No.

IN THE

Supreme Court of the United States

JASON KOKINDA,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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I. QUESTION PRESENTED FOR REVIEW

Whether the district court erroneously instructed the jury regarding a crucial element of the criminal offense of failure to register as a sex offender, 18 U.S.C. §2250, by defining "change of residence," 34 U.S.C. §20913(c), in a way that enlarged the scope of conduct that would trigger a sex offender's obligation to register, based on passages dispersed throughout the Attorney General's so-called SMART Guidelines.

II. LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States v. Jason Kokinda, Case Nos. 2:19CR33 and 2:21CR20, United States District Court for the Northern District of West Virginia at Elkins, District Court Judge Thomas Kleeh.[1] Judgment entered October 13, 2022 [ECF #188, Case 2:21CR20]

United States v. Jason Kokinda, Appeal No. 22-4595, United States Court of Appeals for the Fourth Circuit. Judgment entered February 21, 2024. Motion for Rehearing denied April 2, 2024.

[1] Cases 2:19CR33 and 2:21CR20 were consolidated "for case management purposes" [ECF #44, 2:21CR20] (JA37-39). Counts One and Two of 2:19CR33 were "severed for purposes of trial" [ECF48, 2:21CR20] (JA40), and the trial was continued as to Count Two (Possession of Child Pornography, 2:19CR33). The case went to trial on Count One of the Indictment in Case 2:21CR20 [ECF #48, 2:21CR20], which was consolidated with Count Two of Case 2:19CR33 [ECF #44, 2:21CR20]. Trial on the charges contained in Count One, Case 2:21CR20, was held on October 19, 20 and 21, 2021, and a verdict was returned finding the Defendant guilty of Failure to Update Sex Offender Registration (Failure to Register) [ECF #62, 2:21CR20] (JA41).

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V. OPINIONS BELOW

The Published Opinion of the United States Court of Appeals for the Fourth Circuit (Appendix, p. 1a) appears in West's National Reporter System at *United States v. Kokinda*, 93 F.4th 635 (2024), and at ECF #64, Fourth Circuit Court of Appeals, Case No. 22-4595. The case was argued in Richmond, Virginia, before a three-judge panel, consisting of Circuit Judges, Agee, Thacker and Rushing, on December 8, 2023. It was decided by published opinion dated February 21, 2024. The opinion of the Appeals Court, authored by Judge Thacker, affirmed the judgment of the the United States District Court for the Northern District of West Virginia, District Judge Thomas Kleeh. After a three (3) day jury trial, and after a contested sentencing hearing, District Judge Kleeh's findings and conclusions about the guilty verdict was incorporated into the Judgment Order, (1A, P. 18a) which was filed on November 8, 2018. Judge Kleeh denied the Appellant's Motion for Judgment of Acquittal, by order dated October 5, 2022 (Appendix, p. 26a) [ECF #174, Case 2:21CR20].

VI. JURISDICTION

This Petition seeks review of an opinion of the United States Court of Appeals for the Fourth Circuit, decided on February 21, 2024, in Case No. 22-4595, United States v. Jason Kokinda. A Petition for Rehearing was filed on March 20, 2024 and denied on April 2, 2024. This Petition is filed within 90 days of the denial of Williamson's Petition for Rehearing in accordance with Rule 13, Rules of the

Supreme Court of the United States. Jurisdiction is conferred upon this Court by

28 U.S.C. §1254.

VII. STATUTES AND REGULATIONS INVOLVED

18 U.S.C. §2250. Failure to Register

> (a) * * * Whoever —
> (1) is required to register [see 34 U.S.C. §§20911(13) and 20913(a) and (c), below] under the Sex Offender Registration and Notification Act [SORNA]
> (2)(A) is a sex offender [so stipulated in this case]
> (B) travels in interstate . . . commerce [conceded though not formally stipulated in this case]; 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.

34 U.S.C. §20911(13)(SORNA)

> 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. §20913

> (a) In general
> A sex offender shall register and keep the registration current in each jurisdiction where the offender resides . . . .
> * * * *
> (c) Keeping the registration current
> A sex offender shall, not later than 3 business days after each change of . . . residence . . . 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.

VIII. STATEMENT OF THE CASE

A. Procedural history

1. District Court

The Appellant was arrested on September 29, 2019, in Elkins, Randolph County, West Virginia, by officers of the Elkins Police Department, and charged with Third Degree Sexual Abuse (Case 19-M42M-01538, Magistrate Court of Randolph County), a violation of West Virginia Code §61-8B-9. (ECF #365-6, Case 2:19CR33) (JA610-630). He was also charged with misdemeanor Making a False Statement to an Officer (19-M42M-1521), a violation of West Virginia Code §61-5-17. Both charges were later dismissed on the initiative of the Randolph County Prosecuting Attorney, after the defendant was indicted by a federal grand jury for what the indictment titled, "Failure to Update Sexual Offender Registration," (titled Failure to Register in the United States Code), 18 U.S.C. §2250. No federal charges were filed to correspond to the dismissed state court misdemeanors. The dismissed state court Third Degree Sexual Assault charge became the basis for an eight (8) level increase in the Defendant's offense level in this case. (JA902)

On November 14, 2019, the Defendant was charged with felony Failure to Register as a Sex Offender, a violation of West Virginia Code §15-12-9(b)(2) (Case 19-MF-228, which became Case 19-B [Boundover]-164). This case was also dismissed on the motion of the Randolph County Prosecuting Attorney when the Defendant was indicted on similar charges in federal court. The one (1) count indictment was filed in the United States District Court Northern District of West

Virginia, on December 17, 2019 [ECF #1, 2:19CR33], charging the Defendant with "Failure to Update Sex Offender Registration," (Failure to Register), 18 U.S.C. §2250(a). A Superseding Indictment (ECF #200, 2:19CR33), was filed February 2, 2021, charging the Defendant with Possession of Child Pornography, 18 U.S.C. §§2252A(a)(5)(B) and 2252A(b)(2) (Count One) and Failure to Update Sex Offender Registration, 18 U.S.C. §2250(a) (Count Two) (JA19 and JA53). A Forfeiture Allegation seeking the forfeiture of a Samsung cellphone was included. It is not pertinent to this appeal. A separate indictment was returned charging only "Failure to Update Sex Offender Registration," (Failure to Register), 18 U.S.C. §2250, Case 2:21CR20 (JA37).

Cases 2:19CR33 and 2:21CR20 were consolidated "for case management purposes" [ECF #44, 2:21CR20] (JA37-39). Counts One and Two of 2:19CR33 were "severed for purposes of trial" [ECF48, 2:21CR20] (JA40), and the trial was continued as to Count Two (Possession of Child Pornography, 2:19CR33). The case went to trial on Count One of the Indictment in Case 2:21CR20 [ECF #48, 2:21CR20], which was consolidated with Count Two of Case 2:19CR33 [ECF #44, 2:21CR20]. Trial on the charges contained in Count One, Case 2:21CR20, was held on October 19, 20 and 21, 2021, and a verdict was returned finding the Defendant guilty of Failure to Update Sex Offender Registration (Failure to Register) [ECF #62, 2:21CR20] (JA41).

After a June 9, 2022, evidentiary hearing [ECF #367, 2:19CR33] (JA33) on the Defendant's Motion to Suppress evidence of illicit images relating to the Count

One Possession of Child Pornography case, on June 15, 2021, the government dismissed Count One of Case 2:19CR33, without prejudice [ECF #371] (JA33), and the Court dismissed 2:19CR33 [ECF #373, 2:19CR33] (JA34).

It must be explained that although the district court judge variously ordered the consolidation, merger, severance, continuance and dismissal of one or both counts, in both cases, filings were docketed, sometimes to one, sometimes to the other, and sometimes to both cases, leading to some confusion that has never been fully resolved. The issues raised in this appeal relate to pleadings, orders and events that were entered in both dockets. In this brief, the case numbers (2:19CR33 or 2:21CR20) will be included when numbered events or documents in CMECF are referenced.

2. <u>Appeals Court</u>

The Appellant timely filed a Notice of Appeal from the judgment and the district court's decisions [ECF #190, Case 2:21CR20] on October 20, 2022. The case was docketed in the Fourth Circuit Court of Appeals, briefed, and oral argument was held on December 8, 2023 in Richmond, Virginia. The appellate court issued its Published Opinion on February 21, 2024 (Appendix p. 1a)(ECF 64, Appeal 22-4595) affirming the judgment and the district court's denial of the Appellant Motion for Acquittal on grounds that the jury instructions were a correct statement of law. The Fourth Circuit addressed the issues of jury instructions and sentencing. The Appellant filed his petition for rehearing on March 20, 2024 (ECF #72, Appeal 22-

4595), which was denied by an order dated April 2, 2024 (Appendix, p. 38a) (ECF #73, Appeal 22-4595).

B. Factual Background

Between August 24, 2019 and September 29, 2019, the defendant traveled, camped, shopped and accessed various amenities in three (3) different counties in West Virginia. During the same period of time, he also stayed at campgrounds in Maryland and Virginia and traveled extensively outside of West Virginia (JA429-493). In spite of his peripatetic habits, the government charged the defendant with "Failure to Update Sex Offender Registration," based on the theory that he was "residing" in West Virginia. Factually, the government's case was built almost entirely on bank records of credit card purchases (shopping at Walmart, Kroger, etc.), eyewitness sightings of the defendant at the public library, the YMCA and the City Park, that took place in Elkins, West Virginia. He did not have a home or apartment, or stay overnight with a friend in Elkins. He did not camp or sleep in his car in Elkins. He did not even visit Elkins on the 15 continuous days, which would have been necessary to trigger the West Virginia sex offender registry requirement. The defendant contends, that he was convicted due to over-broad jury instructions that allowed the jury to find that he knowingly failed to register while he was "residing" in West Virginia based, largely, on his presence, during the daylight hours, in Elkins, West Virginia. The court doubled his sentence based on the finding that he committed a sex offense against a minor although the criminal charges

relied on by the government had been dismissed. The Court imposed a sentence of 63 months, lifelong supervision and limits on computer use as part of the sentence.

The Appellant's chief complaints are: (1) the manner in which the jury was instructed at the October, 2019, trial of Count One, Case 2:21CR20, on the all-important element that the Defendant must register "in each jurisdiction where the offender resides," (emphasis added), 34 U.S.C. §20913(a); (2) the district judge made findings that the government's evidence provided sufficient indicia of reliability to support the probably accuracy (U.S.S.G. §6A1.3) of evidence that the defendant committed a "sex offense against a minor" "while in a failure to register status," (U.S.S.G. §2A3.5(b)(1)(C)), which resulted in an eight-level increase in the offense level, doubling his sentence. Lastly, the defendant complains of the post-prison conditions of supervision imposed on him, principally the lifetime supervision and severe limits on the use of computers and internet technology.

IX. REASONS FOR GRANTING THE WRIT

A. Erroneous Jury instructions

Presently, I am reading a very fine book, former Associate Justice Stephen Breyer's *Reading the Constitution, Why I Chose Pragmatism, Not Textualism*. And I revere Justice Breyer. But I must disagree with his thesis, which (as I understand it) amounts to the proposition that "practical" considerations and the perceived "purpose" of legislation may override the "ordinary English usage" of the text, to borrow the quoted phrase and the principle adopted in *United States v. Nichols*, 578 U.S. 104, 105, 136 S.Ct. 1113, 194 L.E.2d 324 (2016). In *Nichols*, Justice Alito

boiled down the rationale for the "ordinary English usage" test. Quoting *Kloeckner v. Solis*, 568 U.S. 41, 55, n. 4, 133 S.Ct. 596, 607, n. 4,184 L.Ed.2d 433 (2012), he wrote: "the most formidable argument concerning the statute's purposes [cannot] overcome the clarity [found] in the statute's text." *Nichols* is the controlling precedent, the binding construction of the relevant statutory text, and the "ordinary English usage" test is the principle against which the exercise of crafting jury instructions must be weighed in this case. The circuit court panel, however, relied on the "purpose" of the Sex Offender Registration and Notification Act (SORNA),[2] in affirming the district court's judgment and the enlargement of the crucial statutory element of "change of residence." Judge Kleeh cobbled together a jury instruction purporting to explain the statutory text with passages from the sprawling National Guidelines for Sex Offender Registration and Notification, 73 FR 38030-01, 2008 WL 2594934 (July 2, 2008)(referred to herein as the "Guidelines" or the "AG Guidelines"), which, importantly, were not meant to define the elements that trigger the obligation to register, but, rather, intended to identify pieces of information a sex offender should provide "if and when," *Nichols*, p. 110-111; see also, *United States v. Ward*, 2014 WL 6388502 (USDC N.D.Florida), he is required to register.

