

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF VIRGINIA  
ABINGDON DIVISION

UNITED STATES OF AMERICA,     )  
                                          )  
                                  plaintiff     )  
v.                                            )     Case No.: 1:06cr72  
                                          )  
MICHAEL MCCOY,                        )  
                                          )  
                                  defendant     )

CORRECTED MOTION TO DISMISS THE INDICTMENT  
AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

The defendant, Michael McCoy, through counsel and pursuant to Federal Rules of Criminal Procedure 12 (b)(2), hereby moves this Honorable Court to dismiss the indictment in the instant case.

In support of this motion, counsel states:

The United States alleges that Mr. McCoy has failed to comply with the requirements of 18 U.S.C. § 2250(a) by failing to register or to update his sex offender registration as required by the Sex Offender Registration and Notification Act (“SORNA”), 42 U.S.C. § 16901 *et seq.* However, Mr. McCoy cannot be charged with failing to register as a sex offender because he is not required to register as sex offender, either under Virginia law or under SORNA. In addition, the federal failure to register (“FFR”) statute, 18 U.S.C. § 2250(a), under which Mr. McCoy has been charged, and certain provisions of SORNA, 42 U.S.C. § 16901 *et seq.*, are unconstitutional, either on their face or as applied to him.

## I. INTRODUCTION

On September 4, 1984, Mr. McCoy pled guilty to attempted rape in the Tazewell County Circuit Court. On October 30, 1984, the court sentenced Mr. McCoy to ten years in prison. On July 5, 1991, Mr. McCoy was paroled and released, having served six years of his sentence. His parole ended on January 5, 1992, well prior to the creation of the Virginia sex offender registry and the Virginia statute that created it. This 1984 conviction was, and is, Mr. McCoy's only conviction for a sex offense, by any definition of the term, federal or state.

Between 1992 and 2003, Mr. McCoy incurred charges and convictions that were unrelated to any sex offense. On March 2003, Mr. McCoy was released from incarceration on one of these unrelated charges, and was directed by a probation officer to register as a sex offender, even though the Virginia sex offender registry statute did not require it.<sup>1</sup> Mr.

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<sup>1</sup> The Virginia sex offender registration statute, enacted in 1994, is limited to those persons whose convictions arose after the effective date of that statute. The Virginia Code states:

Every person convicted on or after July 1, 1994, including a juvenile tried and convicted in the circuit court pursuant to § 16.1-269.1, whether sentenced as an adult or juvenile, of an offense set forth in § 9.1-902 and every juvenile found delinquent of an offense for which registration is required under subsection C of § 9.1-902 shall register and reregister as required by this chapter. Every person serving a sentence of confinement on or after July 1, 1994, for a conviction of an offense set forth in § 9.1-902 shall register and reregister as required by this chapter. Every person under community supervision as defined by § 53.1-1 or any similar form of supervision under the laws of the United States or any political subdivision thereof, on or after July 1, 1994, resulting from a conviction of an offense set forth in § 9.1-902 shall register and reregister as required by this

McCoy registered on March 27, 2003, and remained thereafter on the Virginia sex offender registry. In the summer or fall of 2006, Mr. McCoy allegedly moved to West Virginia, where he was subsequently arrested by United States Marshals and charged with violating the FFR statute. In December 2006, he was indicted for this offense.

The one count indictment filed against Mr. McCoy states:

On or about and between September 1, 2006 and October 25, 2006, in the Western District of Virginia and elsewhere, MICHAEL V. MCCOY, while being a person required to register pursuant to the Sex Offender Registration and Notification Act, traveled in interstate commerce and failed to register or update his registration as required by the Sex Offender Registration and Notification Act. All in violation of Title 18, United States Code, Section 2250(a).

The Court should dismiss this indictment because Mr. McCoy was not required under SORNA “to register or update his registration,” an essential element of FFR. First, SORNA’s provision of initial and continuing registration requirements do not apply to Mr. McCoy because based on the text of SORNA, Mr. McCoy’s conviction predated SORNA’s only currently effective date. Although SORNA authorizes the Attorney General to promulgate regulations regarding whether and how those whose convictions predated SORNA have to comply, the Attorney General never did, leaving Mr. McCoy outside the ambit of SORNA and thus the FFR statute. Second, even if the Attorney General had created registration requirements for persons whose convictions predated SORNA, that delegation

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chapter.

