Docket No. 13-2324

In the
United States Court of Appeals
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

KEITH ALLEN COOPER,

Appellant.

On Direct Appeal from Judgment of Conviction and Sentence
on Conditional Guilty Plea in the U.S. District Court for the District of Delaware

BRIEF OF AMICUS CURIAE
National Association of Criminal Defense Lawyers
in Support of Appellant and Suggesting Reversal

JENNY CARROLL
Seton Hall University School of Law
One Newark Center
Newark, NJ 07102
(973) 642-8528
jenny.carroll@shu.edu

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
fax: (610) 649-8362
peter.goldberger@verizon.net

Co-Counsel for Amicus Curiae, NACDL

CORPORATE DISCLOSURE STATEMENT

The National Association of Criminal Defense Lawyers certifies pursuant to Fed.R.App.P. 29(c)(1) that it is a not-for-profit corporation, established in the District of Columbia, with no parent corporations or publicly-traded stock. This disclosure is made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED: July 9, 2013

By */s/Peter Goldberger*
PETER GOLDBERGER
Third Circuit Co-Chair,
NACDL Amicus Curiae Committee

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is the only national bar association working solely in the interest of public and private criminal defense attorneys and their clients. Founded in 1958, NACDL was established to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has more than 13,000 members nationwide, joined by 90 state, local, and international affiliate organizations with a total of more than 35,000 members. NACDL members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges who are committed to preserving fairness and due process in the criminal justice system. This Court has often permitted NACDL to appear as an *amicus curiae* in important cases, as have other Circuits and the United States Supreme Court. NACDL has a significant interest in guaranteeing criminal defendants their right under the Constitution not to be prosecuted under an invalid delegation of Legislative power, which is the issue addressed in this brief. NACDL urges this Court to fortify that right for all.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a), this brief is filed with the express consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than amicus or its counsel, make a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT FOR AMICUS CURIAE

The separation of powers that is one of the foundations of our Constitutional system invalidates any statutory provision by which Congress purports to delegate its Article I legislative power to another Branch. At the same time, the courts have long recognized that in the context of modern government, many details of implementation of a complex statutory scheme must and can be assigned by law to a responsible Executive Department (or to an independent agency or commission). To draw the line between impermissible delegation of legislative power and permissible assignment of the duty of implementation, the Supreme Court has developed a test under which Congressional articulation of a "a mere 'intelligible principle'" to guide the Executive will ordinarily suffice. *United States v. Amirnazmi*, 645 F.3d 564, 575 (3d Cir. 2011). However, both the Supreme Court and this Court have raised the question, without deciding, whether a higher standard – framed in *Touby v. United States*, 500 U.S. 160, 165-66 (1991), as one which "meaningfully constrains" executive discretion to criminalize; *Amirnazmi*, 645 F.3d at 576, quoting *Touby*, 500 U.S. at 166 – must apply when the legislative delegation in effect empowers the executive official or agency to determine who can be prosecuted or for what.

The instant appeal requires this Court to determine the constitutionality of Congress's delegation to the Attorney General, in the 2006 Sex Offenders

Registration and Notification Act, of authority to decide whether this federal law should be applied retroactively to sex offenders convicted prior to the statute's July 27, 2006, effective date. Appellant Keith A. Cooper is such an offender, having been convicted of a covered offense in 1999 in a state court. The provision at issue, 42 U.S.C. 16913(d) , assigns this power to the Attorney General with no suggestion of what standards or criteria he should use in making his decision.

