No.
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 2009 TERM

BILLY JOE REYNOLDS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

**MOTION FOR LEAVE TO**
**PROCEED IN FORMA PAUPERIS**

Petitioner, Billy Joe Reynolds, pursuant to Title 18, United States Code, Section 3006A(d)(6) and Rule 39 of the United States Supreme Court, asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs, and to proceed in forma pauperis. Pursuant to an appointment under the Criminal Justice Act of 1964, as amended, the Federal Public Defender's Office was appointed to represent the Petitioner in the United States District Court for the Western District of Pennsylvania and in the United States Court of Appeals for the Third Circuit.

DATED: September 14, 2010

Respectfully submitted,

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# TO THE UNITED STATES COURT OF APPEALS

# FOR THE THIRD CIRCUIT

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## QUESTIONS PRESENTED

I. DOES MR. REYNOLDS HAVE STANDING UNDER THE PLAIN READING OF THE S.O.R.N.A. STATUTE TO RAISE CLAIMS CONCERNING THE ATTORNEY GENERAL'S INTERIM RULE AND IS REVIEW BY THIS COURT IS NEEDED TO RESOLVE THE CIRCUIT CONFLICT?

II. DOES S.O.R.N.A. VIOLATE THE CONSTITUTION AND SHOULD THIS COURT HEAR BILLY JOE REYNOLDS' CASE TO RESOLVE CONFLICTING COURT OPINIONS CONCERNING THE COMMERCE CLAUSE, THE EX POST FACTO CLAUSE AND DUE PROCESS?

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## OPINIONS AND ORDERS ENTERED BY THE COURTS BELOW

The non-precedential opinion of the United States Court of Appeals for the Third Circuit was filed on May 14, 2010 at Appeal No. 08-4747 and is attached to this petition at Appendix 1a.

The Third Circuit filed an order denying Mr. Reynold's petition for rehearing en banc on June 16, 2010 at Appeal No. 08-4747. A copy of the order is attached to this petition at Appendix 2a.

The district court's judgment of sentence at was entered at Criminal No. 07-412 in the Western District of Pennsylvania on November 24, 2008. App. 4-8, 16.[1]

[1] The Appendix filed in the United States Court of Appeals for the Third Circuit is cited as "App." followed by the page number. The presentence report is cited as "PSR" followed by the paragraph or page number.

## STATEMENT OF JURISDICTION

A writ of certiorari is sought from a non-precedential opinion of the United States Court of Appeals for the Third Circuit filed on May 14, 2010 affirming the judgment of the District Court. (Appendix 1a herein, page 2).

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1) which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the courts of appeals.

The time for filing a Petition for Writ of Certiorari began to run on June 16, 2010, when the Third Circuit filed its order denying Mr. Reynold's petition for rehearing en banc. (Appendix 2a herein).

The due date for filing this Petition for Writ of Certiorari is September 14, 2010.

## STATUTORY PROVISIONS INVOLVED

**Administrative Procedures Act, in pertinent part:**

5 U.S.C. § 553. Rule making

* * *

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include –

(1) a statement of the time, place, and nature of the public rule making proceedings;
(2) reference to the legal authority under which the rule is proposed; and
(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply –

* * *

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

* * *

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except –

* * *

(3) as otherwise provided by the agency for good cause found and published with the rule.

5 U.S.C. §§ 553(b)(3)(B) and (d)(3).

**Sex Offender Registration and Notification Act (SORNA), in pertinent part:**

CHAPTER I – CHILD PROTECTION AND SAFETY

SUBCHAPTER I – SEX OFFENDER REGISTRATION AND NOTIFICATION

* * *

Part A – Sex Offender Registration and Notification

* * *

42 U.S.C. § 16913. Registry requirements for sex offenders

(a) In general

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

(b) Initial registration

The sex offender shall initially register –

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

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

(c) Keeping the registration current

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

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

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

42 U.S.C. §§ 16913(a)-(e).

## STATEMENT OF THE CASE

**A. S.O.R.N.A. Indictment and Motion to Dismiss:**

A grand jury in the United States District Court for the Western District of Pennsylvania returned an indictment charging appellant, Billy Joe Reynolds, with one count of violating 18 U.S.C. § 2250(a), alleging that:

> Between on or about September 16, 2007, and on or about October 16, 2007, in the Western District of Pennsylvania, the defendant, BILLY JOE REYNOLDS, who was required to register under the Sex Offender Registration and Notification Act after having been convicted in 2001 in...[Missouri]...of the felony sex offense of Statutory Sodomy in the 2nd Degree, traveled in interstate commerce and knowingly failed to register and update a registration as required by the Sex Offender Registration and Notification Act.

App. 20.

Mr. Reynolds moved to dismiss the indictment on constitutional and other grounds and filed a brief in support. App. 21-57. The Government responded. App. 58-114. After a status conference and consideration of written arguments the district court denied Mr. Reynolds' motion to dismiss. App. 1-3, 114-118.

**B. Conditional Plea of Guilt and Sentencing:**

Mr. Reynolds then entered a conditional plea of guilt to the indictment pursuant to a plea agreement. App. 119-145. The district court later sentenced Mr. Reynolds to 18 months imprisonment and three years supervised release. App. 4-8. The

court imposed a special assessment in the amount of $100.00. App. 4, 16.