Virginia Code § 9.1-901.

to the executive branch of government of an essential legislative function would be unconstitutional. Third, if in this case the SORNA requirements are made, despite their terms, to apply to Mr. McCoy's conduct, that application would violate the Due Process Clause of United States Constitution, and would also create *ex post facto* new, increased exposure to punishment for past conduct. Finally, this Court should dismiss the indictment because regardless of SORNA's and the FFR statute's application to Mr. McCoy's conduct, the statutes violate the Commerce Clause of the Constitution.

## II. THE FEDERAL OFFENSE OF FAILURE TO REGISTER

Enacted in the summer of 2006, the Adam Walsh Act, which created SORNA, also created the new criminal offense of FFR. This FFR statute makes it a crime punishable by up to ten years for a person who "is required to register under [SORNA]" to "knowingly fail[] to register or update a registration as required by [SORNA]," if certain federal jurisdictional requirements are met.

The FFR offense is as follows:

- (a) In general. Whoever—
  - (1) is required to register under the Sex Offender Registration and Notification Act; [and]
  - (2) (A) is a sex offender as defined for the purposes of [SORNA] 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 [SORNA];

shall be fined under this title or imprisoned not more than 10 years, or both.

18 U.S.C. §§ 2250(a).<sup>2</sup>

Under subsection (a)(1) of this FFR statute, an essential element of this offense is that the defendant be “required to register under [SORNA].” SORNA, in turn, states that all persons convicted of a sex offense<sup>3</sup> must register. SORNA further states that this initial registration should occur before completing a sentence of imprisonment for a sex offense,

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<sup>2</sup> This statute also provides an affirmative defense.

- (b) Affirmative defense.--In a prosecution for a violation under subsection (a), it is an affirmative defense that—

- (1) uncontrollable circumstances prevented the individual from complying;

- (2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

- (3) the individual complied as soon as such circumstances ceased to exist.

<sup>3</sup> SORNA, 42 U.S.C. § 16911 *et seq.*, defines a sex offense as a criminal offense that has an “element involving a sexual act or sexual contact with another,” is a “specified offense against a minor” as further defined, is a federal offense prosecuted under certain code sections, is a military offense specified in certain code sections, or is an attempt or conspiracy to commit one of these offenses. Presumably, the United States believes that Mr. McCoy’s 1984 attempted rape conviction qualifies under the first of these, as a criminal offense with an “element involving a sexual act or sexual contact with another.”

or within three days of conviction if not sentenced to prison. 42 U.S.C. § 16913 (b)(1)-(2) (“the three-day rule”). For those who have initially registered under that section or who are otherwise required (for example, under state law) to register, 42 U.S.C. § 16913(c) requires them to keep their registration current, including to notify their reporting jurisdictions of changes in name, address, employment or student status.

Importantly, SORNA has a special provision for those, like McCoy, convicted of offenses occurring before the implementation of SORNA, who are thus “unable to comply” with the three-day rule. For those persons, 42 U.S.C. § 16913(d) states that

The Attorney General shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with [the three-day rule].

Finally, subsection (e) of 42 U.S.C. § 16913 directs the states to implement SORNA by creating their own criminal penalties, providing for a maximum possible imprisonment of more than one year, for violations of the registration requirements.

At the time that Mr. McCoy is alleged in the indictment to have committed a violation of the FFR statute, the Attorney General of the United States had not, and still has not, implemented any regulations providing a mechanism for the registration under SORNA of persons convicted before SORNA’s enactment. More importantly, the Attorney General has not exercised his “authority to specify the applicability” of SORNA and the FFR statute – if any – to such persons in the first place. Finally, in addition to there being an absence of

regulations extending SORNA to persons convicted before SORNA's enactment, at the time that Mr. McCoy is charged with violating the FFR statute, the Commonwealth of Virginia had not, and still has not, implemented SORNA by creating its own set of statutory penalties for violations of SORNA's registration requirements.

### III. ARGUMENT

#### A. MR. MCCOY WAS NOT REQUIRED TO REGISTER UNDER SORNA OR ANY OTHER AUTHORITY

There is no existing statute or regulation that requires Mr. McCoy to register as a sex offender. The question whether Mr. McCoy was legally required to comply with SORNA in September and October of 2006, and can therefore be charged with criminally failing to comply, is a legal question that this Court should resolve by dismissing the instant indictment.

