to punishment. *Id.* at 578, 62 A.3d 123 (McDonald, J., concurring). Central to each holding were the following facts: (1) in 1983-1984, when Doe committed the sexual offense for which he was later convicted, Doe was not subject to MSORA—indeed, MSORA did not exist at that time; and (2) because of his conviction, the retroactive provision of MSORA placed Doe on the sex offender registry for life, which required his compliance with all of the requirements of a Tier III sex offender and provided for public dissemination of information about him as a registered sex offender. *Id.*

at 553, 559, 62 A.3d 123. In other words, but for the retroactive application of MSORA under the 2009 and 2010 amendments thereto, Doe would not be subject to registration as a Tier III sex offender for the rest of his life.

Similarly, in the instant case, (1) in 2000, when appellant committed the sexual offense for which he was later convicted, appellant was not subject to MSORA *beyond a period of ten years;* and (2) because of his conviction, the retroactive provision of MSORA placed appellant on the sex offender registry *for an additional period of fifteen years,* which required his compliance with all of the requirements of a Tier II sex offender and provided for public dissemination of information about him as a registered sex offender. In other words, but for the retroactive application of MSORA, appellant would not be subject to registration as a Tier II sex offender for the fifteen year period following the initial ten years of registration. In sum, at the end of the first ten years as a registered sex offender, appellant was in the exact same position as Doe—the retroactive application of MSORA placed both Doe and appellant on the sex offender registry when they otherwise would have been free from any obligations under MSORA.

The Department, however, argues that the case *sub judice* is distinguishable from *Doe I,* because (1) Doe's "1983-1984 crime pre-dated Maryland's first sex offender registration law by more than ten years," while MSORA was in effect when appellant committed his crime in 2000; and (2) Doe had never been legally obligated to register as a sex offender prior to the 2009 and 2010 amendments to MSORA, while appellant "was actually *on* the sex offender registry at the time of the passage of the 2009-2010 amendments." In our view, these factual distinctions do not compel a result different from *Doe I.*

As set forth earlier in this opinion, one of the consolidated cases in *Doe II* involved Roe, who had been convicted of a third degree sexual offense in 1997. 439 Md. at 211, 94 A.3d 791. The Court of Appeals observed that "[a]t the time of Roe's offenses and conviction, the Maryland sex offender registration statute in effect was the 1995 version," which required registration for a period of ten years. *Id.* at 212, 94 A.3d 791. Roe, however, was not subject to registration until the 2009 and 2010 amendments to MSORA went into effect. *Id.* at 212-13, 94 A.3d 791. This Court held, in an unreported opinion, that under *Doe I,* the 2009 and 2010 amendments to MSORA could not be retroactively applied to Roe. *Id.* at 213, 94 A.3d 791. Therefore, the existence of a sex offender registration statute at the time of the commission of the sex crime at issue did not make *Roe* distinguishable from *Doe I.* The same result should occur here.

A more difficult factual distinction is the presence of appellant on the sex offender registry at the time that the 2010 amendment to MSORA became effective. Not only was Doe not on the sex offender registry when the 2009 and 2010 amendments became effective, but neither were Roe[7] and Amicus in *Doe II. See id.* at 208, 212-13, 215, 94 A.3d 791. The issue raised in the instant case does not involve an increase in the requirements, restrictions, or public dissemination of personal information of a registrant occasioned by the retroactive application of the 2010 amendment.[8] Rather, the retroactive application of the 2010 amendment automatically subjects appellant to registration under MSORA for a period of time, fifteen years, during which time he otherwise would not have been subject to *any* of the statute's requirements, restrictions, or public dissemination of private information. It is, in essence, an all or nothing proposition.

The retroactive imposition of MSORA when it would not otherwise be required for a convicted sex offender was found to be punishment by both the plurality opinion and Judge McDonald's concurring opinion in *Doe I. See* 430 Md. at 568, 578, 62 A.3d 123 (plurality opinion and McDonald, J., concurring). As we have stated, such punishment is the same when applied to appellant (after the ten-year registration period) as when applied to Doe. In other words, the presence of appellant on the sex offender registry as of the effective date of the 2010 amendment does not change the nature or the severity of the consequences of the retroactive application of MSORA. Therefore, we conclude that the presence of appellant on the Maryland sex offender registry at the time of the effective date of the 2010 amendment to MSORA does not remove the instant case from the ambit of *Doe I.*

Finally, our conclusion is not altered by the opinion of the Court of Appeals in *Ochoa v. Department of Public Safety and Correctional Services,* which was decided just months before *Doe I.* 430 Md. 315, 61 A.3d 1 (2013). In that case, Ochoa was convicted of child sexual abuse and third degree sexual offense in 1998, for offenses that were committed in 1997. *Id.* at 317, 61 A.3d 1. Ochoa was required to register for a period of ten years under the version of MSORA in effect at that time. *Id.* By virtue of a 1999 amendment to MSORA, Ochoa's registration period increased from ten years to lifetime. *Id.* at 321, 61 A.3d 1. On April 6, 2010, Ochoa instituted a declaratory judgment action, seeking a declaration that he had not committed a crime that required lifetime registration under the 2010 amendment to MSORA. *Id.* at 317, 61 A.3d 1.

Ochoa's issue on appeal was one based solely on statutory interpretation, namely, that his 1998 convictions did not make him subject to registration under the version of MSORA in effect on September 30, 2010. *Id.* at 321-22, 61 A.3d 1. The Court held that Ochoa's 1998 convictions made him subject to registration on September 30, 2010, and thus under the retroactive application of the 2010 amendment, he was a Tier III sex offender and required to register for life. *Id.* at 327-28, 61 A.3d 1.

Ochoa, however, raised no constitutional arguments, much less one based on Article 17's prohibition against *ex post facto* laws. The Court concluded with the following comments:

Ochoa also insists that the sex-offender registration statute is penal and must be "strictly construed against the State." Although Ochoa quotes at length one case in support of this proposition, he makes no effort in his brief to apply it to his own case or develop it in any meaningful way. For example, he does not argue that the alleged penal nature of the statute bars retroactive application of the 1999 law imposing a lifetime registration under the principles of due process. *See* Maryland Rule 8-504(a)(5) (requiring "[a]rgument in support of a party's position"). We have held that "arguments not presented in a brief or not presented with particularity will not be considered on appeal." *Klauenberg v. State,* 355 Md. 528, 552, 735 A.2d 1061, 1074 (1999) (citation omitted) (declining to address an appellant's argument that was merely "lumped in" with another). Considering these principles, we need not address this issue.

Id. at 328, 61 A.3d 1 (footnote omitted). Because the Court of Appeals did not address the constitutionality of MSORA's retroactive application to Ochoa under Article 17, we conclude that Ochoa is inapplicable to the case before us.

In sum, we conclude that the retroactive application of MSORA to appellant by the 2010 amendment imposed additional punishment on appellant for criminal conduct that occurred prior to the existence of the amended statute, by extending the term of his required registration from ten years to twenty-five years. Thus the 2010 amendment, as applied to appellant, is unconstitutional under the prohibition against *ex post facto* laws contained in Article 17 of the Maryland Declaration of Rights. Accordingly, we hold that the trial court erred by denying appellant a writ of prohibition, and also erred by granting summary judgment in favor of the Department.

II.

The Sex Offender Registration and Notification Act ("SORNA")

The Department argues, in the alternative, that SORNA, 42 U.S.C. § 16911 *et seq.,* "imposes on [appellant] an obligation to register as a sex offender that is independent of [his] obligation to register under Maryland law." Therefore, the Department concludes, "even if the Maryland Act imposed no [ ] requirements [to register], [appellant] would still be required under SORNA to register in Maryland as a tier II offender and to keep his registration current; if he failed to do so, he would be criminally liable under federal law."

