NO. _____

IN THE
Supreme Court of the United States

SALVADOR DIAZ,

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.
802 B Street
San Rafael, California 94901
(415) 726-8000
rcs@robinsmithesq.com

Counsel for Petitioner

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

TABLE OF CONTENTS

Page

19-1895-cr
United States v. Salvador Diaz

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2019

(Argued: June 24, 2020 Decided: July 22,2020)

Docket No. 19-1895-cr

UNITED STATES OF AMERICA,

Appellee,

v.

SALVADOR DIAZ,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

Before:

CALABRESI, CHIN, and CARNEY, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York (Caproni, *J.*) convicting defendant-appellant of

failing to register as a sex offender under the Sex Offender Registration and Notification Act in violation of 18 U.S.C. § 2250(a). Defendant-appellant contends that the district court erred when it precluded him from collaterally attacking his predicate conviction, rejected his argument that the statute is unconstitutional, and denied his motion to dismiss for improper venue.

AFFIRMED.

Judge CALABRESI CONCURS in a separate opinion.

DANIEL NESSIM, Assistant United States Attorney (Elinor Tarlow, David Abramowicz, Assistant United States Attorneys, *on the brief*), *for* Audrey Strauss, United States Attorney for the Southern District of New York, New York, New York, *for Appellee*.

ROBIN C. SMITH (Leean Othman, *on the brief*), Law Office of Robin C. Smith, Esq., P.C., New York, New York, *for Defendant-Appellant*.

PER CURIAM:

Defendant-appellant Salvador Diaz appeals from a judgment of the district court entered June 26, 2019, following a jury trial, convicting him of failing to register as a sex offender under the Sex Offender Registration and

Notification Act ("SORNA"), 18 U.S.C. § 2250(a). He was sentenced principally to five years' probation, with the first three months to be served in home confinement. On appeal, Diaz challenges his conviction on the grounds that the district court erred when it precluded him from collaterally attacking his predicate conviction, rejected his argument that SORNA is unconstitutional, and denied his motion to dismiss for improper venue. For the reasons set forth below, we affirm the judgment of conviction.

BACKGROUND

On December 1, 2000, Diaz, then a chief petty officer in the United States Navy, was convicted by court-martial of three counts of rape and two counts of indecent acts, in violation of Articles 120 and 134 of the Uniform Code of Military Justice. He was sentenced to nine years' imprisonment and a dishonorable discharge. Diaz has since pursued several challenges to his convictions, all unsuccessfully. *See, e.g.*, *United States v. Diaz*, 61 M.J. 594 (N-M. Ct. Crim. App. 2005) (appeal to the Navy-Marine Corps Court of Criminal Appeals); *United States v. Diaz*, 64 M.J. 180 (C.A.A.F. 2006) (appeal to the United States Court of Appeals for the Armed Forces); *Diaz v. United States*, 549 U.S. 1356

(2007) (petition for writ of certiorari to United States Supreme Court); *Diaz v. Inch*, No. 06-3306, 2007 WL 9754574 (D. Kan. Sept. 28, 2007) (habeas petition).

Following his release from prison, Diaz registered as a sex offender in New York. Between 2014 and 2017, Diaz moved from New York to New Jersey and Virginia, but did not register in the latter two states. On April 12, 2017, the Government indicted Diaz for violating § 2250(a)(2)(A) -- the "Sex Offense Clause" -- because he "changed his residence without updating his registered address in New York." App'x at 27. On March 2, 2018, Diaz, proceeding *pro se*, moved to dismiss the indictment, arguing that his predicate sex offender conviction was obtained in violation of the Constitution and that SORNA was unconstitutional. The district court denied the motion.