##### 1. By its terms, SORNA does not require that Mr. McCoy register, unless and until the Attorney General promulgates regulations directing him to comply and specifying the mechanism for doing so

SORNA requires that persons released from prison from a sex offense conviction, or who are sentenced for a sex offense but not imprisoned, register within three days. This requirement was effective on the date of its enactment, which was July 27, 2006. For persons whose convictions arose before that date, Congress authorized, but did not direct or require, the Attorney General of the United States to prescribe regulations for their registration. Mr. McCoy is not required to comply with SORNA because his conviction occurred before July 27, 2006, and because the Attorney General has not yet promulgated a regulation

“specify[ing] the applicability of this subchapter to sex offenders convicted before July 27, 2006.” 42 U.S.C. § 16913(d).

When Congress enacted the Adam Walsh Act, it did not state a date upon which the sex offender provisions are to be effective. By its terms, SORNA clearly applies to persons who are convicted after July 27, 2006; the statute is silent as to others except to say that the Attorney General has “the authority” to specify the applicability of SORNA, if any, to sex offenders who are convicted before July 27, 2006, who are convicted before SORNA’s implementation in a particular jurisdiction, and to “to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders” (such as Mr. McCoy) who are unable to comply with the initial three-day registration requirements. See 42 U.S.C. §§ 16913(b), (d), § 16917.

On the dates alleged in the indictment, September 1, 2006 to October 25, 2006, there was no statute, and there were no regulations, for persons unable to comply with the three-day rule. Because the Attorney General has not yet prescribed any rules pursuant to the authority given him in SORNA, SORNA does not yet apply to sex offenders who are convicted before July 27, 2006.

This is no mere technicality. As Congress ceded to the Attorney General the question of who among those convicted prior to SORNA would have to register, until the Attorney General does so, Mr. McCoy has not violated any statute or regulation. Until the Attorney General specifies, if he chooses to, which if any individuals who had completed sentences before the enactment of SORNA are subject to SORNA, Mr. McCoy is not covered by

SORNA and cannot be convicted under the FFR.

2. **Mr. McCoy was not required to register as a sex offender under Virginia law, and Virginia has not yet implemented the mandate of SORNA**

The Virginia sex offender registration statute, Virginia Code §9.1-901, does not require Mr. McCoy to register in Virginia because he was convicted in 1984 and his parole ended before the 1994 effective date of the statute. He is not eligible to be prosecuted in state court for failing to update his registration. Moreover, he is not required to register in his new alleged state of West Virginia, as application of West Virginia's sex offender registry depends upon the offender being required to have registered in the state where he was convicted. West Virginia Code § 15-12-9(c). Neither Virginia, nor West Virginia, have implemented the more comprehensive registration requirements of SORNA; although SORNA requires them to, it has given the states until July 27, 2009 to do so. Because the only continuing registration provision of SORNA depends upon being required to have initially registered in the first place, and that provision, as previously discussed, does not apply to Mr. McCoy, Mr. McCoy is simply not required by any existing law, in any jurisdiction, to have registered, or to have updated his registration, as a sex offender.

**B. SORNA AND THE FFR ARE UNCONSTITUTIONAL**

Although SORNA has many provisions that may not be unconstitutional, provisions of SORNA and the FFR statute that require present compliance by Mr. McCoy and seek to criminalize his conduct under the circumstances of his case violate the United States Constitution and cannot lawfully be enforced.

1. **Although the Attorney General has not promulgated any regulations implementing SORNA for offenders convicted before SORNA was enacted, the provision in SORNA allowing the Attorney General to criminalize conduct is a violation of the Constitutional nondelegation doctrine.**

By delegating to the Attorney General the authority to specify SORNA's applicability to offenders convicted before SORNA's implementation, Congress may or may not have recognized that there were *ex post facto* implications. Regardless, in delegating this legislative task, Congress passed the problem on to the executive branch. If the Attorney General promulgates regulations pursuant to the authority Congress gave it, this delegation of the legislative function violates both the Constitutional separation of powers and non-delegation doctrines.

The nondelegation doctrine ensures that federal law is enacted by Congress, and thus comports with the Presentment Clause of the Constitution and the Separation of Powers doctrine. While the Supreme Court has upheld some delegation of authority by Congress to the executive branch, it has only done so when Congress has provided clear guidance to the executive branch as to the intent of the legislation. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 445 (1998) (holding line-item veto to be a violation of the Presentment Clause, and distinguishing the delegation held permissible in *Field v. Clark*, 143 U.S. 649 (U.S. 1892), on the basis that “[t]he Line Item Veto Act authorizes the President himself to effect the repeal of laws, *for his own policy reasons*); *see also id.* at 449-52 (Kennedy, J., concurring) (finding that line item veto violates separation of powers).