Appellant responds that this issue is waived for our review, because the issue of whether federal law required him to register was not raised in or decided by the circuit court. Alternatively, appellant asserts that, "[e]ven if this issue were before this Court, federal law does not impose an obligation on Appellant to register as a sex offender," because, pursuant to 42 U.S.C. § 16911(2), (3), & (4), appellant would only be categorized federally as a Tier I sex offender. Although Tier I sex offenders must initially register for fifteen years, as appellant concedes, he argues that, under 42 U.S.C. § 16915(b)(1), in light of his clean record, his period of registration ended on January 3, 2011. Therefore, even if this Court were to reach the merits, appellant argues, he would not be required to register under SORNA.

The Court of Appeals directly addressed the issue of SORNA registration in *Doe II,* holding, as we have said, that SORNA does not change the consequences of a registration requirement held unconstitutional under Maryland law. 439 Md. at 207, 94 A.3d 791. The Court reasoned:

Where Appellees would only be required to register in Maryland, and where we have held that the retroactive application of the Maryland registry is unconstitutional, they, and individuals similarly situated in Maryland, cannot be required to register in Maryland. The language of SORNA expressly providing for a conflict between the federal law and state constitutions, as well as the available federal guidance on the topic, leads us to the conclusion that so long as Appellees are in Maryland, they cannot be required to register as sex offenders in Maryland, notwithstanding the registration requirements imposed directly on individuals by SORNA.

Id. at 235, 94 A.3d 791. Therefore, because we have held that appellant cannot be required to register as a sex offender in Maryland beyond the ten years imposed by the Pennsylvania Court, he cannot be required to register pursuant to SORNA.

ORDERS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY DATED MARCH 29, 2012 REVERSED; CASE REMANDED TO THAT COURT WITH DIRECTIONS TO ENTER AN ORDER IN FAVOR OF APPELLANT CONSISTENT WITH THIS OPINION; APPELLEES TO PAY COSTS.

[*] Friedman, J., did not participate in the Court's decision to designate this opinion for publication pursuant to Maryland Rule 8-605.1.

[1] For the sake of conciseness, we may use the term "register" as shorthand for "register as a sex offender" in this opinion.

[2] Article 17 of the Maryland Declaration of Rights provides:

That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made; nor any retrospective oath or restriction be imposed, or required.

[3] Appellant received five years' probation for the offense of unlawful communication with a minor, five years' probation for the corruption of minors charge, and a fine for the crime of loitering and prowling at nighttime.

[4] The other offense that required appellant to register in Pennsylvania was corruption of minors. Neither party makes any argument about that crime, and thus we will not address it.

[5] Roe registered annually for ten years. *Doe II,* 439 Md. at 211-12, 94 A.3d 791. At the conclusion of the ten year period, Roe was instructed, apparently erroneously, that he had to continue on the sex offender registry for the rest of his life. *Id.* at 212, 94 A.3d 791. As a result, Roe was on the registry at the time that the 2009 and 2010 amendments to MSORA became effective. *Id.*

[6] Roe also argued that he was improperly placed on the sex offender registry at the time of his conviction, because under the registration law at that time, he was not required to register as a sex offender. *Doe II,* 439 Md. at 212, 94 A.3d 791.

[7] Roe was in fact on the sex offender registry, but the State conceded that Roe should not have been on the registry, because the registration law in effect at the time of his offenses and conviction did not apply to him. *Doe II,* 439 Md. at 213, 94 A.3d 791.

[8] The 2010 amendment to MSORA imposed many new requirements, restrictions, and public dissemination of personal information. *See Doe I,* 430 Md. at 569-70, 62 A.3d 123 (Harrell, J., concurring). We are not called upon in the instant case to decide, nor do we express any opinion on, whether the changes brought about by the 2010 amendment violate the prohibition against *ex post facto* laws under Article 17 when applied to an individual who is placed on the sex offender registry prior to the 2010 amendment, but whose registration period is not extended by the 2010 amendment.

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George SHEPARD, and all other inmates in a similar situation, appellees, v. Robert P. HOUSTON, director, Nebraska Department of Correctional Services, in his official and individual capacities, appellant.

No. S-13-1032.

Supreme Court of Nebraska.

Filed November 7, 2014.

Jon Bruning, Attorney General, and Jessica M. Forch for appellant.

George Shepard, pro se.

Heavican, C.J., Wright, Connolly, Stephan, McCormack, Miller-Lerman, and Cassel, JJ.

McCormack, J.

I. NATURE OF CASE

Neb.Rev.Stat. § 29-4106(2) (Cum.Supp. 2012) provides for retroactive application of its requirement that all inmates convicted of a felony sex offense or other specified offense submit a DNA sample before being discharged from confinement. Section 29-4106(2) also specifically provides that those inmates convicted before the passage of § 29-4106 "shall not be released prior to the expiration of his or her maximum term of confinement or revocation or discharge from his or her probation unless and until a DNA sample has been collected." In effect, § 29-4106(2) provides that an inmate will forfeit his or her past and future good time credit if the inmate refuses to submit a DNA sample. The issue is whether § 29-4106(2), as applied to an inmate who was convicted before its passage, violated the Ex Post Facto Clauses of U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16.

II. BACKGROUND

George Shepard was sentenced on July 11, 1990, to a combined term of up to 50 years' imprisonment. He was sentenced to 40 years' imprisonment for sexual assault in the first degree and 10 years' imprisonment for manufacturing child pornography, the sentences to run consecutively.[1]

Under the good time law in effect at the time of Shepard's crimes, Shepard's projected mandatory discharge date was May 4, 2015. Neb.Rev.Stat. § 83-1,107 (Reissue 1987) provided:

(1) The chief executive officer of a facility shall reduce for good behavior the term of a committed offender as follows: Two months on the first year, two months on the second year, three months on the third year, four months for each succeeding year of his term and pro rata for any part thereof which is less than a year. The total of all such reductions shall be credited from the date of sentence, which shall include any term of confinement prior to sentence and commitment as provided pursuant to section 83-1,106, and shall be deducted:

(a) From his minimum term, to determine the date of his eligibility for release on parole; and

(b) From his maximum term, to determine the date when his discharge from the custody of the state becomes mandatory.

(2) While the offender is in the custody of the Department of Correctional Services, reductions of such terms may be forfeited, withheld and restored by the chief executive officer of the facility, with the approval of the director after the offender has been consulted regarding the charges of misconduct.

(3) While the offender is in the custody of the Board of Parole, reductions of such terms may be forfeited, withheld, and restored by the Parole Administrator with the approval of the director after the offender has been consulted regarding the charges of misconduct or breach of the conditions of his parole. In addition, the Board of Parole may recommend such forfeitures of good time to the director.

(4) Good time or other reductions of sentence granted under the provisions of any law prior to August 24, 1975, may be forfeited, withheld, or restored in accordance with the terms of the act.

Neb.Rev.Stat. § 83-1,107.01 (Reissue 1987) further provided:

(1) In addition to the reductions provided in section 83-1,107, an offender shall receive, for faithful performance of his assigned duties, a further reduction of five days for each month of his term. The total of all such reductions shall be deducted from his maximum term to determine the date when his discharge from the custody of the state becomes mandatory.

(2) While the offender is in the custody of the Department of Correctional Services, reductions of such terms may be forfeited, withheld, and restored by the chief executive officer of the facility, with the approval of the director after the offender has been consulted regarding any charges of misconduct.

(3) While the offender is in the custody of the Board of Parole, reductions of such terms may be forfeited, withheld, and restored by the Parole Administrator with the approval of the director after the offender has been consulted regarding the charges of misconduct or breach of the conditions of his parole. In addition, the Board of Parole may recommend such forfeitures of good time to the director.

