

RECORD NO. _____

IN THE
Supreme Court of the United States

THOMAS ABDUL HOLCOMBE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX

Robin C. Smith, Esq.
Leean Othman, Esq.
Law Office of Robin C. Smith, Esq., P.C.
99 Wall Street, Suite 901
New York, NY 10005
(415) 726-8000
rcs@robinsmithesq.com

Counsel for Petitioner

16-1429-cr

United States v. Holcombe

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2016

Docket No. 16-1429-cr

UNITED STATES OF AMERICA,

Appellee,

V.

THOMAS ABDUL HOLCOMBE,

Defendant-Appellant.

Before:

JACOBS, LEVAL, and LOHIER, *Circuit Judges.*

28 Thomas Abdul Holcombe appeals from a judgment of conviction entered
29 after a bench trial in the United States District Court for the Southern District of
30 New York (Briccetti, J.) for failing to register as a sex offender, in violation of the
31 Sex Offender Registration and Notification Act (“SORNA”), 18 U.S.C. § 2250(a).
32 On appeal, Holcombe argues principally that venue was improper in the
33 Southern District of New York and that SORNA’s registration requirements are
34 void for vagueness and violate his right to travel. We **AFFIRM**.

1 ROBIN CHRISTINE SMITH, Law Office of
2 Robin C. Smith, Esq., P.C., San Rafael, CA,
3 *for Defendant-Appellant.*
4

5 WON SHIN, Assistant United States
6 Attorney (Margaret Garnett, Assistant
7 United States Attorney, *on the brief*), *for*
8 Geoffrey S. Berman, Interim United States
9 Attorney for the Southern District of New
10 York, New York, NY, *for Appellee.*
11

12 LOHIER, *Circuit Judge:*

13 Thomas Abdul Holcombe, a sex offender subject to the requirements of the
14 Sex Offender Registration and Notification Act (SORNA or the Act), was
15 convicted after a bench trial in the United States District Court for the Southern
16 District of New York (Briccetti, L) of failing to update his registration when he
17 moved from New York to Maryland. SORNA makes it a crime for a sex offender
18 who is required to register under the Act and who “travels in interstate . . .
19 commerce” to “knowingly fail[] to register or update a registration as required
20 by [the Act].” 18 U.S.C. § 2250(a). The statute governing venue for crimes
21 committed in more than one district, 18 U.S.C. § 3237(a), provides that “any
22 offense against the United States begun in one district and completed in another,
23 or committed in more than one district, may be . . . prosecuted in any district in
24 which such offense was begun, continued, or completed.” The principal

1 question before us is whether a SORNA offense “beg[ins]” and venue is proper
2 in the federal district from which a state sex offender subject to SORNA travels
3 interstate to reside in another district.

4 After determining that a defendant must travel interstate in order to
5 violate Section 2250(a), and citing Section 3237(a), the District Court concluded
6 that Holcombe’s offense “beg[a]n” in the Southern District of New York (SDNY)
7 and that venue was proper there because Holcombe traveled from the SDNY to
8 Maryland. The District Court also rejected Holcombe’s arguments that SORNA
9 is void for vagueness and violates his constitutional right to travel, and
10 summarily rejected a number of other arguments foreclosed by settled precedent.

11 We **AFFIRM**.

12 **BACKGROUND**

13 After pleading guilty in 1992 to attempted rape in the first degree under
14 State law, Holcombe was required under SORNA to register as a sex offender
15 and keep his registration current in any State where he resides. In 1996, while
16 still in prison, Holcombe registered as a state sex offender in New York. He did
17 so by completing a New York State Sex Offender Registration Form, on which he
18 indicated that he would reside in Peekskill, New York (in the SDNY) after his

1 release and promised to notify his "local law enforcement agency" and the New
2 York State Division of Criminal Justice Services "in writing of any change of
3 home address within 10 days before" he moved. App'x 60.