Judgment was entered November 24, 2008. App. 4-8, 16. A timely notice of appeal was filed on December 8, 2008. App. 9, 17.

**C. <u>Proceedings on Direct Appeal</u>:**

Mr. Reynolds raised the following issues in the Court of Appeals:

I. THE INDICTMENT AGAINST BILLY JOE REYNOLDS FOR VIOLATION OF CRIMINAL AND NATIONWIDE REGISTRATION PROVISIONS OF TITLE I OF THE ADAM WALSH ACT, OR "SORNA," SHOULD HAVE BEEN DISMISSED AS UNCONSTITUTIONAL, BOTH FACIALLY AND AS APPLIED TO HIM, AND AS A VIOLATION OF FEDERAL LAW.

A. Congress Improperly Delegated to the Attorney General the Decision Whether SORNA Would Apply Retroactively to Those Like Mr. Reynolds Who Were Convicted Before July 27, 2006, Before SORNA Was Implemented, which Violated the Non-Delegation Doctrine in Article I, Sections 1 and 8 of the United States Constitution.

B. The District Court erred in upholding SORNA as a proper exercise of Congressional Authority under the Commerce Clause.

C. If SORNA Applied to Mr. Reynolds, It Violated the Ex Post Facto Clause and is Unconstitutional.

D. SORNA is Unconstitutional and its Application Violated Mr. Reynolds' Due Process Rights Because: 1) SORNA Has Not Been Implemented and There is No Duty to Register; and 2) Mr. Reynolds Never Received Notice of His Duty to Register Under SORNA and, Therefore, Did Not Knowingly Fail to Register.

1. SORNA Has Not Been Implemented and Thus There Was No Duty, and Is No Duty, Under SORNA For Mr. Reynolds To Register.

2. Mr. Reynolds Never Received Notice of His Duty to Register Under SORNA and Therefore Did Not Knowingly Fail to Register.

E. The Attorney General's "Interim" Regulation Retroactively Applying SORNA to Mr. Reynolds Without Notice and Comment Violates the Administrative Procedures Act.

F. The Indictment Must Be Dismissed Because SORNA Impermissibly Encroaches Upon A State's Power By Forcing State Officials To Enforce A Federal Regulatory Scheme In Violation Of The Tenth Amendment and The Principles of Federalism.

II. MR. REYNOLDS' MOTION TO DISMISS SHOULD HAVE BEEN GRANTED AND HIS CONVICTION VACATED BECAUSE HE WAS NOT REQUIRED TO REGISTER IN PENNSYLVANIA UNDER "SORNA" UNTIL HE HAD BEEN IN THE STATE AT LEAST 30 DAYS.

On May 14, 2010 the Third Circuit Court of Appeals, following additional briefing concerning the Administrative Procedures Act and the Interim Rule, affirmed the judgment of the district court. The Court determined that Mr. Reynolds' claims concerning the Commerce Clause, the Ex Post Facto Clause and due process were foreclosed by its decision in United States v. Shenandoah, 595 F.3d 151 (3d Cir. 2010). The Court also held that Mr. Reynolds lacked standing to raise issues concerning the Interim Rule and the Tenth Amendment. (Appendix 1a herein, pages 2-3). Finally, the Court determined that Mr. Reynolds' argument

that he was actually innocent of violating SORNA was foreclosed by the appellate waiver in his plea agreement. (Appendix 1a herein, page 3).

On June 16, 2010 the Court of Appeals filed an order denying Mr. Reynolds' petition for rehearing en banc. (Appendix 2a herein.)

This petition followed.

## STATEMENT OF THE FACTS

Billy Joe Reynolds of Missouri and Melissa Hall of Washington, Pennsylvania talked by cell phone for approximately two and a half years before he came to Pittsburgh. App. 136. Mr. Reynolds and Ms. Hall had gotten to know each other on a chat phone line called "C-Lounge." App. 136. According to the government Mr. Reynolds boarded a train in Missouri on September 16, 2007. App. 136.

Ms. Hall and her mother picked up Mr. Reynolds at the train station in Pittsburgh "after arriving here on September 17, 2007" from Missouri. App. 136. At the time, Billy Joe Reynolds was in his early 40s and Ms. Hall had turned 20 that September. App. 121, 136. After he arrived Mr. Reynolds stayed with the Halls in Washington, Pennsylvania and got a job working at Max and Erma's restaurant on the deep fryer. App. 136.

Mr. Reynolds was on parole in Missouri at the time he left for Pittsburgh. App. 136. On October 16, 2007, 29 days after arriving, Mr. Reynolds was arrested in Washington County, Pennsylvania for having absconded Missouri parole and was charged with the instant offense. App. 61. Billy Joe Reynolds had been convicted in Missouri in 2001 of second degree statutory sodomy, a felony. App. 135. Following his incarceration he registered as a sex offender in Missouri. App. 135. Mr. Reynolds "updated and verified his registration as

required on several occasions." App. 135. He also signed Missouri "forms notifying him of his registration obligations, including his obligation if he moved to another jurisdiction." App. 136. Missouri forms attached to the government's response to Mr. Reynolds' motion to dismiss state that an offender who moves out of state "must also meet that state's registration requirements." App. 111, 112.