Disciplinary procedures for the Nebraska Department of Correctional Services (Department) are governed by Neb.Rev. Stat. §§ 83-4,109 to 83-4,123 (Reissue 2008). Under § 83-4,111(3), which continues to be in essentially the same form as it was at the time of Shepard's crimes, the Department has broad powers to adopt and promulgate rules and regulations, including criteria concerning good time credit, but such rules and regulations "shall in no manner deprive an inmate of any rights and privileges to which he or she is entitled under other provisions of law." Under § 83-4,114.01(2), previously located at Neb.Rev.Stat. § 83-185(2) (Reissue 1987), good time may be forfeited only in cases involving "flagrant or serious misconduct." Further, pursuant to § 83-4,122, in disciplinary cases involving the loss of good time, forfeiture must be done through disciplinary procedures adopted by the director of the Department that are consistent with various requirements of the statute.

Various factors could be considered before making a determination regarding a committed offender's actual release on parole upon the date of eligibility.[2] As for the mandatory discharge date, however, the Board of Parole was required to discharge a parolee from parole and the Department was required to discharge a legal offender from the custody of the Department "when the time served ... equals the maximum term less all good time reductions."[3]

In 1997, the Legislature passed provisions under the DNA Detection of Sexual and Violent Offenders Act, now known as the DNA Identification Information Act (the Act),[4] for collecting DNA samples from any person convicted of a felony sex offense or other specified offense, in order to place such sample for use in the State DNA Sample Bank. Since 1997, § 29-4106(2) has provided for the retroactive application of

the Act to persons convicted before the effective date of the Act but still serving a term of confinement on the effective date of the Act.

Under § 29-4106(2), such person shall not be released prior to the expiration of his or her maximum term of confinement unless and until a DNA sample has been drawn. Section 29-4106(2) currently states:

A person who has been convicted of a felony offense or other specified offense before July 15, 2010, who does not have a DNA sample available for use in the State DNA Sample Bank, and who is still serving a term of confinement or probation for such felony offense or other specified offense on July 15, 2010, *shall not be released prior to the expiration of his or her maximum term of confinement or revocation or discharge from his or her probation unless and until a DNA sample has been collected.*

(Emphasis supplied.)

Department administrative regulation (A.R.) 116.04 implements this statute and provides that an inmate's refusal to provide a DNA sample will result in administrative withholding of all good time and that the inmate's sentence will be recalculated to the maximum prison term. Department employees testified that under A.R. 116.04, the Department gives inmates until 7 days prior to their release date, as calculated with good time credit, to submit their DNA sample. If an inmate does not submit a sample by that time, the inmate is given notice of a classification hearing. The deputy director over institutions for the Department explained that under A.R. 116.04, good time credit is taken away through a reclassification process rather than through a disciplinary procedure. The reclassification results in forfeiture of the good time. The deputy director explained, "That's what our policy allows for and that's carrying out what we believe state law says." The deputy director was aware of no other behaviors for which good time credits would be forfeited through a reclassification process.

The crimes for which Shepard was sentenced in 1990 are subject to DNA testing under § 29-4106. Section 29-4106 was not in effect when the crimes were committed. On August 18, 2010, Shepard was asked by the Department staff to provide a DNA sample. He declined to do so, and he has not given a DNA sample since that time. The deputy director testified that if Shepard continued to refuse to submit to DNA testing, his good time credit would be forfeited through reclassification under A.R. 116.04. Although in 2011, Shepard apparently would have been parole eligible based on good time, the record does not clearly reflect the reason why Shepard has not been released on parole.

After dismissing a prior complaint as not yet ripe for review, on April 7, 2011, the district court granted Shepard leave to file an amended complaint challenging the impending forfeiture of his good time credit. After sustaining various motions to dismiss and for summary judgment, the only remaining claim of Shepard's amended complaint was for declaratory judgment challenging the application of § 29-4106 as violative of the prohibition against ex post facto laws. The only remaining defendant was Robert P. Houston in his official capacity as director of the Department.

The court noted that Shepard had failed to make the agency promulgating the challenged rule a party to the action, as required by the Uniform Declaratory Judgments Act, but the court found that the action challenging the validity of § 29-4106 was not so barred. The court further found Shepard's declaratory judgment claim was ripe for review. The court reasoned that although § 29-4106(2) and A.R. 116.04 would not potentially be applied to Shepard until his May 4, 2015, release date, declaratory judgment is appropriate under the circumstances to prevent future harm. The court did not address Shepard's parole eligibility.

The district court declared § 29-4106(2) unconstitutional under the Ex Post Facto Clauses of U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, as applied to Shepard, an inmate sentenced prior to the statute's enactment. Houston was accordingly enjoined from withholding from Shepard any good time under the provisions of § 29-4106(2).

The court reasoned that the effect of § 29-4106(2) was to retroactively repeal the good time statutes as to Shepard if he did not provide a DNA sample. The court noted that Shepard had not been found guilty of any misconduct while incarcerated. The court stated that while merely requiring a DNA sample would not impose any additional penalty on an inmate, the language of the statute eliminating good time credit does impose an additional penalty not present at the time of Shepard's convictions.

The court rejected the argument that the forfeiture of good time for refusing to submit to DNA testing is a result of a violation of valid administrative prison regulations rather than the imposition of the penalty imposed by statute. The court said that A.R. 116.04 is facially a mere enforcement of the statute and that Neb.Rev.Stat. § 83-173(6) (Reissue 2008) does not grant the Department director authority to impose penalties for failure to comply with a statutory requirement. And, under § 83-4,111, discipline may be imposed only for conduct outlined in the "Code of Offenses" adopted by the Department and appearing in title 68, chapter 5, of the Nebraska Administrative Code. Failure to submit a DNA sample, the court noted, is not listed as an offense within the code of offenses. While "[d]isobeying an [o]rder" and "[v]iolation of [r]egulations" are listed as offenses, loss of good time may be imposed only for such violations if they are "serious or flagrant," and no more than 1 month of good time can be lost for such serious and flagrant violations.[5]

Houston appeals. Shepard does not cross-appeal.

III. ASSIGNMENTS OF ERROR

Houston assigns that the district court erred in (1) determining Shepard's action was ripe for review and (2) determining that § 29-4106(2) violates the constitutional prohibition against ex post facto laws, "as this statute is a Constitutional civil regulatory scheme which does not impose punishment."

IV. STANDARD OF REVIEW

Constitutional interpretation presents a question of law.[6]

V. ANALYSIS

The only issues presented by the parties in this appeal are whether the district court erred in determining that Shepard's claim was ripe for review and whether it erred in concluding that the retroactive application of § 29-4106(2) was unconstitutional.

1. RIPENESS

We first address the question of ripeness. According to Houston, Shepard's claim is not ripe, because "[t]here is merely a possible threat of harm, sometime in the future, and we have no idea whether that harm will even come to fruition."[7] We disagree.

Ripeness is a justiciability doctrine that courts consider in determining whether they may properly decide a controversy.[8] The fundamental principle of ripeness is that courts should avoid entangling themselves, through premature adjudication, in abstract disagreements based on contingent future events that may not occur at all or may not occur as anticipated.[9]

A determination of ripeness depends upon the circumstances in a given case and is a question of degree.[10] With regard to the jurisdictional aspect of ripeness, we employ a two-part test in which we consider (1) the fitness of the issues for judicial decision and (2) the hardship of the parties of withholding court consideration. Because ripeness is peculiarly a question of timing, it is the situation now rather than the situation at the time of the district court's decision that must govern.[11] Generally, a case is ripe when

no further factual development is necessary to clarify a concrete legal dispute susceptible to specific judicial relief, as distinguished from an advisory opinion regarding contingent future events.[12]

First, this appeal presents a constitutional question that is essentially legal in nature and may be resolved without further factual development.[13]

Second, this appeal presents a concrete controversy and does not present merely abstract disagreements based on contingent future events that may not occur at all or may not occur as anticipated. Shepard has already declined to submit a DNA sample and professes that he will continue to do so. The deputy director of the Department testified that Shepard's good time will be forfeited if he continues to refuse to submit a DNA sample. The deputy director, indeed, has no discretion under § 29-4106(2) to do otherwise. While it is possible that Shepard will change his mind, thereby making the controversy moot, that possibility is more speculative than the present reality. The hypothetical possibility of future mootness does not render the present appeal unripe.

