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JOSE ROBERTO PACHECO-ARVIZO

5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON
(HONORABLE WM. FREMMING NIELSEN)

7 UNITED STATES OF AMERICA,)
)
8 Plaintiff,) CR-08-6040-WFN-1
)
9 vs.)
) MEMORANDUM IN SUPPORT
10 JOSE ROBERTO PACHECO-ARVIZO,) OF MOTION FOR JUDGMENT OF
) ACQUITTAL
11 Defendant.)

12 Mr. Pacheco-Arviso submits the following memorandum in support of
13 his motion for judgment of acquittal, pursuant to FRCrP 29:

14 **Background**

15 Mr. Pacheco-Arviso is charged with failing to register as a sex
16 offender, in violation of 18 U.S.C. § 2250. A bench trial was held in
17 this matter on October 1, 2008. The evidence introduced at trial
established the following:

18 On November 26, 1985, Mr. Pacheco-Arviso was convicted of
19 forcible rape and sodomy by force in California state court. He was
20 sentenced to 18 years in prison. After release from custody, Mr.
21 Pacheco-Arviso was deported from the United States in 1994. Prior to
22 his deportation, Mr. Pacheco-Arviso was advised of his responsibility
23 to register as a sex offender under California law.

1 Mr. Pacheco-Arvizo was arrested in Franklin County, Washington,
2 on May 7, 2008. A search of applicable court records revealed that Mr.
3 Pacheco-Arvizo has never registered as a sex offender. No evidence was
4 introduced at trial indicating when Mr. Pacheco-Arvizo returned to the
5 United States after deportation or whether Mr. Pacheco-Arvizo ever
6 crossed over state lines subsequent to July 27, 2006.

7 Analysis

8 The criminal provision at issue in this case was signed into law
9 on July 27, 2006. Under 18 U.S.C. § 2250(a), it is a crime,
10 punishable up to 10 years, for anyone one who (1) is required to
11 register under the Sex Offender Registration and Notification Act
12 ("SORNA"); and (2) either has a sex offense arising from a federal
13 jurisdiction or "travels" in interstate or foreign commerce or enters
14 or leaves or resides in Indian country; and (3) knowingly fails to
15 register or update a registration as required by SORNA. Because Mr.
16 Pacheco-Arvizo does not have a predicate federal conviction and is not
17 alleged to have ever entered Indian country, the second element of §
18 2250(a) requires the government to prove travel in interstate
19 commerce.

20 Section 2250(a) uses the present tense of the verb "to travel,"
21 i.e., "travels." This choice is significant. As the Ninth Circuit
22 recognized in United States v. Jackson, 4880 F.3d 1014, 1018 (9th Cir.
23 2007), "[t]he use of the present tense suggests that [the] statutory
24 element does not apply to travel that occurred before the statute's
enactment." While Jackson analyzed the word "travels" in the context

1 of 18 U.S.C. § 2423(c), there is no reason to think that the word
2 "travels" should be interpreted differently in the present context.
3 Indeed, Jackson's analysis focused on grammatical rules that are
4 equally applicable to both contexts.

5 The district courts that have interpreted Jackson in the context
6 of § 2250 have found the decision applicable and held the word
7 "travels" means travel subsequent to enactment of the Sex Offender
8 Registration and Notification Act on July 27, 2006. See United States
9 v. Terwilliger, 2008 WL 50075 at *3 (No. 07-CR-1254-BTM) (S.D. Cal.
10 2008); United States v. Rich, 2007 WL 4292394 *2 (No. 97-CR-274-1-HFS)
11 (W.D. Mo. 2007) (granting motion for judgment of acquittal). Similarly,
12 even without reference to Jackson, the vast majority of federal
13 district courts that have addressed the issue have held that the word
14 "travels" requires proof of prospective travel. United States v.
15 Natividad-Garcia, 560 F.Supp.2d 561, 570 (W.D. Tex. 2008); United
16 States v. Gillette, 553 F.Supp.2d 524, 533 (D. V.I. 2008); United
17 States v. Kent, 2008 WL 360624 at *9 (No. 07-CR-226-CJ) (S.D. Ala.
18 2008) ("the plain language of the statute requires *prospective*
19 *travel*"); United States v. Howell, 2008 WL 313200 at *11 (No. 07-CR-
20 2013-MWB) (N.D. Ia 2008); United States v. Bonner, 2007 WL 4372887 *3
21 (No. 07-CR-264-KD) (S.D. Ala. 2007) (granting judgment of acquittal
22 because government failed to prove that travel took place post-
23 enactment); United States v. Mantia, 2007 WL 4730120 at *5 (No. 07-CR-
24 60041) (W.D. La. 2007); United States v. Deese, 2007 WL 2778362 at *3