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[2] Judge Thacker wrote that "because the district court's jury instruction was a correct statement of the law and Appellant's proposed construction of SORNA is contrary to its purpose, we hold that the jury instruction was proper" (emphasis added). *United States v. Kokinda*, 93 F.4th 635, 645 (2024). To justify enlarging the "change of residence" element, Judge Thacker cited the so-called SMART Guidelines, which opine that "an overly narrow definition [of "habitually lives"] would undermine the objectives of SORNA." *Kokinda*, p. 645.

An old proverb recommends drinking water where the spring comes out of the ground, rather than down stream after the cattle have waded through it. This turns out to be an apt analogy for applying the statutory elements of the Failure to Register offense, vis-a-vis the aforementioned Guidelines.

Start with the text:

> 18 U.S.C. §2250. Failure to Register
> (a) * * * Whoever —
> (1) is required to register [see 34 U.S.C. §§20911(13) and 20913(a) and (c), below] under the Sex Offender Registration and Notification Act [SORNA]
> (2)(A) is a sex offender [so stipulated in this case]
> (B) travels in interstate . . . commerce [conceded though not formally stipulated in this case]; 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.
>
> 34 U.S.C. §20911(13)(SORNA)
>
> 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. §20913
>
> (a) In general
> A sex offender shall register and keep the registration current in each jurisdiction where the offender resides . . . .
> * * * *
> (c) Keeping the registration current
> A sex offender shall, not later than 3 business days after each change of . . . residence . . . 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.

The application of these elements has become controversial with respect to the meaning of the phrase "change of . . . residence," because the "ordinary English"

meaning seems to exclude the class of "transient" sex offenders who have no "fixed abode." This brief will review authorities that have grappled with the controversy. In the process, it will draw some distinctions between the stereotypical "transient," aka homeless, sex offender, and other variants, like the sex offender who is "transient," meaning, literally, in transit (perhaps "transitory" would better describe this class). Finally, it will address the "digital nomad," as Kokinda liked to describe himself, who has removed from a prior fixed address, but who does not yet "reside" or "habitually live" in a particular location long enough to trigger the requirement to register. Unavoidably, we discuss whether there is still the long-lamented "hole" in SORNA, in spite of its intended "purpose" to monitor — and "register" — as many sex offenders as possible.

We will begin and end with the landmark case of *Nichols v. United States*, 578 U.S. 104, 136 S.Ct. 1113, 194 L.Ed.2d 324 (2016). Prosecution for Failure to Register, 18 U.S.C. §2250, experienced a sea change in 2016. Nichols involved a registered sex offender who abruptly left his home in Kansas City, Kansas, where he was registered, without "updating" the New Jersey sex offender registry or "deregistering." He flew to Manila, Philippines, and he stayed there. The *Nichols* court resolved a circuit split created when *United States v. Lunsford*, 725 F.3d 859 (8th Cir. 2013), rejected the holding of *United States v. Murphy*, 664 F.3d 798 (10th Cir. 2011). Murphy and Lunsford presented the question of whether a sex offender must "update" his sex offender registration in a departing jurisdiction (*Murphy*), or only register in an arriving jurisdiction, where he "resides" (*Lunsford*). Writing for

the court, Justice Alito, found that the "plain text" of the statute only required a sex offender to register where he "resides" — "present tense," *Nichols*, supra, at p. 109 — not where he "resided." *Nichols*, at p. 108. Justice Alito chided the government for resisting "this straightforward reading of the statutory text," *Nichols*, at p. 110, and counseled that the law should not be applied in some "strained and hyper-technical way." *Nichols*, at p. 109.

In spite of Justice Alito's clarity and the *Nichols* paradigm shift, the theoretical premise of the instant case leaned heavily on pre-*Nichols* orthodoxy that the defendant must "update" his registration when he leaves a jurisdiction, either in the departing jurisdiction or in a new jurisdiction. Even the title of the indictments in this case, stated "Failure to Update Sex Offender Registration" (emphasis added). In spite of the misnomer, this is NOT an "updating" case. "Updating" is the process of amending or adding information to an existing registration (e.g. a new phone number, residence address or email address, while the sex offender resides in the same jurisdiction where he is already registered), including so-called "(de)registering," *Nichols*, Syllabus, at p. 104, in the sense of giving notice that the sex offender is leaving the jurisdiction where he is currently registered. Before *Nichols*, several circuits held that the sex offender was required to "update" registration in a departing jurisdiction, register in a new jurisdiction, or both. The crux of the pre-Nichols paradigm was that there could not be an un-registered interregnum. See *United States v. Van Buren*, 599 F.3d 170 (2nd Cir. 2010).

Before *Nichols*, the struggle between that interpretation and the theory that Justice Alito adopted in *Nichols* played out in this circuit in *United States v. Bruffy*, 466 Fed.Appx. 239 (4th Cir. 2012)(consider the juxtaposition of Judge Gregory's dissent and Judge Keenan's majority opinion). After *Nichols*, the sex offender is clearly required to register only where he "resides" — "present tense," *Nichols*, supra, at p. 109 — not where he "resided." *Nichols*, at p. 108. The holding in *Nichols*, acknowledged (or created) the possibility that the sex offender may depart from a jurisdiction where he was registered, without being required to "update" or "deregister," Nichols, syllabus, at p. 104, and yet he may not be required to register somewhere else because he does not yet "reside" somewhere else. Justice Alito articulated an obvious example of how this might occur: "[W]hat if he were to move from Kansas to California and spend several nights in hotels along the way? Such ponderings cannot be the basis for imposing criminal punishment. 'We interpret criminal statutes, like other statutes, in a manner consistent with ordinary English usage.'" *Nichols*, at p. 111 (citing *Abramski v. United States*, 573 U.S. ____, ____, 134 S.Ct. 2259, 2277, 189 L.Ed.2d 262 (2014)(Scalia, J., dissenting). Justice Alito did not place a time limit on the transitory period. In *Nichols*, the government asserted that one of the broad purposes of SORNA was to corral the large number of "lost" sex offenders. Justice Alito stuck to his textualist brand and declined to improve the statute on the basis of the policy argument. He frankly acknowledged that foreseeable interludes of unregistered travel would not satisfy the "change of residence" element. The case was not about a "transient" offender, per se, since

Nichols left Kansas City, traveled to and made his permanent residence in Manilla, Phillipines. Nevertheless, Justice Alito raised the hypothetical, if in dicta, of a transitory offender traveling from Kansas to California and staying overnight in hotels. He reasoned that the offender's travel and temporary lodging could not satisfy the change of residence element of §2250 without ignoring the plain English usage of the statutory phrase "change of residence."

A post-*Nichols* opinion out of the Sixth Circuit provides a stark contrast — perhaps a circuit split — in how it would treat a transient sex offender, vis-à-vis how the district and circuit courts have treated Kokinda. In *M.S. Willman v. Attorney General*, 972 F.3d 819 (6th Cir. 2020), the panel made no attempt to distinguish or narrowly construe *Nichols*. Rather, it took Justice Alito at his word. The plaintiff, M.S. Willman, was convicted of a sex crime (in 1993) and completed his registration under Michigan law before he was prosecuted for violating SORNA. The principal question presented was whether Willman was subject to SORNA even if he was no longer required to register under Michigan law (SORA). Willman claimed he was not. Moreover, Willman asserted that he was not subject to SORNA because it was facially unconstitutional and invalid. In particular, he claimed that SORNA violates the Fourteenth Amendment's Privileges and Immunities Clause and Article IV's Privileges and Immunities Clause because it impermissibly restricts his right to travel. The panel in *Willman* held that SORNA does not burden a sex offender's movement in a way that violates a person's right to travel, and it held that a sex offenders SORNA duties would not affect the "temporary-visit

component" of the constitutional right to travel. Explicitly referencing Justice Alito's hypothetical road trip, Judge Griffin wrote that his travel and temporary-visit status would not trigger a sex offender's registration obligation until he reached his new permanent residence in California. Judge Thacker, in contrast, "declined [Kokinda's] invitation to construe *Nichols* hypothetical so broadly." *Kokinda*, 93 F.4th 635, 646. She made the point that Justice Alito's hypothetical had a presumptive end-point (California) and Kokinda's temporary-visit/"digital nomad" might never reach California. Still, on its face, Justice Alito's hypothetical does not exclude Kokinda. Kokinda claimed that his travels would end at some point. He was working with his mother to locate a "permanent residence" [JA444] (Trial Transcript, Vol. III, p. 411).

In *Lunsford*, supra, the ruling that *Nichols* validated, the court acknowledged that "[i]f . . . there is still a "hole" in the law that permits a particular transient to avoid registration, then it is a product of the statutory text that we cannot repair." *Lunsford*, at p. 863. In *Nichols*, Justice Alito dismissed the concern about "loopholes and deficiencies," Nichols, at p. 111, in SORNA because, he thought, further refinements in the federal law or provisions of state law would fill the chink.

In this case, the prosecutors are hanging on to the pre-Nichols world of "updating," "(de)registration," and the mistaken notion that every sex offender must always be registered somewhere. This interpretation of the registration requirement is not supported by the text of the statute, by *Nichols*, *supra*, or by any

post-*Nichols* authority. To plug the hole in the comprehensive federal registration scheme, the prosecution in this case resorted to the A.G. Guidelines.

<u>The Guidelines</u>

Within SORNA, authority is expressly delegated to the United States Attorney General to promulgate guidelines to "interpret and implement this subchapter," 34 U.S.C. §20912(b). The authorized guidance was promulgated in 2008. The Guidelines consist of a lengthy commentary on the history and purpose of the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. §20901 et seq. (formerly cited as 42 USCA § 16901 et seq.). It also includes directives about the elements that each jurisdiction must include in its sex offender registry in order to remain eligible for federal funding. Each state must "substantially implement" SORNA or lose "10 percent of the funds that would otherwise be allocated for that fiscal year" to the State under the Omnibus Crime Control and Safe Streets Act of 1968. 42 U.S.C. §16925(a). See, *U.S. v. Gould*, 568 F.3d 459, n. 1 (4th Cir. 2009) and *United States v. Felts*, 674 F.3d 599, 608 (6th Cir. 2012).

The Guidelines make it clear that "[s]ome of the provisions of SORNA are formulated as directions to sex offenders . . . . Other SORNA provisions are cast as directions to jurisdictions . . . ." *United States v. Gould*, 568 F.3d 459, 464 (4th Cir. 2009)(explaining Guidelines, 73 FR, at 38048). "The requirement imposed on individuals to register is independent of the requirement imposed on the states to implement the enhanced registration and notification standards of SORNA." *Gould*, 568 F.3d 459, at p. 465. This is notable because of the pitfalls in failing to

distinguish directives aimed solely at states, territories, tribes and the District of Columbia, relating to the development, implementation and operation of the civil registration scheme, which are not to be confused with the requirement to register which is imposed on sex offenders and enforced by criminal prosecution, 18 U.S.C. §2250.