Finally, addressing the underlying merits in the present appeal will avoid significant hardship. The Department does not conduct the reclassification proceedings that result in good time forfeiture until 7 days before the mandatory release date. If we decline to address the merits in this appeal and demand that the process of reclassification be complete before we consider the matter ripe, then it will not be possible for Shepard's action to be determined before Shepard would be subjected to potentially illegal incarceration. Deciding the case now avoids the possibility of the irreparable harm to Shepard of being imprisoned past the mandatory discharge date (without forfeiture) of May 4, 2015. In addition, by deciding the case now, we avoid the needless waste of judicial resources through future relitigation of the issues.[14]

Having found the matter ripe for review, we turn to the underlying merits of Shepard's ex post facto claim.

2. EX POST FACTO

Under the laws in effect at the time Shepard committed his crimes, he was entitled to mandatory "regular" good time, automatically earned under the formula stated above, as well as "meritorious" good time, if earned though good conduct.[15] His parole eligibility date was calculated by deducting good time from his minimum sentence, and his mandatory discharge date was calculated by deducting good time from his maximum sentence.[16] This appeal, however, concerns only Shepard's mandatory discharge date.

Good time earned could be forfeited under the scheme in effect at the time of Shepard's crimes, but only pursuant to specified procedures and regulations and only, under § 83-4,114.01(2), for "flagrant or serious misconduct." There were no statutory provisions allowing for the forfeiture of future mandatory good time or for general ineligibility for participation in the good time scheme as a result of misconduct. There were no provisions mandating that inmates provide a DNA sample.

By changing the release date to the maximum term of confinement or revocation or discharge from probation, § 29-4106(2) effectively provides for mandatory forfeiture of participation in the good time credit system upon the act of refusing to submit a DNA sample under the requirements first passed in 1997. The State does not claim that the refusal to provide a DNA sample is an act of "flagrant or serious misconduct," and it is clear from the record that when a convicted person refuses to provide a DNA sample, the Department does not change the mandatory discharge date pursuant to procedures provided for disciplinary forfeiture of good time.

Facially, § 29-4106(2) applies retroactively to any person who has been convicted of a felony offense or other specified offense before July 15, 2010. It thus facially encompasses both inmates whose crimes occurred before the passage of the Act in 1997 and those whose crimes occurred after the passage of

the Act. As applied to Shepard, however, § 29-4106(2) is retroactive. Section 29-4106(2) plainly expanded the scope of potential forfeiture of good time beyond the limitations to flagrant or serious misconduct in existence at the time of his crimes. Further, by mandating that the inmate shall not be released prior to the expiration of his or her maximum term of confinement or revocation or discharge from his or her probation, § 29-4106(2) increased the amount of good time that could be lost for any singular act.

Nevertheless, the State argues that providing a DNA sample is not in itself punitive. And to the extent that Shepard is punished for refusing to provide a DNA sample, the State argues he was given fair notice of the consequences before he refused.

For the reasons that follow, we agree with Shepard and the district court that the retroactive expansion of the scope of good time forfeiture violated the prohibitions against ex post facto laws, found in the Ex Post Facto Clauses of U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16. While the requirement of DNA sampling, in itself, may be civil, the attendant forfeiture of good time increases the quantum of punishment for Shepard's original crimes beyond the measure of punishment legally stated at the time they were committed.

(a) Ex Post Facto Prohibitions

The ex post facto prohibitions found in the Ex Post Facto Clauses of U.S. Const. art. I, § 10, and Neb. Const. art. I, § 16, forbid Congress and the states to enact any law "`which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'"[17] Stated another way, the Ex Post Facto Clauses "`forbid the application of any new punitive measure to a crime already consummated.'"[18]

The Ex Post Facto Clauses ensure that individuals have fair warning of applicable laws, and they guard against vindictive legislative action.[19] Even where these concerns are not directly implicated, the clauses also safeguard "`a fundamental fairness interest ... in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.'"[20]

To fall within the ex post facto prohibition, a law must be retrospective or retroactive[21] — that is, it must apply to events occurring before its enactment — and it must disadvantage the offender affected by it either by altering the definition of criminal conduct or by increasing the punishment for the crime.[22]

Only retroactive criminal punishment for past acts is prohibited.[23] The retroactive application of civil disabilities and sanctions is permitted.[24] But any statute that punishes as a crime an act previously committed which was innocent when done, which makes more burdensome the punishment for a crime after its commission, or which deprives one charged with a crime of any defense available according to law at the time when the act was committed is prohibited as ex post facto.[25] Subtle ex post facto violations are no more permissible than overt ones.[26]

(b) Retrospective Increases in Quantum of Punishment Through Changes in Good Time Scheme Violate Ex Post Facto Principles

In *Weaver v. Graham,*[27] the U.S. Supreme Court held that it is a violation of the prohibition against ex post facto laws to apply a new formula for calculating future good time credits to a person incarcerated for a crime committed before the new law was passed. The new law reduced the amount of good time automatically available through performance of satisfactory work and avoidance of disciplinary violations, but increased the amount of discretionary good time available for specific productive conduct.[28] The Court reasoned that regardless of whether the good time was a vested right, there was a lack of fair

notice and governmental restraint because the legislature increased the inmate's punishment beyond what was prescribed when the crime was consummated.[29] "[E]ven if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense."[30]

The Court in *Weaver v. Graham* rejected the state's argument that the law altering the availability of good time was prospective, and not retrospective, because it operated only upon the accumulation of good time after its effective date. The Court explained:

This argument fails to acknowledge that it is the effect, not the form, of the law that determines whether it is *ex post facto.* The critical question is whether the law changes the legal consequences of acts completed before its effective date. In the context of this case, this question can be recast as asking whether [the statute] applies to prisoners convicted for acts committed before the provision's effective date. Clearly, the answer is in the affirmative.[31]

The Court in *Weaver v. Graham* also rejected the state's argument that the new good time statute was not retrospective, because good time is not part of the punishment annexed to the crime. The Court explained:

First, we need not determine whether the prospect of the gain time was in some technical sense part of the sentence to conclude that it in fact is one determinant of petitioner's prison term — and that his effective sentence is altered once this determinant is changed.... Second, we have held that a statute may be retrospective even if it alters punitive conditions outside the sentence.[32]

The Court concluded that the new good time statute "substantially alters the consequences attached to a crime already completed, and therefore changes `the quantum of punishment.'"[33]

Finally, the Court rejected the state's argument that the net effect of all the new good time provisions was to increase availability of good time deduction and, thus, that the change was not to the defendant's disadvantage. The Court held that the alteration in the quantum of punishment was to the inmate's disadvantage because there was a reduced opportunity to shorten time in prison "simply through good conduct."[34] The Court explained:

The fact remains that an inmate who performs satisfactory work and avoids disciplinary violations could obtain more gain time per month under the repealed provision ... than he could for the same conduct under the new provision.... To make up the difference, the inmate has to satisfy the extra conditions specified by the discretionary gain-time provisions. Even then, the award of the extra gain time is purely discretionary, contingent on both the wishes of the correctional authorities and special behavior by the inmate, such as saving a life or diligent performance in an academic program.... In contrast, under both the new and old statutes, an inmate is automatically entitled to the monthly gain time simply for avoiding disciplinary infractions and performing his assigned tasks.[35]

Because the new good time scheme made more onerous the punishment for the crimes committed before its enactment, the Court in *Weaver v. Graham* held that it violated the prohibition against ex post facto laws.[36]

(c) Retroactive Application of Changes to Discretionary Elements of Parole Only Ex Post Facto if Significant Risk of Lengthening Time Incarcerated