According to the government's recitation of facts during Mr. Reynolds' guilty plea he did not "comply with Missouri sex offender registration requirements when he left Missouri for Pennsylvania" and he did not register in Pennsylvania after arriving. App. 136. The government also contended that Mr. Reynolds admitted that "he did not register as a sex offender in Pennsylvania" and that he knew he should have. App. 136. Mr. Reynolds agreed at the plea that he did not register in Pennsylvania. App. 137. However, Mr. Reynolds did not agree that he admitted to police that he knew he should have registered in Pennsylvania. App. 136-137.

Mr. Reynolds personally informed the judge that he had "difficulty" with "[r]eading and writing." App. 121. Counsel then added, "Your Honor, he's been in Special Ed. He can't really read or write, Your Honor." App. 121.

The district court then adjudged Mr. Reynolds guilty of knowing failure to register under S.O.R.N.A.[2] pursuant to 18 U.S.C. §2250(a), the federal failure-to-register offense.

[2] On July 27, 2006 Congress enacted the Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act"). Title I of the Adam Walsh Act codified S.O.R.N.A., which stands for Sex Offender Registration and Notification Act. *See* 42 U.S.C. § 16911 *et seq*.

## REASONS FOR GRANTING THE WRIT

### I. MR. REYNOLDS HAS STANDING UNDER THE PLAIN READING OF THE S.O.R.N.A. STATUTE TO RAISE CLAIMS CONCERNING THE ATTORNEY GENERAL'S INTERIM RULE AND REVIEW BY THIS COURT IS NEEDED TO RESOLVE THE CIRCUIT CONFLICT.

The Third Circuit's decision in this case, concluding that Mr. Reynolds lacks standing to challenge the Attorney General's interim rule making SORNA retroactively applicable to those who committed their underlying sex offense prior to its enactment date, conflicts with the decision of the Sixth Circuit Court of Appeals in United States v. Cain, 583 F.3d 408 (6th Cir. 2010) and United States v. Utesch, 596 F.3d 408, 307 (6th Cir. 2010).

Mr. Reynolds was prosecuted federally for failure to register as a sex offender under SORNA based on his 2001 Missouri conviction. Mr. Reynolds traveled from Missouri to Pennsylvania on September 17, 2007 and was arrested there on a Missouri parole warrant 29 days later on October 16, 2007. His pre-trial motion to dismiss on various grounds was denied.

The Third Circuit Court of Appeals ruled that Billy Joe Reynolds did not have standing to challenge applicability of the Sex Offender Registration and Notification Act (SORNA) to offenders, like him, who were convicted prior to its enactment because Reynolds was required under SORNA merely to keep his registration current, and was not required to initially register. United States v. Reynolds, Appeal No. 08-4747 non-

precedential opinion; reprinted herein as Appendix 1a). See 42 U.S.C. § 16913(d).

The Third Circuit's reading of 42 U.S.C. § 16913(d) ignored that the statute consists of two clauses and the first of those two clauses of the statute, underlined below, delegates the applicability of SORNA itself to the Attorney General. The text of 42 U.S.C. § 16913(d) states:

> The Attorney General shall have the authority to specify the applicability of the requirements of **this subchapter** to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, *and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section*.

42 U.S.C. § 16913(d)(emphasis added).

Subchapter I begins with 42 U.S.C. § 16901 and ends with 42 U.S.C. § 16962. Undisputably, § 16913(d) is located within Subchapter I of SORNA. Therefore, the words of § 16913(d) in bold type above, "this subchapter," refer to Subchapter I of SORNA, which is located within Chapter 151 of Title 42. See 42 U.S.C. § 16911 et seq. ("Child Protection and Safety").

The Court of Appeals in Reynolds glosses over the fact that the text of § 16913(d) contains two clauses -- the first clause, which is underlined above, concerns retroactivity and does not limit the authority of the Attorney General. In particular, this first clause does not limit retroactive application of SORNA to sex offenders who did not register initially and not to

others who were obligated to keep their registration current. 42 U.S.C. § 16913(d).

The second clause of § 16913(d), which is italicized above, states: "*and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.*" Even if courts determine that this second clause is limited to sex offenders who have not initially registered as part of their obligations under a state registration scheme ("Megan's Law"), it does not limit the authority of the Attorney General with respect to retroactive application of SORNA to Mr. Reynolds' prosecution.

Furthermore, Subchapter I includes all sections of 42 U.S.C. § 16913, including §§ 16913(a)-(e). The requirement that sex offenders are required to keep their registration current is contained in 42 U.S.C. § 16913(a). Therefore, sex offenders who are required to "keep the registration current" are among those subject to the requirements in SORNA's Subchapter I. See 42 U.S.C. § 16913(a). As a result, SORNA's provision that delegates authority to the Attorney General applies to all sex offenders included in Subchapter I – even those who are required to "keep the registration current." 42 U.S.C. § 16913(a). Therefore, the Attorney General's Interim Rule applies to Mr. Reynolds.

