

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

UNITED STATES,  
Appellee

FINAL BRIEF ON BEHALF OF  
APPELLANT

v.

Crim. App. Dkt. No. 20110499

Specialist (E-4)  
**William E. Newton, Jr.,**  
United States Army,  
Appellant

USCA Dkt. No. 14-0415/AR

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BRIEF ON BEHALF OF APPELLANT

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**TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF  
APPEALS FOR THE ARMED FORCES:**

**Issue Presented**

**I.**

**WHETHER THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA), 18 U.S.C. § 2250(a) (2006), APPLIED TO APPELLANT AS A RESULT OF EITHER THE ATTORNEY GENERAL'S 2007 INTERIM RULE OR HIS 2008 GUIDELINES. SEE, E.G., UNITED STATES V. LOTT, 750 F.3d 214 (2d Cir. 2014), 2014 WL 1522796; UNITED STATES v. REYNOLDS, 710 F.3d 498 (3d Cir. 2013.)**

**Statement of Statutory Jurisdiction**

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 866 (2012). This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ.

## Statement of the Case

On February 9, June 13 and June 16-17, 2011, Specialist (SPC) William E. Newton, Jr. (appellant) was tried at Fort Bliss, Texas before an enlisted panel sitting as a general court-martial. Contrary to his plea, appellant was convicted of rape of a child under the age of 12 on divers occasions and committing indecent conduct, in violation of Article 120, UCMJ.<sup>1</sup> Additionally, contrary to his plea, appellant was convicted of indecent language, a general article violation and failing to register as a sex offender in accordance with the Sex Offender Registration and Notification Act, in violation of Article 134 of the UCMJ.<sup>2</sup> The panel sentenced him to be reduced to the grade of E-1, to forfeit all pay and allowances, to be confined for thirty years, and to be discharged with a dishonorable discharge.<sup>3</sup> Following the trial, Specification 1 of renumbered Charge II was dismissed.<sup>4</sup> Additionally, the convening authority approved the sentence as adjudged, except that he reduced the confinement time to twenty nine years instead of thirty years.<sup>5</sup>

On February 6, 2013, appellant filed a brief with the Army Court alleging two issues. On December 19, 2013, the Army Court issued a Summary Disposition affirming the findings and

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<sup>1</sup> J.A. at 14 and 15.

<sup>2</sup> J.A. at 14 and 15.

<sup>3</sup> J.A. at 16.

<sup>4</sup> Result of Trial (Corrected Copy).

<sup>5</sup> J.A. at 13.

sentence. Appellant then filed a petition for grant of review of the Army Court decision with this Honorable Court. This Honorable Court granted the petition to review the above issue.

#### **Statement of the Facts**

Appellant was convicted of rape of a child under 14 years old in St. Louis, Missouri on October 2, 1995. The 1995 conviction is unrelated to his 2011 court-martial convictions except for the Article 134 charge alleging that appellant failed to comply with sex offender registration requirements under the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250(a). Appellant was charged and convicted of failing to comply with SORNA when he did not register as a sex offender in Texas between October 1, 2009 and July 29, 2010.<sup>6</sup>

The evidence presented at appellant's court-martial demonstrated that appellant was generally compliant with regards to sex offender registry following his 1995 conviction. Ms. Tammy Byrd, the supervisor of the sex offender registry office in St. Louis, Missouri testified on the merits during appellant's court-martial. Ms. Byrd stated that appellant complied with the Missouri requirements for sex offender registry immediately following his conviction.<sup>7</sup> Then, in 1997, appellant on his own volition went to the St. Louis City office

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<sup>6</sup> J.A. at 10 and 15.