1 (No. 07-CR-167-L) (W.D. Okla. 2007); United States v. Stinson, 507
2 F.Supp.2d 560, 566-67 (S.D.W.Va. 2007); United States v. Sallee, 2007
3 WL 3283739 at *2 (No. 07-CR-152-L) (W.D. Okla. 2007) (noting
4 significance of the present tense, "travels"); United States v.
5 Heriot, 2007 WL 2199516 at *2 (No. 06-CR-323) (D.S.C. 2007); United
6 States v. Smith, 481 F.Supp.2d 846 (E.D. Mich. 2007) ("Congress' choice
7 of verb tense-*travels* rather than *traveled*-was significant," meaning §
8 2250 does not apply when travel occurred pre-enactment). But see
9 United States v. Hardy, 2008 WL 4534103 at *4-5 (No. 07-MJ-108-
10 FHM) (N.D. Okla. 2008); United States v. Pitts, 2008 WL 474244 at *3-4
11 (No. 07-CR-157) (M.D. La. 2008); United States v. Dixon, 2007 WL
12 4553720 at *3 (No. 07-CR-72-RM) (N.D. Ind. 2007).

13 Interpreting the word "travels" to mean prospective, post-
14 enactment travels, is not only appropriate under the plain meaning of
15 the statute, it is also appropriate under the doctrine of
16 constitutional avoidance. The doctrine of constitutional avoidance
17 requires the court to interpret statutes in a manner that avoids
18 serious constitutional concerns. See Jones v. United States, 526 U.S.
19 227, 251 (1999). Here, if the court were to read "travels" as
20 including retrospective travel, then applying SORNA against Mr.
21 Pacheco-Arviso would violate the ex-post facto clause, U.S. Const.
22 Art. 1, § 9, cl. 3, by criminalizing behavior committed prior to
23 enactment of the law. See Gillette, 553 F.Supp.2d at 529; Kent, 2008
24 WL 360624 at *7; Howell, 2008 WL 313200 at *11; Bonner, 2007 WL
4372887 at *2; Deese, 2007 WL 2778362 at *3; Sallee, 2007 WL 3283739
at *2-3; and Smith, 481 F.Supp.2d at 851-54. In order to avoid this

1 serious constitutional problem, the court must interpret the term
2 "travels" prospectively, consistent with the Ninth Circuit's decision
3 in Jackson. Should the court nevertheless determine that "travels"
4 includes pre-enactment travel, then Mr. Pacheco-Arvizo would ask that
5 the charge against him be dismissed on the basis of the ex-post facto
6 clause.

7 Finally, if nothing else, the rule of lenity compels the
8 conclusion that the word "travels" only encompasses prospective
9 travel. Given the Ninth Circuit's holding in Jackson, the term
10 "travels," is at least ambiguous, meaning that any doubts about its
11 meaning must be resolved in favor of the defense.

12 **Conclusion**

13 The government did not present any evidence at trial indicating
14 that Mr. Pacheco-Arvizo traveled in interstate commerce after the
15 enactment of SORNA on July 27, 2006. Accordingly, Mr. Pacheco-Arvizo
16 is entitled to judgment of acquittal and, given Mr. Pacheco-Arvizo's
17 right to be free from double jeopardy, the indictment must be
18 dismissed with prejudice. See United States v. Shipsey, 190 F.3d 1081,
19 1088 (9th Cir. 1999).

20 Dated: October 20, 2008

Respectfully submitted,

s/Rick L. Hoffman

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2008, I electronically filed Defendant's Memorandum in Support of Motion for Judgment of Acquittal with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following: Alexander C. Ekstrom, Assistant United States Attorney.

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