In this case, Congress has completely abdicated its decisionmaking authority as to sex

offenders who had completed their sentence as of the date of the enactment of SORNA. Thus, the Attorney General has no guidance from Congress whether, for example, all such individuals must be subject to SORNA, regardless of how old their offense, regardless of when they completed their sentences, and regardless of the nature of the offense. Instead, the Attorney General has been given sole authority to determine, as a policy matter, who should be subject to SORNA and the FFR and who should not. Assuming that this retroactive application of SORNA and the FFR is constitutional in the first place, it is a decision for Congress itself to make. As in *Clinton*, Congress simply cannot delegate this policy decision to the executive branch.

Although some delegation of legislative functions is essential in a government with large agencies having specialized expertise in various areas such as food and drugs, firearms, labor relations, education, and health, the Office of the Attorney General is not a scientific agency with expertise in criminology and sex offenses, but a police agency whose chief function in this context is the arrest and prosecution of lawbreakers. The Department of Justice is not a regulatory agency but a police agency. For Congress in this context to give it the authority to decide what the law is, to whom it applies, and how it should be complied with is for Congress to abdicate its proper role and violates the separation of powers

**2. The FFR violates Mr. McCoy's guarantee of due process.**

The federal registration statute additionally violates the Due Process Clause, both procedurally and substantively.

Due Process requires that a person prosecuted or sentenced for the new federal offense

of knowingly failing to comply with SORNA's registration requirements not only be in fact required to register under SORNA, but also be provided notice in accordance with SORNA. Before SORNA, the federal law requiring that sex offender registries be created and required compliance with them was the Wetterling Act, 42 U.S.C. § 14071.<sup>4</sup> Under the Wetterling Act, if a person knowingly failed to comply with a state sex offender registry law with which he was required to comply based on an offense listed in the Act, the federal penalty, assuming there is federal jurisdiction, would be not more than one year, or not more than 10 years for a second or subsequent offense. *See* 42 U.S.C. § 14072(i). All of the states have sex offender registries now as required by the Wetterling Act, but no jurisdiction, which includes both states and jurisdictions other than states, *see* 42 U.S.C. §§ 16911(9), 16912, 16927, has yet implemented the broader, more detailed and more onerous provisions of SORNA. In consultation with the jurisdictions, the Attorney General is required to develop and support software to enable the diverse jurisdictions to establish and operate uniform sex offender registries and Internet sites, and to make the first edition of this software available by July 27, 2008. *See* 42 U.S.C. § 16923.

Virginia does not require that Mr. McCoy register under state law, and Virginia has not implemented SORNA. Thus even if SORNA were held to apply to Mr. McCoy, Mr. McCoy lacked the notice that SORNA requires penal institutions to give him. Under 18

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<sup>4</sup> The Wetterling Act appears to be scheduled for repeal on the same date, July 27, 2009, as the date by when the states are required to have implemented SORNA. *See* Pub. L. No. 109-248 § 129(b); 42 U.S.C. § 14071 note.

U.S.C. § 4042(c) as amended by SORNA, in the case of federal prisoners, the Bureau of Prisons or the supervising probation officer must notify a sex offender as defined in SORNA who is released or sentenced to probation of SORNA's requirements as they apply to him, and must provide notice to the authorities in the jurisdiction where the person will reside that he is required to register as required by SORNA. *See* 18 U.S.C. § 4042(c)(3). However, there are no rules for notifying sex offenders of their duties under SORNA who cannot be registered shortly before release from custody or immediately after sentencing if not in custody.<sup>5</sup>

SORNA also violates substantive due process because a person may be subjected to registration and public notification requirements, or prosecuted for failing to register, when he was not in fact convicted of an offense that Congress listed as a qualifying sex offense in SORNA, or whose conviction was set aside. *See Branch v. Collier*, 2004 WL 942194 (N.D. Tex. Apr. 30, 2004) (state authorities' subjection of parolee to sex offender registration and public notification requirements when he was never convicted of an enumerated sex offense under state law violated the Due Process Clause); *Coleman v. Dretke*, 409 F.3d 665 (5<sup>th</sup> Cir. 2005) (same). This may occur when a prior conviction is overturned or expunged, the person

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<sup>5</sup> Under the probation and supervised release statutes as amended by SORNA on July 27, 2006, compliance with SORNA is a mandatory condition. *See* 18 U.S.C. §§ 3563(a)(8), 3583(d). However, in a case in which the defendant is sentenced to probation or supervised release for a crime of which he was convicted before July 27, 2006, or for a crime of which he was convicted before his jurisdiction of residence, employment or school implemented SORNA, or who is otherwise not given notice and registered in the relevant jurisdiction or jurisdictions in compliance with SORNA, questions of how and whether to comply are completely unanswered.