On February 28, 2007, pursuant to 42 U.S.C. § 16913(d), the Attorney General issued an interim rule applying SORNA "to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of [the] Act." 28 C.F.R. § 72.3. This interim rule was issued without notice and comment and without a 30-day comment period based on the "good cause" provision of the Administrative Procedures Act (APA). See 72 Fed.Reg. 8894, 8896. The Attorney General stated, however, that comments would be accepted until April 30, 2007. See 72 Fed.Reg. 8895. The Attorney General's guidelines for SORNA did not become effective until August 1, 2008, which was 30 days after their publication. See 73 Fed.Reg. 38,030 ("SMART" guidelines) and 5 U.S.C. § 553(d).

According to the government, Mr. Reynolds violated SORNA because he did not keep his registration current. Mr. Reynolds was then prosecuted and imprisoned. The panel in Reynolds ignored the text of 42 U.S.C. § 16913(d) and took the position that because Mr. Reynolds was obligated by SORNA to "keep the registration current" that he was not subject to the "initial registration" requirements of 42 U.S.C. § 16913(a) and for that reason was not subject to the Attorney General's Interim Rule. However, assuming for argument only that Mr. Reynolds already registered initially pursuant to SORNA by registering under state law, he was still subject to the Interim Rule as an

offender who was required to "keep the registration current."[3] 42 U.S.C. § 16913(a). Therefore, Mr. Reynolds had standing to contest the viability of the Attorney General's Interim Rule. See United States v. Hays, 515 U.S. 737, 747 (1995).

The Court of Appeals ruled that Reynolds' case was governed by its decision in United States v. Shenandoah, 595 F.3d 151, 163 (3d Cir.), cert. den., __ U.S. __, 130 S.Ct. 3433 (June 14, 2010). There, the Court ruled, referring to the second clause of 42 U.S.C. § 16913(d), "[s]ince Shenandoah was already a registered sex offender when SORNA was enacted, SORNA only required him to keep his registration current on and after July 27, 2006" and SORNA's provisions concerning initial registration did not apply to him. See 42 U.S.C. § 16913(d). However, Mr. Reynolds contends that the plain text of the first clause of 42 U.S.C. § 16913(d) stating, "[t]he Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006..." applies to him. Id.

In United States v. Carr this Court recently determined that the text of the Sex Offender Registration and Notification Act (SORNA) means what it plainly states regarding applicability to pre-SORNA travel: the statute's use of "the present tense

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[3] Mr. Reynolds does not concede that he is not required to "initially register" under SORNA. 42 U.S.C. § 16913(b).

('travels') rather than the past or present perfect ('traveled' or 'has traveled') reinforces the conclusion that preenactment travel falls outside the statute's compass." United States v. Carr, 130 S.Ct. 2229, 2236 (2010). In Carr, this Court looked to "normal usage" of language. Id. Likewise, the plain text of SORNA shows that the terms of 42 U.S.C. § 16913(d) apply to all sex offenders convicted of underlying offenses prior to July 27, 2006, including Mr. Reynolds. As such, Mr. Reynolds has standing to contest the Attorney General's interim rule. See United States v. Hays, 515 U.S. 737, 747 (1995).

Furthermore, the Third Circuit's decision in Mr. Reynolds' case declining to reach the question of whether SORNA violated the non-delegation doctrine or whether the Attorney General's Interim Rule violated SORNA is also in conflict with the decisions of the Sixth Circuit Court of Appeals. See United States v. Cain, 583 F.3d 408 (6th Cir. 2010) and United States v. Utesch, 596 F.3d 302, 307 (6th Cir. 2010)(rejecting the government's argument that Mr. Utesch lacked "standing to challenge the validity or any retroactive regulation issued by the Attorney General"). In Utesch the Sixth Circuit held that "a defendant in Utesch's position is not bound by the interim rule." 596 F.3d at 310.

The allegations against the appellant in Utesch, like those against Mr. Reynolds, were that he was required to keep his

registration current, not that he failed to register initially. 596 F.3d at 305. Like Mr. Reynolds, the appellant in Utesch was indicted after SORNA's 30-day notice and comment period, but before the final SMART guidelines were promulgated in July 2008. The Sixth Circuit held that Mr. Utesch was therefore not bound by the Attorney General's Interim Rule and vacated Utesch's conviction and sentence. 596 F.3d at 313. The salient facts in Utesch and Reynolds are identical. The Eighth Circuit has held that those in Mr. Reynolds' situation do not have standing to challenge the interim rule or the non-delegation clause. See United States v. Hacker, 565 F.3d 522 (8th Cir. 2009) and United States v. May, 535 F.3d 912 (8th Cir. 2008).

This Court should grant certiorari, vacate Mr. Reynolds' judgment and remand or accept his case for review.

## II. S.O.R.N.A. VIOLATES THE CONSTITUTION AND THIS COURT SHOULD HEAR BILLY JOE REYNOLDS' CASE TO RESOLVE CONFLICTING COURT OPINIONS CONCERNING THE COMMERCE CLAUSE, THE EX POST FACTO CLAUSE AND DUE PROCESS.

This Court has only addressed the issues arising from SORNA twice and did not address the constitutional issues in either case. In United States v. Carr this Court resolved the issue in Mr. Carr's favor on the plain text of the statute and did not reach the *ex post facto* question. United States v. Carr, 130 S.Ct. 2229, 2233 (2010). Only one other case has come before this Court concerning SORNA, United States v. Juvenile Male, and there, a question was certified to the Montana Supreme Court to help determine whether the case was moot. United States v. Juvenile Male, 130 S.Ct. 2518, 2520 (2010)(per curiam).