Certain other Circuits have held that the general purpose of SORNA, as stated in the legislative findings, was enough to give the Attorney General an "intelligible principle" to apply. Amicus NACDL argues in this brief, in reliance on this Court's recent holding on a related issue in *United States v. Reynolds*, 710 F.3d 498 (3d Cir. 2013) (on remand from Supreme Court), that mere consistency with the overall statutory purpose does not satisfy even this lower standard. If the statute *fails* the "intelligible principle" test, of course, it must be stricken, and this Court need not reach the question reserved in *Amirnazmi* as to whether a higher standard actually applies. Conversely, if § 16913(d) is held to *satisfy* the lower standard, then the Court must address the undecided constitutional issue. On that point, NACDL argues, in further reliance on this Court's analogous reasoning in *Reynolds*, that merely passing that lower threshold should not be enough. To be constitutional, the delegation at issue here, because it makes conduct criminal that would not otherwise be punishable, must meet the stricter, "meaningful constraint"

standard. Since the § 16913(d) delegation utterly fails this test, the statute is unconstitutional as to Mr. Cooper and others similarly situated, and his conviction for failure to register must be reversed.

ARGUMENT FOR AMICUS CURIAE

Introductory comments: the Constitutional context. The concept of the separation of powers among the branches of government is fundamental to the American Constitutional plan. The notion that each branch of government enjoys a particular grant of authority which it cannot exceed was critical to the Founders' ideal that the power of government should be checked and balanced within the democracy that they created. One manifestation of this vision of governance is the prohibition on the delegation of the legislative power. Today, as throughout our Nation's history, this prohibition is of acute importance to criminal defendants, protecting against the *ad hoc* creation of criminal law outside Congress's statutory constructs. The rule established two centuries ago that there are no common law federal crimes serves as a constant reminder that the Nation's lawmaking function is assigned to the Legislative, not to the Executive and Judicial branches, which serve distinct purposes. *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812); *United States v. Worrall*, 2 U.S. (2 Dall.) 384 (D. Pa. 1798) (Chase, J., on circuit).

See also Michael J. Zidney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 113-15 (2012) (noting that the Anti-Federalists and later the Republicans opposed the creation of the federal common law, as a mechanism by which the federal judiciary could assert power beyond that granted by the Constitution).

Just as the authority to create a crime via common law cannot be delegated to the Judicial Branch, it has also been established for more than a century – since the dawn of the "administrative state" – that Congress cannot delegate to the Executive the authority to declare what will or will not be a federal crime (or the punishment for a crime). Congress has authority to establish by statute a complex regulatory regime, but the authority delegated to the responsible agency cannot include the creation of a new crime. Compare *United States v. Grimaud*, 220 U.S. 506 (1911) (upholding statute penalizing violation of regulations of Dept. of Agriculture specifying when sheep may be grazed in a forest reserve, where statute assigned to Secretary the responsibility to regulate use of the land so as to protect the forests from destruction), with *United States v. Eaton*, 144 U.S. 677 (1892) (invalidating prosecution for failing to keep certain books required by regulation, where Secretary was authorized to implement the Act by promulgating regulations but statute did not expressly make violation of those regulations a criminal offense and set available penalties).

In *United States v. Amirnazmi*, 645 F.3d 564, 574-77 (3d Cir. 2011), this Court explored in depth the current contours of this doctrine, taking into account the Supreme Court's decision in *Touby v. United States*, 500 U.S. 160, 165-66 (1991). The Court noted that while Congressional assignment of administrative implementation responsibility to an Executive agency or independent commission ordinarily survives a non-delegation challenge if the statute provides the agency with "a mere 'intelligible principle'" to effectuate, 645 F.3d at 575, the Supreme Court recognized in *Touby* that when the Legislature grants an Executive official the power to define what conduct will be criminal, a higher standard may apply. *Amirnazmi*, 645 F.3d at 576. Under this elevated standard, Congress must provide statutory guidance that "meaningfully constrains" executive discretion to criminalize. See *Touby*, 500 U.S. at 166.

A. If the Court finds that the general duty to comply with the legislative purpose of SORNA provided the Attorney General an "intelligible principle" for deciding whether to make the law retroactive, then the Court must decide whether that standard satisfies the Constitutional non-delegation rule in a criminal context.