Unfortunately, both the statutory text of SORNA and the Guidelines reinforce a kind of circular logic, i.e. that a sex offender must register where he "resides," 34 U.S.C. §20913(a), which is . . . where he "habitually lives," 34 U.S.C. 20911. "A sex offender shall register and keep the registration current, in each jurisdiction where the offender resides." 34 U.S.C. 29013(a)(emphasis added), which can be discerned based on where the sex offender "habitually lives." 34 U.S.C. §20911(13). "The term "resides" means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives"(emphasis added), Id. "Resides" and "lives" are synonyms, and saying that someone "resides" where they "live" is a tautology which adds nothing to the ordinary meaning of the words.

The Guidelines advise that "habitually lives" "is not "self-explanatory and requires further definition." Guidelines, p. 38061(Part VIII, Where Registration Is Required). The Guidelines attempt to illuminate "habitually lives" by supplying a temporal standard of at least 30 days. "[A] sex offender habitually lives in the relevant sense in any place in which the sex offender lives for at least 30 days." 73 FR 38062. Supplying a temporal dimension does provide a more concrete meaning

to the term "habitually," but, otherwise, it does nothing to ameliorate the synonymous overlap of the terms "lives" and "resides."

To the government, the Guidelines appear to square this circle by supplying descriptions, examples and hypothetical scenarios, which illuminate the "special difficulties," Guidelines, 73 FR, p. 38066, of identifying a sex offender's location when he has no "fixed abode." See, Guidelines, 73 FR, pp. 38054, 38055, 38056, 38061. However, some of the examples that were adopted and included in the jury instruction in this case appear in Part VI, Required Registration Information, 73 FR 38054-38058. Part VI "defines the required minimum informational content of sex offender registries," 73 FR 38054. In other words, Guidelines Part VI, like 34 U.S.C. §20914, "merely lists the pieces of information that a sex offender must provide if and when he updates his registration, *Nichols*, pp. 110-111; it says nothing about whether the offender has an obligation to update his registration in the first place" (emphasis added) *Nichols*, p. 110-111. See also, *United States v. Ward*, 2014 WL 6388502 (USDC N.D.Florida).

Part VI states:

> [S]ome more or less specific description should normally be obtainable concerning the place or places where such a sex offender habitually lives — e.g. information about a certain part of the city that is the sex offender's habitual locale, a park or spot on the street (or a number of such places) where the sex offender stations himself during the day or sleeps at night, shelters among which the sex offender circulates, or places in public buildings, restaurants, libraries, or other establishments that the sex offender frequents.

Guidelines, pp. 38055-56.

The purpose of requiring the states to obtain this kind of information is articulated in the Guidelines. "Having this type of information serves the same public safety purposes as knowing the whereabouts of sex offenders with definite addresses." It serves the "public safety objectives of tracking sex offenders whereabouts," Guidelines, p. 38062, which is achieved by placing this information in publicly accessible websites. "[I]t is valueable to have information about other places in which the sex offenders are staying, even if only temporarily." 73 FR38056. In fact, Part VI repeatedly refers readers "[f]or more as to the meaning of 'resides 'under SORNA, see Part VIII of these Guidelines," 73 FR 38055, and "Sex offenders who lack fixed abodes are nevertheless required to register in the jurisdiction in which they reside, as discussed in Part VIII of these Guidelines" (emphasis added), Id.

Part VIII discusses the application of the registration requirement, §113(a) of SORNA, which is codified at 34 U.S.C.A. § 20913 (formerly cited as 42 USCA § 16913), and the meaning of "resides," by citing internal references connecting 18 U.S.C. §2250 with 34 U.S.C. 34 U.S.C. §20911(13). Other than this self-referential exercise, the Guidelines state that the "specific interpretation of this element that a sex offender "habitually lives" in the relevant sense is any place in which the sex offender lives for at least 30 days." 73 FR 38062. The Guidelines do note that jurisdictions may specify in the manner of their choosing the application of the 30 days as intermittent or consecutive days, and they may even establish that mere "presence" in the jurisdiction for 30 days satisfies the "resides" element, but that is

up to the states to define. "[L]ine-drawing questions may arise, and jurisdictions may resolve these questions based on their own judgment." 73 FR 38062.

Far from requiring, or even encouraging, deference to or adoption of the particular examples the Guidelines mention, the states are directed to make the "line-drawing" — and we might add, at times, "hair-splitting" — interpretations of whether there is a difference between a "digital nomad" like Mr. Kokinda, a long-haul truck driver (specifically mentioned in the Guidelines. 73 FR 38062) or Justice Alito's hypothetical "what if the defendant moved from Kansas to California and stayed in hotels en route." *Nichols*, at p. 111. Consequently, adopting the examples from Part VI, verbatim — or worse, incorporating a selectively edited version — in jury instructions was error.

Chevron deference to the Guidelines

Chevron deference is the oft-debated, and sometimes poorly understood, doctrine that, based on the proper delegation of authority by Congress, the courts should defer to formally-adopted agency regulations, and, often, to less formal emanations of government agencies, to interpret and implement government policy, when statutory language is unclear. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-44, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Whether or not applying *Chevron* deference to the interpretation of criminal law violates some Scalian purity test, portions of the Guidelines have been adopted to fill "gaps" or define "vague terms." *United States v. Price*, 777 F.3d 700 (4th Cir. 2015)(adopting the Guidelines definition of "conviction"), if they are persuasive and

reasonable, *Bruffy*, supra. But see, *United States v. Piper*, 2013 WL 4052897 (2013)("SORNA does not authorize the Attorney General to interpret its criminal enforcement provision, 18 U.S.C. §2250, which is found in the criminal code.")(citing *Higgins v. Holder*, 677 F.2d 97, 102-03 (2d Cir. 2012) and *Crandon v. United States*, 494 U.S. 152, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990)(Justice Scalia, concurring).

Clarifying the meaning of "change of residence" was foreclosed by *Nichols*, which found that the statutory text has a plain meaning not susceptible or in need of further elaboration. In this case, crafting a jury instruction by weaving together passages dispersed through the sprawling Guidelines and grafting them onto the statutory text absolutely enlarged and changed the scope of circumstances under which the requirement to register is "triggered." The best effort of all involved resulted in an instruction that was misleading to the jury and provided more than enough wiggle room for the government to make inaccurate and unfair arguments. *U.S. v. Bruffy*, 466 Fed.Appx. 239 (4th Cir. 2012); *U.S. v. Voice*, 622 F.3d 870 (8th Cir. 2010).

On the record comments reveal the district court judge's struggle regarding whether or how to synthesize passages from the Guidelines and statutory text in crafting a jury instruction (Trial Transcript, Vol. II, ECF #79 (2:21CR20), at pp. 168-170, JA223-225). Nevertheless, based on the over-inclusive idea that the Guidelines "have the force of law," the government convinced the judge that *Chevron* deference applied and warranted the adoption of multiple passages found "sprinkled in" the Guidelines, as AUSA Wagner so delicately put it. (Trial

Transcript, ECF #80, p. 365, JA420). Passages, as it turns out, defining information that should be obtained from "transient" sex offenders by state sex offender registries "if and when" they must register, *Nichols*, p. 110. were adopted as if they created substantive law that defines the requirement to register. This exercise ignored *Nichols*, violated the canons of statutory construction, misapplied the "steps" of the *Chevron* framework, particularly the question of whether *Chevron* deference even applies to the interpretation of criminal law. This was error.

In *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 125 S.Ct. 2688, 162 L.Ed.2d 820, (2005), the court held that "a court's prior construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision held that its construction follows from unambiguous terms of the statute and thus leaves no room for agency discretion." *Id*., at 969. *Nichols* would be the prior court construction, leaving no room for the Guidelines to alter what the court ruled was the "plain text," *Nichols*, 578 U.S., at p. 110 of SORNA.

Appellant's trial counsel seemingly acquiesced in grafting part of the Guidelines into the instruction. Perhaps based on the judge's indication that he would use the Guidelines, defense trial counsel made the practical compromise of recommending the clearest and most benign language recommending that a temporal standard of at least 30 days would provide clarity to "habitually lives." At oral argument, but less clearly in its published opinion, the circuit court suggested this may have been a waiver of the defendant's complaint about the use of the

Guidelines. To the extent that the Court may consider this interpretation, plain error should apply. *United States v. Hager*, 721 F.3d 167, 182 (4th Cir. 2013). The court may still analyze the adopted verbiage and whether it was confusing or misleading, or whether it was proper at all to allow the Attorney General to define the elements of a criminal offense with hypotheticals, examples and definitions that made it easier to prosecute the offense. *Chevron* deference, if it survives, see, *Loper Bright Enterprises v. Raimondo*, SCOTUS, Case No. 22-451, May have very different criteria than that which Judge Kleeh contemplated.

Setting aside the appropriateness of Chevron deference and the applicability of the Chevron deference to the interpretation of criminal law, the instruction was crafted, in part, by selecting and/or omitting phrases from Part VI the Guidelines, resulting in an instruction which obscures the Guidelines 'emphasis on the proximate nature of circumstances that the Attorney General deemed indicative of where a transient sex offender was "living," like "a certain part of the city" [omitted from the jury instruction] . . . "where the sex offender stations himself during the day or sleeps at night [included in the jury instruction]." p. 38055, Guidelines. Part VI. Required Registration Information. The omission of the first phrase alters the meaning of the second phrase in a significant way. The resulting formulation, as applied to the facts of the case, transformed "habitually lives" into "habitually shops," or "regularly commutes" or maybe "hangs out in the park," even though the defendant camped (something which is much more akin to "living" or "residing") at four (4) different campgrounds, located in four (4) different counties, in three (3)

different states, during the period of time in which he visited Elkins, West Virginia frequently (but never for the "15 continuous days" necessary to trigger the requirement to register under West Virginia law. West Virginia Code §15-12-2(b); W.Va. Code St. R. §81-14-5.1; *State v. Beegle*, 237 W.Va. 692, 790 S.E.2d 528, n. 11 (2016)).

The jury was instructed thus:

> Even a transient or homeless sex offender is still required to provide a description of the place they habitually live. Some more or less specific description should normally be attainable concerning the place or places where such a sex offender habitually lives, <u>including where the sex offender might station himself during the day ***or*** sleep at night</u> (emphasis added to illuminate how this passage enlarges the "change of residence" element by providing a disjunctive option — where the sex offender might "station himself during the day" — OR — where he "sleep[s] at night." Take your pick, but "ordinary English usage" — in Podunk, USA — understands "reside" to mean where you lay your head at night, not where you commute for your groceries. This construction is only even debatable in the "hyper-technical," purpose-driven, text-averse world that was abolished by *Nichols*.

Trial Transcript, Vol. III, ECF #80 (2:21CR20), p. 480, JA513.

Setting aside the important detail that this language was lifted from Part VI, which was clearly directed to the states 'registries, not to sex offenders, the complete Guidelines passage, from which these nuggets were extracted, demonstrates more clearly that, even if the hypotheticals were intended to clarify the kind of conduct that would trigger the requirement to register, the Guidelines ' passage contemplates activity which occurs in a definably proximate "location"/"place," like a particular city.

The normal text in the block quote below is the portion of the Part VI Guidelines passage that was selected, and the omitted portions are emphasized by strikethrough:

> some more or less specific description should normally be obtainable ["attainable" in the jury charge given, see, n. __, herein] concerning the place or places where such a sex offender habitually lives — ~~e.g. information about a certain part of the city that is the sex offender's habitual locale, a park or spot on the street (or a number of such places~~) [including] where the sex offender [might] station[s] himself during the day or sleep[] at night[.] ~~shelters among which the sex offender circulates, or places in public buildings, restaurants, libraries, or other establishments that the sex offender frequents~~.

Relying on the reductive that the Guidelines have "the full force and effect of law," (Trial Transcript, Vol. II, ECF #79 (2:21CR20), at pp. 168-170, JA223-225), the district court judge believed that it was necessary to sift through all 40 pages (10 point type, triple columns, narrow margins) of the A.G. Guidelines and cobble together a description of transient activity — like being found at the same place frequently during the daylight hours — that would trigger the requirement to register. Distilled to its essence, this approach resulted in an instruction that allowed the jury to find that the defendant "habitually lived" where he shopped, worked out at a gym and plugged in his laptop computer at a public park "during the day." That is far broader than just "where the sex offender resides." It also led the jury to believe that by some inscrutable legal fiction that contradicts the ordinary meaning of the elemental terms, "resides" or "lives," that every sex offender must reside somewhere, and this one "lived" in a park where he was spotted several times, or in a town where he shopped frequently.