On November 19, 2018, after the district court ordered the Government to address the effect of *Nichols v. United States*, 136 S. Ct. 1113 (2016), on Diaz's indictment, the Government filed a superseding indictment, charging Diaz with traveling in interstate commerce and failing to update his registration in the jurisdictions in which he resided after departing New York, in violation of § 2250(a)(2)(B) -- the "Interstate Travel Clause." The district court set a pretrial motion deadline for December 21, 2018. On February 25, 2019, Diaz again

moved to dismiss for, *inter alia*, improper venue. The district court denied the motion as untimely, without good cause to excuse waiver, and meritless.

Diaz was convicted following a jury trial and sentenced principally to five years' probation with the first three months to be served in home confinement. This appeal followed.

DISCUSSION

I. *Collateral Challenges to Predicate Convictions under SORNA*

"We review questions of statutory interpretation *de novo*." *United States v. Ng Lap Seng*, 934 F.3d 110, 122 (2d Cir. 2019). In interpreting a statute, this Court gives "the statutory terms their ordinary or natural meaning." *United States v. Lockhart*, 749 F.3d 148, 152 (2d Cir. 2014) (internal quotation marks omitted).

The Supreme Court has routinely interpreted statutes that depend on a prior conviction as precluding defendants from collaterally challenging the predicate conviction in a subsequent proceeding. *See Custis v. United States*, 511 U.S. 485, 497 (1994) (holding that defendant may not collaterally attack prior conviction used to enhance sentence under the Armed Career Criminal Act because the statute does not explicitly permit such challenges); *Lewis v. United*

States, 445 U.S. 55, 67 (1980) (finding that felon-in-possession statute did not permit defendant to contest felony conviction in subsequent firearms prosecution because the statute "focus[es] not on reliability, but on the mere fact of conviction" as an element of the firearms offense); *cf. United States v. Mendoza-Lopez*, 481 U.S. 828, 840-41 (1987) (permitting collateral attack on predicate conviction despite the Immigration and Nationality Act's silence because judicial review of that conviction is otherwise unavailable). At least one circuit has addressed and rejected the contention that SORNA permits collateral challenges to sex offender convictions in its proceedings. *See United States v. Delgado*, 592 F. App'x 602, 603 (9th Cir. 2015) (mem. disp.).

We agree that SORNA does not permit defendants to collaterally challenge predicate sex offender convictions. SORNA is similar in structure to the statutes that the Supreme Court has held do not authorize collateral attacks of predicate convictions: SORNA requires the fact of a sex offender conviction as an element of the registration offense, *see Lewis*, 445 U.S. at 67, and lacks explicit terms authorizing a defendant to challenge the predicate conviction, *see Custis*, 511 U.S. at 491-92.[1] Moreover, Diaz's argument that SORNA permits collateral

[1] Section 2250(a) provides: "Whoever-- (1) is required to register under [SORNA]; (2)(A) is a sex offender . . . by reason of a conviction under Federal law (including the

attack through 34 U.S.C. § 20911(5)(B) (the "Foreign Conviction Exception") is unpersuasive.[2] The Foreign Conviction Exception is by its terms limited to foreign convictions, and Congress did not intend to extend it to domestic convictions. *See id.* at 492 (applying *expressio unius* maxim that maintains "where Congress includes particular language in one section of a statute but omits it in another," we presume Congress acted intentionally (brackets omitted)).

Finally, Diaz already received judicial review of his sex offender conviction. Permitting him to attack his prior conviction would provide him an opportunity for judicial review not available to those who abide by SORNA's requirements. *See id.* at 497 (emphasizing the interest in not undermining a prior judgment "in a proceeding that ha[s] an independent purpose other than to overturn the prior judgmen[t]") (internal quotation marks omitted).

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).

[2] The Foreign Conviction Exception provides that "[a] foreign conviction is not a sex offense . . . if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused," 34 U.S.C. § 20911(5)(B), and mandates that the Attorney General establish "guidelines" to determine whether these convictions qualify as sex offenses, *see id.* § 20912(b).

Accordingly, the district court correctly held that a defendant in a SORNA prosecution may not collaterally challenge his underlying sex offender conviction.