In *Touby*, the Supreme Court easily determined that the detailed and specific guidance afforded in the Controlled Substances Act, both substantive and procedural, for adding a new psychoactive substance to the Schedules, and in particular for deciding to do so on an emergency basis, more than satisfied the higher "meaningful constraint" standard. *Id.* 164-69. Similarly, in *Amirnazmi*, this

Court readily concluded that the criteria provided in the International Emergency Economic Powers Act, which amends the Trading with the Enemy Act, clearly satisfied even that more stringent standard.[2] Thus, in neither case was it necessary to decide definitively whether the higher standard is constitutionally required where authority to criminalize through regulatory action is granted by statutory law to the Executive.

In the present case, the Court may finally have to confront and decide that issue. If the question is reached in this case, NACDL suggests that this Court firmly and clearly approve a strict application of the higher standard. However, once again that question may not have to be addressed. That is because Congress actually provided *no* meaningful criteria at all for the Attorney General to consider and apply when finally deciding which, if any, sex offenders whose prior convictions occurred before July 2, 2008, would be required federally to register, as well as when and where they should register, under SORNA. Thus, the Court could readily rule in this case – and therefore should[3] – that the Attorney General's promulgation of the Final Rule fails any constitutional standard, even the most

[2] As was the case with the Controlled Substances Act at issue in *Touby*, the limitations on executive authority that this Court identified in the IEEPA were not only substantive but also procedural (in the form of after-the-fact oversight).

[3] See, *e.g.*, *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 S.Ct. 876, 892 (2010); *United States v. Lopez*, 514 U.S. 549, 562 (1995); *Brown v. City of Pittsburgh*, 586 F.3d 263, 274 (3d Cir. 2009) (all affirming doctrine of avoidance of decision of unnecessary constitutional issues).

lenient. On that basis, the Court could once again pretermit the issue raised but not decided by the Supreme Court in 1991 in *Touby*.

1. Appellant's case presents the constitutional delegation question in stark form, and because of the date of his prior convictions and the time period when he failed to register, the issue cannot be avoided on statutory grounds.

In 1999, many years before Congress passed SORNA, appellant Keith Cooper was convicted in Oklahoma of rape, which is defined in SORNA (*see* 42 U.S.C. § 16911(5)) as a "sex offense." He subsequently moved to Delaware, where – between February 1, 2011, and May 4, 2012 – he failed to register as a "sex offender." App. 15 (indictment); App. 43 (conditional guilty plea); PSR ¶ 11. That failure led to the federal conviction which is now before the Court on appeal pursuant to a conditional plea. Because Mr. Cooper's federal offense occurred, if at all after December 29, 2010 (and thus after July 2, 2008, as well), this case does not present the question noted by this Court in *United States v. Reynolds*, 710 F.3d 498, 506 & n.7 (3d Cir. 2013), on remand from *Reynolds v. United States*, 565 U.S. —, 132 S.Ct. 975 (2012), concerning which of these possible dates (July 2008 or December 2010) marks the truly finality of the Attorney General's retroactive registration rule for old (pre-SORNA) offenses. Likewise, the failure of the Department of Justice to justify its omission of a notice-and-comment period under the Administrative Procedure Act for the Interim Rule, which this Court held in the *Reynolds* remand decision to invalidate SORNA convictions for pre-2008 failures

to register, at least, 710 F.3d at 509-24, does not save Mr. Cooper, who failed to register in 2011-12.

2. The complete and standardless Congressional assignment to the Attorney General of authority to decide the extent of SORNA's retroactivity violates any Constitutional standard limiting delegation of the legislative power.