Back to the actual jury instruction — the passage adopted from Part VI is further complicated by a proposition that is not found in the Guidelines or in the statutory text. It is a proposition that is conjured out of whole cloth by the government, and, when applied literally, it left the jury no other choice but to convict. The sentence preceding the Part VI Guidelines quotation that the judge edited, states: "Even a transient or homeless sex offender **{IS}** still required to provide a description of the place they habitually live" (emphasis — bracketed, CAPed, bolded and underlined — added). (ECF#80 (2:21CR20), Trial Transcript, Vol. III, p. 480, JA513).

The problem is that some transient or homeless sex offenders don't "habitually live" anywhere, and that was the crux of Kokinda's defense. "Even a transient or homeless sex offender {IS} still required to provide a description of the place they habitually live." This instruction entirely foreclosed the defense theory of the case. Namely that the defendant is only required to register where he "habitually lives," and he did not "habitually live" anywhere during the time period designated in the indictment. The defendant admitted that his intention and operative assumption was that he was not required to register so long as he did not "reside" or intend to "reside" in a "location" within a particular "jurisdiction" for at least 30 days, or, under West Virginia law, he did not need to register, indeed, he assumed he could not register, until he at least "visited" a particular county for "15 continuous days." West Virginia Code §15-12-2(b); W.Va. Code St. R. §81-14-5.1; *State v. Beegle*, 237 W.Va. 692, 790 S.E.2d 528, n. 11 (2016)).

During the presentation of evidence in its case in chief, the government anchored this erroneous proposition of law. Over AFPD Walker's objection, AUSA Wagner was allowed to question Detective Reustle (a New Jersey police officer) about whether transient and homeless persons are required to register.

> "Q. [Wagner] Generally speaking, can homeless or transient individuals register and are they supposed to register in your jurisdiction?
>
> A. [Reustle] Yes, sir."

(Trial Transcript, Vol I, ECF #78 (2:21CR20), p. 47, JA102).

On cross-examination, Reustle conceded that Kokinda wasn't required to register under New Jersey law, unless he stayed in the area for more than 14 days. Part of Detective Reustle's testimony may have been relevant to bolster the "knowingly" element, based on the defendant's prior experience registering in other states, but it also demonstrates that the trial was infected from start to finish with the pre-Nichols paradigm of a continuing duty to "update" registration and the idea that a sex offender must be registered somewhere. He left New Jersey, and he is not registered anywhere else, so he must be guilty — according to the government's theory of the case.

Back to the jury instruction again: The very tone of the phrase "[e]ven a transient or homeless sex offender . . ." rhetorically suggests a raised eyebrow. How would this sentence be any different if the word "even" were omitted? Moreover, neither the statutory text, the Guidelines, or any post- Nichols precedent, supports this interpretation of the registration requirement. AUSA Wagner quoted the

edited Guidelines 'passage verbatim, which implies the same thing, i.e. that SORNA directs transient sex offenders to designate a residence, and, frankly, that it should not be too difficult for him to decide where that is — for example, wherever he was seen hanging out during the day.

The Rule of Lenity v. the Rule of Severity

After a long and tortured history of applying *Chevron* deference — or not — this court stepped into the breach once again, with *Pugin v. Garland*, 19 F.4th 437 (4th Cir. 2021). Judge Richardson, observed that "[t]here is a thoughtful and ongoing debate about whether *Chevron* can apply to interpretations of criminal law . . . ." Id., at p. 441 (and see n. 3 for collected cases, pro and con, re *Chevron* deference to interpretations of criminal law). Judge Gregory, in dissent, Id., at pp. 454-455, quoting *WEC Carolina Energy Sols. LLC v. Miller*, 687 F.3d 199, 204 (4th Cir. 2012)(which, in turn, quoted *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997), answered the implicit question. "When a statutory interpretation involves a statute, whose provisions have both civil and criminal application, our task merits special attention because our interpretation applies uniformly in both contexts." *WEC*, supra, at p. 204. "In such instances, 'we follow "the canon of strict construction of criminal statutes, or the rule of lenity."'" *Pugin*, supra, at p. 455 (quoting *WEC*, supra, at p. 204, quoting *Lanier*, supra, at p. 266). How much more clearly does the rule of lenity apply to defining elements in a strictly criminal law setting. "Since the founding, it has been the job of Article III courts, not Article II executive-branch agencies, to have the final say over what

criminal laws mean." *Clark v. Martinez*, 543 U.S. 371, 380, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005).

This applies with elevated force in the case against delegating to the Attorney General the power to define the criminal law it will then enforce. "Some agencies enforce the law; more particularly, some enforce criminal law. Is it plausible to say when criminal statutes are ambiguous, the Department of Justice is permitted to construe them as it sees fit? That would be a preposterous conclusion." Cass, R. Sunstein, "Chevron Step Zero," 92 Virginia Law Review 187, 210 (2006); See also, *Crandon v. United States*, 494 U.S. 152, 177-78 (1990)(Scalia, J., concurring in the judgment, and coining the aphorism that giving the Attorney General's interpretation of criminal text the force of law is "replacing the rule of lenity with the rule of severity." Id., at p. 178)(but for a contrary view, see Dan M. Kahan, "Is Chevron Relevant to Federal Criminal Law?" 110 Harv.L.Rev. 469, 489-506 (1996).

The Rule of Lenity must be applied here because defining "resides," with language about "a park . . . where the sex offender stations himself during the day," (the final draft of Judge Kleeh's charge to the jury appears at pp. 466-486, in Vol. III of the Trial Transcript (JA499-519), and the instruction defining "resides" begins at p. 478 (JA511), Guidelines, at p. 38055, so obviously altered and enlarged the element that it made new law.

If any other reason were needed to not apply *Chevron* deference, there is a conflict between any rule that may be conjured from any combination of passages

from the Guidelines and West Virginia's own regulatory pronouncement "requiring sex offenders to register with the State Police detachment in the county where they reside, work, attend school or visit for more than fifteen (15) continuous days . . . ." W.Va. Code St. R. §81-14-5.1. Although the defendant did not attempt to register, if he had appeared at the State Police Detachment in any of the counties he visited, and if he told them he was visiting but did not intend to live there, they would have declined to register him until he spent 15 continuous days in that county. According to the government's summary evidence chart (Trial Exhibit #27), the defendant did not even spend 15 continuous days shopping in Elkins.

The government's attorneys scoffed at the defendant's own characterization of himself as a "digital nomad," but it is useful to describe his unique peripatetopathy (peripatet[ic] + opathy). The error that occurred in the trial of this case may be largely attributed to the conflation of Kokinda's conduct with that of the garden variety transient or homeless person, who has no traditional house, apartment or "fixed abode," but who "lives" on the street, "moving from shelter to shelter," Guidelines, 73 FR 38061, "transient in a defined jurisdiction," Bruffy, at p. 244, though he may be "sleep[ing] on a different park bench," *Bruffy*, at p. 247, "at various locations," *Bruffy*, p. 247, but all within a narrowly defined geographic "location," like "a certain part of a city," Voice, infra, on a regular basis, and for at least 30 days. By contrast, Kokinda purposely (see Trial Transcript, Vol. III, ECF #80 (2:21CR20), pp. 408-09, JA441-442, where he describes his study of state and federal registration requirements) moved in and out of Randolph, Tucker and

Pendleton counties, indeed in and out of West Virginia. Kokinda testified that, during the 36 day period designated by the indictment, he camped/slept at campgrounds in four (4) different counties, two in West Virginia: Yokums Campground, at Seneca Rocks (Pendleton County); and Five Rivers Campground, at Parsons (Tucker County), West Virginia); one (1) in Maryland: Bumble Bee RV Park and Campground, in Accident (Garrett County), Maryland; and one (1) in Virginia: Gooney Creek Campground, in Front Royal, (Warren County), Virginia. See Trial Transcript, Vol. III, ECF #80 (2:21CR20) pp. 407-408, JA440-441). This evidence was not contradicted by the summary chart of financial transactions that placed him in Elkins, briefly, during daylight hours, most, but not all, days. Moreover, the government conceded that he never slept or stayed overnight in Elkins, Randolph County, which the government designated as his "base" or "hub" (Trial transcript, III, ECF #80 (2:21CR20) pp. 442, 503 and 529, JA475, JA530, JA536). During the relevant time period, he also traveled to Erie, Pennsylvania, in a rental car to obtain an axle for the car he owned. He frequently returned to Elkins, Randolph County, to access "amenities," (internet access at the library, exercise at the YMCA/Anytime Fitness, groceries at Krogers, car rentals and repairs). The government's theory of the case amounts to a vague assertion that if your travel frequently intersects a particular geographic node, even if only for a few brief hours, during daylight hours, that is enough to establish the "location" where the offender "habitually lives." This clearly broadens the meaning of "lives" or "resides," as we know and use those words in "ordinary speech"/"ordinary English usage." Nichols, at

pp. 109 and 111. Shopping, accessing amenities and camping in four (4) different counties can only become the equivalent of "residing"/"habitually living" in a particular place by imposing a special, situational definition — a legal fiction — on the statutory text. There is no such special definition expressed or implied in the statute, and attributing that amendment to or enlargement of the statutory element to the Guidelines distorts the meaning and purpose of the Guidelines even if you ignore the Rule of Lenity.

The Circuit Court's opinion omitted undisputed factual details — like the defendant camping in three (3) different states during in the time frame the government accused him of "residing" in West Virginia, and it overemphasized the appellant's prior convictions and conduct, including the salacious details of the state court, misdemeanor Third Degree Sexual Assault arrest, which was dismissed without any corresponding offense being charged in federal court. This background may be pertinent to sentencing, but it is utterly immaterial to the paramount question presented by this appeal, whether the jury convicted the appellant based on improper instructions about the "change of residence" element of the failure to register offense.

B. Sentencing Factors

The Appellant hereby waives rehashing all of the arguments made in the district court and at the circuit court regarding sentencing, except to note that the eight-level sentence enhancement was entirely based on alleged conduct for which the underlying criminal charges were dismissed without prejudice, the functional

equivalent of an acquittal. Beginning November 2024, under revised Rule 1B1.3, the United States Sentencing Commission will prohibit the district courts from imposing or enhancing a sentence based on acquitted conduct. The district court should not be permitted to rely on the low standard of proof required for consideration of sentencing factors under U.S.S.G. §6A1.3 to punish for criminal conduct that was dismissed.

X. CONCLUSION

The Petitioner respectfully requests that this Court reverse the jury verdict and the judgment of the district court and award him a new trial based on the erroneous jury instruction expanding the "change of residence" element of the Failure to Register as a Sex Offender offense. *Nichols* is the controlling precedent and requires this result, holding that temporary lodging and travel do not trigger the registration requirement of SORNA. The erroneous instruction defining the phrase "change of residence" permitted — perhaps compelled — the jury to find that the Appellant was "residing" "where he stationed himself during the day," or, more vaguely, where he shopped, exercised or hung out, in the daylight hours, while he was camping over night (something much more closely akin to "residing" or "living") at campgrounds in four (4) different counties in three (3) different states during the time period designated in the Superseding Indictment.

This 1st day of July, 2024.

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PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4595

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JASON STEVEN KOKINDA,

Defendant - Appellant.

Appeal from the United States District Court for the Northern District of West Virginia, at Elkins. Thomas S. Kleeh, Chief District Judge. (2:21-cr-00020-TSK-MJA-1)

Argued: December 8, 2023 Decided: February 21, 2024

Before AGEE, THACKER, and RUSHING, Circuit Judges.

