IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

U N I T E D S T A T E S, Appellee	)	BRIEF ON BEHALF OF APPELLEE
v.	)	Crim. App. Dkt. No. 20110499
Specialist (E-4) **William E. Newton,** United States Army, Appellant	)	USCA Dkt. No. 14-0415/AR

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

Granted Issue

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 United States Army Court of Criminal Appeals (Army Court) reviewed this case pursuant to Article 66(b), Uniform Code of Military Justice (UCMJ).[1] The statutory basis for this Honorable Court's jurisdiction is Article 67(a)(3), UCMJ.[2]

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[1] UCMJ, Art. 66(b), 10 U.S.C. § 866(b).
[2] UCMJ, Art. 67(a)(3), 10 U.S.C. § 867(a)(3).

Statement of the Case

An enlisted panel sitting as a general court-martial convicted appellant, contrary to his pleas[3], of rape of a person under the age of 12, indecent conduct, indecent language[4], violating the general article, and failing to register as a sex offender[5], in violation of Articles 120 and 134, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920, 934 (2008) [Hereinafter UCMJ].[6] The panel sentenced appellant to reduction to the grade of E-1, forfeiture of all pay and allowances, confinement for 30 years, and a dishonorable discharge from the service.[7] The convening authority approved the reduction in rank, the forfeitures, and confinement for 29 years.[8]

On 23 September 2013, the Army Court affirmed appellant's conviction.[9] On 27 June 2014, this Court granted appellant's petition for review of the Army Court's decision.

Statement of Facts

On 31 October 1994, appellant, then 23 years old, was indicted in Missouri for rape of a child less than 14 years of

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[3] JA 18
[4] Dismissed post-trial due to a failure to state an offense (i.e., failure to allege the terminal element) (see JA 86).
[5] Assimilation of 18 U.S.C. § 2250(a).
[6] JA 19
[7] JA 20
[8] JA 13 (Action).
[9] JA 001-004. (United States v. Newton, 2013 WL 5402231 (Army Ct. Crim. App. September 23, 2013) (sum. disp.)).

age, a felony punishable by life imprisonment.[10] On 02 October 1995, appellant pled guilty to statutory rape and received two years' probation.[11]

On 02 October 1995 and 06 November 1995, appellant signed forms issued by the Missouri Department of Public Safety wherein he acknowledged his obligation to register as a sex offender and, in the event he "change[d] [his] residence or address ... inform the chief law enforcement official of the county who has jurisdiction over [his] new residence or address."[12] These were lifetime requirements from which appellant was never exempt, no matter where he moved.[13]

Appellant completed his initial registration on 05 December 1995.[14] He then reregistered with the State of Missouri on 24 September 1997, when he changed his address.[15] Appellant entered the Army on 23 April 1998.[16] Over the course of the next 12 years, appellant travelled in interstate commerce to Georgia, Tennessee, North Carolina, South Carolina, and Texas, but did not reregister with the State of Missouri.[17]

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[10] JA 61 (Pros. Ex. 1).
[11] JA 59-60 (Pros. Ex. 1).
[12] JA 64 (Pros. Ex. 2).
[13] JA 25, 30, 31.
[14] JA 28; JA 66 (Pros. Ex. 2).
[15] JA 28; JA 67 (Pros. Ex. 2).
[16] JA 74 (Pros. Ex. 3).
[17] JA 34.

Specific to the case at bar, on or about 01 October 2009, appellant, who was then stationed at Fort Jackson, South Carolina, received permanent change of station (PCS) orders to report to Fort Bliss, Texas.[18] Appellant drove from Fort Jackson to Fort Bliss in early November 2009, but did not register as a sex offender upon his arrival in Texas. Rather, appellant registered nine months later (on 28 July 2010), after the local police department contacted him.[19]

The Sex Offender Registration and Notification Act (SORNA)

The Sex Offender Registration and Notification Act (SORNA) became effective on 27 July 2006, over three years before appellant's PCS move. In accordance with SORNA, "A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides. . . ."[20] An offender has three business days after changing his address to register or reregister with the appropriate sex offender registry.[21] "A 'sex offense'" includes a "criminal offense that has an element involving a sexual act or sexual contact with another."[22] Appellant's 1995 conviction for statutory rape is a qualifying sex offense.[23]

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[18] Pros. Ex. 3.
[19] SJA 001; JA 48; JA 75 (Pros. Ex. 5).
[20] 18 U.S.C. § 2250(a).
[21] 42 U.S.C. § 16913(c).
[22] 42 U.S.C. § 16911(6).
[23] 42 U.S.C. § 16911(7)(I).

Congress delegated to the Attorney General of the United States the authority to make the SORNA registration requirements retroactive to pre-SORNA convictions (i.e., convictions before SORNA's 27 July 2006 effective date).[24] The Attorney General also was required to "issue guidelines and regulations to interpret and implement [SORNA]."[25]

On 28 February 2007, over two-and-a-half years before appellant's PCS move, the Attorney General exercised his option and published the 2007 Interim Rule (the "Interim Rule"), thereby making SORNA applicable to qualifying pre-Act sex offenders.[26] Under the Administrative Procedure Act (APA), the Attorney General must publish a rule 30 days before its effective date in order to give the public fair notice and an opportunity to comment.[27] However, the Attorney General suspended the comments period and implemented the Interim Rule immediately, invoking the "good cause" exception to the APA.[28] The Attorney General explained that immediate promulgation was necessary to protect the public and to resolve any uncertainty

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[24] 42 U.S.C. § 16913(d).
[25] 42 U.S.C. § 16912(b).
[26] 28 C.F.R. § 72.3 (see also "Example 2"); 72 Fed. Reg. 8894.
[27] 5 U.S.C. § 553(b),(c).
[28] 5 U.S.C. § 553(b)(3)(B).

regarding retroactivity.[29] Nevertheless, the comment period remained open until 30 April 2007.[30]