4 Holcombe was released from prison in 1998. Thereafter, he drifted in and
5 out of prison for committing various crimes, including failure to comply with his
6 sex offender registration obligations. In April 2013 Holcombe left the
7 Westchester County Jail (in the SDNY) and updated his address to a residence in
8 Peekskill, New York (in the SDNY), where, it turns out, he never resided.
9 Instead, he moved to Maryland, where he lived for at least eighteen months
10 without updating his New York registration or registering as a sex offender in
11 Maryland.

12 In May 2015 Holcombe was charged in the District Court for the SDNY
13 with failing to register and update his registration as a sex offender as required
14 by SORNA. After unsuccessfully moving to dismiss the indictment on various
15 grounds, including that the SDNY was an improper venue, Holcombe proceeded
16 with a bench trial on stipulated facts. The District Court convicted Holcombe of
17 one count of knowingly failing to register and update his registration as required

1 by SORNA and sentenced him on April 27, 2016. Holcombe completed his term
2 of imprisonment on March 14, 2017.

3 This appeal followed.

4 **DISCUSSION**

5 SORNA “establishes a comprehensive national system for the registration
6 of [sex] offenders.” 34 U.S.C. § 20901. The statute has requirements both for
7 offenders who initially register and for those offenders who are already
8 registered but need to update their registration.¹ SORNA provides that anyone

¹ The registration provisions of the statute, 34 U.S.C. § 20913, state, in relevant part:

(a) In general

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

(b) Initial registration

The sex offender shall initially register—

- (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or
- (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) 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.

1 required to register under the Act who “travels in interstate . . . commerce . . .
2 [and] knowingly fails to register or update a registration . . . shall be fined . . . or
3 imprisoned not more than 10 years, or both.” 18 U.S.C. § 2250(a). Other SORNA
4 provisions instruct jurisdictions to maintain sex offender registries that conform
5 with the requirements of the Act, see 34 U.S.C. § 20912, and to provide registry
6 information to “each jurisdiction from or to which a change of residence,
7 employment, or student status occurs,” 34 U.S.C. § 20923(b)(3).

8 Although Holcombe mounts several challenges to his conviction under
9 SORNA, we focus on the three challenges that are not squarely foreclosed by
10 precedent: (1) whether venue was proper in the SDNY; (2) whether SORNA is
11 void for vagueness; and (3) whether SORNA violates Holcombe’s constitutional
12 right to travel. We review each of these legal questions de novo. See United
13 States v. Gundy, 804 F.3d 140, 145 (2d Cir. 2015).

14 1. Venue

15 A criminal defendant must be tried in the district where the crime was
16 committed. U.S. Const. amend. VI; Fed. R. Crim. P. 18. In determining where a
17 crime was committed, we consider Section 3237(a), which governs venue. That
18 statute provides that an offense “begun in one district and completed in another,

1 or committed in more than one district, may be . . . prosecuted in any district in
2 which such offense was begun, continued, or completed.” Id.; see United States
3 v. Lange, 834 F.3d 58, 68 (2d Cir. 2016) (“When a federal statute defining an
4 offense does not specify how to determine where the crime was committed, the
5 locus delicti must be determined from the nature of the crime alleged and the
6 location of the act or acts constituting it.” (quotation marks omitted)). Whether
7 venue is proper in a particular district turns on the elements of the underlying
8 crime and where the acts satisfying those elements occurred.

9 Holcombe stipulated that he left New York and moved to Maryland and
10 then failed to register with Maryland authorities when he established a residence
11 there, in violation of 34 U.S.C. § 20913(c). There is no question, therefore, that he
12 “travel[ed] in interstate . . . commerce,” 18 U.S.C. § 2250(a), an essential element
13 of a SORNA violation for state sex offenders, see Carr v. United States, 560 U.S.
14 438, 454 (2010) (“The act of travel by a convicted sex offender may serve as a
15 jurisdictional predicate for § 2250, but it is also . . . the very conduct at which
16 Congress took aim.”); see also Gundy, 804 F.3d at 141.