What defeats Mr. Cooper's conviction is the fundamental invalidity of 42 U.S.C. § 16913(d), as construed by the Supreme Court in *Reynolds*, under the non-delegation doctrine. Congress not only failed to provide the Attorney General with a standard that "meaningfully constrained" his discretion in deciding which old convictions should be covered by the new registration requirements (the standard that should be applied), the Legislature did not even provide the Executive with an "intelligible principle" (the most lenient standard that could be applied). By reversing Mr. Reynolds' conviction on remand from the Supreme Court on statutory (APA) grounds, the Court was able to avoid this constitutional question. 710 F.3d at 506. But because, as just noted, the statutory argument that negated Mr. Reynolds' prosecution does not apply to Mr. Cooper, the constitutional issue is now presented. Nevertheless, the reasoning expressed in Judge Smith's scholarly decision on remand in *Reynolds* reveals the clear error behind the other Circuits' decisions upholding this flawed statute, and sounds the death knell for Mr. Cooper's conviction as well.

Rather than decide itself which "sex offenders," as defined in 42 U.S.C. § 16911(1), convicted before SORNA's enactment on July 27, 2006, should be required federally to register, Congress directed that the Attorney General make that determination. Until the AG's determination was made (and validly made) such offenders were not required by federal law to register, and so could not be convicted of the federal offense of failure to register. *Reynolds v. United States*, *supra*. In assigning this authority to the AG, Congress stated only, "The Attorney General shall have the authority to specify the applicability of the [registration] requirements ... to sex offenders convicted before the enactment of this chapter ...." See *id.*, 132 S.Ct. at 978, 979, 985 (*quoting* § 16913(d)). Congress articulated no criteria or considerations whatever for the Attorney General to take into account in making this "specif[ication]" of the Act's "applicability." Congress did not say whether the AG was – or was not – to take into account, for example, how long ago the qualifying prior convictions may have occurred, the nature of those convictions, the number or frequency of past violations, the offender's age at the time of the prior offense or his/her age at the present time, the duration of any crime-free period the past offender might have exhibited, the offender's success or lack thereof in any past course of treatment or supervision, the past offender's current family, residential, or occupational circumstances, his or her physical or

mental health, or intellectual capacity, or anything else. Nor did Congress provide for any after-the-fact legislative review of the Attorney General's determination.

In his order denying Mr. Cooper's motion to dismiss, Judge Andrews indicated his general approval of the reasoning of the other Circuits which have rejected the non-delegation argument against the validity of the AG's retroactive regulation, App. 8 (DDE 18).[4] The appellant candidly admits the existence of that precedent in his brief, AOB 23 & n.2, although he does not discuss the reasoning of those decisions which held that SORNA provided an "intelligible principle" sufficient to guide the AG's decision.

Typical of the decisions upholding the Congressional delegation to the Attorney General of the question whether SORNA can be applied to pre-enactment offenders is the latest, the Eighth Circuit's, which accurately summarizes its sister Circuits' rulings:

> We conclude that SORNA provides the Attorney General with an intelligible principle, and is a valid delegation of legislative authority. SORNA contains a "clearly delineat[ed]" policy which guides the Attorney General in the exercise of his delegated authority. Section 16901 sets forth the congressional policy of SORNA, "to protect the public from sex offenders and offenders against children." 42 U.S.C. § 16901. The Supreme Court has found broad policy statements, like that in SORNA, sufficient to provide an intelligible principle for delegation. *See, e.g.*, *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944) (upholding a

[4] The district court principally suggested that its opinion didn't matter, since this Court would be deciding the issue in *Reynolds* in its remand decision. *Id.* Of course, that prognostication was mistaken.