is pardoned, through clerical or administrative error, or through regulations currently on the books or to be promulgated by the Attorney General adding sex offenses that are not on the list of sex offenses in SORNA. *See also People v. Bell*, 3 Misc.3d 773, 778 N.Y.S.2d 837 (2003) (application of sex offender registry act to person who was not convicted of a sex offense violated the Due Process Clause and the Equal Protection Clause of both the state and federal constitutions); *Doe v. State*, 92 P.3d 398, 404-12 (Alaska 2004) (Alaska law requiring person to submit to sex offender registration and notification requirements after conviction was set aside violated the due process clause of the state constitution).

**3. As charged against Mr. McCoy, the FFR violates the *ex post facto* clause**

The Court should also find that because the FFR statute, applied to a persons like Mr. McCoy whose conviction of a sex offense long predated its implementation, creates new penalties not known or contemplated at the time that Mr. McCoy committed the offense, enforcement of the FFR statute against Mr. McCoy violates the *ex post facto* clause of the United States Constitution. The existence of criminal penalties that attend violation of SORNA and the FFR critically distinguishes this statute from the Alaska sex offender registry statute narrowly upheld by a divided Supreme Court in *Smith v. Doe*, 538 U.S. 84 (2003),<sup>6</sup> and under the factors articulated in the majority opinion in that case, the statute fails

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<sup>6</sup> The majority opinion was authored by Justice Rehnquist and joined in full only by Justices O'Connor, Kennedy and Scalia. Justices Rehnquist and O'Connor are no longer on the Court, and although Justice Thomas joined the opinion, he disagreed with some of its reasoning. Justice Souter concurred only in the judgment and substantially disagreed with the majority's conclusions. Justices Stevens, Ginsburg and Breyer

to pass constitutional scrutiny.

The statute challenged under the *ex post facto* clause in *Smith v. Doe* created a purely civil regulatory scheme that required sex offenders to register on a central state registry that would maintain certain information confidential and provide certain information to the public. The majority in *Smith v. Doe* framed the issue in that case as, first, whether the Alaska legislature intended the law to be punitive or a regulatory scheme that was civil and non-punitive. If punitive, the law would be *ex post facto*. If non-punitive, the question was then whether the law was so punitive in purpose or effect to negate the legislature's intent to deem it civil. *Id.* at 92-93. The majority first found the Alaska legislature intended to create a civil, nonpunitive regulatory scheme. *Id.* at 93-96.

Under the majority's reasoning, SORNA and the FFR are unlikely to be similarly upheld. In *Doe*, the legislature had stated that its purpose was to protect the public based on legislative findings that sex offenders have a high risk of re-offense and that public disclosure would protect the public. The Court concluded that "an imposition of restrictive measures on sex offenders deemed to be dangerous is a 'legitimate nonpunitive governmental objective.'" *Id.* at 93 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997)). In contrast, in enacting SORNA, Congress said that the purpose was to "protect the public from sex offenders and offenders against children, and in response to the vicious attacks by violent predators against the victims listed below." Pub. L. 109-248 § 102. It made no finding that

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dissented.

sex offenders have a high risk of re-offense, or that public notification without any risk assessment would promote public safety.

The majority's conclusion in *Doe* that the law was non-punitive was strengthened by the fact that, "aside from the duty to register, the statute itself mandates no procedures. Instead, it vests the authority to promulgate implementing regulations with the Alaska Department of Public Safety, . . . an agency charged with enforcement of both criminal and civil regulatory laws." *Id.* at 96. In contrast to the Alaska statute, SORNA contains some very detailed procedures, and where it does not, it vests the authority to prescribe them in the Attorney General, who is the head of the Department of Justice, the primary federal criminal investigation and enforcement agency, and chief law enforcement officer of the United States, whose primary responsibility is enforcing criminal laws. The responsibility for enforcing purely civil regulatory laws lies with other federal agencies, such as the Department of Health and Human Services, who play no role in the implementation of SORNA.

After looking at the seven factors noted in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), the majority identified other considerations supporting the Alaska legislature's intent to establish a civil, non-punitive regulatory scheme. These included whether the requirements served to shame those subject to it, and whether the law subjected sex offenders to an affirmative disability or restraint, which it found it did not. *Id.* at 97-101.