<sup>7</sup> J.A. at 24.

to inform the office that he had moved to a different location in Missouri.<sup>8</sup>

Appellant enlisted in the Army on February 23, 1998.<sup>9</sup> Appellant moved to Texas under military orders in 2009. The evidence showed that on March 16, 2010, the sex offender registration office mistakenly mailed a letter to appellant that was intended for another William Newton. The letter explained that William Newton had been exempt from registration for three years, but now had a duty to register.<sup>10</sup>

Mr. Ted Saiz, an El Paso, Texas police officer from the sex offender registry office testified on the merits.<sup>11</sup> He recounted that he received a call in 2010 from an Army Criminal Investigations Division (CID) agent stating that appellant was currently under investigation and that he may be required to file in Texas as a sex offender for a previous offense from Missouri.<sup>12</sup> Mr. Saiz testified that it took him one or two weeks to translate Missouri law to Texas law and determine whether or not appellant was required to register.<sup>13</sup> Then, once he determined that he was required to register, he personally contacted appellant. Appellant immediately complied and

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<sup>8</sup> J.A. at 24.

<sup>9</sup> J.A. at 70.

<sup>10</sup> J.A. at 27.

<sup>11</sup> J.A. at 39.

<sup>12</sup> J.A. at 41.

<sup>13</sup> J.A. at 44 and 46.

registered with the Texas office.<sup>14</sup> Mr. Saiz testified that he only determined that appellant had a duty to register under Texas law, not federal law. He stated that he was not very familiar with SORNA's requirements.<sup>15</sup>

#### **Statement of the Law**

Appellant's 1995 conviction occurred prior to the enactment of SORNA. The Sex Offender Registration and Notification Act, 18 U.S.C. 2250(a) was enacted in July 2006. The Act states that its registration requirements apply to those who committed a sex offense prior to its enactment if made applicable by the Attorney General.<sup>16</sup>

On 28 February 2007, the Attorney General issued an Interim Rule ("2007 Interim Rule") which stated that SORNA was applicable to those who committed an offense prior to the enactment of SORNA.<sup>17</sup> However, in issuing this 2007 Interim Rule, the Attorney General did not comply with the Administrative Procedures Act (APA) because he did not provide notice and receive comments and the rule was published less than thirty days before its effective date.<sup>18</sup> The Attorney General

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<sup>14</sup> J.A. at 44 and 46.

<sup>15</sup> J.A. at 45.

<sup>16</sup> 18 U.S.C. § 2250(a).

<sup>17</sup> 28 C.F.R. § 72.3 (2007).

<sup>18</sup> See 5 U.S.C. § 553(b), (c) (1966) (stating that notice of proposed rulemaking "shall be published in the Federal Register" and that the agency "shall give interested persons an opportunity to participate in the rule making through submission

claimed that his failure to comply was justified based on "good cause."<sup>19</sup>

On July 2, 2008, after receiving notice and comment, the Attorney General promulgated Sentencing, Monitoring, Apprehending, Registering, and Tracking guidelines ("2008 SMART guidelines") for the states and other jurisdictions on matters of SORNA's implementation.<sup>20</sup> On December 29, 2010, the Federal Register published an Attorney General order addressing further comments on retroactivity and other issues. This order finalized the Interim Rule issued in 2007. This final action became effective on January 28, 2011.<sup>21</sup>

There have been several court challenges made regarding the legitimacy of the 2007 Interim Rule. In fact, immediately prior to appellant's trial, the Supreme Court granted certiorari by *Billy Joe Reynolds v. United States*,<sup>22</sup> to determine whether a sex offender convicted prior to the enactment of SORNA has standing

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of written data, views, or arguments" arguments"); 5 U.S.C. § 553(d) (requiring that a "substantive rule" be published "not less than 30 days before its effective date").).

<sup>19</sup> See 5 U.S.C. § 553(b)(B) (creating an exception to the notice and hearing requirements "when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest").

<sup>20</sup> See Office of the Att'y Gen., U.S. Dep't of Justice, *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38,030.

<sup>21</sup> See Office of the Att'y Gen., U.S. Dep't of Justice, *Applicability of the Sex Offender Registration and Notification Act*, 75 Fed. Reg. 81,849 (28 C.F.R. § 72.3 (2011)).