In Juvenile Male, the juvenile was found delinquent by a federal court in June 2005. Id. at 1518. Under SORNA, which was enacted in 2006, the juvenile was required to keep his registration current. 42 U.S.C. §§ 16911(8); 16913. In February 2007 the Attorney General issued the Interim Rule stating that SORNA applied to sex offenders convicted prior to enactment of SORNA. 72 Fed.Reg. 8897 (codified at 28 CFR § 72.3(2009)). The Ninth Circuit "vacated the sex-offender-registration requirements" stating that "'retroactive application of SORNA's provision covering individuals who were adjudicated juvenile delinquents because of the commission of certain sex offenses

before SORNA's passage violates Ex Post Facto Clause of the United States Constitution.'" United States v. Juvenile Male, 130 S.Ct. 2518, 2519 (2010).

This Court has not ruled on whether SORNA violates the Ex Post Facto Clause. Likewise, this Court has not yet ruled on whether SORNA violates the Commerce Clause or due process. Each of these issues was rejected by the Third Circuit in Mr. Reynolds' case based on its precedent in United States v. Shenandoah, 595 F.3d 151, 163 (3d Cir.), cert. den., __ U.S. __, 130 S.Ct. 3433 (June 14, 2010). See United States v. Reynolds, No. 08-4747 (Appendix 1a herein). Each of these issues is represented by conflicting opinions in the courts below and this Court should accept Mr. Reynolds' case for review in order to provide direction to courts below.

**A. The Third Circuit erred in upholding SORNA as a proper exercise of Congressional Authority under the Commerce Clause.**

"Under our federal system, the 'States possess primary authority for defining and enforcing criminal law.'" United States v. Lopez, 514 U.S. 549, 561 n.3 (1995). Mr. Reynolds contended in the courts below that SORNA was unconstitutional on its face and as applied to him as a violation of the Commerce Clause. App. 31. The courts below failed to address Mr. Reynold's arguments that SORNA, including the registration

requirements of 42 U.S.C. §16913 and 18 U.S.C. §2250, do not fall into any of the "three broad categories of activity that Congress may regulate under its commerce power." United States v. Morrison, 529 U.S. 598, 608-609 (2000). Further, the presence of a jurisdictional element is not dispositive, but instead "may establish that the enactment is in pursuance of Congress' regulation of interstate commerce." Morrison, 529 U.S. at 612.

No nexus exists between Mr. Reynolds' travel and his alleged failure to register, which is a purely local act. Unlike similar statutes, such as the Travel Act, 18 U.S.C. §1951 or the Mann Act, 18 U.S.C. §2421, which require a defendant to travel in interstate commerce with the intent to commit certain prohibited acts, the travel element of §2250 does not require the travel occur in connection with a person's failure to register. To uphold the courts below in Mr. Reynolds' case would mean "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government. *See* United States v. Lopez, 514 U.S. 549, 555 (1995). Because Congress lacks the authority under the Commerce Clause to direct individuals convicted of purely local offenses to register as state sex offenders, the first element of SORNA's criminal penalty under 18 U.S.C. §2250(a) cannot be met. *See* 18 U.S.C. §2250(a).

The United States Constitution created a federal government of limited enumerated powers. U.S. Constitution, Article I, §8. Congress may only enact legislation pursuant to the powers specifically delegated to it by the Constitution. *See* United States v. Lopez, 514 U.S. 549, 552 (1995). SORNA does not explain under what authority Congress imposed the registration requirements for those it defined as sex offenders.

In Lopez, the Supreme Court "identified three broad categories of activity that Congress may regulate under its commerce power." Lopez, 514 U.S. at 558. The areas that Congress has power and authority are:

1. to "regulate the use of the channels of interstate commerce;"

2. "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and

3. "to regulate those activities that substantially affect interstate commerce."

United States v. Lopez, 514 U.S. 549, 558 (1995). Mr. Reynolds contends that the SORNA regulations requiring him to register as a sex offender within the state where he resides, with the corresponding power to indict him criminally for failing to do so, are not encompassed within any of the three areas of permissible regulation in Lopez. Instead, SORNA's provisions regulate criminal activity, not economic activity. Any economic effect that the activities regulated by SORNA and

subject to prosecution is too attenuated to bring SORNA within the authority of the commerce clause. Any potential aggregated economic effect is insufficient to sustain SORNA. *See* Morrison, 529 U.S. at 617; Lopez, 514 U.S. at 564.

The existence of congressional findings that indicate that the statute is a valid exercise of Congress' Commerce Clause power will at least enable a court "to evaluate the legislative judgment that the activity in question substantially affect[s] interstate commerce." Lopez, 514 U.S. at 563. Although Congress included findings in other sections of the Adam Walsh Act, SORNA contains no such findings. Like the Gun Free School Zone Act at issue in Lopez, SORNA is unsupported by legislative findings indicating that purely local sex crimes have any link with interstate commerce.