SORNA and the FFR statute, even in the absence of an FFR conviction, provide for disabilities never contemplated by the Alaska statute. Although recognizing that the

argument that the registration system was akin to probation or supervised release had “some force,” the majority rejected it because sex offenders are “free to move where they wish and to live and work as other citizens, free from supervision.” *Id.* at 101-02. In contrast to the Alaska statute, when a person charged with FFR is released pretrial, electronic monitoring is mandatory. Upon conviction, the FFR statute requires a term of imprisonment up to 10 years for failure to register, followed by a possible consecutive mandatory minimum of 5 years, followed by a mandatory minimum of five years supervised release up to life.<sup>7</sup> Justice Souter concurred only in the judgment.<sup>8</sup> *Id.* at 107-110. Justice Stevens, Ginsburg, and

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<sup>7</sup> Justice Thomas joined the opinion but wrote separately to say that the effects of Internet publication should play no part in the analysis because the statute itself did not require Internet publication. *Id.* at 106-07. This suggests that Justice Thomas may have disregarded evidence in the record regarding the problems that indiscriminate Internet publication creates. Perhaps he would vote differently on a law like SORNA that requires Internet publication.

<sup>8</sup> Justice Souter found “considerable evidence” that the law was punitive. First, the Alaska legislature did not label the law as “civil,” thus distinguishing it from the Court’s past cases relying on the legislature’s stated label. Second, several of the provisions were placed in the criminal code, which did not force a criminal characterization, but stood in the way of asserting that the statute’s intended character was clearly civil. Third, the fact that the law used past crime as the touchstone and swept in a significant number of people who pose no real threat to the community “serves to feed the suspicion that something more than regulation of safety is going on; when a legislature uses prior convictions to impose burdens that outpace the law’s stated civil aims, there is room for serious argument that the ulterior purpose is to revisit past crimes, not prevent future ones.” *Id.* at 109. Fourth, Justice Souter stated that Internet publication did bear a resemblance to shaming punishments designed to disable offenders from living normally in the community. He cited examples in the record of damage to reputation, exclusion from jobs and housing, harassment and physical harm. *Id.* at 109 & n\*. What led Justice Souter to concur in the judgment was the presumption of constitutionality of state laws, which gives the state the benefit of the doubt in close cases. *Id.* at 110.

Breyer dissented.<sup>9</sup>

SORNA, and the FFR statute, as applied to Mr. McCoy's 1984 Virginia conviction, are punitive and therefore violate the *ex post facto* clause of the Constitution.

#### **4. The FFR violates the Commerce Clause**

The FFR statute violates the Commerce Clause because it fails to evidence a constitutionally sufficient relationship to the regulation of interstate commerce. The statute requires that one of two elements be found to establish federal jurisdiction. The defendant either (A) "is a sex offender as defined for the purposes of [SORNA] by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of

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<sup>9</sup> Justice Stevens dissented, finding that the law unquestionably affected a constitutionally protected liberty interest in that it was akin to supervised release or parole, and had a severe stigmatizing effect that resulted in threats, assaults, loss of housing and loss of jobs. The law was punitive because it (1) constituted a severe deprivation of liberty, (2) was imposed on everyone convicted of certain offenses, and (3) was not imposed on anyone else. The law added punishment based on past crimes to the punishment of persons already tried and convicted of those crimes, and so violated the *ex post facto* clause. *Id.* at 110-14.

Justices Ginsburg and Breyer also dissented. Like Justice Souter, they recognized that the legislature's intent was unclear and so they would neutrally evaluate the law's purposes and effects. They would hold the law punitive in effect, and therefore in violation of the *ex post facto* clause, for the reasons identified by Justices Souter and Stevens. The law was excessive in relation to its nonpunitive purpose by applying to all offenders convicted of enumerated crimes without regard to future dangerousness, by keying the duration to whether the offense was aggravated rather than risk of reoffense, by requiring quarterly reporting in perpetuity even if personal information had not changed, and most important, "the Act makes no provision whatever for the possibility of rehabilitation . . . . However plain it may be that a former sex offender currently poses no threat of recidivism, he will remain subject to long-term monitoring and inescapable humiliation." *Id.* at 116-17.

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.” Under (B), the conviction can have been obtained under the law of any jurisdiction, if the person “travels in interstate or foreign commerce.” The statute does not say that such travel must be during the period the person was required but failed to register, and does not include any requirement that commercial activity be affected or any legislative finding that it historically has been.