On 30 May 2007, the Attorney General published proposed guidelines from the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (the "Proposed SMART Guidelines"). The Attorney General stated that the purpose of the Proposed SMART Guidelines was "to interpret and implement the Sex Offender Registration and Notification Act."[31] He also stated that he published the Proposed SMART Guidelines pursuant to the "statutory directive to the Attorney General in section 112(b) of SORNA to issue guidelines to interpret and implement SORNA."[32] Regarding retroactivity, the Attorney General stated, "SORNA's requirements apply to all sex offenders, including those whose convictions predate the enactment of the Act."[33] The public comment period for the Proposed SMART Guidelines lasted between the 30 May 2007 publication date and 01 August 2007.[34]

On 02 July 2008, the Attorney General published and made immediately effective the Final SMART Guidelines.[35] The summary section explains, "The United States Department of Justice is

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[29] 72 Fed. Reg. 8896-8897.
[30] 75 Fed. Reg. 81,850.
[31] 72 Fed. Reg. 30,210.
[32] 72 Fed. Reg. 30,210, 30,212 (citing 42 U.S.C. § 16912(b)).
[33] 72 Fed. Reg. 30,212.
[34] 72 Fed. Reg. 30,210.
[35] 73 Fed. Reg. 38,030.

publishing Final Guidelines to interpret and implement the Sex Offender Registration and Notification Act."[36] The Final SMART Guidelines are, for all practical purposes, identical to the Proposed SMART Guidelines, notwithstanding the "Summary of Comments on the Proposed Guidelines" that prefaces the Final Guidelines.[37]

On 29 December 2010, the Attorney General "finaliz[ed]" the Interim Rule (the "Final Rule"). Without conceding that the Interim Rule or the SMART Guidelines were invalid, the attorney general asserted that his "aim[]" for issuing the Final Rule was "to eliminate any possible uncertainty or dispute concerning the scope of SORNA's application by finalizing the interim rule."[38]

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[36] 73 Fed. Reg. 38,030.
[37] 73 Fed. Reg. 38,030-38,044.
[38] 75 Fed. Reg. 81,850.

Timeline of Events

Date	Event	Notes
02 Oct 1995	Appellant pleads guilty to statutory rape	
27 July 2006	SORNA becomes effective	AG requirement to publish regulations: § 112(b), codified at 42 U.S.C. § 16912(b) Retroactive option: § 113(d), codified at 42 U.S.C. § 16913(d)
28 Feb 2007	Interim Rule is published	72 Fed. Reg. 8894 - 8897; 28 C.F.R. § 72.3
30 May 2007	Proposed SMART guidelines are published	72 Fed. Reg. 30,210 - 30,234
02 July 2008	Final SMART Guidelines are published	73 Fed. Reg. 38,030 - 38,070
Nov 2009	Appellant moves from SC to TX without registering within 3 days of arrival	Violates 18 U.S.C. § 2250(a)
29 Dec 2010	Final Rule is published	75 Fed. Reg. 81,849 - 81,853

Summary of Argument

The SMART Guidelines implemented SORNA's retroactive provisions. As a result, appellant was properly convicted for failing to register within three days of moving in interstate commerce. Five circuits have ruled that the SMART Guidelines made SORNA retroactive, and no circuit has ruled otherwise.

Administrative rules that implement a statute are substantive and have the force of law. Conversely, interpretive

rules merely expound upon policy or advise the public. The SMART Guidelines repeatedly state that their purpose is to implement SORNA. Nowhere do the SMART Guidelines state an intention merely to explain or advise with regard to a policy decision. Moreover, rules are substantive if an agency promulgates them based on a congressional requirement. Not only was the Attorney General required to promulgate the SMART Guidelines in accordance with SORNA, he cited to this requirement in the Interim Rule and in both the Proposed and Final SMART Guidelines.

The SMART Guidelines also are substantive because they create myriad new duties and were published in accordance with the APA. Moreover, the SMART Guidelines were not displaced by the Final Rule; rather, the Attorney General published the Final Rule to eliminate any doubt as to SORNA's retroactive requirements.

Next, the Interim Rule also applied to appellant during the relevant period. The Attorney General had good cause to suspend the notice and comment period when he published the Interim Rule, citing the need for certainty and the public risk associated with delay. The suspension of the notice and comment period was announced in accordance with the plain language of the APA.

However, even if the Attorney General did not have good cause to suspend the notice and comment period, appellant suffered no prejudice as a result of the error. Appellant's conviction came well after the Attorney General considered comments regarding SORNA's retroactive provisions, which did not change as a result of those comments. In addition, appellant proffers no evidence that he would have made an argument not already contemplated by the Attorney General, or that the outcome of the administrative process would have been different had the Attorney General allowed for a notice and comment period before publishing the Interim Rule.

Finally, in the event this Court finds that SORNA did not apply to appellant during the relevant period, this Court should not grant appellant sentence relief.

Argument

1) Because of the SMART Guidelines, SORNA applied to appellant during the relevant period.

The SMART Guidelines implemented SORNA's retroactive provisions. Although appellant argues that the SMART Guidelines are "merely interpretive,"[39] each circuit that has considered the issue has ruled that the SMART Guidelines are substantive and have the force of law. Not one circuit has ruled otherwise.[40]

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[39] Appellant's Br. 17.

[40] The First, Second, Sixth, and Ninth Circuits each have ruled that the SMART Guidelines made SORNA retroactive. See United

a. The SMART Guidelines are substantive and have the force of law because they implement the SORNA statute.