17 But where was his SORNA offense “begun”? The majority of our sister
18 circuits that have addressed the issue have held that a SORNA offense begins

1 under Section 3237(a) in the district that the defendant leaves, not in the district
2 where the defendant's interstate travel ends and in which the defendant
3 ultimately fails to register. See United States v. Kopp, 778 F.3d 986, 988–89 (11th
4 Cir. 2015); United States v. Lewis, 768 F.3d 1086, 1092–94 (10th Cir. 2014); United
5 States v. Howell, 552 F.3d 709, 717–18 (8th Cir. 2009). We agree with this
6 majority view because travel in interstate commerce is an essential element of a
7 SORNA offense involving a state sex offender. The offense begins where the
8 interstate journey begins, regardless of whether the defendant had already
9 formed an intent to violate the statute when the interstate travel began.
10 Holcombe's interstate journey began in the SDNY because his address when he
11 was released from the Westchester County Jail was in the SDNY. (Moreover, the
12 address he furnished to the authorities as his residential address upon his release
13 from jail was also in the SDNY.)

14 The Eighth Circuit's decision in United States v. Lunsford, 725 F.3d 859
15 (8th Cir. 2013), on which Holcombe relies, is not to the contrary. Lunsford,
16 which concerned whether SORNA required a sex offender to update his
17 registration in the departure State upon leaving the United States for the
18 Philippines, was not about venue. Instead, the Eighth Circuit resolved whether

1 the defendant's departure State remained a "jurisdiction involved" under
2 SORNA. 725 F.3d at 861–62. The Eighth Circuit addressed venue under SORNA
3 four years before Lunsford, in Howell, and there held that venue was proper in
4 the departure jurisdiction "because an offense begun in one district and
5 completed in another may be prosecuted in the district in which such offense
6 was begun." Id. at 863 (quotation marks omitted) (citing Howell, 552 F.3d at
7 718).²

8 In agreeing with a majority of our sister circuits, we must respectfully
9 disagree with the analysis in United States v. Haslage, 853 F.3d 331 (7th Cir.
10 2017). There, a split panel of the Seventh Circuit, relying almost entirely on the
11 Supreme Court's intervening ruling in Nichols v. United States, 136 S. Ct. 1113
12 (2016), overturned its prior precedent in United States v. Leach, 639 F.3d 769,
13 771–72 (7th Cir. 2011), that venue in a SORNA prosecution is proper in the
14 departure district. In view of Nichols, the majority concluded, venue in a
15 SORNA prosecution is not proper in the district where the sex offender's
16 interstate travel commenced because travel "is neither a distinct crime nor an

² Holcombe's reliance on United States v. Miller, No. 2:10-CR-196, 2011 WL 711090, at *5 (S.D. Ohio Feb. 22, 2011), is also unavailing. See Carr, 560 U.S. at 454.

1 element of the crime" and therefore is not "conduct that is part of the offense."
2 853 F.3d at 333, 335. For the reasons already stated, we think that interstate
3 travel is an element of a SORNA offense where, as here, the defendant is a state
4 sex offender.

5 We note, too, that Nichols did not address venue, and involved a
6 defendant who was a federal sex offender, not, as here, a state sex offender. See
7 136 S. Ct. at 1116–17. A federal sex offender, unlike a state sex offender, does not
8 need to travel interstate to commit a SORNA offense. See 18 U.S.C.
9 § 2250(a)(2)(A). And insofar as the Seventh Circuit's Haslage decision held that
10 interstate travel is not a SORNA element because the defendant need not have
11 criminal intent while traveling across state lines, see 853 F.3d at 334, we have
12 explained that venue turns on "where physical conduct occurred, and not where
13 criminal intent was formed," United States v. Miller, 808 F.3d 607, 615 (2d Cir.
14 2015) (quotation marks omitted). Interstate travel requires a departure from one
15 State just as much as arrival in another. See Haslage, 853 F.3d at 336, 338 (Sykes,
16 L. dissenting).