Because the FFR statute requires no connection between the travel and any crime or any effect on interstate commerce, it exceeds Congress’s authority under the Commerce Clause. Unlike the Travel Act, 18 U.S.C. § 1952, and the felon-in-possession statute, 18 U.S.C. § 922(g)(1), which have withstood Commerce Clause challenges, the FFR statute cannot withstand a constitutional challenge under modern Commerce Clause jurisprudence. Both the Travel Act, which prohibits traveling interstate to distribute proceeds of or to engage in specified unlawful commercial activity such as gambling, liquor sales, drug distribution or prostitution, and the felon-in-possession statute, which specifically requires transportation of firearms “in commerce,” have the economic and commercial basis justifying Congress’s assertion of authority.

Sex offender registration when moving, while relating to basic interstate activity, has no identifiable connection to commerce and is intrinsically, as well as historically, the province of local law enforcement. In the last decade, the Supreme Court has signaled a developing rejection of the expansion of federal criminal statutes into the province of what

has traditionally been state police power. *See Jones v. United States*, 529 U.S. 848 (2000); *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). These three Supreme Court cases on the constitutional reach of the Commerce Clause with respect to Congressional regulation of crime have changed the landscape of federal criminal jurisdiction. In light of *Lopez* and its progeny, the FFR statute does not bear a sufficient nexus with interstate commerce to fall within the carefully enumerated powers of the federal government.

In *Lopez*, the defendant challenged his conviction under the Gun-Free School Zones Act, 18 U.S.C. § 922(q). That section of the U.S. Code makes it unlawful for any individual to knowingly possess a firearm at a place that individual knows, or has reasonable cause to believe, is a school zone. The defendant contended § 922(q) exceeded Congress's power to legislate under the Commerce Clause. The Court agreed and ruled the statute unconstitutional.

The *Lopez* Court's analysis began by setting out three broad categories of activity that Congress may regulate under its commerce power: (1) the use of the channels of interstate commerce; (2) instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities; and (3) activities having a substantial relation to interstate commerce.

The Court refused to broaden the commerce power so as to cede to Congress the general police power our system of federalism allotted to the States:

To uphold the Government's contentions here, we would have to pile inference

upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.

514 U.S. at 567; see also *id.* at 602 (J. Thomas, concurring) (“If we wish to be true to a Constitution that does not cede a police power to the Federal Government, our Commerce Clause’s boundaries simply cannot be defined as being commensurate with the national needs . . . . Such a formulation of federal power is not a test at all: It is a blank check.”) (citations omitted).

In *Morrison*, the Court continued and expanded Lopez’s limiting approach to Congress’s use of the Commerce Clause as a basis for federal jurisdiction over intrastate violent activity. The *Morrison* Court struck down a portion of the Violence Against Women Act, 42 U.S.C. § 13981, because the activity being regulated, gender-motivated violence, was deemed not an activity that substantially affects interstate commerce. The *Morrison* Court considered four types of showings of the requisite Commerce Clause effects: whether the activity in question was economic, whether the statute at issue contained a jurisdictional element, any legislative findings of interstate nexus, and whether there are other arguments (including ‘implicit’ legislative findings) establishing that the activity in question may have the requisite effect on interstate commerce. *Id.* at 609-613. Unlike the statute reviewed in *Lopez*, however, the statute at issue in *Morrison* came with “numerous findings” by Congress. *Id.* at 614. The *Morrison* Court, however, deemed the Congressional findings behind § 13981 insufficient to establish interstate nexus:

But the existence of congressional findings is not sufficient, by itself, to

sustain the constitutionality of Commerce Clause legislation. As we stated in *Lopez*, “[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.”

529 U.S. 614 (citations omitted).

The *Morrison* Court noted first that Congress’s findings regarding the effect on interstate commercial activity relied heavily on a “method of reasoning” already rejected in *Lopez*, namely, the set of government arguments concerning national productivity (e.g., the activity affects commerce by deterring travel, business interactions, and resulting in costs such as medical costs then imposed on the greater population). *Id.* The Court further noted that the same faulty reasoning would lead to permitting Congress to regulate such traditional areas of state regulation as family law. The *Morrison* Court concluded its analysis by definitively eschewing an “aggregate effects” methodology: “We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.” *Id.* at 618.

The Supreme Court applied the principles of *Lopez* and *Morrison* once again in *Jones*. At issue in *Jones* was the constitutionality of the federal arson statute, 18 U.S.C. § 844(I), when applied to private property not used for any commercial venture. The statute at issue makes it a federal crime to “maliciously damage[] or destroy[] . . . any building . . . used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce.” *Jones*, 529 U.S. 848, 849 (2000).