<sup>22</sup> 131 S. Ct. 1043 (2011).

to challenge the Attorney General's 2007 Interim Rule. The Third Circuit in *Reynolds* ruled that SORNA applied to sex offenders convicted prior to the enactment of SORNA regardless of the Attorney General's rule and therefore the legitimacy of that Interim Rule was not an issue needing to be decided.<sup>23</sup>

In January 2012, the Supreme Court reversed and remanded this decision ruling that SORNA did not apply to sex offenders with convictions prior to its enactment unless the Attorney General rules that it should so apply. Therefore, the Supreme Court determined that the legitimacy of the Interim Rule was an issue needing resolved and remanded the case without ruling on its legitimacy.<sup>24</sup>

In 2013, upon remand from the Supreme Court, the Third Circuit held that the Attorney General's 2007 Interim Rule violated the APA and the Attorney General did not have "good cause" to waive the APA procedural requirements.<sup>25</sup> The Third Circuit further concluded that the Attorney General's lack of good cause was prejudicial to *Reynolds* and therefore vacated *Reynolds'* conviction.<sup>26</sup>

The Third Circuit was not the first to rule on the legitimacy of the 2007 Interim Rule based on the APA procedural

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<sup>23</sup> *United States v. Billy Joe Reynolds*, 380 Fed. Appx. 125 (3d Cir. 2010).

<sup>24</sup> *Billy Joe Reynolds v. United States*, 132 S. Ct. 975 (2012).

<sup>25</sup> *United States v. Reynolds*, 710 F.3d 498 (3d Cir. 2013).

<sup>26</sup> *Id.*

requirements. Prior to this 2013 Third Circuit ruling, the Fifth, Sixth and Ninth Circuit all held that the Attorney General did not have good cause to waive the APA procedural requirements.<sup>27</sup> However, as acknowledged by the Third Circuit in *Reynolds*, the Fourth and the Eleventh Circuits both held that the Attorney General *did* have good cause to waive the APA notice-and-comment procedural requirements.<sup>28</sup> The Supreme Court acknowledged the court conflict in 2010, but did not opine on this issue.<sup>29</sup>

The Third Circuit in *Reynolds* only addressed the legitimacy of the Attorney General's 2007 Interim rule and not the 2008 SMART guidelines because *Reynolds* was convicted for failing to register between September 16, 2007 and October 16, 2007, prior to the existence of the 2008 SMART guidelines. The Second Circuit recently addressed whether the 2008 SMART guidelines served to make SORNA applicable to pre-Act offenders.<sup>30</sup>

In *United States v. Lott*, the Second Circuit held that the guidelines "were an act of substantive rulemaking" and were not

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<sup>27</sup> See *United States v. Johnson*, 632 F.3d 912, 928 (5<sup>th</sup> Cir. 2011); *United States v. Cain*, 583 F.3d 408, 419-24 (6<sup>th</sup> Cir. 2009); and *United States v. Valverde*, 628 F.3d 1159 (9<sup>th</sup> Cir. 2010).

<sup>28</sup> See *United States v. Gould*, 568 F.3d 459 (4<sup>th</sup> Cir. 2009) and *United States v. Dean*, 604 F.3d 1275 (11<sup>th</sup> Cir. 2010).

<sup>29</sup> *Carr v. United States*, 130 S. Ct. 2229, 2234 n.2 (2010).

<sup>30</sup> *United States v. Lott*, 750 F.3d 214 (2<sup>nd</sup> Cir. 2014).

merely "interpretive rules."<sup>31</sup> Further, the Second Circuit held that the Attorney General complied with the notice-and-comment requirement of the APA in enacting the guidelines.<sup>32</sup> The Second Circuit therefore concluded that the 2008 SMART guidelines validly served to make SORNA applicable to pre-Act offenders.