1 2. Void for Vagueness

2 SORNA requires a sex offender to “register[] and keep the registration
3 current[] in each jurisdiction where the offender resides.” 34 U.S.C. § 20913(a). It
4 defines “resides” as “the location of the individual’s home or other place where
5 the individual habitually lives.” Id. § 20911(13). The Attorney General’s
6 National Guidelines for Sex Offender Registration and Notification provide that
7 a sex offender “habitually lives” in a jurisdiction if he “lives in the jurisdiction for
8 at least 30 days,” but give each jurisdiction discretion to specify “the application
9 of the 30-day standard to sex offenders whose presence in the jurisdiction is
10 intermittent but who live in the jurisdiction for 30 days in the aggregate over
11 some longer period of time.” 73 Fed. Reg. 38,030, 38,062 (July 2, 2008).

12 Holcombe argues that SORNA is unconstitutionally vague because it fails to
13 sufficiently define the term “resides.” Specifically, Holcombe asserts that the
14 Attorney General’s Guidelines improperly permit each jurisdiction to determine
15 how the thirty-day statutory requirement is calculated.

16 We easily reject Holcombe’s vagueness challenge. Where, as here, First
17 Amendment rights are not implicated, we evaluate such a challenge “in light of
18 the specific facts of the case at hand” and not with regard to the facial validity of

1 the criminal statute or regulation at issue. See United States v. Nadi, 996 F.2d
2 548, 550 (2d Cir. 1993). We determine whether a statute is void for vagueness by
3 considering whether it “define[s] the criminal offense with sufficient definiteness
4 that ordinary people can understand what conduct is prohibited and in a manner
5 that does not encourage arbitrary and discriminatory enforcement.” Kolender v.
6 Lawson, 461 U.S. 352, 357 (1983).

7 Had Holcombe lived in Maryland for a far shorter period of time, his
8 argument might have been stronger. Because Holcombe lived in Maryland for at
9 least eighteen months, however, SORNA’s use of the word “resides” is not void
10 for vagueness in this case: Holcombe was on fair notice that his continuous
11 residence in Maryland for at least eighteen months easily satisfied the thirty-day
12 requirement, however Maryland calculated it. No one could read the statute and
13 Guidelines and reasonably come away thinking that he did not need to update
14 his registration after eighteen months.

15 3. Right to Travel

16 Holcombe also argues that SORNA’s registration requirements violate his
17 constitutional right to travel. “Although the Supreme Court has suggested that
18 ‘[t]he textual source of the constitutional right to travel, or, more precisely, the

1 right of free interstate migration, . . . has proved elusive,'" Selevan v. N.Y.
2 Thruway Auth., 584 F.3d 82, 99 (2d Cir. 2009) (quoting Attorney Gen. of N.Y. v.
3 Soto-Lopez, 476 U.S. 898, 902 (1986)), the Supreme Court has also stated that the
4 Government may not unreasonably burden "the right of a citizen of one State to
5 enter and to leave another State, the right to be treated as a welcome visitor
6 rather than an unfriendly alien when temporarily present in the second State,
7 and, for those travelers who elect to become permanent residents, the right to be
8 treated like other citizens of that State." Saenz v. Roe, 526 U.S. 489, 500 (1999);
9 see Shapiro v. Thompson, 394 U.S. 618, 629–30 (1969). Where a statute implicates
10 the right to travel, it will be upheld only if it is found "to be necessary to promote
11 a compelling governmental interest." Shapiro, 394 U.S. at 634.

12 As an initial matter, we are inclined to think that SORNA's registration
13 requirements do not even implicate the fundamental right to travel because
14 nothing in SORNA stops a sex offender from "enter[ing] [or] leav[ing] another
15 State" if the offender chooses to permanently relocate. Saenz, 526 U.S. at 500.
16 Moving from one State to another entails any number of registration
17 requirements required by law that, while at times inconvenient, do not unduly
18 infringe the right to travel. "The essential part of the charged crime in this matter

1 is the failure to register; [the] right to travel is incidental to this obligation, and
2 not constitutionally offended.” United States v. Shenandoah, 595 F.3d 151, 162–
3 63 (3d Cir. 2010), abrogated on other grounds by Reynolds v. United States, 565
4 U.S. 432 (2012); see also Bacon v. Neer, 631 F.3d 875, 878 (8th Cir. 2011) (“Bacon is
5 free to travel if he registers.”).