However, even the existence of legislative findings does not guarantee that the statute will be upheld as a valid exercise of Congressional power. The Violence Against Women Act, at issue in Morrison, was accompanied by "numerous findings regarding the serious impact that gender-motivated violence has on victims and their families." Morrison, 529 U.S. at 614. The Court still struck down the statute, holding that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." Id. Rather, the Court held that the determination of whether an

activity sufficiently affects interstate commerce is for the judiciary. Id. Because no commercial activity is involved, 42 U.S.C. §16913 and 18 U.S.C. §2250(a) violate the commerce clause as SORNA exceeds Congress' power and authority as outlined in Lopez. Mr. Reynolds recognizes that the majority of courts nationwide have ruled that SORNA is a valid exercise of authority under the commerce clause. However, most appellate courts have not decided the issue and, as the Supreme Court recognized in Lopez, "so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the Commerce Clause always will engender 'legal uncertainty.'" United States v. Lopez, 514 U.S. 549, 566 (1995).

Lopez teaches that "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" Lopez, 514 U.S. at 561 n.3. That relationship has been altered dramatically by SORNA. For example, under SORNA what happens to a state's Megan's Law registration provision that is more protective of an offender's privacy rights than SORNA's and bases that extra protection in its own state constitution? The scheme under the Wetterling Act where each state already has in place a sex offender registry,

along with a criminal provision, the problem of protecting children from sex offenders through registry and punishment for failure to comply has been addressed. 42 U.S.C. §14071 et seq. In fact, SORNA currently relies on those same state registries as the basis for its federal criminal prosecutions, so it can hardly argue that state registry is inadequate. *See* 18 U.S.C. §2250(a).

Another lesson of Lopez is that any argument that SORNA is valid regulation under the commerce clause due to the "costs of crime" would lead, as the government in Lopez admitted, to excessive regulation of "not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." United States v. Lopez, 514 U.S. 549, 564 (1995).

### B. If SORNA Applies to Mr. Reynolds, It Violates the Ex Post Facto Clause and is Unconstitutional.

Mr. Reynolds was convicted of a sex offense in Missouri in 2001, years before SORNA was enacted on July 27, 2006. App. 135. On February 28, 2007, the Attorney General of the United States issued an Interim Rule applying SORNA to sex offenders convicted before enactment of the federal criminal offense requiring registration as a sex offender. *See* 28 C.F.R. § 72.3. This interim rule aimed to subject Mr. Reynolds to federal criminal liability for coming to Pennsylvania and not registering as a

sex offender after he arrived on September 17, 2007. *See* 18 U.S.C. §2250(a) *and* 42 U.S.C. §16913-16916. At most, Mr. Reynolds should have been subject to a Pennsylvania crime for failure to register under state's "Megan's Law" provision or to a maximum one year sentence under the Wetterling Act, the predecessor to SORNA. *See* 42 Pa.C.S. §9791 *et seq*. and 42 U.S.C. §14072(i)(4). If Mr. Reynolds is subject to retroactive application of SORNA, it violates the *ex post facto* clause.

Article I, Section 9, Clause 2 of the United States Constitution prohibits the passing of an *ex post facto* law. *See* U.S. Const. Art. I, § 9, cl. 2. This Court has interpreted the *Ex Post Facto* Clause to apply to laws that "retroactively alter the definition of crimes and increase the punishment of criminal acts." Collins v. Youngblood, 497 U.S. 37, 43 (1990). Here, application of SORNA to Mr. Reynolds circumstances resulted in a ten-fold increase in potential punishment for his prior criminal acts. Furthermore, the ex post facto clause applies to Mr. Reynolds' prosecution because it was the intent of SORNA to impose punishment. *See* 18 U.S.C. §2250(a).

The ex post facto clause restricts vindictive legislation out of concern that a legislature's response to "political pressures poses a risk that they may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." Landgraf v. USI Film

Products, 511 U.S. 244, 266 (1994). Currently, political pressure has made sex offenders a reviled group in our country. *See* Shiela T. Caplis, Got Rights? Not if You're a Sex Offender in the Seventh Circuit, 2 Seventh Cir. Rev. 115 (2006)(describing the convicted sex offender as "perhaps the most despised and unsympathetic member of American society" noting "the general trend to strip convicted sex offenders of their rights").

Although this Court upheld sex offender registration and notification requirements in Smith v. Doe, 538 U.S. 84 (2003), that case involved a 42 U.S.C. §1983 action and the Court was sharply divided. *See* Smith, 538 U.S. at 87-88. Furthermore, the majority's conclusion was premised, in significant part, upon the non-punitive purpose surrounding a state's civil registry scheme. *See* Smith, 538 U.S. at 102. In addition, the provisions of SORNA differ significantly from those at issue in Smith. The Supreme Court's question in Smith was simply "whether the registration requirement is a retroactive punishment prohibited by the *Ex Post Facto* Clause." Smith, 538 U.S. at 89. Here, SORNA pairs "an independent federal obligation" to register directly with punishment of up to 10 years in prison, which is a much different ex post facto question. In Mr. Reynold's case, SORNA attached new, and as yet unidentified, legal consequences to events, specifically, Mr. Reynold's 2001 conviction, which

occurred years prior to SORNA's 2006 enactment. The additional requirements imposed by SORNA are punitive in both purpose and effect. For example: SORNA broadens the class of offenders subject to registration; expands the information gathered from those required to register; lengthens the registration; creates classes of offenders; reduces the time frame in advising the officials of any changes of required information; and substantially increases the penalties for a violation of any of the requirements. *Compare* 42 U.S.C. §14072 (Wetterling Act) with 42 U.S.C. §§16911 (SORNA, expansion of sex offender definition and expanded inclusion of "child predators"); §16915 (SORNA, addressing the duration of the registration requirements); 18 U.S.C. §2250 (SORNA, increasing the penalties for violations of the registration requirements).