"Substantive rules . . . create new law, right[s], or duties. Substantive rules *implement* the statute."[41] Because substantive rules implement law, they have the force of law. Said the Supreme Court in Chrysler Corp. v. Brown,

> In order for a regulation to have the "force and effect of law," it must have certain substantive characteristics and be the product of certain procedural requisites. The central distinction among agency regulations found in the APA is that between "substantive rules" on the one hand and "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice" on the other.[42]

In a footnote found in Chrysler Corp., the Supreme Court stated that in past decisions "we have given some weight to the Attorney General's Manual on the Administrative Procedure Act (1947)," in order to distinguish between a substantive and an

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States v. Whitlow, 714 F.3d 41, 46 (1st Cir. 2013); United States v. Lott, 750 F.3d 214, 216-219 (2nd Cir. 2014); United States v. Stevenson, 676 F.3d 557, 563 (6th Cir. 2012), United States v. Utesch, 596 F.3d 302, 310-11 (6th Cir. 2010); and United States v. Valverde, 628 F.3d 1159, 1168-1169 (9th Cir. 2010). After ruling in United States v. Gould, 568 F.3d 459, 470 (4th Cir. 2009), that the Interim Rule comment period was waived for good cause, the Fourth Circuit in Kennedy v. Allera, 612 F.3d 261, 267 (4th Cir. 2010), treated the SMART Guidelines as similarly valid. However, Kennedy did not specifically address whether the SMART Guidelines were substantive.

[41] Lott, 750 F.3d at 217 (quoting N.Y. State Elec. & Gas corp. v. Saranac Power Partners, L.P., 267 F.3d 128, 131 (2nd Cir. 2001), and Chrysler Corp. v. Brown, 441 U.S. 281, 302-303, 99 S.Ct. 1705 (1979) (emphasis added in Lott) (internal quotations omitted).

[42] Chrysler Corp., 441 U.S. at 302, (citing 5 U.S.C. § 553).

interpretive rule.[43] Quoting the Manual, the Supreme Court continued:

> Interpretive rules are issued by an agency *to advise the public* of the agency's construction of the statutes and rules which it administers. General statements of policy are statements issued by an agency *to advise the public* prospectively of the manner in which the agency proposes to exercise a discretionary power.[44]

Or, as the Manual itself defines the term:

> *Interpretative rule* -- rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.[45]

The Supreme Court added, "The Manual refers to substantive rules as rules that 'implement' the statute."[46]

Another factor in the analysis as to whether a regulation is substantive or interpretive is if the regulation was issued in accordance with a Congressional mandate. "Legislative, or substantive, regulations are 'issued by an agency pursuant to statutory authority and . . . implement the statute, as, for example, the proxy rules issued by the Securities and Exchange Commission. . . . Such rules have the force and effect of

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[43] Id., n.31.
[44] Id., n.31 (quoting The Attorney General's Manual on the Administrative Procedure Act (1947) at 30 (internal quotation marks omitted) (emphasis added).
[45] Attorney General's Manual on the Administrative Procedure Act (1947) at 30.
[46] Chrysler Corp., 441 U.S. at 302, n.31.

law.'"[47] "When Congress delegates to an agency the power to promulgate rules, 'the [agency] adopts regulations with legislative effect.' "[48]

The Attorney General issued the SMART Guidelines not to "advise the public" or make a general statement on policy, but to implement SORNA. A plain reading of the SMART Guidelines demonstrates this. In addition, the SMART Guidelines were issued pursuant to a congressional mandate, specifically 42 U.S.C. § 16912(b). For these reasons, the SMART Guidelines are substantive and have the force of law.

Earlier this year, the Second Circuit upheld the retroactivity of SORNA in United States v. Lott. Like appellant, Lott was convicted of failing to register for a pre-Act crime during the period between the promulgation of the Interim Rule and the Final Rule.[49] Also like appellant, Lott argued that the SMART Guidelines were interpretive rather than substantive.[50]

In affirming Lott's conviction, the Second Circuit held that the SMART Guidelines were substantive and that they properly implemented SORNA's retroactive provisions:

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[47] Id., at 302-303 (quoting Batterton v. Francis, 432 U.S. 416, 425, n.9, 97 S.Ct. 2399 (1977)).
[48] United States v. Chestman, 947 F.2d 551, 557-58 (2d Cir. 1991) (quoting Batterton, 432 U.S. at 425-26).
[49] Lott, 750 F.3d at 216-217.
[50] Id. at 217.

> The SMART Guidelines were an act of substantive rulemaking. The notice proposing the guidelines specifically stated: 'These proposed guidelines carry out a statutory directive to the Attorney General in section 112(b) of SORNA (42 U.S.C. § 16912(b)) to issue guidelines to interpret and implement SORNA.[51]

In § 16912(b), Congress required the Attorney General to issue guidelines implementing SORNA as a whole: "The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter." Per Chrysler Corp., rules issued pursuant to statutory authority are substantive and have the force of law.[52] Accordingly, Lott held that the Attorney General fulfilled his obligation under § 16912(b) "to issue substantive rules" when he published the SMART Guidelines.[53]

The Attorney General stated expressly in the text of the Proposed SMART Guidelines that, with their publication, he had fulfilled his legal obligation to implement SORNA:

> These proposed guidelines carry out a statutory directive to the Attorney General in section 112(b) of SORNA [42 U.S.C. § 16912(b)] to issue guidelines to interpret and implement SORNA.[54]

Virtually the same language is found in the Final SMART Guidelines:

> The adoption of these guidelines carry out a statutory directive to the Attorney General in section 112(b) of

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[51] Id. at 217 (quoting 72 Fed. Reg. 30,210).
[52] Chrysler Corp., 441 U.S. at 302-303.
[53] Id. at 218.
[54] 72 Fed. Reg. 30,210.