Such alteration of the substantive formula for good time is treated distinctly from the retrospective application of changes to discretionary elements of the parole process. The U.S. Supreme Court has observed that "[w]hether retroactive application of a particular change in parole law respects the

prohibition on *ex post facto* legislation is often a question of particular difficulty when the discretion vested in a parole board is taken into account."[37] The question in such cases is a "matter of degree" and depends on whether the retroactive application of the change creates "`a sufficient risk of increasing the measure of punishment attached to the covered crimes.'"[38]

In two cases, the U.S. Supreme Court held that retroactive changes that decreased the frequency of parole hearings did not create a sufficient risk of increasing the likelihood of longer incarceration that would violate the ex post facto prohibition.[39] In *Garner v. Jones*[40] and *California Dept. of Corrections v. Morales*,[41] the Court reasoned that the changes to the parole laws in question (1) did not change the substantive formula for securing any reductions to sentence ranges, (2) did not affect the standards for determining a prisoner's suitability for parole and setting a release date, and (3) did not present any "significant risk"[42] of lengthening the time spent in prison.[43]

The Court explained that "the *Ex Post Facto* Clause should not be employed for `the micromanagement of an endless array of legislative adjustments to parole and sentencing procedures.' ... The States must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release."[44] And, while

[t]he presence of discretion does not displace the protections of the *Ex Post Facto* Clause, ... to the extent there inheres in *ex post facto* doctrine some idea of actual or constructive notice[,]... where parole is concerned discretion, by its very definition, is subject to changes in the manner in which it is informed and then exercised.[45]

The concurring opinion in *Garner v. Jones* advocated for a distinction between the penalties that a person can anticipate for the commission of a particular crime and the opportunities for mercy or clemency that may go to the reduction of the penalty. The concurrence admitted, "At the margins, to be sure, it may be difficult to distinguish between justice and mercy."[46] It illustrated then: "A statutory parole system that reduces a prisoner's sentence by fixed amounts of time for good behavior during incarceration can realistically be viewed as an entitlement — a reduction of the prescribed penalty — rather than a discretionary grant of leniency. But that is immeasurably far removed from the present case."[47]

(d) Requiring DNA Sample Is Not Punitive

The State is correct that, standing alone, requiring DNA sampling is not punishment at all. Courts have consistently held that requiring a convicted person to submit a DNA sample does not violate the prohibition against ex post facto laws, because such a requirement is not punitive.[48]

Further, courts consistently hold that when a law requiring a DNA sample punishes refusal to provide a sample as an offense *separate* from the offense that made the person subject to DNA sampling, such law does not violate ex post facto prohibitions.[49] Rather, the punishment is solely for the new offense of refusing to provide the DNA sample — even though the original offense may have been the "but for" reason for the DNA sample requirement. Such punishment is not a new punitive measure of the original offense.

This is similar to our Sex Offender Registration Act (SORA). The requirement of registration, in itself, is not punitive.[50] Further, we have held that although Neb. Rev.Stat. § 29-4011 (Cum.Supp.2012) imposes a criminal penalty for those found guilty of failing to register under SORA, such punishment is not for behavior that occurred before the statute's enactment.[51]

It is "not additional punishment for the crimes that resulted in a person's being subject to SORA; instead, it punishes the act of failing to comply with SORA once a person is subject to its requirements."[52]

At issue here, however, is not punishment of refusal to submit a DNA sample as a separate offense. At issue here is the mandatory forfeiture of all good time, and this forfeiture results in an increased period of incarceration for the original offense, which was committed before the statute's enactment.

(e) Changes to Consequences of Original Crime as Result of Failure to Abide by New Rules

Section 29-4106(2) arguably falls under a class of "close cases" wherein courts have traditionally had more difficulty determining if the consequence for failure to adhere to new prescriptions should be considered the continuing legal consequence of the original crimes or the independent legal consequence of later misconduct.[53]

The Sixth Circuit, in *U.S. v. Reese,*[54] opined that if the new punishment applies to everyone who has committed the predicate offense without regard to any subsequent offense, there is clearly an ex post facto violation. In contrast, an increased punishment *of the new crime,* but based on recidivism, has uniformly been upheld as constitutional.[55] In such cases, the punishment is not "`for the earlier offense,'" even though the punishment was a "but for" consequence of that earlier offense.[56]

Changes to the consequences attendant to the original crime, but based on new conduct subsequent to those changes, however, create more confusion. The Sixth Circuit framed the relevant ex post facto question for these situations as: "Is there fair notice, and is the punishment for the *original* conduct being imposed or increased?"[57]

In the context of changes to release eligibility based on the failure to provide a DNA sample, courts illustrate that the ex post facto question is more specifically whether the subsequently established requirement lengthens the time incarcerated under the original sentence and, if so, whether the inmate was on fair notice at the time the crime was committed that the requirement in question could change. Where the length of incarceration is increased by virtue of the new law, the distinction of whether the new law is ex post facto hinges on whether the change involved matters of discretion — or other changes clearly contemplated by the original statutory scheme — or whether instead the change involved the standards for determining a prisoner's suitability for parole or for setting a release date.

(i)* Jones v. Murray *— Forfeiture of Mandatory Good Time for Refusing DNA Sample Violated Ex Post Facto Principles

Thus, in *Jones v. Murray,*[58] the Fourth Circuit held that a statute that required a DNA sample from convicted felons and sex offenders violated the prohibition against ex post facto laws to the extent it could be enforced to modify mandatory parole.

The statutory scheme in force when the inmate in question committed his crimes provided that every person "`shall be released on parole ... six months prior to his date of final discharge.'"[59] The only exception at the time of the inmate's crimes was if new information was provided to the parole board giving the board reasonable cause to believe that release posed a clear and present danger to the life or physical safety of any person.[60]

Subsequent to the inmate's crimes, a DNA blood testing requirement was passed, stating:

"Notwithstanding the provisions [providing for release 6 months before the date of final discharge with such limited exception in the case of being a clear and present danger], any person convicted of a felony who is in custody after July 1, 1990, shall provide a blood sample prior to his release."[61]

The court in *Jones v. Murray* noted that the DNA testing itself was not punitive. Further, the court observed in dicta that it would not be contrary to the prohibitions against ex post facto laws for violators to

be administratively punished "within the terms of the prisoners' original sentence" for the failure to provide samples.[62] This was because "reasonable prison regulations, and subsequent punishment for infractions thereof, are contemplated as part of the sentence of every prisoner."[63] "[S]ince a prisoner's original sentence does not embrace a right to one set of regulations over another, reasonable amendments, too, fall within the anticipated sentence of every inmate."[64] Accordingly, the statute did not violate the prohibition against ex post facto in "its possible effect in authorizing prison punishment, the denial of good-time credits, or consideration by the parole board in granting discretionary parole to compel the inmate to provide a sample, because it does not thereby alter any prisoner's sentence for past conduct."[65]

However, the court held that punishing the refusal to provide a DNA sample through the denial of the statutory 6-month mandatory parole inherent to the original sentence constituted after-the-fact punishment of the original crimes. The court elaborated that the prisoner was being denied the benefit present at the time of his original crimes of being entitled to a 6-month reduction in sentence unless he constituted a clear and present danger to society. There was no indication that refusing to provide a DNA sample made the inmate a clear and present danger to society.

The court severed that part of the DNA statute which referred to modifying mandatory parole upon an inmate's refusal to provide a DNA sample.

(ii)* State v. Henry County Dist. Ct. — *Changes to Laws Specifying New Conduct That Would Earn or Forfeit Good Time Violated Ex Post Facto Principles

Though not a DNA case, in *State v. Henry County Dist. Ct.*,[66] the court similarly held that a statute that added requirements to the previously automatic accrual of good time for simple good conduct violated the prohibition against ex post facto laws. The statutory scheme in place at the time the inmate committed his crimes allowed an inmate to earn a specified amount of good time for simple good conduct and another specified amount of good time for participation in listed activities. Subsequently, the statute was amended such that an inmate who was required to participate in a sex offender treatment program was ineligible for any good time reduction of his or her sentence unless the inmate participated in and completed the sex offender treatment program. An implementing regulation stated that inmates required to participate in sex offender treatment programs who refused treatment, were removed from treatment, or failed program completion criteria would not be eligible for earned time credits. The inmate in question had been temporarily removed from a sex offender treatment program for misconduct. During his removal, the inmate did not earn any good time, thus ultimately extending his tentative date for discharge by 4 months.