Furthermore, Congress' stated purpose in enacting SORNA was punitive. *See* 42 U.S.C. §16901 (the Act was designed "to protect the public from sex offenders and offenders against children, and in response to vicious attacks by violent offenders against the victims listed below, . . ."). As the retroactive application of SORNA's more onerous and punitive requirements increases the punishment associated with Mr. Reynold's 2001 conviction by a factor of ten, it violates the *Ex Post Facto* Clause of the United States Constitution and, accordingly, Mr. Reynolds cannot be prosecuted under its provisions.

**C. SORNA is Unconstitutional and its Application Violated Mr. Reynolds' Due Process Rights Because: 1) SORNA Has Not Been Implemented and There is No Duty to Register; and 2) Mr. Reynolds Never Received Actual Notice of His Duty to Register Under SORNA and, Therefore, Did Not Knowingly Fail to Register.**

SORNA makes it a crime to "knowingly fail to register or update a registration as required by the Sex Offender Registration Notification Act." 18 U.S.C. §2250(a). Mr. Reynolds was convicted of a sex offense in Missouri in 2001, years before SORNA was enacted on July 27, 2006. Although Mr. Reynolds arrived in Pennsylvania in September 2007, a few months after an "interim rule" issued, and long before any SMART guidelines were promulgated, the Attorney General stated that SORNA applied to all sex offenders no matter when convicted, he was never informed of any obligation to register under SORNA. Since Mr. Reynolds had no notice or knowledge of SORNA's reporting requirements he cannot be prosecuted for knowingly violating §2250(a).

**1. SORNA Has Not Been Implemented and Thus There Was No Duty, and Is No Duty, Under SORNA For Mr. Reynolds To Register.**

Mr. Reynolds' prosecution for violation of SORNA violates his due process rights because he had no actual notice of SORNA or its registration requirements. SORNA explicitly provides that an appropriate government official must notify a sex

offender of his duty to register under SORNA. *See* 42 U.S.C. § 16917. For individuals in custody or awaiting sentencing for an offense giving rise to the duty to register under SORNA, the Government must notify them of their SORNA obligations immediately after they are released from custody or immediately after sentencing. *See* 42 U.S.C. § 16917(a). Specifically, the Government must (1) "inform the sex offender of the duties of a sex offender under [SORNA] and explain those duties," (2) "require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement," and, (3) "ensure that the sex offender is registered." Id.

For those sex offenders who have already served their sentences for an offense committed before SORNA's enactment, like Mr. Reynolds, the Act directs the Attorney General to prescribe specific rules for notification. 42 U.S.C. § 16917(b). Furthermore, with respect to Mr. Reynolds' prosecution, the Attorney General had not promulgated any regulation making SORNA retroactively applicable to persons (1) convicted before SORNA's implementation in a particular state, or (2) "unable" to initially register under Section 16913(b) of SORNA. The Attorney General's proposed SMART Guidelines, however, explicitly provide that the Act becomes applicable to these two

groups of offenders only "when [a state] implements the SORNA requirements in its system." 72 Fed. Reg. at 30228.

States are required to implement SORNA the later of July 27, 2009 or one year after the Attorney General provides the states software to "enable jurisdictions to establish and operate uniform sex offender registries and Internet sites." 42 U.S.C. §§ 16923, 16924. The SMART Guidelines provide that a jurisdiction has not *implemented* SORNA until it has "carrie[d] out the requirements of SORNA as interpreted and explained in these Guidelines," and the SMART Office of the Department of Justice has determined that it has done so. 72 Fed. Reg. at 30213-14. Therefore, individuals with "pre-SORNA implementation convictions," like Mr. Reynolds, have a duty to register *only after* the jurisdiction implements the federal law.

> With respect to sex offenders with pre-SORNA or pre-SORNA implementation convictions who remain in the prisoner, supervision, or registered sex offender populations **at the time of implementation** . . . jurisdictions should endeavor to register them with SORNA as quickly as possible. . . . In other words, sex offenders in these populations must be registered by the jurisdiction **when it implements** the SORNA requirements in its system.

72 Fed. Reg. at 30228 (emphasis added).

Pennsylvania still has not yet implemented SORNA. As noted by the Attorney General in the SMART Guidelines, a jurisdiction has not implemented SORNA until it has (1) "carrie[d] out the requirements of SORNA as interpreted and explained in these Guidelines," and (2) the SMART Office has determined that it has

done so. 72 Fed. Reg. at 30213-30214. Because Pennsylvania has failed to implement SORNA, Mr. Reynolds cannot possibly be subject to its penalty.