> SORNA [42 U.S.C. § 16912(b)] to issue guidelines to interpret and implement SORNA.[55]

The Lott court found this express citation to be significant: "By specifying that the Attorney General has the power to 'implement' SORNA, section 112(b) plainly gives the Attorney General the authority to issue substantive rules."[56]

Unquestionably, the SMART Guidelines implement SORNA - the Attorney General said so no fewer than five times on the very first page of the Proposed SMART Guidelines. See, for example, the summary:

> **SUMMARY:** The United States Department of Justice is publishing Proposed Guidelines to interpret and implement the Sex Offender Registration and Notification Act.[57]

See also the Final SMART Guidelines:

> **SUMMARY:** The United States Department of Justice is publishing Final Guidelines to interpret and implement the Sex Offender Registration and Notification Act.[58]

Again, rules that implement law are substantive. The fact that the SMART Guidelines may also interpret SORNA does not eclipse, nullify, or eliminate their substantive function. No precedent establishes such a concept. "These 'comprehensive' guidelines . . . clearly have (at least) two purposes: (1) to provide guidance and assistance to jurisdictions; [and] (2) to impose

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[55] 73 Fed. Reg. 38,044.
[56] Lott, 750 F.3d at 218 (citing 42 U.S.C. § 16912(b)).
[57] 72 Fed. Reg. 30,210.
[58] 73 Fed. Reg. 38,030.

requirements on sex offenders whose convictions predate SORNA by specifying that SORNA applies retroactively."[59]

The Interim Rule and the SMART Guidelines work in tandem. The purpose of the Interim Rule was to announce SORNA's retroactive applicability, while the SMART Guidelines implemented retroactivity by way of substantive rules. The summary of the Interim Rule explains:

> The Department of Justice is publishing this interim rule to specify that the requirements of the Sex Offender Registration and Notification Act, title I of Public Law 109-248, apply to sex offenders convicted of the offense for which registration is required before the enactment of that Act. . . .[60]

Further along, the Interim Rule contemplates the eventual issuance of guidelines that would actually implement retroactivity (i.e., the SMART Guidelines):

> The purpose of this interim rule is not to address the full range of matters that are within the Attorney General's authority under section 113(d), much less to carry out the direction to the Attorney General in section 112(b) to issue guidelines and regulations to interpret and implement SORNA as a whole. The Attorney General will hereafter issue general guidelines to provide guidance and assistance to the states and other covered jurisdictions in implementing

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[59] United States v. Ross, 778 F.Supp.2d 13, 22 (D.D.C. 2011) (quoting United States v. Utesch, 596 F.3d 302, 310 (6th Cir. 2010)).

[60] 72 Fed. Reg. 8894. The Code of Federal Regulations (28 C.F.R. 72.1) also uses the word "specify" with respect to the of the Interim Rule's purpose: "This part specifies the applicability of the requirements of the Sex Offender Registration and Notification Act to sex offenders convicted prior to the enactment of that Act."

> SORNA ... and may also issue additional regulations as warranted.[61]

If the Attorney General had not intended for the SMART Guidelines to be substantive, he would have stated that their purpose was to advise the public or make a general statement with respect to policy.[62] Instead, the Attorney General announced as far back as the Interim Rule that he intended to issue rules to guide jurisdictions with the implementation of SORNA. Such rules are substantive and have the force of law.

Like the Second Circuit in Lott, the Sixth Circuit in United States v. Stevenson held that the SMART Guidelines were substantive because they "implement the statute," and that the Guidelines validated SORNA's retroactive provisions independent of the Interim Rule.[63] Citing to the plain language of § 16912(b), Stevenson also states that "[b]y its own terms, § 16912(b) authorizes the Attorney General to make both interpretative and substantive rules because it unambiguously permits the Attorney General to make rules regarding both the interpretation *and* implementation of the sections therein."[64] Moreover, since "Section 16912(b) also unambiguously instructs

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[61] 72 Fed. Reg. 8896.
[62] See Chrysler Corp., 441 U.S. at 302 (citing Attorney General's Manual on the Administrative Procedure Act (1947) at 30)).
[63] Stevenson, 676 F.3d at 562, 563, 564 (citing 72 Fed. Reg. 30,210, 30,212).
[64] Id. Also, "Section 16912(b) unambiguously gives the Attorney General to make substantive rules on how to implement SORNA."

the Attorney General to make the necessary regulations to 'implement this subchapter'" and "§ 16913(d) [the SORNA retroactive option] indisputably falls within that subchapter," the SMART Guidelines properly implemented SORNA's retroactive provisions.[65] "For all these reasons, the SMART guidelines can and do have the force and effect of law, and they establish that SORNA became retroactive as of August 1, 2008 [i.e., the date the Final SMART Guidelines were published]."[66]

Appellant uses the four-pronged test from American Mining Congress v. Mine Safety & Health Admin., a D.C. Circuit case, to show that the SMART guidelines are merely interpretive.[67] Although at first blush persuasive, the D.C. Circuit's analysis is not binding on this Court. But even if it was, the SMART Guidelines easily comport with the third prong of the D.C. Circuit's test because the Justice Department "expressly invoked its general legislative authority" within the text of the SMART Guidelines. As stated on the very first page of the Final SMART Guidelines, "Section 112(b) of SORNA (42 U.S.C. 16912(b)) directs the Attorney General to issue guidelines to interpret

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[65] Id. (citing 42 U.S.C. § 16912(b)).
[66] Id.
[67] Appellant's Br. 18 (citing American Mining Congress v. Mine Safety & Health Admin., 995 F.2d 1106, 1109 (D.C. Cir. 1993).

and implement SORNA."[68] As the D.C. Circuit stated in American Mining Congress, "[w]e have said that a rule has such force [i.e., the force of law] only if Congress has delegated legislative power to the agency and if the agency intended to exercise that power in promulgating the rule."[69] Again, in 42 U.S.C. 16912(b) Congress delegated specific legislative power to the Attorney General to implement SORNA. Therefore, according to the analysis found in American Mining Congress, the SMART Guidelines are substantive.

Although the D.C. Circuit has never specifically ruled as to whether the SMART Guidelines are substantive, in 2011 the District of D.C. held in United States v. Ross that they were: "These procedurally valid final SMART guidelines complied with the APA and carry the force of law."[70] Three years later, the District of D.C.'s ruling still stands.

b. The SMART Guidelines are substantive and have the force of law because they create new duties.