II. *SORNA's Constitutionality under the Eighth and Fifth Amendments*

We review the district court's interpretation of the constitutionality of a federal statute *de novo*. *See United States v. Henry*, 888 F.3d 589, 602 (2d Cir. 2018), *cert. denied*, 139 S. Ct. 2615 (2019).

Diaz argues that SORNA violates the Eighth and Fifth Amendment's prohibitions on cruel and unusual punishments and double jeopardy because the statute imposes a "second punishment" on the same criminal conduct. Appellant's Br. at 49.[3] He contends that the registration and notification provisions of sex offender registration statutes are punitive in nature because they result in "lifetime deprivations" of housing and employment and "public shaming." Appellant's Br. at 44, 45. He questions the efficacy of sex offender statutes, asserting that they are "an ineffective solution to tackling sex crimes." Appellant's Br. at 47.

---

[3] The Eighth Amendment mandates against the infliction of "cruel and unusual punishments," U.S. Const. amend. VIII, while the Fifth Amendment prohibits subjecting a person "to be twice put in jeopardy of life or limb" for one criminal act, U.S. Const. amend. V.

As Diaz acknowledges, however, we held in *Doe v. Pataki* that the mandatory registration and notification requirements of New York State's Sex Offender Registration Act, which are analogous to SORNA's requirements, are nonpunitive in purpose and effect. *See* 120 F.3d 1263, 1285 (2d Cir. 1997), *as amended on denial of reh'g* (Sept. 25, 1997) (rejecting that the New York statute violates the Fifth Amendment's Ex Post Facto Clause). Moreover, the Supreme Court reached the same conclusion in its review of an Ex Post Facto challenge to Alaska's Sex Offender Registration Act. *See Smith v. Doe*, 538 U.S. 84, 105 (2003). Our precedent precludes the argument that sex offender registration and notification requirements are punitive, *see Pataki*, 120 F.3d at 1285, and the Supreme Court's similar conclusion in *Smith v. Doe* forecloses this Court's ability to revisit the *Pataki* decision, 538 U.S. at 105. Accordingly, the district court correctly concluded that SORNA does not violate the Fifth or Eighth Amendments.[4]

[4] Diaz further argues that the district court erred when it denied as untimely his motion to dismiss for improper venue. Diaz raised his venue objection more than two months after the pretrial motion deadline, and the district court held that his explanation for the delay -- that he did not understand venue and waiver as a *pro se* litigant -- did not constitute good cause to excuse waiver because the court had previously explained these concepts to him. *See United States v. O'Brien*, 926 F.3d 57, 83 (2d Cir. 2019). As a counseled litigant on appeal, Diaz waived any challenge to the district court's findings on this issue because he failed to address it in his opening brief.

CONCLUSION

For the foregoing reasons, the district court's judgment is **AFFIRMED**.

See Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis., 804 F.3d 178, 192 (2d Cir. 2015). Accordingly, Diaz's improper venue challenge fails.

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 1st day of October, two thousand twenty.

United States of America,

Appellee,

v.

Salvador Diaz,

Defendant - Appellant.

ORDER

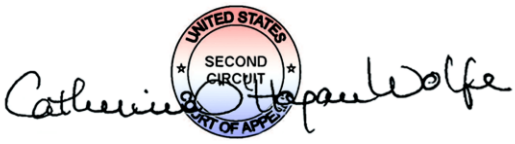
Docket No: 19-1895

Appellant, Salvador Diaz, 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



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.

(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.

(c) Crime of violence. –

(1) In general. --An individual described in subsection (a) who commits a crime of violence 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 shall be imprisoned for not less than 5 years and not more than 30 years.

(2) Additional punishment. --The punishment provided in paragraph (1) shall be in addition and consecutive to the punishment provided for the violation described in subsection (a).

United States Constitution, Amendment V

"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 offense 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." USCS Const. Amend. 5.

United States Constitution, Amendment VI

"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 defence." USCS Const. Amend. 6.

United States Constitution, Amendment VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." USCS Const. Amend. 8.