Affirmed by published opinion. Judge Thacker wrote the opinion in which Judge Agee and Judge Rushing joined.

ARGUED: David W. Frame, LAW OFFICE OF DAVID W. FRAME, Clarksburg, West Virginia, for Appellant. Sarah Wagner, OFFICE OF THE UNITED STATES ATTORNEY, Clarksburg, West Virginia, for Appellee. **ON BRIEF:** William Ihlenfeld, United States Attorney, Wheeling, West Virginia, Brandon S. Flower, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Clarksburg, West Virginia, for Appellee.

THACKER, Circuit Judge:

Jason Steven Kokinda ("Appellant"), a convicted sex offender required to register pursuant to the Sex Offender Registration and Notification Act ("SORNA"), attempted to evade his registration requirements while staying at campgrounds in West Virginia.

A federal grand jury indicted Appellant on one count of traveling in interstate commerce and knowingly failing to update his registration as a sex offender in violation of 18 U.S.C. § 2250. The case proceeded to trial and Appellant stipulated that his prior sex offense required him to register. But Appellant argued that, by staying mobile without a fixed abode, SORNA did not require him to register anywhere. When the district court instructed the jury on SORNA's definition of "resides," it supplemented the term "habitually lives" with guidance from The National Guidelines for Sex Offender Registration and Notification ("SMART Guidelines"). After the jury found Appellant guilty, he moved for judgment of acquittal or a new trial, arguing that the district court's jury instruction improperly expanded SORNA's definition of "resides." The district court denied the motion.

Appellant makes the same argument on appeal -- that the district court's jury instruction was an incorrect recitation of the law. He also argues that SORNA, as applied to him, violates the Tenth Amendment. And Appellant challenges two facets of his sentence: (1) the eight-level enhancement for his third degree sexual abuse of a minor and possession of child pornography and (2) his lifetime term of supervised release.

We conclude that the district court correctly instructed the jury on what the terms "resides" and "habitually lives" mean for purposes of SORNA. We also conclude that

SORNA, as applied to Appellant, does not violate the Tenth Amendment. And we affirm the district court's sentence as it was procedurally and substantively reasonable.

I.

A.

In 2007, Appellant was arrested in New Jersey and charged with one count of endangering the welfare of a child and one count of distribution of child pornography. He pled guilty to both charges in 2009 and was sentenced to three years of imprisonment. Following his New Jersey sentence, Appellant served a separate Pennsylvania sentence for unlawful contact with a minor. Based on the New Jersey child pornography conviction, Appellant was required to register as a sex offender pursuant to SORNA. *See* 34 U.S.C. § 20913; 18 U.S.C. § 2250(a). Appellant was registered in Delaware in 2015, Vermont in 2016, and New York in 2017. In 2018, Appellant left the country without notification and was later deported from Israel back to the United States based on a Vermont arrest warrant. He was released on bond in February 2019 and remained unregistered throughout 2019. While unregistered, Appellant traveled to several states in the Northeast and Midwest, evading detection by law enforcement.

That evasion ended on September 28, 2019, when Rosanna Bell ("Bell") called the police on Appellant. Bell observed Appellant talking to two pre-teen girls on the swings at the city park in Elkins, West Virginia. Then, Bell saw Appellant grab the buttocks of one of the girls while pushing her on the swing. Bell approached the girls and asked if they knew Appellant. P.M. -- the girl whom Appellant had grabbed -- asked if Bell "could

please make [Appellant] leave." J.A. 599.[1] Bell called the police and waited with the girls until law enforcement arrived. By the time law enforcement officers arrived, Appellant had left the park. The next day, officers noticed a man near the park matching Appellant's description and approached him. When asked his identity, Appellant gave the name "Representative Jason Stevens." *Id.* at 122. Officers arrested him and charged him with sexual abuse in the third degree in violation of W. Va. Code § 61-8B-9 (2019).[2]

During the month prior to his arrest, Appellant left a paper trail of his stay in West Virginia. Financial records placed Appellant shopping in and near Elkins, West Virginia on an almost daily basis from August 24 until September 27. And receipts and witnesses established that Appellant rented two different campsites in West Virginia for most of September. At one of those campsites, Appellant used the alias "Jason Smoke." J.A. 183. Additionally, an Elkins, West Virginia YMCA employee provided records demonstrating that a "Jason Stevens" purchased day passes on five occasions between September 10 and 24. *Id.* at 201. Only four of Appellant's transactions during the August 24 to September 27 time period occurred outside West Virginia, indicating brief visits to Winchester, Virginia, and Erie, Pennsylvania. The Winchester trip occurred on September 17, with Appellant making a purchase back in Elkins, West Virginia later that same day. And the

[1] Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

[2] "A person is guilty of sexual abuse in the third degree when he subjects another person to sexual contact without the latter's consent, when such lack of consent is due to incapacity to consent by reason of being less than sixteen years old." W. Va. Code § 61-8B-9.

Erie trip included transactions on September 23, with a transaction back in Elkins the following day. Appellant did not dispute these transactions when he testified at trial.

When Appellant was arrested, his two cell phones were seized. Later examination of one of the cell phones revealed thirty images depicting child pornography, along with a PDF file containing child pornography search terms such as "My little girl nude," "Kiddy CP," and "Preteen incest." J.A. 653. The cell phone also contained indicia of Appellant's ownership and use of the phone, including photographs of himself, his passport, and documents and receipts containing his name.

B.

Appellant was indicted by a federal grand jury on one count of failing to register as a sex offender, in violation of 18 U.S.C. § 2250(a). The case proceeded to trial. Appellant stipulated that his New Jersey conviction required him to register as a sex offender pursuant to SORNA. But Appellant argued that he never "resided" in West Virginia, so SORNA's registration requirement was not triggered.

1.

At trial, Appellant testified in his own defense. He admitted that he had not registered as a sex offender in West Virginia, or any state after leaving Vermont in February 2019. But he denied that he had a home or regularly lived in West Virginia during the month preceding his arrest. Appellant explained that he "fully studied" SORNA's registration requirements and "tried to move around as much as possible" so he would not need to register. J.A. 441–42. And he admitted frequenting Elkins from August 24 to September 19, to go to the gym, to shop, and to charge his laptop at the library and city

park. But he asserted that he was "staying somewhere very far away, as [his] home base of operations, [as his] constructive type of temporary lodging." *Id.* at 459. And he explained that he used false identities to conceal the fact that he is a sex offender, and stayed in campgrounds that did not require an identification.

2.

SORNA requires sex offenders to register "and keep the registration current, in each jurisdiction where the offender resides." 34 U.S.C. § 20913. "Resides" is defined as "the location of the individual's home or other place where the individual habitually lives." *Id.* § 20911(13). As discussed below, the SMART Guidelines define SORNA's term "habitually lives." The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,061 (July 2, 2008).

Both Appellant and the United States proposed jury instructions to clarify SORNA's registration requirement. Appellant's proposed instruction included SORNA's definition of "resides" along with a portion of the SMART Guidelines' definition of "habitually lives." Specifically, Appellant's instruction defined "habitually lives" to "include[] places in which the sex offender lives with some regularity. A sex offender habitually lives in the relevant sense in any place in which the sex offender lives for at least 30 days." S.A. 5.[3] The United States' proposed instruction also included SORNA's definition of "resides," but included a longer excerpt from the SMART Guidelines defining "habitually lives." That longer excerpt stated:

[3] S.A. refers to the Supplemental Appendix filed by the United States in this appeal.

> "Habitually lives" accordingly should be understood to include places in which the sex offender lives with some regularity, and with reference to where the sex offender actually lives, not just in terms of what he would choose to characterize as his home address or place of residence for self-interested reasons. The specific interpretation of this element of "residence" these Guidelines adopt is that a sex offender habitually lives in the relevant sense in any place in which the sex offender lives for at least 30 days. Hence, a sex offender resides in a jurisdiction for the purposes of SORNA if the sex offender has a home in the jurisdiction, or if the sex offender lives in the jurisdiction for at least 30 days. Jurisdictions may specify in the manner of their choosing the application of the 30-day standard to sex offenders whose presence in the jurisdiction for 30 days is intermittent but who live in the jurisdiction for 30 days in the aggregate over some longer period of time.

S.A. 27.

The district court declined to give either party's proposed instruction in total, opting to give an instruction incorporating SORNA's definition of "resides" and the SMART Guidelines' definition of "habitually lives":

> [T]he place where a person "resides" is the location of an individual's home or other place where the individual habitually lives. "Habitually lives" includes places in which the sex offender lives with some regularity. "Habitually lives," accordingly, should be understood to include where the sex offender actually lives, not just in terms of what he would choose to characterize as his home address or place of residence for self-interested reasons. The specific interpretation of this element of "residence" is that a sex offender habitually lives in the relevant sense in any place in which the offender lives for at least 30 days. Hence, a sex offender resides in a jurisdiction for the purposes of SORNA, if the sex offender has a home in the jurisdiction, or if the sex offender lives in the jurisdiction for at least 30 days. As to the timing of registration, based on changes of residence, the understanding of "habitually lives" to mean living in a place for at least 30 days does not mean that the registration of a sex offender who enters a jurisdiction to reside may be delayed

> until after he has lived in the jurisdiction for 30 days. Rather, a sex offender who enters a jurisdiction, in order to make his home or habitually live in the jurisdiction, is required to register within three business days.
>
> A sex offender who lacks a fixed abode or permanent residence is still required to register in the jurisdiction in which they reside. Such a sex offender cannot provide the residence address required because they have no definitive address at which they live. Even a transient or homeless sex offender is still required to provide a description of the place they habitually live. Some more or less specific description should normally be attainable concerning the place or places where such a sex offender habitually lives, including where the sex offender might station himself during the day or sleep at night.

J.A. 512–13. After deliberations, the jury rendered a guilty verdict.

Appellant filed a pro se motion for judgment of acquittal or a new trial, arguing that the district court's jury instruction "broaden[ed] the scope of [the] 'resides' element beyond its ordinary English usage by using the guidelines to override the limits imposed by the statutory text." Pro Se Mot. for Acquittal at 15, *United States v. Kokinda*, No. 2:21-cr-00020 (N.D. W. Va. Sept. 8, 2021; filed Nov. 8, 2021) ECF 70-1. The district court denied the motion, noting that the SMART Guidelines had the force and effect of law and explaining that the jury instruction correctly stated the law and did not confuse or mislead the jury.

3.

In advance of sentencing, the probation officer prepared a Presentence Investigation Report ("PSR"). The PSR identified two bases for imposing an eight-level enhancement for committing a sex offense against a minor while in a failure to register status pursuant to section 2A3.5(b)(1)(C) of the United States Sentencing Guidelines (the "Guidelines").

See U.S.S.G. § 2A3.5(b)(1)(C) (2018). The first basis was Appellant's third degree sexual abuse of P.M. when he grabbed her buttocks at the city park in Elkins. The second basis was Appellant's possession of child pornography on his cell phone. The United States called witnesses at the sentencing hearing to support both bases.

First, Bell testified about the specifics of what she saw at the park when she called the police. She explained that she saw Appellant put his hands on P.M.'s rear end and squeeze her buttocks while pushing her on the swing. Bell also relayed that P.M. told her that Appellant had offered her money if she showered while Appellant filmed her. The United States also admitted P.M.'s written statement, which verified that Appellant had touched her buttocks while pushing her on the swing. P.M.'s statement confirmed that Appellant "kept asking [P.M.] and [the other girl] if he could get in the shower with [them] when no one was home." J.A. 614. The statement also indicated that Appellant had communicated with P.M. on social media to ask for nude images.

Second, Police Chief Joseph Corkrean testified that he extracted data from Appellant's phone. Because the phone was broken, Chief Corkrean extracted the raw data from the phone's internal chip. This form of data extraction did not retrieve the metadata from the files, which would have revealed when the files were downloaded and accessed, but the files themselves could be analyzed. Then, Gary Weaver, an FBI Crimes Against Children Task Force Officer, testified that he reviewed the extracted data and identified thirty images that depicted prepubescent females with their genitalia fully exposed. Officer Weaver compared the images to the images that supported Appellant's New Jersey child pornography conviction and testified that they were similar. Officer Weaver also located

a file on Appellant's phone that was created during the period Appellant owned the phone that contained search terms relating to child pornography.