A plain reading of the SMART Guidelines also shows that their purpose was to create new duties. Rules that create new duties are substantive and, by extension, implement law.[71]

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[68] 73 Fed. Reg. 38,030; see also the Proposed SMART Guidelines, 72 Fed. Reg. 30,210, wherein the Attorney General also expressly invokes his general legislative authority.
[69] American Mining Congress, 995 F.2d at 1109.
[70] United States v. Ross, 778 F.Supp.2d 13, 21-22 (D.D.C. 2011) (internal quotations omitted).
[71] Lott, 750 F.3d at 217; Chrysler Corp., 441 U.S. at 302-303.

For example, the SMART Guidelines more fully explain what is meant by "a conviction," and that a jurisdiction must require the registration of anyone who "remains subject to penal consequences based on the conviction, however it may be styled."[72]

To cite another example, the SMART Guidelines announce the supplemental information required by the Attorney General (but not by SORNA) that a jurisdiction must obtain and keep in order to "substantial[ly] implement[]" the Act - e.g., "Internet Identifiers and Addresses"; "Telephone Numbers"; purported or false social security numbers used by an offender; "other residence information" in the event an offender does not have a fixed abode; "Temporary Lodging Information"; "Travel and Immigration Documents"; "Other Employment Information," such as professional licenses or off-site work locations; "watercraft and aircraft" owned or operated by a sex offender, including all information pertaining to where a sex offender "habitually park[s], dock[s] or otherwise [keeps]" his vehicle; and "Date of Birth".[73]

Also, whereas SORNA states generally that a jurisdiction will "make available on the Internet . . . all information about each sex offender in the registry," the SMART Guidelines

[72] 73 Fed. Reg. 38,050.
[73] 73 Fed. Reg. 38,054-38,057.

announce the specific pieces of information a jurisdiction must make publicly available.[74]

Because the SORNA Guidelines create myriad new duties, they are substantive.

c. The SMART Guidelines are substantive and have the force of law because they were published in accordance with the APA.

Appellant asserts that the SMART Guidelines cannot be substantive because "[t]he 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."[75] However, this is not the proper standard by which to determine whether a rule is substantive and implements law.

SORNA's retroactive provisions became law as soon as the Attorney General fulfilled the requirements of the APA. Said the First Circuit in United States v. Whitlow, "'the essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of the final plan.'"[76] Whitlow held that the SMART Guidelines have the force of law since they were promulgated after an APA-compliant notice and comment period, the results of which were detailed extensively

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[74] Compare 42 U.S.C. § 16918 (§ 118) to 73 Fed. Reg. 38,058.
[75] Appellant's Br. 19.
[76] Whitlow, 714 F.3d at 47 (citing Natural Res. Def. Council, Inc. v. EPA, 824 F.2d 1258, 1283 (1st Cir.1987); Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174, 127 S.Ct. 2339 (2007)) ("The object, in short, is one of fair notice.")).

in the Final SMART Guidelines.[77] Therefore, "[g]iven that the notice of proposed rulemaking specifically discussed retroactivity . . . the SMART Guidelines were intended to create a comprehensive regime that could supplement or displace the Interim Rule. . . ."[78]

The Ninth Circuit in United States v. Valverde also held that retroactivity became effective upon promulgation of the Final SMART Guidelines since, "the effective date of the retroactivity provision is the date on which that provision fulfilled the requirements of the APA."[79] Similarly, the Sixth Circuit in Stevenson held that because the Proposed SMART Guidelines provided an adequate period for public comment on SORNA's retroactive provisions, the Final Guidelines have the force of law.[80]

d. The Final Rule does not displace the SMART Guidelines.

Appellant also asserts that if the SMART Guidelines were intended to be substantive law, "the Attorney General would not have felt the need to publish the 2011 Final SORNA Order."[81] However, no authority (to include the Final Rule itself)

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[77] 73 Fed. Reg. 38,030-38,044.
[78] Whitlow, 714 F.3d 41, 47 (1st Cir. 2013).
[79] United States v. Valverde, 628 F.3d 1159, 1161-1162 (9th Cir. 2010). See also United States v. Mattix, 694 F.3d 1082, 1083-1084 (9th Cir. 2012) (analysis of Final SMART Guidelines in Valverde is not mere dicta and is binding).
[80] Stevenson, 676 F.3d. at 565.
[81] Appellant's Br. 20.

suggests that the Final Rule was intended to replace the SMART Guidelines.

The Final Rule plainly states that the SMART Guidelines also established SORNA's retroactive provisions, and that the purpose of the Final Rule was to eliminate any lingering doubt regarding retroactivity:

> The [Final SMART] Guidelines, like the interim rule, state that SORNA applies to all sex offenders regardless of when they were convicted, and they provide guidance to jurisdictions regarding the registration of sex offenders whose convictions predate the enactment of SORNA. . . .
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> In *United States* v. *Utesch*, 596 F.3d 302, 310-11 (6th Cir. 2010), the United States Court of Appeals for the Sixth Circuit held that the SORNA Guidelines are, independently of the interim rule, a valid final rule providing that SORNA applies to all sex offenders, including those whose convictions predate SORNA. This rulemaking reflects no disagreement with that conclusion *but rather aims to eliminate any possible uncertainty or dispute concerning the scope of SORNA's application by finalizing the interim rule*.[82]

Lott also addresses appellant's argument by citing to the Final Rule: "In August 2010, the Attorney General published the Final Rule to 'eliminate any possible uncertainty or dispute concerning the scope of SORNA's application,' without conceding that the Interim Rule or the SMART Guidelines were invalid."[83]

Like the Second Circuit in Lott, the Sixth Circuit in Stevenson also held that the Attorney General did not concede

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[82] 75 Fed. Reg. 81,850 (emphasis added).