The court in *State v. Henry County Dist. Ct.* reasoned that to the extent the inmate could no longer automatically earn good time merely by following institutional rules, without participating in programs required by the director, the amended statute and its implementing regulation made the penalty for the inmate's original crime more onerous. "[I]f [the inmate] does not participate in the [sex offender treatment program,] he will have a longer period of incarceration under the amended statute than he would have had under the statute in effect at the time of his sentencing."[67] In fact, the inmate's "failure to satisfactorily participate renders him ineligible to earn *any* reduction in his sentence, even if he has no disciplinary infractions."[68]

The court rejected the argument that the inmate was given fair notice because his failure to participate in the sex offender treatment occurred after the passage of the amended statute and the pertinent regulation. The court found that the state's analysis was "misplaced."[69] The question, the court reasoned, was whether the inmate was on notice when he committed his original crime and was sentenced that he would not be eligible for a reduction in his sentence by merely following prison rules.[70]

The court also rejected the State's argument that the amended statute and the implementing regulation merely changed the institutional rules contemplated as part of the sentence of every prisoner. Although

an inmate would have been on notice that the precise conduct required to qualify for good time credit could vary over time, an inmate "would have had the expectation that, if he simply complied with institutional rules, he could cut his sentence in half."[71] Furthermore, given the wording of the statutes at the time of the inmate's crimes, he would have understood that compliance with institutional rules and participation in treatment programs were treated distinctly.

(iii) Courts Distinguish* Jones v. Murray *and Find No Ex Post Facto Violation When New Law or Regulation Does Not Lengthen Time in Prison

In contrast to the facts presented in *Jones v. Murray* or *State v. Henry County Dist. Ct.,* internal prison sanctions for failure to submit a DNA sample that do not affect the prisoner's parole eligibility date or discharge date have uniformly been held not to violate the prohibition against ex post facto laws.[72] Such changes to internal punishments are contemplated as part of the sentence of every prisoner.

Thus, in *Padgett v. Ferrero,*[73] the court held that disciplinary action, followed by taking a sample by force in the event of continued refusal, was not an ex post facto law, because "no prison sentences will be extended because of the failure to cooperate with the statute."[74] Likewise, the court in *Cooper v. Gammon*[75] held that it did not violate ex post facto prohibitions for the prison to impose solitary confinement for an inmate who refused to submit a DNA sample under laws enacted since he committed his crimes.

(iv) Courts Distinguish* Jones v. Murray *and Find No Ex Post Facto Violation When Inmate Was on Notice at Time of Crimes That the Act Was Available and Subject to Changing Regulations or Discretion

Furthermore, courts have held that there is no violation of the prohibition against ex post facto laws in the denial or revocation of parole or good time for refusing to submit a DNA sample when the original statutory scheme made clear that actual release, continued release, or the earning of good time credits was subject to the discretion of prison officials or to changing laws or regulations.[76]

Thus, where the convicted person was previously subject to the generally stated requirement that while on supervised release or parole, he or she follow parole agent directives and not commit other crimes, then new laws criminalizing refusal to submit a DNA sample and allowing for revocation of parole or supervised release based on such refusal did not violate the prohibition against ex post facto laws.[77] Such potential revocation of supervised release or parole did not increase the plaintiff's punishment for a prior conviction because, as a part of the original sentence, the plaintiff was subject to the mandatory conditions that he or she not commit another crime (refusal to submit a DNA sample being a separate misdemeanor) and that he or she follow the instructions of the probation officer.[78] "[I]t is well settled that the conditions of parole can be changed at any time."[79]

Similarly, courts hold that there is no violation of the prohibition against ex post facto laws when refusal to submit a DNA sample is the basis for the discretionary determination to deny release on parole.[80] For example, in *Dial v. Vaughn,*[81] the DNA testing statute provided that an inmate shall not be released before expiration of the maximum term of confinement unless and until the inmate provided a DNA sample. The court interpreted this statute, however, as not changing either the mandatory release date or the parole eligibility date. Instead, the court focused on the distinction between parole eligibility and parole release, and found that the statute governed only parole release. Then, the court explained that the inmate was on notice from the time of his crimes that actual release on parole depended upon full compliance with a variety of prison rules and administrative requirements. Therefore, the court concluded that the changes to the specifics of those rules and regulations did not increase the measure of punishment attached to the original sentence.

In *Ewell v. Murray,*[82] the court held that where the original law set forth broad categories of good time eligibility, and where the inmate was on notice that the details of those categories were subject to changing rules and regulations, retrospective changes to the criteria for the categories of good time eligibility did not violate the prohibition against ex post facto laws.

At the time of the inmate's crimes, the law considered in *Ewell v. Murray* stated that inmates shall be given the opportunity to earn good time, based on a four-level classification system. But the law explicitly stated that persons could be reclassified according to prison rules and regulations. One of those classifications meant that no good time could be earned. Subsequently, an amended regulation provided for reclassification to a good-time-ineligible category for refusing to provide a DNA sample. Another amended regulation provided for forfeiture of previously earned good time.

Considering some of the same laws at issue in *Jones v. Murray,* the court in *Ewell v. Murray* explained that the good time credits under the four categories were cumulative to the mandatory 6-month release period discussed in *Jones v. Murray.* These laws were distinguishable from changes affecting the mandatory 6-month release date because, under the laws controlling at the time of the inmate's crimes, an inmate had no right to be released on either discretionary or mandatory parole before that 6-month release date.

(v) U.S. Supreme Court Has Indicated That Whether Change to Original Punishment Based on New Conduct Implicates Ex Post Facto Must Be Determined From Notice at Time of Original Crimes, Not at Time of New Conduct

Cases finding no ex post facto violation upon such consequences for failing to provide a DNA sample sometimes play lipservice to the notion that the punishment was for the refusal to provide a sample, which occurred after the amended law or regulation, and was not an increase in the quantum of punishment for the original crime occurring before the amended law or regulation. But we can find no case wherein a court has concluded that the new law was constitutionally applied to the convicted person when the consequences were an increase in the time incarcerated and the convicted person would not have contemplated the underlying change in the law or regulation at the time of the crime leading to that incarceration.

Most important, the U.S. Supreme Court has repeatedly rejected the notion that a law affecting the period of incarceration for the original crime, but only if the inmate commits or fails to commit certain actions after passage of the new law, somehow does not relate to the original crime for purposes of an ex post facto analysis.

As already discussed, in *Weaver v. Graham,* the U.S. Supreme Court rejected the idea that changes to the good time system, because they applied only to the accumulation of good time after passage of the changes, were prospective and not retrospective.[83] The Court explained that the point of time to be focused on was when the crimes were committed that led to the incarceration that is being affected by the good time.[84]

In *Scafati v. Greenfield,*[85] the U.S. Supreme Court summarily affirmed a decision by the lower court that a law passed after the inmate's crimes but before his release on parole, making a prisoner good time ineligible for 6 months if the prisoner committed a violation of parole, was ex post facto. In *Greenfield v. Scafati,*[86] the lower court explained that while under the law at the time of the prisoner's crime, the inmate could become good time ineligible through misbehavior *during confinement,* there was no prior provision for forfeiture of future good time eligibility through misbehavior while *on parole.* The court found that insofar as the new law thus increased the scope of opportunities to forfeit good time eligibility, it was ex post facto. The court observed that the availability of good conduct deductions was considered part of the sentence for the original crime. Likewise, although a prisoner's entitlement to parole lies in the discretion of the parole board, it does "not follow because a prisoner might not receive parole that it would

not be an unlawful ex post facto burden to deprive him altogether of the right to be found qualified," and "hence earn, parole."[87]

Subsequently, in *Johnson v. United States,*[88] the U.S. Supreme Court reaffirmed, in dicta, its decision in *Scafati v. Greenfield.* In *Johnson v. United States,* the Court determined that because the district court always had the same powers under preexisting law, there was no ex post facto question concerning a statute that allowed for revocation of the supervised release of the original offense, including no credit for time served under such supervised release, upon violation of the conditions of release. Nevertheless, the Court went out of its way to reject the reasoning of the lower court that there was no ex post facto violation, because the law imposed a punishment for the new offense of violating the supervised release conditions and did not increase the quantum of punishment for the original offense.