### **Summary of Argument**

Neither the SORNA 2007 Interim Rule nor the 2008 SMART guidelines applied to appellant between October 1, 2009 and July 29, 2010. As determined by the Third Circuit, Fifth Circuit, Sixth Circuit and Ninth Circuit, the Attorney General violated the APA procedural requirements when enacting the 2007 Interim Rule and did not have "good cause." This lack of "good cause" was prejudicial to appellant. Due to this violation, the 2007 Interim Rule did not validly make SORNA applicable to pre-Act offenders like appellant.

Appellant further contends that despite the Second Circuit Court's recent ruling in *Lott*, the 2008 SMART guidelines did not serve to make SORNA applicable to pre-Act offenders like appellant. The 2008 SMART guidelines were merely interpretive. These guidelines were not substantive rules and therefore should not serve to make SORNA applicable to pre-Act offenders. The 2011 Order finalizing the 2007 Interim Rule is a substantive

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<sup>31</sup> *Id.* at 217.

<sup>32</sup> *Id.* at 219.

rule that serves to make SORNA applicable to pre-Act offenders. This 2011 Final Order did not exist during the time period that appellant was charged with failing to register.

**THE SEX OFFENDER REGISTRATION AND NOTIFICATION ACT (SORNA), 18 U.S.C. § 2250(a) (2006), DID NOT APPLY TO APPELLANT AS A RESULT OF THE ATTORNEY GENERAL'S 2007 INTERIM RULE OR HIS 2008 GUIDELINES.**

#### **Standard of Review**

In *Reynolds*, the Third Circuit explains that the courts are divided on which standard of review should be applied to the issue of whether or not the Attorney General had good cause to waive the APA procedural requirements when enacting the 2007 Interim Rule.<sup>33</sup> The Third Circuit declined to resolve this decision.<sup>34</sup> However, the Third Circuit states that their "application of this interpretive principle generally suggests that *de novo* review is the correct standard for examining claims of good cause under the APA."<sup>35</sup> Also, the Third Circuit in *Reynolds* points out that, although they did not specifically state which standard applied, the Fourth and Sixth Circuits both applied the *de novo* standard of review when determining whether good cause existed to waive the APA procedures.<sup>36</sup>

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<sup>33</sup> *Reynolds*, 710 F.3d at 507.

<sup>34</sup> *Id.* at 509.

<sup>35</sup> *Id.* at 508.

<sup>36</sup> *Id.* at 507, citing *Gould*, 568 F.3d at 469-70 and *Cain*, 583 F.3d at 420-21.

Appellant contends that whether or not the Attorney General's action was completed in "observance of procedure required by law" is a legal question for which the *de novo* standard should apply.<sup>37</sup> Likewise, appellant contends that the *de novo* standard of review should apply when determining whether or not the 2008 SMART guidelines have the legal effect of a substantive rule in this case.

### **Argument**

#### **1. The SORNA did not apply to appellant as a result of the 2007 Interim Rule.**

Appellant contends that the 2007 Interim Rule did not serve to apply SORNA to pre-Act offenders like appellant because of the Attorney General's failure to comply with the APA and because of his lack of good cause. The Third Circuit, Fifth Circuit, Sixth Circuit and Ninth Circuit have all held that the 2007 Interim Rule did not validly make SORNA applicable to pre-Act offenders due to the Attorney General's non-compliance with the APA. Appellant contends that the 2007 Interim Rule was not applicable to him because of the violation and the prejudice he faced based on the lack of good cause.

The Attorney General claimed that good cause for waiver of the notice-and-comment requirements existed because, 1) there was an immediate need to "eliminate any possible uncertainty" as

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<sup>37</sup> *Id.* at 507, quoting 5 U.S.C. § 706(2)(D).

to whether SORNA applied retroactively, and 2) to "protect the public from sex offenders who fail to register."<sup>38</sup> Appellant contends that the Third Circuit's reasoning for why these two reasons did not constitute good cause should be applied by this Honorable Court as well.