[83] Lott, 750 F.3d at 218 (quoting 75 Fed. Reg. at 81,850 (i.e., the Final Rule)).

that the SMART Guidelines or the Interim Rule were invalid with the issuance of the Final Rule. Instead, the Attorney General "finalized the Interim Rule to dispel any doubts regarding the retroactivity of SORNA."[84]

In sum, the SMART Guidelines are substantive and, as such, have the force of law. This Court therefore should affirm appellant's conviction for failing to register in accordance with 18 U.S.C. § 2250.

2) Because of the Interim Rule, SORNA applied to appellant during the relevant period.

Standard of Review

In accordance with the APA, "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[85]

An agency decision is arbitrary or capricious if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible

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[84] Stevenson, 676 F.3d at 560 (citing 75 Fed. Reg. 81,849, 81,850) (internal quotes omitted), 564 n.6 ("The final rule makes clear that the Attorney General . . . was merely clarifying his prior position to expel all doubt.").
[85] 5 U.S.C. § 706(2)(A)

that it could not be ascribed to a difference in view or the product of agency expertise."[86]

Said the Eleventh Circuit, "[t]he good cause exception [to the APA] should be narrowly construed and only reluctantly countenanced."[87] Moreover, "a court is not to substitute its judgment for that of the agency and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned."[88]

In the event a reviewing court determines that an agency committed an error in its decision-making, the APA requires the court also to determine whether the complainant was prejudiced by the error. "[T]he court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."[89]

Law and Argument

The Supreme Court had the opportunity in Reynolds v. United States to invalidate the Interim Rule, but declined to do so.[90] Instead, the Supreme Court merely held that SORNA's retroactive

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[86] Motor Vehicles Mfrs. Ass'n v. State Farm, 463 U.S. 29, 43 (1983).
[87] United States v. Dean, 604 F.3d 1275, 1279 (11th Cir. 2010) (quoting Jifry v. F.A.A., 370 F.3d 1174, 1179 (D.C. Cir 2004).
[88] Id. (quoting Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974) (internal quotations omitted)).
[89] 5 U.S.C. § 706.
[90] Reynolds v. United States, 566 U.S. ___, 132 S.Ct. 975, 984 (2012). Hereinafter, "Reynolds" will be used to refer to United States v. Reynolds, the case on remand).

provisions were not automatic, and that the Attorney General had to take appropriate action in order to make SORNA retroactive.[91] It was left to the lower courts to determine whether the Attorney General had appropriately taken such action.

The Attorney General initially believed that SORNA was per se retroactive.[92] However, as he stated in the Proposed SMART Guidelines, he issued the Interim Rule to "mak[e] it indisputably clear that SORNA applies to all sex offenders (as the Act defines that term) regardless of when they were convicted. The Attorney General exercise[d] his authority under section 113(d) of SORNA to specify this scope of application for SORNA, regardless of whether SORNA would apply with such scope absent [the Interim Rule]. . . ."[93]

There is a split between the circuits as to whether the Attorney General correctly promulgated the Interim Rule. The Fourth, Seventh, and Eleventh Circuits each have held the Attorney General had good cause to suspend the notice and comment period,[94] while the Third and Sixth Circuits have held

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[91] Id.
[92] 72 Fed. Reg. 8896.
[93] 72 Fed. Reg. 8896.
[94] See United States v. Gould, 568 F.3d 459 (4th Cir. 2009); United States v. Dixon, 551 F. 3d 578, 582 (7th Cir. 2008) (rev'd on other grounds by Carr v. United States, 560 U.S. 438 (2010)); United States v. Dean, 604 F.3d 1275 (11th Cir. 2010).

that he did not.[95] The Fifth Circuit also held that the Attorney General did not have good cause, although any error ultimately was harmless.[96]

a. Because the Attorney General had good cause to suspend the notice and comment period, the Interim Rule was validly promulgated.

In accordance with the APA, an agency promulgating a new rule must provide a notice and comment period of at least 30 days before the rule becomes effective.[97] However, the agency may "for good cause" suspend the notice and comment period.[98] The Attorney General did just this when he promulgated the Interim Rule. Specifically, the Attorney General sought to: (1) "eliminate any possible uncertainty about the applicability of the Act's requirements"; and (2) enhance public safety:

> The resulting practical dangers include the commission of additional sexual assaults and child sexual abuse or exploitation offenses by sex offenders that could have been prevented had local authorities and the community been aware of their presence, in addition to greater difficulty in apprehending perpetrators who have not been registered and tracked as provided by SORNA.[99]

As previously stated, several circuits have held that the Attorney General had good cause for suspending the notice and

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[95] United States v. Reynolds, 710 F.3d 498, 511 (3rd Cir. 2013); United States v. Utesch, 596 F.3d 302 (6th Cir. 2010).
[96] United States v. Johnson, 632 F.3d 912, 927-933 (5th Cir. 2011).
[97] 5 U.S.C. § 553(b),(c).
[98] 5 U.S.C. § 553(d)(3).
[99] 72 Fed. Reg. 8896-8897.

comment period. However, other circuits, most notably the Third Circuit in Reynolds, have held that the Attorney General did not have good cause. Reynolds found unavailing the Attorney General's rationale for suspending the notice and comment period. First, said Reynolds, "the desire to eliminate uncertainty, by itself, cannot constitute good cause," since "some uncertainty follows the enactment of any law that provides an agency with administrative responsibility."[100] Next, Reynolds found that "[the] public safety rationale cannot constitute a reasoned basis for good cause because it is nothing more than a rewording of the statutory purpose Congress provided in the text of SORNA."[101] Instead, the Attorney General needed to indicate "something specific that illustrates a particular harm that will be caused by the delay required for notice and comment."[102]

Contrary to the Third Circuit's holding in Reynolds, the Attorney General complied with the plain language of the APA when he suspended the notice and comment period. As the APA requires, the Attorney General published a "brief statement of reasons" explaining that delay would be "contrary to the public interest."[103]

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[100] Reynolds, 710 F.3d at 511.
[101] Id. at 512.
[102] Id. at 513.
[103] 5 U.S.C. § 553(b)(3)(B); see 72 Fed. Reg. 8896-8897.