Appellant objected to the eight-level sentencing enhancement, arguing that he did not grab P.M.'s buttocks at the park in Elkins and that he did not knowingly possess child pornography on his cell phone. Regarding the child pornography, Appellant argued that because the photographs lacked metadata, the United States could not prove Appellant was the one to download the images on his phone.

The district court overruled Appellant's objection to the eight-level sentencing enhancement pursuant to Guidelines section 2A3.5(b)(1)(c). The court found by a preponderance of the evidence that Appellant committed third degree sexual abuse against a minor while in failure to register status, which supported the enhancement. Additionally, the court found that Appellant possessed child pornography, which it explained was a separate and independent basis for the enhancement. Application of the enhancement resulted in a Guidelines sentencing range of 51 to 63 months. The district court sentenced Appellant to 63 months of imprisonment to be followed by lifetime supervised release. The court emphasized that the lifetime term of supervised release was appropriate in order to protect the community, considering Appellant's history of sex offenses and evasion of SORNA's registration requirement.

II.

"We review a district court's decision to give a particular jury instruction for abuse of discretion, and review whether a jury instruction incorrectly stated the law de novo." *United States v. Hassler*, 992 F.3d 243, 246 (4th Cir. 2021) (quoting *United States v.*

Miltier, 882 F.3d 81, 89 (4th Cir. 2018)). "In reviewing the adequacy of jury instructions, we determine whether the instructions construed as a whole, and in light of the whole record, adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party." *Hassler*, 992 F.3d at 246 (quoting *United States v. Kivanc*, 714 F.3d 782, 794 (4th Cir. 2013)). Even if a jury was erroneously instructed, we will not set aside a resulting verdict unless the erroneous instruction seriously prejudiced the challenging party's case. *Hassler*, 992 F.3d at 246 (quoting *Miltier*, 882 F.3d at 89).

Generally, we review constitutional claims de novo. *United States v. Claybrooks*, 90 F.4th 248, 255 (4th Cir. 2024). But unpreserved constitutional claims are reviewed for plain error. *United States v. Hager*, 721 F.3d 167, 182 (4th Cir. 2013).

After *United States v. Booker*, 543 U.S. 220 (2005), we review a sentence for reasonableness, whether inside, just outside, or significantly outside the Guidelines range, and we apply a "deferential abuse-of-discretion standard." *United States v. Roy*, 88 F.4th 525, 530 (4th Cir. 2023) (quoting *United States v. McCain*, 974 F.3d 506, 515 (4th Cir. 2020)). We first must "ensure that the district court did not commit a 'significant procedural error.'" *Roy*, 88 F.4th at 530 (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)). Only if the sentence is procedurally reasonable can we evaluate the substantive reasonableness of the sentence, again using the abuse of discretion standard of review. *Gall*, 552 U.S. at 51.

III.

Appellant raises four issues on appeal. First, he argues that the district court erred in instructing the jury on the definition of "habitually lives," which he alleges expanded the definition of "resides." Second, Appellant argues that SORNA, as applied to him, violates the Tenth Amendment to the United States Constitution. Third, he argues the district court erred in imposing the eight-level sentencing enhancement, which he alleges was not supported by either third degree sexual abuse of a minor or possession of child pornography. And fourth, Appellant argues that the district court erred in imposing lifetime supervised release.

A.

Jury Instruction

Appellant raises two arguments to challenge the district court's jury instruction. First, he argues that after the Supreme Court's decision in *Nichols v. United States*, 578 U.S. 104 (2016), SORNA's registration requirement does not apply to transient sex offenders who have no fixed abode. Second, he argues that the SMART Guidelines should not be afforded *Chevron*[4] deference because neither "resides" nor "habitually lives" is ambiguous and even if they were, *Chevron* deference should not apply in criminal contexts. Because the district court's jury instruction was a correct statement of the law and Appellant's proposed construction of SORNA is contrary to its purpose, we hold that the jury instruction was proper.

[4] *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

1.

We begin with an overview of SORNA's registration requirement. In 2006, Congress enacted SORNA as part of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587. Among its provisions, SORNA requires sex offenders to 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." 34 U.S.C. § 20913.[5] SORNA also establishes a federal criminal offense covering any person who (1) "is required to register under [SORNA];" (2) "travels in interstate or foreign commerce;" and (3) "knowingly fails to register or update a registration." Adam Walsh Child Protection and Safety Act of 2006 § 141, 120 Stat. at 601–02 (codified at 18 U.S.C. § 2251(a)).

SORNA defines "resides" to mean "the location of the individual's home or other place where the individual habitually lives." 34 U.S.C. § 20911(13). To keep the registration current, "[a] sex offender shall, not later than 3 business days after each change of . . . residence, . . . appear in person in at least 1 jurisdiction . . . and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry." *Id.* § 20913(c). That information includes the "address of each residence at which the sex offender resides or will reside." *Id.* § 20914(a)(3).

[5] 34 U.S.C. § 20913 was formerly codified at 42 U.S.C. § 16913. Its language did not change when it was recodified.

As authorized by SORNA, 34 U.S.C. § 20912(b), the Attorney General has issued the SMART Guidelines for interpretation. The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030 (July 2, 2008). Section VIII of the SMART Guidelines recognizes that "[r]equiring registration only where a sex offender has a residence or home in the sense of a fixed abode would be too narrow to achieve SORNA's objective of 'comprehensive' registration of sex offenders, . . . because some sex offenders have no fixed abodes." *Id.* at 38,061. The section then explains that, pursuant to SORNA, a sex offender must register "[i]n any jurisdiction in which he has his home; and [i]n any jurisdiction in which he habitually lives (even if he has no home or fixed address in the jurisdiction, or no home anywhere)." 73 Fed. Reg. at 38,061.

Section VIII also addresses the meaning of "habitually lives." It explains that the term "is not self-explanatory and requires further definition" and that an "overly narrow definition would undermine the objectives of sex offender registration and notification under SORNA." *Id.* Therefore, per the SMART Guidelines, the term "should be understood to include places in which the sex offender lives with some regularity, and with reference to where the sex offender actually lives, not just in terms of what he would choose to characterize as his home address or place of residence for self-interested reasons." *Id.* at 38,062. Ultimately, the SMART Guidelines define "resides" to mean where "a sex offender habitually lives in the relevant sense . . . for at least 30 days." *Id.* And when sex offenders register, those "who lack fixed abodes are nevertheless required to register in the jurisdictions in which they reside" and provide "some more or less specific description . . . concerning the place or places where such a sex offender habitually lives—e.g.,

information about a certain part of a city that is the sex offender's habitual locale, a park or spot on the street (or number of such places) where the sex offender stations himself during the day or sleeps at night." *Id.* at 38,055.

2.

Appellant argues that the SMART Guidelines' definitions of "resides" and "habitually lives" conflict with *Nichols v. United States*, 578 U.S. 104. In *Nichols*, the Supreme Court analyzed whether a sex offender, Nichols, needed to update his registration in Kansas before he moved to the Philippines. 578 U.S. at 105. *Nichols* clarified that sex offenders who moved out of the country were not required to notify the jurisdiction they had left after they changed their residence. *Id.* at 110. The Court explained that SORNA "requires a sex offender who changes his residence to appear, within three business days of the change, in person in at least one jurisdiction (but not a foreign country) where he resides, works, or studies, and to inform that jurisdiction of the address change." *Id.* at 109. But SORNA "uses only the present tense [of] 'resides,'" meaning that once Nichols moved to the Philippines, "he was no longer required to appear in person in Kansas to update his registration." *Id.*

Appellant argues that *Nichols* held that a sex offender may depart from a jurisdiction where he was previously registered, without being required to "update" or "de-register" and that he may not need to register somewhere else because he does not "reside" anywhere yet. Appellant relies on a hypothetical from *Nichols* wherein the Court opined, "[W]hat if [a sex offender] were to move from Kansas to California and spend several nights in hotels along the way? Such ponderings cannot be the basis for imposing criminal punishment."

Id. at 111. Appellant would have us extend that hypothetical to hold that sex offenders can travel indefinitely to evade registration requirements, never reaching the hypothetical's California. We decline the invitation to construe *Nichols*' hypothetical so broadly. Appellant's interpretation is at odds with the reasoning in *Nichols* as well as the purpose of SORNA. Instead, the hypothetical underscores that the act of leaving a residence does not count as a change of residence. "Nichols changed his residence just once: from Kansas to the Philippines." *Id.* Similarly, here, Appellant's course of conduct for the month before his arrest indicates that he changed his residence just once -- from Vermont to West Virginia.

Thus, we reject Appellant's argument that the SMART Guidelines conflict with *Nichols*. The district court's use of the SMART Guidelines to instruct the jury on the meaning of "resides" and "habitually lives" was a correct statement of the law. *United States v. Hassler*, 992 F.3d 234, 246 (4th Cir. 2021).

3.

Next, Appellant argues that we should not afford *Chevron* deference to the SMART Guidelines' interpretation of "resides" and "habitually lives" because neither term is ambiguous. And he argues that even if the terms are ambiguous, the SMART Guidelines should not be afforded *Chevron* deference in the criminal context.

Based on *Chevron*, courts "give deference to an agency's reasonable interpretation of an ambiguous statute it administers because of its expertise and because of what is viewed as an implicit congressional delegation of authority to interpret that ambiguity." *Pugin v. Garland*, 19 F.4th 437, 441 (4th Cir. 2021) (citing *Chevron*, 467 U.S. at 865).

Section 112(b) of SORNA directs the Attorney General to issue guidelines -- which it did in the SMART Guidelines -- to interpret and implement SORNA. 34 U.S.C. § 20192(b). Because Appellant challenges whether *Chevron* applies in this context, we begin at "Step Zero" and ask whether *Chevron* applies at all. *Pugin*, 19 F.4th at 441.

a.

We have acknowledged the "thoughtful and ongoing debate about whether *Chevron* can apply to interpretations of criminal law." *Pugin*, 19 F.4th at 441. But the SMART Guidelines interpret SORNA's *civil* statute, not a criminal statute. We have held that SORNA's civil registration requirement is a "civil regulatory scheme." *United States v. Under Seal*, 709 F.3d 257, 263 (4th Cir. 2013). And we have consulted the SMART Guidelines in other failure-to-register cases. *See United States v. Helton*, 944 F.3d 198, 204 (4th Cir. 2019) (looking to the SMART Guidelines' definitions of "sexual act" and "sexual contact" because SORNA did not define those terms and Congress "expressly delegated authority to the Attorney General" to interpret SORNA); *United States v. Bridges*, 741 F.3d 464, 468 n.5 (4th Cir. 2014) ("By leaving the operative statutory term undefined and delegating broad rulemaking authority to the Attorney General, Congress has implicitly left a gap in SORNA's statutory scheme that the Attorney General may fill." (citing *Chevron*, 467 U.S. at 843)). So, we break no new ground in consulting them here and therefore proceed to the *Chevron* analysis.

A *Chevron* analysis proceeds in two steps: (1) whether the terms "resides" and "habitually lives" are ambiguous; and (2) if so, whether the SMART Guidelines' interpretation is a reasonable construction of the language. *Chevron*, 467 U.S. at 843.

b.

While the operative statutory term here -- "resides" -- is defined by the statute itself, the term "habitually lives" is not. So the question becomes whether "habitually lives" is ambiguous as to where transient sex offenders reside when they try to evade SORNA's registration requirements by frequently moving within a state or between states. The SMART Guidelines acknowledge that "habitually lives" is "not self-explanatory and requires further definition," emphasizing that an "overly narrow definition would undermine the objectives of sex offender registration and notification under SORNA." 73 Fed. Reg. at 38,061. And while the term "habitually lives" would be unambiguous if we were determining where most Americans live, it does not provide clarity for how long a transient sex offender must live in a place with regularity in order to trigger SORNA's registration requirement. Therefore, the term "habitually lives" is ambiguous.