The Court said that "[w]hile this understanding of revocation of supervised release has some intuitive appeal, [such understanding raises] serious constitutional questions...."[89] First, "the violative conduct need not be criminal and need only be found by a judge under a preponderance of the evidence standard, not by a jury beyond a reasonable doubt."[90] Second, "[w]here the acts of violation are criminal in their own right, they may be the basis for separate prosecution, which would raise an issue of double jeopardy if the revocation of supervised release were also punishment for the same offense."[91] The Court concluded that "[t]reating postrevocation sanction as part of the penalty for the initial offense ... avoids these difficulties."[92] The Court further observed that treating such sanctions as part of the penalty for the initial offense is "all but entailed by our summary affirmance of *Greenfield v. Scafati.*"[93]

"We therefore attribute postrevocation penalties to the original conviction,"[94] said the Court. The Court explained:

Since postrevocation penalties relate to the original offense, to sentence [the defendant] to a further term of supervised release [under the law enacted after the original crimes but before the conduct on supervised release] would be to apply this [law] retroactively (and to raise the remaining *ex post facto* question, whether that application makes him worse off).[95]

(vi) § 29-4106(2) and A.R. 116.04 Are Ex Post Facto to Extent They Provide for Forfeiture of Good Time for Refusing to Submit DNA Sample

Cases such as *Weaver v. Graham, Scafati v. Greenfield,* and *Johnson v. United States* make clear that we cannot accept the State's argument that the penalties for Shepard's refusal to provide a DNA sample relate to the prospective act of refusal and not to the original crimes for which Shepard was incarcerated. The analysis is as simple as observing that § 29-4106(2) affects changes to Shepard's period of incarceration for the original crimes committed before its enactment. Section 29-4106(2) does not set forth a separate crime with a separate punishment. We are not presented with the question of punishment for the refusal to submit a DNA sample as a separate crime. Section 29-4106(2) as applied to Shepard was retrospective because it changed the period of incarceration for a crime committed before its enactment.

We further conclude that Shepard did not have fair notice of the changes to the good time scheme mandated by § 29-4106(2). Section 29-4106(2) did not make changes in the kind of discretionary disciplinary measures discussed in cases such as *California Dept. of Corrections v. Morales* or *Ewell v. Murray.* Nor did § 29-4106(2) merely change or elaborate upon the category of disciplinary measures considered to be gross or serious misconduct.

At the time of Shepard's crimes, he expected that his mandatory discharge date would be calculated based on a mandatory scheme of good time accumulation. He further expected that the only possible forfeiture of this good time would be in finite amounts upon the discretion of the prison officials, and only upon gross or serious misconduct. Looking at the welldefined parameters of the mandatory good time

scheme in effect at the time of Shepard's crimes with a limited scope of forfeiture, we find he did not have fair notice that the scheme would change to mandating automatic forfeiture of all past and future good time upon refusal to submit a DNA sample, thereby entailing a much larger amount of forfeiture than previously possible, for an act that was not gross or serious misconduct, and outside the traditional discretionary, disciplinary process.

Finally, we conclude that § 29-4106(2), in mandating forfeiture of all good time and thereby increasing the period of Shepard's incarceration, is punitive. While the requirement of providing a DNA sample is not itself punitive, the provision of § 29-4106(2) that increases the period of incarceration by mandating recalculation of the release date to the maximum term of confinement clearly is. This is not meaningfully different from cases such as *California Dept. of Corrections v. Morales,*[96] *State v. Henry County Dist. Ct.,*[97] *Jones v. Murray,*[98] *Scafati v. Greenfield,*[99] and *Johnson v. United States*.[100] Those cases illustrate that it does not matter if the new requirement is especially onerous or could be, in itself, considered "civil." The new requirement considered in *State v. Henry County Dist. Ct.,* that the inmate participate in sex offender treatment, although not in itself onerous or even punitive, was held to be an ex post facto law when the consequence for the failure to participate in the treatment was removal from good time eligibility. The new requirement considered in *Weaver v. Graham,* that the inmate demonstrate meritorious behavior, might in itself be considered civil, but the court held that when such meritorious behavior was not a requirement for good time eligibility before, the law adding that requirement was ex post facto.

Failure to satisfy the new requirement of providing a DNA sample results in an increased period of incarceration. And an increased period of incarceration is punitive. Due to the expanded scope of good time forfeiture and the imminent removal of his good time, Shepard is "worse off" than he was before the passage of § 29-4106(2).[101]

In conclusion, we agree with the district court that insomuch as § 29-4106(2) forfeits Shepard's past and future good time and recalculates his parole eligibility and mandatory discharge dates without regard to any good time, it violates the constitutional prohibitions against ex post facto laws. Shepard, at the time of his crimes, expected to automatically incur good time simply through good conduct, and he expected to have his mandatory discharge date calculated upon his maximum sentence minus good time. Section 29-4106(2), by allowing for forfeiture of more good time than could have been forfeited before and by allowing for forfeiture based on conduct that is something less than flagrant and serious misconduct — indeed, conduct not even contemplated at the time of Shepard's crimes — substantially altered the punitive consequences attached to his crimes.

VI. CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

[1] See *State v. Shepard,* 239 Neb. 639, 477 N.W.2d 567 (1991).

[2] See Neb.Rev.Stat. § 83-1,115 (Reissue 1999).

[3] Neb.Rev.Stat. § 83-1,118(3) and (4) (Reissue 1987).

[4] See Neb.Rev.Stat. §§ 29-4101 to 29-4115.01 (Reissue 2008 & Cum.Supp. 2012).

[5] See 68 Neb. Admin. Code, ch. 5, § 005, and ch. 6, § 011 (2008).

[6] *Krings v. Garfield Cty. Bd. of Equal.,* 286 Neb. 352, 835 N.W.2d 750 (2013).

[7] Brief for appellant at 11.

[8] *Pennfield Oil Co. v. Winstrom,* 276 Neb. 123, 752 N.W.2d 588 (2008).

[9] *Id.*

[10] See *Harleysville Ins. Group v. Omaha Gas Appliance Co.,* 278 Neb. 547, 772 N.W.2d 88 (2009).

[11] *Regional Rail Reorganization Act Cases,* 419 U.S. 102, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974).

[12] *Pennfield Oil Co. v. Winstrom, supra* note 8.

[13] See *City of Omaha v. City of Elkhorn,* 276 Neb. 70, 752 N.W.2d 137 (2008).

[14] See *id.*

[15] See *Johnson v. Bartee,* 228 Neb. 111, 421 N.W.2d 439 (1988).

[16] See § 83-1,107.

[17] *Weaver v. Graham,* 450 U.S. 24, 28, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981).

[18] *California Dept. of Corrections v. Morales,* 514 U.S. 499, 505, 115 S.Ct. 1597, 131 L.Ed.2d 588 (1995).

[19] See *Peugh v. U.S.,* ___ U.S. ___, 133 S.Ct. 2072, 186 L.Ed.2d 84 (2013).

[20] *Id.,* 133 S.Ct. at 2085.

[21] See 16A C.J.S. *Constitutional Law* § 559 (2005).

[22] See *Lynce v. Mathis,* 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997).

[23] *State v. Worm,* 268 Neb. 74, 680 N.W.2d 151 (2004).