Reynolds relies on a Ninth Circuit case, Hawaii Helicopter Operators Association v. F.A.A., to support its assertion that the Attorney General's statement of reasons should have included "some statement of facts or circumstances that justifies the existence of good cause."[104] To be sure, the F.A.A. suspension notice at issue in Hawaii Helicopter made extensive reference to specific incidents involving helicopters, while the notice accompanying the Interim Rule cited no qualifying crimes committed by unregistered sex offenders.[105, 106] However, the APA does not require any such specificity - only "a brief statement of reasons."[107]

Said the Eleventh Circuit in Dean (quoting the D.C. Circuit), "the [good cause] exception excuses notice and comment in emergency situations, or where delay could result in serious harm."[108] Here, the Attorney General expressly stated in his suspension notice that delay could result in serious harm:

> Delay in the implementation of this rule would impede the effective registration of [pre-Act] sex offenders and would impair immediate efforts to protect the public from sex offenders who fail to register through

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[104] Reynolds, 710 F.3d at 512 (citing Haw. Helicopter Operators Ass'n v. F.A.A., 51 F.3d 212, 214 (9th Cir. 1995).
[105] Haw. Helicopters, 710 F.3d at 214 (citing 59 Fed. Reg. 49,138, 49,145).
[106] The SORNA statute itself, under its "Declaration of Purpose," listed no fewer than seventeen actual victims of sex crimes, murder, and/or abduction. See 42 U.S.C. § 16901.
[107] 5 U.S.C. § 553(b)(3)(B).
[108] Dean, 604 F.3d at 1281 (quoting Jifry v. F.A.A., 370 F.3d 1174, 1179 (D.C. Cir. 2004) (internal citations omitted)).

> prosecution and the imposition of criminal sanctions. The resulting practical dangers include the commission of additional sexual assaults and child sexual abuse or exploitation offenses by sex offenders that could have been prevented had local authorities and the community been aware of their presence, in addition to greater difficulty in apprehending perpetrators who have not been registered and tracked as provided by SORNA.[109]

Because the Attorney General explained in "a brief statement of reasons" why delay would be "contrary to the public interest,"[110] the Attorney General's suspension of the notice and comment period was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[111] Rather, it was in full compliance with APA.

The public safety rationale cited by the Attorney General was neither capricious nor arbitrary. Said the Fourth Circuit in Gould, "[d]elaying implementation of the regulation to accommodate notice and comment could reasonably be found to put the public safety at greater risk."[112] Quoting Reynolds, appellant argues that "[if] the mere assertion that . . . 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."[113] But as Dean noted, "[t]his is true for any rule that bypasses the notice and comment

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[109] 72 Fed. Reg. 8896-8897.
[110] 5 U.S.C. § 553(b)(3)(B).
[111] 5 U.S.C. § 706(2)(A).
[112] Gould, 568 F.3d at 470.
[113] Appellant's Br. 16 (quoting Reynolds, 710 F.3d at 512).

provision."[114] If Reynolds is correct, an agency could never suspend notice based on public interest if it could not cite the risk to public safety created by delay.

It must also be noted that the Reynolds court, by making demands not required by the APA, comes close to substituting impermissibly its judgment for that of the agency.

The SORNA statute is not merely duplicative of state laws. Rather, SORNA requires the registration of offenders who may not have had to register under the laws of the state in which they reside.[115] See, e.g., 42 U.S.C. § 16911, which provides for "expansion of sex offender definition[s] and expanded inclusion of child predators." See also, 42 U.S.C. § 16911(5)(A)(ii), (7)(A)-(B), wherein a "child predator" convicted of nonparental kidnapping or false imprisonment of a minor must register, even if the crime in question involved no sexual acts or contact. Hence, "[t]here was a need for legal certainty about SORNA's 'retroactive' application. . . ."[116]

b. Even if the Attorney General did not have good cause to suspend the notice and comment period, appellant suffered no prejudice.

In the event this Court finds that the Attorney General did not have good cause to suspend the notice and comment period,

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[114] Dean, 604 F.3d at 1282.
[115] Dean, 604 F.3d at 1281 (citing 42 U.S.C. § 16941).
[116] Id. at 1280 (quoting Gould, 568 F.3d at 471).

then this Court should also find that appellant was not prejudiced.[117]

The Third Circuit found it significant that "[t]here was never an opportunity for Reynolds - or any other interested party - to provide meaningful comments relating to the substance of the [interim] rule."[118] This may be true for Reynolds, who moved in interstate commerce on 16 September 2007,[119] approximately nine-and-a-half months *before* the Attorney General considered in the Final SMART Guidelines comments on SORNA's retroactive provisions.[120] However, it is untrue for the appellant here, who, like the appellant in United States v. Johnson, moved in interstate commerce well *after* the Attorney General considered and published comments regarding retroactivity.[121] The timeline is important since SORNA's retroactive application remained unchanged even after comments were received:

> [T]hat the final rulemaking process with full APA comment [i.e., the Final SMART Guidelines] did not change the Attorney General's decision cannot be ignored. . . . The comments received on retroactivity did not sway the Attorney General. Rather, the position of the earlier interim [sic] final rule was incorporated into the final publication of the full [SMART] guidelines promulgated in July 2008.[122]

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[117] See 5 U.S.C. § 706
[118] Reynolds, 710 F.3d at 520.
[119] Id., at 503.
[120] 73 Fed. Reg. 38,030 (published on 02 July 2008).
[121] SJA 001.
[122] Johnson, 632 F.3d at 932.

Because the retroactive provisions did not change between the issuance of the Interim Rule and the Final SMART Guidelines (or, for that matter, between the issuance of the Interim Rule and the Final Rule), appellant could not have suffered any prejudice.