Given this ambiguity and Congress leaving the term undefined, we look to whether the SMART Guidelines adequately filled the gap in SORNA's definition of "habitually lives." *See Bridges*, 741 F.3d 464, 468 n.5 (4th Cir. 2014) ("By leaving the operating statutory term undefined and delegating broad rulemaking authority to the Attorney General, Congress has implicitly left a gap in SORNA's statutory regime that the Attorney General may fill.").

c.

We must therefore decide whether the SMART Guidelines provide "a clear and reasonable interpretation" of "habitually lives." *See United States v. Price*, 777 F.3d 700, 709 n.9 (4th Cir. 2015). The SMART Guidelines explain that "habitually lives" should

"be understood to include places in which the sex offender lives with some regularity, and with reference to where the sex offender actually lives, not just in terms of what he would choose to characterize as his home address or place of residence for self-interested reasons." 73 Fed. Reg. at 38,062. The SMART Guidelines also provide a timeframe: "a sex offender habitually lives in the relevant sense in any place in which the sex offender lives for at least 30 days." *Id.* This interpretation clarifies "habitually lives" and reasonably interprets the term to include where the sex offender actually lives -- such as the place he "stations himself during the day or sleeps at night" -- not just where he could characterize his place of residence for self-interested reasons. *Id.* at 38,055; *see also United States v. Alexander*, 817 F.3d 1205, 1215 (10th Cir. 2016) (recommending that jury instructions defining "reside" include the SMART Guidelines' definition of "habitually lives"). And the definition provides a 30-day requirement, which reasonably interprets how long a sex offender must live somewhere to be habitual. This interpretation is not unclear or unreasonable.

d.

Thus, we are satisfied that the jury instructions, "construed as a whole, and in light of the whole record, adequately informed the jury of the controlling legal principles without misleading or confusing the jury to the prejudice of the objecting party." *Hassler*, 992 F.3d at 246 (quoting *United States v. Kivanc*, 714 F.3d 782, 794 (4th Cir. 2013)). Therefore, the district court did not err when it used the SMART Guidelines to clarify these terms for the jury.

B.

Tenth Amendment

Appellant argues that SORNA, as applied to him, violates the Tenth Amendment. He raises two arguments. First, Appellant asserts that SORNA's registration requirement conflicts with West Virginia's Sex Offender Registry Act, which he argues did not require him to register in the state. Next, Appellant argues that SORNA would commandeer West Virginia officers to register sex offenders, like himself, contrary to state law. These arguments are foreclosed by our precedent.

In *Kennedy v. Allera*, we addressed whether SORNA violates the Tenth Amendment. 612 F.3d 261, 268 (4th Cir. 2010). Appellant's arguments largely mirror those we rejected in *Kennedy*. His first argument -- that conflicting federal and state registration requirements violate the Tenth Amendment -- "rests on the faulty premise that only those who are *required* to register are lawfully *able* to register." *Id.* And like the offender in *Kennedy*, Appellant cannot cite a provision of West Virginia law that prohibits him from registering. *See id.* Instead, West Virginia law required Appellant to register after visiting the state "for a period of more than fifteen continuous days" or once he changed his residence to West Virginia. *See* W. Va. Code § 15-12-9(b)(2), (c).

Kennedy also forecloses Appellant's second argument, that SORNA commandeers state officers to register offenders contrary to state law. In *Kennedy*, we held that SORNA does not "*require* that the States comply with its directives. Rather, SORNA gives the States a choice, indicating that 'a jurisdiction that fails . . . to substantially implement [SORNA] shall not receive 10 percent of the funds that would otherwise be allocated.'"

612 F.3d at 269 at 269 (alterations in original) (quoting 34 U.S.C. § 20913(a)). And in *Kennedy*, we further noted that even if a defendant could "demonstrate facts or circumstances raising the specter of an unconstitutional commandeering, it would be the State, not [the defendant], that would be aggrieved" and a defendant "undoubtedly would face a serious standing question." 612 F.3d at 269. Appellant does not address this pitfall in his argument, and we find no reason to depart from our binding precedent in *Kennedy*.

C.

Sentencing Enhancement

Appellant argues that the district court erred in imposing an eight-level sentencing enhancement to his base offense level for commission of a sex offense against a minor while in failure to register status. *See* U.S.S.G. § 2A3.5(b)(1)(C) (2018). The Guidelines incorporate the definition of "sex offense" found in 34 U.S.C. § 20911(5), which defines "sex offense" as "a criminal offense that has an element involving a sexual act or sexual contact with another." *Id.* § 2A3.5 cmt. n.1; 34 U.S.C. § 20911(5). And "sex offense" also includes "a criminal offense that is a specified offense," which is defined to include "possession, production, or distribution of child pornography." 34 U.S.C. § 20911(5), (7)(G).

The district court determined that Appellant committed two offenses while unregistered: commission of third degree sexual abuse against P.M. and possession of child pornography; both of which provided independent bases for the application of the eight-level sentencing enhancement. Appellant challenges both grounds.

1.

Appellant first argues that the district court erred in imposing the eight-level sentencing enhancement for committing sexual abuse in the third degree against P.M. He argues that the district court should not have believed Bell's testimony and that even if Bell should be believed, the touching of P.M.'s buttocks was not for Appellant's sexual gratification.

For a defendant to qualify for the enhancement, the Guidelines only require commission of a sex offense, not a conviction. *United States v. Lott*, 750 F.3d 214, 220–21 (2d Cir. 2014). And the United States bears the burden of proving, by the preponderance of the evidence, that a sex offense was committed. *United States v. Shivers*, 56 F.4th 320, 325 (4th Cir. 2022). Sexual abuse in the third degree is defined as subjecting a person who is less than sixteen years old to sexual contact without their consent. W. Va. Code § 61-8B-9. "Sexual contact" includes touching, either directly or through clothing, of the buttocks of another person, where the touching is done to gratify the sexual desire of either party. *Id.* § 61-8B-1(6).

At sentencing, the district court may consider sufficiently reliable information, and its determination that evidence is sufficiently reliable is reviewed for an abuse of discretion. *United States v. Pineda*, 770 F.3d 313, 318 (4th Cir. 2014). Its factual findings are reviewed for clear error. *Id.* The district court found Bell to be credible after she testified that she saw Appellant grab P.M.'s buttocks while pushing her on the swing. And Bell's testimony was consistent with P.M.'s own statement that she gave to police officers the day of the incident. Although Appellant argues that Bell was not reliable, he does not argue

that P.M. was not credible. And nothing in the record suggests that the district court's credibility determinations were erroneous.

Appellant also argues that touching P.M. was not for his "sexual gratification." *See* W. Va. Code § 61-8B-1(6) (defining "sexual contact" to require the touching be done to gratify the sexual desire of either party). In context, the record is clear that Appellant touching P.M. was intended for his sexual gratification. The record demonstrates that Appellant frequented the Elkins playground, befriended underage girls, asked to shower with P.M. and her friend while he filmed, and messaged P.M. on social media asking for nude images. Thus, the district court did not abuse its discretion by imposing the eight-level enhancement for this offense.

2.

Next, Appellant argues that testimony at sentencing did not establish that he knowingly possessed child pornography on his phone. He argues that because metadata of the child pornography files could not be gathered and he bought the phone from someone else, it remains unknown when the files were downloaded, accessed, and viewed and therefore whether he was the one to download, access, or view them.

To prove the knowledge element of a violation of 18 U.S.C. § 2252A, a defendant must have knowledge of "the sexually explicit nature of the materials as well as . . . the involvement of minors in the materials' production." *United States v. Miltier*, 882 F.3d 81, 86 (4th Cir. 2018) (quoting *United States v. Matthews*, 209 F.3d 338, 351 (4th Cir. 2000)).

Officer Weaver testified at sentencing that the photographs retrieved from Appellant's phone depicted minors engaged in sexually explicit conduct, *i.e.,* lascivious

exhibition of the genitals. And to prove Appellant knowingly possessed the photographs, Officer Weaver testified that the phone was Appellant's, the photographs were similar to the child pornography in Appellant's prior New Jersey child pornography conviction, and there was a file on Appellant's phone -- created on a date Appellant owned the phone -- containing child pornography search terms such as "My little girl nude," "Kiddy CP," and "Preteen incest." J.A. 653. Based on this record, we conclude the district court did not clearly err when it concluded that Appellant knowingly possessed child pornography in violation of 18 U.S.C. § 2252A.

D.

Lifetime Supervised Release

Appellant's final argument is that his lifetime term of supervised release is both procedurally and substantively unreasonable. But Appellant merely states in a conclusory fashion that lifetime supervision is not reasonably related to the sentencing factors set forth in 18 U.S.C. § 3553(a), involves a greater deprivation of liberty than is reasonably necessary for the purposes set forth in § 3553, and conflicts with any pertinent policy statements issued by the Sentencing Commission.

In support of the imposition of lifetime supervised release, the district court focused on the need to protect the community and Appellant's general belief that he was "above the law." J.A. 802. The court specifically explained that it "believed that the lifetime term of supervised [release] . . . is the appropriate manner in which to ensure the protection of the community in this case without constituting excessive punishment." *Id.* at 807. The record amply demonstrates that Appellant repeatedly and intentionally evaded registering

as a sex offender, violated conditions of pretrial release, and continued to victimize children. Therefore, we have no trouble affirming lifetime supervised release in this case.

IV.

For these reasons, the judgment of the district court is

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff,

v. **CRIMINAL NO. 2:21-CR-20 (KLEEH)**

JASON STEVEN KOKINDA,

Defendant.

MEMORANDUM OPINION AND ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL OR NEW TRIAL [ECF NO. 70]

Pending before the Court is Defendant's motion for judgment of acquittal or a new trial. For the reasons discussed herein, the motion is **DENIED.**

I. BACKGROUND AND PROCEDURAL HISTORY

On December 17, 2019, the grand jury returned a one-count indictment against Defendant, charging him with Failure to Update Sex Offender Registration, in violation of 18 U.S.C. § 2250(a). See ECF No. 1, Case No. 2:19-CR-33. On February 2, 2021, the grand jury returned a superseding indictment against Defendant, charging him with Possession of Child Pornography – Previous Conviction, in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2252A(b)(2), and Failure to Update Sex Offender Registration, in violation of 18 U.S.C. § 2250(a). See ECF No. 200, Case No. 2:19-CR-33. On September 8, 2021, in this case, the grand jury returned a one-count indictment against Defendant, charging him with Failure to

Update Sex Offender Registration, in violation of 18 U.S.C. § 2250(a). See ECF No. 1, Case No. 2:21-CR-20. The Government then moved to dismiss Count Two of the Superseding Indictment in Case No. 2:19-CR-33, and the Court granted the motion. See ECF No. 286, Case No. 2:19-CR-33.[1]

On October 19, 2021, this case came on for trial. At the close of the Government's case in chief, Defendant orally moved for acquittal. See ECF No. 53. October 21, 2021, the jury returned a guilty verdict against Defendant with respect to the charge of Failure to Update Sex Offender Registration. On June 15, 2022, the Government moved to dismiss Count One of the Superseding Indictment in Case No. 2:19-CR-33, which was the only remaining count in that case. The Court granted the motion.

On November 8, 2021, Defendant filed a pro se motion for acquittal or new trial in this matter [ECF No. 70]. His counsel moved to adopt the motion, which the Court grants herein, and filed a memorandum in support [ECF Nos. 102, 103]. Defendant has filed a number of pro se supplements to the motion. Counsel also filed a motion to adopt a number of Defendant's pro se filings, which the Court grants herein [ECF No. 130]. On April 4, 2022, due to

[1] Case Nos. 2:21-CR-20 and 2:19-CR-33 were previously consolidated. They have since been severed, and as discussed herein, Case No. 2:19-CR-33 has been dismissed in its entirety.

the excessive number of filings from Defendant, the Court informed the parties that it would not consider any supplemental filings beyond those filed as of April 1, 2022, in ruling on the motion for judgment of acquittal. See ECF No. 128.