As reasoned by the Third Circuit with regard to the Attorney General's first assertion, "[a]n agency's intention to provide clarity, without more, cannot amount to good cause."<sup>39</sup> Further, as concluded by the Third Circuit, "if the Attorney General intended to eliminate 'any possibly uncertainty,' the best course to have taken would have been to provide for notice and comment at the start and later issue a final rule. His choice not to follow this path undermines his stated justification of eliminating uncertainty."<sup>40</sup> For these reasons, the Attorney General's first reason for asserting good cause is inadequate.

The Attorney General's second reason, public safety, is also inadequate. As pointed out by the Third Circuit, the Attorney General merely restated the public safety rationale offered in the statute itself to support the assertion that he had good cause to waive the notice-and-comment requirements of

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<sup>38</sup> See Office of the Att'y Gen., U.S. Dep't of Justice, *Applicability of the Sex Offender Registration and Notification Act*, 75 Fed. Reg. 8894-01, 8896-97 (28 C.F.R. § 72.3 (2007)).

<sup>39</sup> *Reynolds*, 710 F.3d at 510.

<sup>40</sup> *Id.* at 511.

the APA.<sup>41</sup> The Third Circuit further concludes that this type of mere restatement of the Act "cannot constitute good cause because it would allow agencies to circumvent the notice and comment requirements."<sup>42</sup> In other words, "[i]f the mere assertion that such harm will continue while an agency gives notice and receives comment were enough to establish good cause, then notice and comment would always have to give way."<sup>43</sup> This second assertion of good cause is simply not adequate.

The Attorney General failed to comply with the notice-and-comment requirements of the APA when issuing the 2007 Interim Rule. For the above reasons, the Attorney General's assertions that he had good cause to waive these requirements are completely inadequate. Further, appellant was prejudiced because of the liberty interest at stake in his criminal proceeding. Therefore, appellant contends that the 2007 Interim Rule should not serve to make SORNA applicable to him as a pre-Act offender.

**2. The SORNA did not apply to appellant as a result of the 2008 SMART guidelines.**

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<sup>41</sup> *Id.* at 512.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

Appellant also contends that the 2008 SMART guidelines do not validly make SORNA applicable to pre-Act offenders because the guidelines were merely interpretive and were not substantive law.

In 1995, the Supreme Court addressed whether a "guideline" issued by the Secretary of Health and Human Services regarding Medicare regulations was invalid because the Secretary did not follow the notice-and-comment procedures of the APA when it was promulgated.<sup>44</sup> The Supreme Court found that the guideline was valid and distinguished between interpretive guidelines and substantive law. The Supreme Court held that rules issued by a federal administrative agency that interpret federal legislation "do not have the force and effect of law and are not accorded that weight in the adjudicatory process."<sup>45</sup>

In 1989, the Third Circuit held that "if the rule in question merely clarifies and explains existing law, we deem it 'interpretive.'"<sup>46</sup> In 1992, the Court of Appeals for the District of Columbia Circuit further defined interpretive rules as "rules or statements issued by an agency to advise the public

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<sup>44</sup> *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995).

<sup>45</sup> *Id.* at 119.

<sup>46</sup> *Bailey v. Sullivan*, 885 F.2d 52, 62 (3d Cir. 1989).

of the agency's construction of the statutes and rules which it administers."<sup>47</sup>

The Court of Appeals for the District of Columbia Circuit also laid out four factors to determine whether a rule is substantive or interpretive. That court stated that to determine if a rule is substantive, the following factors should be considered,

(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties, (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency has explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior legislative rule. If the answer to any of these questions is affirmative, we have a legislative, not an interpretive rule.<sup>48</sup>

The 2008 SMART guidelines are just that; guidelines. They were put forth by the Attorney General to clarify the already existing 2007 Interim Rule or "Act", to quote the term used in the guidelines, which he presumed was valid at the time. In fact, the guidelines themselves state, "[t]hese final guidelines provide guidance and assistance to the states and other jurisdictions in incorporating the SORNA requirements into their

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<sup>47</sup> *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993).