The defendant contended that the statute, when applied to the arson of a private

residence, exceeded Congress's authority under the Commerce Clause. *Id.* at 851-852. The *Jones* Court posed two questions at the beginning of its inquiry: (1) should the statute be construed not to reach owner-occupied private dwellings; and (2) if the statute is construed to reach private owner-occupied residences, is it constitutional under the Commerce Clause. *Id.* at 852. Heeding its previous decision in *Lopez* as well as "the interpretive rule that constitutionally doubtful constructions should be avoided," answered the first question in the affirmative and thereby avoided the second question. *Id.* at 851. Once again, as in the *Lopez* decision, the Court reasoned by *reductio ad absurdum* that were it to adopt the government's expansive interpretation of the statute, "hardly a building in the land would fall outside the federal statute's domain." *Id.* at 857.

*Lopez*, *Morrison* and *Jones* have re-established the basic constitutional proposition that the Founders did not cede to Congress a general police power. Rather, "[t]he regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Morrison*, at 618. To justify a Congressional attempt to regulate intrastate violence, the activity to be regulated must fall under one of three categories. Typically the first two categories, activities involving the channels and instrumentalities of or commodities moving in interstate commerce, will not be pertinent. Thus, federal regulation directed at intrastate violence must be regulation of a sort of activity affecting interstate commerce.

*Lopez* further teaches that despite unclear precedent, the proper test for interstate nexus under the third category is that the activity "substantially affects" interstate

commerce.” *Lopez*, 514 U.S. at 559. Thus, previous case law and Congressional enactments relying on the proposition that a minimal nexus or effect on interstate commerce is enough to pass constitutional muster is now overruled. To determine whether there is a substantial effect, at least four types of considerations can be pertinent to the analysis. First, a court should inquire whether the activity itself is economic in the sense of being part of a larger economic regulatory scheme. *Lopez* and its progeny teach that intrastate violence, including the possession of guns in locations that endanger schoolchildren, the rape of women, and the burning of buildings, are not economic in this sense.

Second, a court should look to whether the statute purporting to regulate activity substantially affecting interstate commerce has a jurisdictional element that requires a particularized showing of interstate nexus. According to *Jones*, if the language of that element uses the term “affecting commerce,” then Congress is deemed to have signaled its intention to invoke its full authority under the Commerce Clause. If the statute uses the term “in commerce”, then Congress is invoking a more restricted exercise of its Commerce Clause authority. *Lopez* and its progeny also recognizes that when a jurisdictional element appears in a statute, that element “lends support” to the argument that the statute is sufficiently tied to interstate commerce. *Morrison*, at 611. However, *Lopez* and its progeny hold that “[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by [the Supreme] Court.” *Morrison*, 529 U.S. 614.

Third, a court should look to legislative findings as support for a sufficient interstate nexus. But if Congress's method of reasoning in making such findings constitutes a *reductio ad absurdum* to the untenable conclusion that every activity would be within reach of national regulation, then such findings must be rejected. So, by way of example, if the Violence Against Women Act's , 42 U.S.C. § 13981, legislative findings that gender-related violence deters travel and business interactions, imposes medical costs on the general population, and more generally detracts from national productivity are sufficient for Commerce Clause jurisdiction, then Congress can regulate every sort of violent crime. 529 U.S. at 615. In the end, "[s]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Morrison*, 529 U.S. at 614 (quoting *Lopez*, 514 U.S. at 557, n.2).

Fourth, a court can look to any other purported links between the activity to be regulated and commerce. It is not acceptable, however, to argue that the activity, viewed in the aggregate, has a substantial effect on interstate commerce. *Morrison*, 529 U.S. 615. *Lopez* and its progeny reject reasoning about effects in the aggregate because such reasoning leads to unacceptable results. On such reasoning, Congress would have a national police power and that national police power would preempt the police power ceded to the states as one of the fundamentals of our federalist system. Congress does not have such power, and should not be held to have it in this case.

#### IV. CONCLUSION

The Court should dismiss the indictment because the SORNA and FFR statutes, like the Virginia statutes, do not apply to Mr. McCoy. If they are held to apply to Mr. McCoy, the statutes are unconstitutional.

WHEREFORE, for the foregoing reasons, and for any other reasons as may appear to the Court at a hearing on this motion, Mr. McCoy, respectfully requests this Court dismiss the Grand Jury Indictment.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document will be served by hand on Zachary Lee, Esq., Special Assistant United States Attorney, this 12<sup>th</sup> day of March, 2007.

s/Nancy Dickenson