6 And even assuming that SORNA’s registration requirements implicate the
7 right to travel, we conclude that the burdens imposed by the registration scheme
8 narrowly serve the Government’s compelling interest in addressing “the
9 deficiencies in prior law that had enabled sex offenders to slip through the
10 cracks.” Carr, 560 U.S. at 455. “In other words, Congress wanted to make sure
11 sex offenders could not avoid all registration requirements just by moving to
12 another state.” United States v. Guzman, 591 F.3d 83, 91 (2d Cir. 2010); see also
13 United States v. Ambert, 561 F.3d 1202, 1210 (11th Cir. 2009) (“[T]he
14 government’s interest in protecting others from future sexual offenses and
15 preventing sex offenders from subverting the purpose of the statute is
16 sufficiently weighty to overcome the burden.”).

17 For these reasons, SORNA’s registration requirement does not violate
18 Holcombe’s right to travel.

4. Remaining Challenges

Finally, Holcombe acknowledges that his claims based on the non-delegation doctrine, the Ex Post Facto Clause, the Commerce Clause, and the Tenth Amendment, as well as his argument that SORNA cannot be applied to him because New York has not yet implemented the statute, are all squarely foreclosed by Guzman, 591 F.3d 83.

CONCLUSION

8 We have considered Holcombe's remaining arguments and conclude that
9 they are without merit. For the foregoing reasons, the judgment of the District
10 Court is **AFFIRMED**.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of August, two thousand nineteen.

United States of America,

Appellee,

v.

ORDER

Docket No: 16-1429

Thomas Abdul Holcombe,

Defendant - Appellant.

Appellant, Thomas Abdul Holcombe, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

U.S. Const., Art. I, § 9, cl. 2

"No Bill of Attainder or ex post facto Law shall be passed."

United States Code

18 U.S.C. § 2250

(a) In general. Whoever--

- (1)** is required to register under the Sex Offender Registration and Notification Act;
- (2)(A)** is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or
- (B)** travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and
- (3)** knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

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

34 U.S.C. § 20911(13)

(13) Resides

The term “resides” means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives

34 U.S.C. § 20912(b)

(b) Guidelines and regulations

The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter.

34 U.S.C. § 20913

(a) In general

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

(b) Initial registration

The sex offender shall initially register--

- (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or
- (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) 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)

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

34 U.S.C. § 20914(a)(3)

(a) Provided by the offender

The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:

(3) The address of each residence at which the sex offender resides or will reside.

34 U.S.C. § 20917(a)(b)

(a) In general

(1) Secure system for comparisons

The Attorney General shall establish and maintain a secure system that permits social networking websites to compare the information contained in the National Sex Offender Registry with the Internet identifiers of users of the social networking websites, and view only those Internet identifiers that match. The system—

(B) shall use secure procedures that preserve the secrecy of the Information made available by the Attorney General, including protection measures that render the Internet identifiers and other data elements indecipherable.

34 U.S.C. § 20923(b)(1)-(7)

(b) Program notification

Except as provided in subsection (c), immediately after a sex offender registers or updates a registration, an appropriate official in the jurisdiction shall provide the information in the registry (other than information exempted from disclosure by the Attorney General) about that offender to the following:

(1) The Attorney General, who shall include that information in the National Sex Offender Registry or other appropriate databases.

(2) Appropriate law enforcement agencies (including probation agencies, if appropriate), and each school and public housing agency, in each area in which the individual resides, is an employee or is a student.

(3) Each jurisdiction where the sex offender resides, is an employee, or is a student, and each jurisdiction from or to which a change of residence, employment, or student status occurs.

(4) Any agency responsible for conducting employment-related background checks under section 40102 of this title.

(5) Social service entities responsible for protecting minors in the child welfare system.

(6) Volunteer organizations in which contact with minors or other vulnerable individuals might occur.

(7) Any organization, company, or individual who requests such notification pursuant to procedures established by the jurisdiction.