<sup>48</sup> *Id.* at 1112.

sex offender registration and notification programs.”<sup>49</sup> Further the guidelines state, “The adoption of these Guidelines carries out a statutory directive to the Attorney General, appearing in SORNA § 112(b), to issue guidelines to interpret and implement SORNA.”<sup>50</sup> From that description, it is clear that the guidelines were not intended to be substantive and create new law. The guidelines themselves declare their purpose to be interpretive. If the guidelines were intended to be substantive, the Attorney General would have seen no need for publishing the Final Order in 2011.

In reviewing the Court of Appeals for the District of Columbia Circuit factors, it is clear that the 2008 SMART guidelines should not be considered substantive rules. First, while it may be that courts later determined the 2007 Interim Rule to be unenforceable in some ways due to the Attorney General’s failure to follow APA procedures, the 2008 SMART guidelines were certainly not published with this future knowledge in mind.

The Attorney General had every reason to believe that the 2007 Interim Rule would be enforced with or without the existence of the 2008 SMART guidelines. While he may have been

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<sup>49</sup> See Office of the Att’y Gen., U.S. Dep’t of Justice, *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38,030.

<sup>50</sup> *Id.*

trying to clarify that SORNA applied retroactively, there is no indication that the Attorney General meant for the guidelines themselves to be a substantive law. If that were the case, the Attorney General would not have felt the need to publish the 2011 Final SORNA Order. Therefore, with regard to the first factor, in the absence of the 2008 SMART guidelines, the 2011 Final SORNA Order certainly makes SORNA enforceable and to "ensure the performance of duties." In other words, the guidelines are not required to make SORNA enforceable.

The second factor asks whether the "rule" in question was published in the Code for Federal Regulations (CFR). While SORNA itself is published in the CFR, the 2008 SMART guidelines are not. The third factor asks whether in publishing the rule, or in this case the guidelines, the agency specifically invoked its legislative authority. In publishing the guidelines, the Attorney General explicitly stated that the purpose was to "provide guidance and assistance to the states and other jurisdictions in incorporating the SORNA requirements." The guidelines do not explicitly state that they are intended to promulgate new substantive legislation.

The final factor asks whether or not the rule effectively amended the already existing law. The 2008 SMART guidelines did not amend the 2007 Interim Rule. The purpose of the guidelines was merely to clarify and explain the 2007 Interim Rule.

The fact that the 2007 Interim Rule faces procedural challenges now does not mean that the guidelines should be used to fill in the gaps and become the substantive SORNA law. The 2011 Final Order was presumably promulgated to do just that. The guidelines were interpretive, not substantive. Therefore, the 2008 SMART guidelines themselves should not make SORNA applicable to pre-Act offenders like appellant.

In conclusion, appellant contends that neither the 2007 Interim Rule nor the 2008 SMART guidelines make SORNA applicable to appellant as a pre-Act offender. The 2007 Interim Rule does not serve to make SORNA applicable to appellant because the Attorney General violated the APA procedural rules when he enacted it and did not have "good cause." The 2008 SMART guidelines also did not serve to make SORNA applicable to appellant because they are merely interpretive guidelines and did not constitute substantive law.

**Conclusion**

**WHEREFORE**, Appellant respectfully requests that this Honorable Court set aside and dismiss the finding of guilty for the Specification of the Additional Charge and reassess the sentence.

Respectfully Submitted,



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**CERTIFICATE OF FILING AND SERVICE**

I certify that a copy of the forgoing in the case of United States v. Newton, Crim. App. Dkt. No. 20110499, Dkt. No. 14-0415/AR, was delivered to the Court and Government Appellate Division on August 8, 2014.



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