II. DEFENDANT'S ARGUMENTS

In Defendant's filings, both in his pro se filings and those by counsel, he argues that the Court mis-instructed the jury as to the meaning of "resides" under the Sex Offender Registration and Notification Act ("SORNA") and that there was insufficient evidence to support a conviction.

III. GOVERNING LAW

Rule 29 of the Federal Rules of Criminal Procedure provides that "[a]fter the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction."

This Court's duty in instructing jurors is to provide correct statements of the law that avoid confusing or misleading them. See United States v. Savage, 885 F.3d 212, 222–23 (4th Cir. 2018) ("[T]aken as a whole, the instruction [must] fairly state[] the controlling law."); United States v. Miltier, 882 F.3d 81, 89 (4th Cir. 2018) (instructions must "adequately inform[] the jury of the controlling legal principles without misleading or confusing the

jury to the prejudice of the opposing party.”).

A defendant who challenges the sufficiency of the evidence under Rule 29 faces an “imposing burden.” United States v. Martin, 523 F.3d 281, 288 (4th Cir. 2008) (citing United States v. Beidler, 110 F.3d 1064, 1067 (4th Cir. 1997)). A defendant must establish that “the record demonstrates a lack of evidence from which a jury could find guilt beyond a reasonable doubt.” Id. (citing United States v. Burgos, 94 F.3d 849, 862 (4th Cir. 1996) (en banc)). When reviewing the sufficiency of the evidence supporting a criminal conviction, courts are “limited to considering whether ‘there is substantial evidence, taking the view most favorable to the Government, to support it.’” Beidler, 110 F.3d at 1067.

The court must uphold the jury’s verdict if, when viewed in the light most favorable to the government, there is sufficient evidence from which “any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.” United States v. Wilson, 118 F.3d 228, 234 (4th Cir. 1997). It is the jury, and not the court, who “weighs the credibility of the evidence and resolves any conflicts in the evidence presented.” Beidler, 110 F.3d at 1067. Reversal of a jury’s verdict of guilty is reserved for cases “where the prosecution’s failure is clear.” Burks v. United States, 437 U.S. 1, 17 (1978).

IV. INSTRUCTIONS PROVIDED TO JURY

The Court instructed the jury of the following law under SORNA:

> Title 18, United States Code, Sections 2250(a)provides, in pertinent part, that:
>
> Whoever –
>
> (1) is required to register under the Sex Offender Registration and Notification Act;
>
> (2) travels in interstate . . . commerce; and
>
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
>
> shall be guilty of a crime.

See ECF No. 65 at 12. The Court instructed the jury as to the elements as follows:

> In order to establish the offense charged in the Indictment, the Government must prove each of the following elements beyond a reasonable doubt:
>
> First: That the defendant was required to register and update his registration as a sex offender under the Sex Offender Registration and Notification Act;
>
> Second: That the defendant thereafter traveled in interstate commerce; and
>
> Third: That defendant knowingly failed to register as a sex offender in West Virginia.

See id. at 12-13. The Court instructed the Jury as to the meaning of "resides" as follows:

> This element is satisfied by evidence that the defendant came to reside in West Virginia. With respect to this element, the place where a person "resides" is the location of an individual's home or other place where the individual habitually lives. "Habitually lives" includes places in which the sex offender lives with some regularity. "Habitually lives" accordingly should be understood to include where the sex offender actually lives, not just in terms of what he would choose to characterize as his home address or place of residence for self-interested reasons. The specific interpretation of this element of "residence" is that a sex offender habitually lives in the relevant sense in any place in which the sex offender lives for at least 30 days. Hence, a sex offender resides in a jurisdiction for the purposes of SORNA if the sex offender has a home in the jurisdiction, or if the sex offender lives in the jurisdiction for at least 30 days. As to the timing of registration based on changes of residence, the understanding of "habitually lives" to mean living in a place for at least 30 days does not mean that the registration of a sex offender who enters a jurisdiction to reside may be delayed until after he has lived in the jurisdiction for 30 days. Rather, a sex offender who enters a jurisdiction in order to make his home or habitually live in the jurisdiction is required to register within three business days.

Id. at 15. Finally, the jury was also provided the following instruction:

> A sex offender who lacks a fixed abode or permanent residence is still required to register in the jurisdiction in which they reside. Such a sex offender cannot provide the residence address required because they have no definite "address" at which they live. Even

> a transient or homeless sex offender is still required to provide a description of the place they habitually live. Some more or less specific description should normally be obtainable concerning the place or places where such a sex offender habitually lives, including where the sex offender might station himself during the day or sleep at night.

Id. at 16.

V. DISCUSSION

In order to convict Defendant under 18 U.S.C. § 2250(a), the Government was required to prove (1) that Defendant was a sex offender required to register under SORNA; (2) that he traveled in interstate commerce; and (3) that he knowingly failed to register or update his registration. See United States v. Helton, 944 F.3d 198, 202 (4th Cir. 2019); 18 U.S.C. §2250(a) ("[W]hoever . . . is required to register under [SORNA], travels in interstate commerce . . . and knowingly fails to register or update a registration as required by [SORNA], shall be fined . . . or imprisoned not more than 10 years, or both.").

Because there was no dispute that Defendant traveled in interstate commerce and that he failed to register in the State of West Virginia, the dispute at trial and now centers around the first element: whether Defendant was required to register in West Virginia under SORNA. A person with a qualifying sex offense is required under SORNA to register in any jurisdiction in which he

resides, is employed, or is a student. See 34 U.S.C. §§ 20911, 20913. Because Defendant stipulated to the qualifying sex offense, the only issue that remained in dispute during trial and remains in dispute now is whether he "resided" in West Virginia during the time period alleged in the Indictment, thus triggering his obligation to register as a sex offender.

In short, Defendant asserts that the Court unlawfully expanded the definition of "resides," and the Court disagrees.

A. The Court's jury instruction on "resides" and "habitually lives" was a correct statement of the law that did not confuse or mislead the jury.

Under SORNA, where an individual "resides" is defined as "the location of the individual's home or other place where the individual habitually lives." 34 U.S.C. § 20911(13). SORNA does not further define "resides" or "habitually lives." Congress, however, expressly delegated to the Attorney General the authority and responsibility for issuing guidelines and regulations to implement SORNA. See 34 U.S.C. § 20912(b) ("The Attorney General shall issue guidelines and regulations to interpret and implement this title.").

Pursuant to its authority delegated by Congress, the Attorney General promulgated the National Guidelines for Sex Offender Registration and Notification (the "Guidelines"). See 73 Fed. Reg. 38030 (July 2, 2008). The Fourth Circuit has held, and

continues to recognize, that the Guidelines have the force and effect of law. See United States v. Gould, 568 F.3d 459, 465 (4th Cir. 2009) ("[T]he National Guidelines . . . have the force of law. . . .")[2]; United States v. Bridges, 741 F.3d 464, 468 (4th Cir. 2014) ("The[] Guidelines 'can and do have the force and effect of law.'"); United States v. Helton, 944 F.3d 198, 204 (4th Cir. 2019) ("As we have stated, these Guidelines can and do have the force and effect of law.") (quotation marks omitted).

Under the Guidelines, offenders who may be transient or homeless are still required to register as sex offenders under SORNA:

> Sex offenders who lack fixed abodes are nevertheless required to register in the jurisdictions in which they reside . . . . [A] sex offender must register . . . [i]n any jurisdiction in which he habitually lives (even if he has no home or fixed address in the jurisdiction, or no home anywhere).

73 Fed. Reg. at 38055, 38061. The Guidelines also explain the meaning of "habitually lives":

> "Habitually lives" accordingly should be understood to include places in which the sex offender lives with some regularity, and with reference to where the sex offender actually lives, not just in terms of what he would choose to characterize as his home address or place of residence for self-interested

[2] In Defendant's supplemental brief docketed at ECF No. 98, he concedes that the Guidelines have the "force of law" are entitled to "Chevron deference."

reasons.

Id. at 38062. More specifically, the Guidelines explain the meaning of "habitually lives" in the context of transient offenders:

> Such sex offenders cannot provide the residence address [as required by 34 U.S.C. § 20914(a)(3)] because they have no definite "address" at which they live. Nevertheless, some more or less specific description should normally be obtainable concerning the place or places where such a sex offender habitually lives — e.g., information about a certain part of a city that is the sex offender's habitual locale, a park or spot on the street (or a number of such places) where the sex offender stations himself during the day or sleeps at night, shelters among which the sex offender circulates, or places in public buildings, restaurants, libraries, or other establishments that the sex offender frequents. Having this type of location information serves the same public safety purposes as knowing the whereabouts of sex offenders with definite residence addresses. Hence, the authority under [34 U.S.C. § 20914(a)(7] is exercised to require that information be obtained about where sex offenders who lack fixed abodes habitually live with whatever definiteness is possible under the circumstances. Likewise, in relation to sex offenders who lack a residence address for any other reason — e.g., a sex offender who lives in a house in a rural or tribal area that has no street address — the registry must include information that identifies where the individual has his or her home or habitually lives.
>
> . . .
>
> [A] sex offender may be homeless, living on

> the street or moving from shelter to shelter, or a sex offender may live in something that itself moves from place to place, such as a mobile home, trailer, or houseboat. SORNA . . . accordingly defines "resides" to mean "the location of the individual's home or other place where the individual habitually lives."

Id. at 38055-56, 38061.

B. There was sufficient evidence supporting the jury's finding that Defendant habitually lived in the Elkins area during the time period charged in the Indictment.

As the Government correctly points out, the jury was presented with sufficient evidence to find that Defendant "habitually lived" in the Elkins, West Virginia, area from August 24, 2019, until his arrest on September 29, 2019. Defendant was regularly seen in the city park, in the library, and at the YMCA. Defendant had reserved two campgrounds close to Elkins. His financial records showed that he regularly shopped at businesses in Elkins, to the exclusion of almost any other location. Financial records further demonstrated that when Defendant left the state or the area, he always returned to Elkins.

In addition to this evidence, the jury heard that Defendant regularly concealed his identity. He used different names, addresses, and telephone numbers when interacting with many of the establishments in the Elkins area, including Enterprise, Corridor H, Yokum's, the YMCA, Anytime Fitness, and the Elkins Police.

Defendant did not dispute this evidence.

Further, as the Government points out, Defendant's stated intent to reset his residence every time he left the county or the state line did not convert his "habitual living" in Elkins to merely "passing through." The Guidelines recognize, and the jury was correctly instructed, that residence is not "just in terms of what [the offender] would choose to characterize as his home address or place of residence for self-interested reasons." 73 Fed. Reg. at 38062. The Government presented sufficient evidence supporting the jury's finding that Defendant habitually lived in the Elkins area during the time period charged in the Indictment.

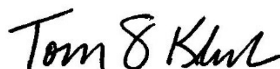
VI. CONCLUSION

For the reasons discussed above, the Court finds that its jury instructions fairly stated the controlling law and did not confuse or mislead the jury. Defendant has not met his burden. His counsel's motions to adopt [ECF Nos. 102, 130] are **GRANTED**, and the motion for acquittal or new trial is **DENIED** [ECF No. 70].

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to counsel of record.

DATED: October 5, 2022



THOMAS S. KLEEH, CHIEF JUDGE
NORTHERN DISTRICT OF WEST VIRGINIA

FILED: April 2, 2024

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 22-4595
(2:21-cr-00020-TSK-MJA-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JASON STEVEN KOKINDA

Defendant - Appellant

O R D E R

The court denies the petitions for rehearing and rehearing en banc and the pro se motion to appoint counsel. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Agee, Judge Thacker, and Judge Rushing.

For the Court

/s/ Nwamaka Anowi, Clerk