Furthermore, because Mr. Reynolds was "unable" to initially register under § 16913(b) of SORNA and Pennsylvania has not implemented SORNA, he cannot comply with SORNA. No process exists by which he can bring himself in compliance with the Act. Criminalizing the failure to do something that is impossible to do violates the Due Process Clause's guarantee of fundamental fairness. *See* United States v. Dalton, 960 F.2d 121, 124 (10th Cir. 1992) (it is a violation of fundamental fairness to hold someone liable for a crime when an essential element of the crime is his failure to perform an act that he is incapable of performing). Because it was (and remains) impossible for Mr. Reynolds to comply with SORNA in Pennsylvania, punishing him for failing to register under that statute violates his due process rights.

**2. Mr. Reynolds Never Received Notice of His Duty to Register Under SORNA and Therefore Did Not Knowingly Fail to Register.**

The fair notice requirements of the Due Process Clause encompass principles of notice, fair warning and forseeability, especially in the context of criminal penalties and do not permit prosecution of Mr. Reynolds. *See* U. S. Const. Amend. V.

*Also* Rogers v. Tennessee, 532 U.S. 451, 460 (2001). Title 18, U.S.C. § 2250(a)(3) provides that a defendant must *knowingly* fail to register in order to violate the statute. Mr. Reynolds' Missouri conviction took place in 2001, years before SORNA was enacted. Therefore, it was impossible for him to "knowingly" fail to register "as required by" SORNA. 18 U.S.C. §2250(a). Since Mr. Reynolds had no notice or knowledge of SORNA's reporting requirements, his conviction for violating §2250 must fall. It is also impossible at this time to register under SORNA because no state has implemented SORNA's registration requirements.

Further, the plain language of 42 U.S.C. § 16917 ("Duty to notify sex offenders of registration requirements and to register") requires the government affirmatively to inform offenders of SORNA before any duty to register under SORNA arises. *See* 42 U.S.C. § 16917(b). Mr. Reynolds was never told he had to register under SORNA. Thus, Mr. Reynolds had no actual notice of his need to register in Pennsylvania or under SORNA. Without actual notice, Mr. Reynolds could not have knowingly failed to register.

Even if this Court concludes that Mr. Reynolds received registration forms from Missouri concerning a requirement to register, that is not legally sufficient notice. Any notice to register that Mr. Reynolds may have received under state law

cannot substitute for notice under the different, and much stricter SORNA requirements. The Department of Justice "SMART" Office Guidelines include an example that clarifies that notice to register under an existing state sex offender law does not serve as notice under SORNA:

> Example 2: A sex offender is required to register for life by a jurisdiction based on a rape conviction in 1995 for which he was released from imprisonment in 2005. The sex offender was initially registered prior to his release from imprisonment on the basis of the jurisdiction's existing law, but the information concerning registration duties he was given at the time of release did not include telling him that he would have to appear periodically in person to verify and update the registration information (as required by SORNA § 116) because the jurisdiction did not have such requirement at the time. **So the sex offender . . . will have to be given new instructions about that as a part of the jurisdiction's implementation of SORNA.**

72 Fed. Reg. 30228 (emphasis added).

In the absence of the required SORNA notice, prosecuting Mr. Reynolds for failing to register violates his due process rights. This Court's decision in Lambert v. California, 355 U.S. 225 (1958) illustrates this point. In that case, the Court invalidated under the Due Process Clause a prosecution for failing to register as a felon, as required by a Los Angeles city ordinance. Id. In finding a due process violation, the Court held that when "wholly passive" conduct such as the "mere failure to register" is criminalized, notice is essential:

> Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that a citizen has the chance to defend charges.... Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act.... [T]he principle is equally appropriate where a person, wholly passive and unaware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.

Lambert, 355 U.S. at 228. As in Lambert, Mr. Reynolds is being prosecuted for wholly passive conduct – failing to register – when he had no notice that a federal statute required him to do so. The Supreme Court in Lambert specifically rejected the argument that "ignorance of the law is no excuse" in the context of "failure to register." Lambert, 355 U.S. at 228. Therefore, applying SORNA and, in particular, 18 U.S.C. §2250 to Mr. Reynolds violates due process.

## CONCLUSION

For all of the foregoing reasons the petitioner, Billy Joe Reynolds, respectfully requests that this Court grant the petition for writ of certiorari, and accept this case for review. In the alternative, Mr. Reynolds requests that his petition be granted, his sentence vacated and his case remanded.

Respectfully submitted,

_____

CANDACE CAIN
Assistant Federal Public Defender
Counsel for Petitioner,
Billy Joe Reynolds

## CERTIFICATE OF MEMBERSHIP IN BAR

I, Candace Cain, Assistant Federal Public Defender, hereby certify that I am a member of the Bar of this Court.

_____

CANDACE CAIN
Assistant Federal Public Defender

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit was mailed this 14th day of September, 2010, to the following:

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_____

CANDACE CAIN
Assistant Federal Public Defender
Counsel for Petitioner,
Billy Joe Reynolds

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 2009 TERM

BILLY JOE REYNOLDS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

**DECLARATION PURSUANT TO RULE 29.2**
**OF THE RULES OF THE SUPREME COURT**

I declare under penalty of perjury under the laws of the United States of America that the Petition for Writ of Certiorari on behalf of Billy Joe Reynolds was mailed to the Clerk's Office of the United States Supreme Court in Washington, D.C., postage and fees paid (USC-426), First Class Mail.

DATE: September 14, 2010

_____
CANDACE CAIN
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