In Johnson, the Firth Circuit held that the Attorney General did not properly invoke the good cause exception to the notice and comment period. However, for several reasons relevant to the instant case, the Fifth Circuit also ruled that Johnson suffered no prejudice. First, like appellant, Johnson's failure to register came well after the date on which the thirty-day notice period would have ended had the Attorney General made provisions for one.[123] Despite the lack of a pre-promulgation comment period, the Johnson court found that the preamble to the Interim Rule

> thoroughly engage[d] the issues and challenges inherent in the regulation. . . . [T]he Attorney General was able to address objections in the interim rulemaking itself. . . . [He] considered those arguments [against retroactivity] and responded to them in his preamble to the interim rule. . . .[124]

The court continued,

> Thus, the error in failing to solicit public comment before issuing the rule was not prejudicial because the Attorney General nevertheless considered the arguments Johnson has asserted and responded to those

[123] Id. at 930.
[124] Id. at 931-932.

> arguments during the interim rulemaking. There is no suggestion that, if given the opportunity to comment, Johnson would have presented an argument the Attorney General did not consider in issuing the interim rule.[125]

Like Johnson, there is no evidence that appellant would have made an argument not already considered by the Attorney General in the preamble to the Interim Rule. Indeed, the Interim Rule addressed both of appellant's arguments: (1) the applicability of the good cause exception;[126] and (2) the eventual issuance of guidelines, as per congressional directive, to implement what the Interim Rule specified.[127] The Fifth Circuit also noted that "Johnson neither proposes comments he would have made during a comment period nor did he choose to involve himself in the post-promulgation comment period."[128] Similarly, appellant's "lack of involvement in all stages of administrative decision-making points to the conclusion that [he] was not practically harmed by the Attorney General's APA failings."[129] Also like appellant, "Johnson makes no showing that the outcome of the process would have differed had notice been at its meticulous best."[130]

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[125] Id. at 932.
[126] 72 Fed. Reg. 8897.
[127] 72 Fed. Reg. 8896.
[128] Johnson, 632 F.3d at 933.
[129] Id.
[130] Id. (internal quotation omitted).

3) Even if this court dismisses The Specification of The Additional Charge, this Court may affirm the approved sentence pursuant to Sales and Winckelmann.

Law

If a military court is convinced that, absent any error, "the accused's sentence would have been at least of a certain magnitude," then the court "need not order a rehearing on sentence, but instead may itself reassess the sentence."[131] In the event this Court determines that the Additional Charge must be dismissed, this Court should find that appellant is not entitled to any sentence relief and should affirm his conviction on the remaining charges.

In determining whether to reassess appellant's sentence, this Court should thoroughly analyze "the totality of the circumstances."[132] When doing so, the following factors are significant: (1) whether there are changes in the penalty landscape; (2) whether appellant was sentenced by members or by a military judge alone; (3) whether the nature of the remaining offenses capture the gravamen of the criminal conduct included within the original offenses; and (4) "[w]hether the remaining offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to

[131] United States v. Sales, 22 M.J. 305, 307 (C.M.A. 1986).
[132] United States v. Winckelmann, 73 M.J. 11 (C.A.A.F. 2013).

reliably determine what sentence would have been imposed at trial."[133]

First, the "penalty landscape" would not change with the dismissal of the Additional Charge. Appellant also was convicted of rape of a child less than 12 years of age and indecent conduct involving his daughter.[134] The maximum punishment for rape of a child is death,[135] and the maximum punishment for indecent conduct is 5 years' confinement and a dishonorable discharge.[136] However, the maximum punishment for violating 18 U.S.C. § 2250 is ten years' confinement.[137] Despite facing death, appellant received from the panel 30 years' confinement and a dishonorable discharge.

It is important to note that, in accordance with Rule for Court-Martial (R.C.M.) 1001(a)(3)(A), the government put forth evidence of prior convictions of the accused. In addition to the 1995 conviction for statutory rape discussed at length herein, the panel also learned that, in 2008, appellant pled guilty at a Special Court-Martial to adultery, sodomy, and wrongfully fraternizing with trainees in violation of a lawful

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[133] Id. at 15-16.
[134] JA 85.
[135] MCM, pt. IV, para. 45.f.(1).
[136] MCM, pt. IV, para. 45.f.(6).
[137] 18 U.S.C. § 2250(a).

regulation.[138] Appellant was reduced in grade from E-6 to E-4 and confined for 75 days.[139]

The remaining offenses for which appellant was found guilty make up the gravamen of appellant's conduct. Appellant raped his natural daughter and engaged in indecent conduct by sending her a text message with "a picture of himself focused on his genital area with a visible erection in his clothing."[140] To be sure, failure to register as a sex offender is a serious crime. However, it pales in comparison to child rape and indecent conduct involving a biological child, especially when appellant's prior sex offenses are added to the calculus.

Finally, appellant's remaining offenses lend themselves to reassessment since rape of a child and indecent conduct fall under the rubric of "offenses are of the type that judges of the courts of criminal appeals should have the experience and familiarity with to reliably determine what sentence would have been imposed at trial."[141] Undeniably, they are "offenses [that] fit within a particular normative range based on repetition and scale within a construct of individualized sentencing based on individual offenses."[142]

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[138] SJA 2, 3-5 (Pros. Ex. 13).
[139] SJA 5.
[140] JA 85.
[141] Winckelmann, 73 M.J. at 16.
[142] United States v. Moffeit, 63 M.J. 40, 44 (C.A.A.F. 2006) (Baker, J. concurring).

Based on the totality of the circumstances, appellant should not be granted any sentence relief.

Conclusion

WHEREFORE, the Government respectfully requests that this Honorable Court affirm the decision of the Army Court and grant appellant no relief.

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September 08, 2014

CERTIFICATE OF SERVICE AND FILING

I certify that the foregoing was transmitted by electronic means to the court (efiling@armfor.uscourts.gov) and contemporaneously served electronically on appellate defense counsel, on September 8, 2014.

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