[24] *Id.*

[25] *State v. Kibbee,* 284 Neb. 72, 815 N.W.2d 872 (2012). See, also, *Carmell v. Texas,* 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000); *Collins v. Youngblood,* 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990).

[26] *Collins v. Youngblood, supra* note 25.

[27] *Weaver v. Graham, supra* note 17.

[28] *Id.* See, also, *Lynce v. Mathis, supra* note 22.

[29] *Weaver v. Graham, supra* note 17.

[30] *Id.,* 450 U.S. at 30-31, 101 S.Ct. 960.

[31] *Id.,* 450 U.S. at 31, 101 S.Ct. 960.

[32] *Id.,* 450 U.S. at 32, 101 S.Ct. 960.

[33] *Id.,* 450 U.S. at 33, 101 S.Ct. 960.

[34] *Id.,* 450 U.S. at 34, 101 S.Ct. 960.

[35] *Id.,* 450 U.S. at 35, 101 S.Ct. 960.

[36] *Weaver v. Graham, supra* note 17.

[37] *Garner v. Jones,* 529 U.S. 244, 250, 120 S.Ct. 1362, 146 L.Ed.2d 236 (2000).

[38] *Id.*

[39] See, *Garner v. Jones, supra* note 37; *California Dept. of Corrections v. Morales, supra* note 18. See, also, *Moore v. Nebraska Bd. of Parole,* 12 Neb.App. 525, 679 N.W.2d 427 (2004).

[40] *Garner v. Jones, supra* note 37.

[41] *California Dept. of Corrections v. Morales, supra* note 18.

[42] *Garner v. Jones, supra* note 37, 529 U.S. at 255.

[43] See, *id.*; *California Dept. of Corrections v. Morales, supra* note 18.

[44] *Garner v. Jones, supra* note 37, 529 U.S. at 252, 120 S.Ct. 1362.

[45] *Id.,* 529 U.S. at 253, 120 S.Ct. 1362.

[46] *Id.,* 529 U.S. at 258, 120 S.Ct. 1362 (Scalia, J., concurring in part in judgment).

[47] *Id.*

[48] See, e.g., *U.S. v. Coccia,* 598 F.3d 293 (6th Cir.2010); *Johnson v. Quander,* 440 F.3d 489 (D.C.Cir.2006); *Shaffer v. Saffle,* 148 F.3d 1180 (10th Cir.1998); *People v. Espana,* 137 Cal.App. 4th 549, 40 Cal.Rptr.3d 258 (2006); *State v. Raines,* 383 Md. 1, 857 A.2d 19 (2004); *State v. Norman,* 660 N.W.2d 549 (N.D.2003); *Doe v. Gainer,* 162 Ill.2d 15, 642 N.E.2d 114, 204 Ill.Dec. 652 (1994).

[49] See, e.g., *U.S. v. Hook,* 471 F.3d 766 (7th Cir.2006); *Word v. U.S. Probation Dept.,* 439 F.Supp.2d 497 (D.S.C.2006); *Vore v. U.S. Dept. of Justice,* 281 F.Supp.2d 1129 (D.Ariz. 2003); *In re D.L.C.,* 124 S.W.3d 354 (Tex.App. 2003).

[50] *In re Interest of J.R.,* 277 Neb. 362, 762 N.W.2d 305 (2009); *Welvaert v. Nebraska State Patrol,* 268 Neb. 400, 683 N.W.2d 357 (2004); *Slansky v. Nebraska State Patrol,* 268 Neb. 360, 685 N.W.2d 335

(2004); *State v. Worm, supra* note 23. See, also, *Smith v. Doe,* 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003).

[51] See *State v. Harris,* 284 Neb. 214, 817 N.W.2d 258 (2012).

[52] *Id.* at 224, 817 N.W.2d at 269.

[53] *U.S. v. Reese,* 71 F.3d 582, 588 (6th Cir. 1995).

[54] *Id.*

[55] See, e.g., *Taylor v. State,* 114 Neb. 257, 207 N.W. 207 (1926); *Smith v. State,* 199 P.3d 1052 (Wyo.2009); *State v. Everett,* 816 So.2d 1272 (La.2002); *State v. Jones,* 344 S.C. 48, 543 S.E.2d 541 (2001).

[56] *U.S. v. Reese, supra* note 53, 71 F.3d at 589.

[57] *Id.* at 590 (emphasis in original).

[58] *Jones v. Murray,* 962 F.2d 302 (4th Cir. 1992).

[59] *Id.* at 309 (emphasis omitted).

[60] *Id.*

[61] *Id.* at 308 (emphasis omitted).

[62] *Id.* at 310.

[63] *Id.* at 309.

[64] *Id.* at 309-10.

[65] *Id.* at 310.

[66] *State v. Henry County Dist. Ct.,* 759 N.W.2d 793 (Iowa 2009).

[67] *Id.* at 800.

[68] *Id.* at 801 (emphasis in original).

[69] *Id.* at 799.

[70] *State v. Henry County Dist. Ct., supra* note 66.

[71] *Id.* at 802.

[72] See, *Dominique v. Weld,* 73 F.3d 1156 (1st Cir.1996); *Padgett v. Ferrero,* 294 F.Supp.2d 1338 (N.D.Ga.2003); *Schreiber v. State,* 666 N.W.2d 127 (Iowa 2003); *Cooper v. Gammon,* 943 S.W.2d 699 (Mo.App.1997).

[73] *Padgett v. Ferrero, supra* note 72.

[74] *Id.* at 1344-45.

[75] *Cooper v. Gammon, supra* note 72. See, also, *Dominique v. Weld, supra* note 72.

[76] *U.S. v. Hook, supra* note 49; *Johnson v. Quander, supra* note 48; *Word v. U.S. Probation Dept., supra* note 49; *Miller v. U.S. Parole Comm'n,* 259 F.Supp.2d 1166 (D.Kan.2003); *Cannon v. South Carolina Dept. of Probation,* 361 S.C. 425, 604 S.E.2d 709 (2006), *reversed on other grounds* 371 S.C. 581, 641 S.E.2d 429 (2007).

[77] See cases cited *supra* note 76.

[78] *Word v. U.S. Probation Dept., supra* note 49; *Miller v. U.S. Parole Comm'n, supra* note 76.

[79] *Miller v. U.S. Parole Comm'n, supra* note 76, 259 F.Supp.2d at 1170.

[80] See, *Boling v. Romer,* 101 F.3d 1336 (10th Cir.1997); *Dial v. Vaughn,* 733 A.2d 1 (Pa. Commw.1999). See, also, *Com. v. Derk,* 895 A.2d 622 (Pa.Super.2006).

[81] *Dial v. Vaughn, supra* note 80. See, also, *Com. v. Derk, supra* note 80.

[82] *Ewell v. Murray,* 813 F.Supp. 1180 (W.D. Va. 1993). See, also, *Smith v. Beck,* 176 N.C.App. 757, 627 S.E.2d 284 (2006).

[83] *Weaver v. Graham, supra* note 17.

[84] *Id.*

[85] *Scafati v. Greenfield,* 390 U.S. 713, 88 S.Ct. 1409, 20 L.Ed.2d 250 (1968).

[86] *Greenfield v. Scafati,* 277 F.Supp. 644 (D.C.Mass.1967).

[87] *Id.* at 646.

[88] *Johnson v. United States,* 529 U.S. 694, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000).

[89] *Id.,* 529 U.S. at 700, 120 S.Ct. 1795.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.,* 529 U.S. at 701, 120 S.Ct. 1795.

[94] *Id.*

[95] *Id.*

[96] *California Dept. of Corrections v. Morales, supra* note 18.

[97] *State v. Henry County Dist. Ct., supra* note 66.

[98] *Jones v. Murray, supra* note 58.

[99] *Scafati v. Greenfield, supra* note 85.

[100] *Johnson v. United States, supra* note 88.

[101] See *id.*