> delegation of legislative authority based on the general policy to set prices that are "generally fair and equitable"); *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943) (upholding a delegation of legislative authority based on the general policy to regulate in the "public interest").
>
> SORNA also contains boundaries on the authority delegated to the Attorney General. Essentially, section 16913(d) delegates one narrow question to the Attorney General: Do SORNA's requirements apply retroactively to offenders whose convictions predate SORNA's enactment? The question of retroactivity has a defined, narrow universe of answers. "[T]he Attorney General cannot do much more than simply determine whether or not SORNA applies to [individuals convicted of covered sex offenses prior to SORNA's enactment]." *United States v. Guzman*, 591 F.3d 83, 93 (2d Cir. 2010). In comparison, the authority delegated in SORNA is more bounded and narrow than other delegations the Supreme Court has upheld. For example, in *Mistretta* the Supreme Court upheld the delegation of authority to the Sentencing Commission to create the federal sentencing guidelines. *Mistretta* [*v. United States*], 488 U.S. [361,] 374–79, 109 S.Ct. 647 [(1988)].
>
> We agree with our sister Circuits [citations omitted] that section 16913(d) of SORNA is a valid delegation of authority because Congress provided the Attorney General with an intelligible principle to follow.

United States v. Kuehl, 706 F.3d 917, 920 (8th Cir. 2013). Not only does this analysis fail to grapple with the question reserved by the Supreme Court in *Touby* and by this Court in *Amirnazmi*, upon finding that Congress satisfied the more lenient standard,[5] as to whether a higher standard must be satisfied to defeat a constitutional non-delegation challenge in a criminal case, but it also contradicts the reasoning that carried the day in this Court in *Reynolds* on remand.

[5] The other Circuits' cases are to like effect, or even skimpier in their reasoning. See, *e.g.*, *United States v. Parks*, 698 F.3d 1, 7-8 (1st Cir. 2012).

First, of the two Supreme Court precedents cited by the Eighth Circuit, only one (*Yakus*) was a criminal case. That case upheld, as an emergency war measure, the criminal enforcement of price controls set by an expert Price Administrator (not by the Attorney General). The allowable allocation of governmental powers in wartime is hardly a good benchmark for the general constitutional question about criminal-lawmaking authority at issue in the present case.[6] Moreover, the World War II Price Control Act's criteria for setting prices were not as vague as the Eighth Circuit states ("generally fair and equitable"); in fact, that was only one of several considerations legislatively articulated.[7] *See* 321 U.S. at 420-21. SORNA, by contrast, states no criteria at all for the AG's determination of retroactive scope. The requirement that the AG's decision be consistent with the Act's general purpose, while no doubt correctly inferred by the Circuits which have addressed this issue, is just that, inferred, not stated in or with reference to § 16913(d) . More important, this Court rejected that same, essentially standardless basis when

[6] Likewise, the delegation involved in the instant appeal is not comparable to the authority upheld in *Loving v. United States*, 517 U.S. 748 (1996), in light of the President's "commander-in-chief" powers, to specify the circumstances under which a death sentence can be authorized in a military court martial prosecution.

[7] In addition, the Eighth Circuit also somewhat misstates the nature of the decision that the Attorney General had to make under § 16913(d). It was not, as the *Kuehl* panel would have it, to answer whether "SORNA's requirements apply retroactively to offenders whose convictions predate SORNA's enactment?" That is a question of statutory construction which Congress would have to say, or else leave to a Court to ascertain. The question assigned to the AG was somewhat different: whether and to what event to make SORNA's registration requirement enforceable against pre-2006 offenders.

proffered by the government in *Reynolds* on remand as a justification for forgoing notice and comment when promulgating the Interim Rule.

On remand in *Reynolds*, the question before this Court was whether the Attorney General had "good cause" under 5 U.S.C. § 553(b)'s exception (B) to forego notice-and-comment rulemaking in promulgating the Interim Rule. As in the present case, there was an antecedent issue concerning the standard of review. *See* 710 F.3d at 506-09 (whether "de novo" or "arbitrary and capricious" standard governed this Court's review). This Court concluded "that the Attorney General's assertion of good cause fails even the most deferential standard of arbitrary and capricious." *Id.* 509. The justifications offered for the Attorney General's action in that case were twofold: to "eliminate uncertainty" and to "protect the public from sex offenders who fail to register." *Id.* 510. The first of these is peculiar to the APA context, and not pertinent here. The second, however, is essentially the same as that endorsed as an "intelligible principle" by the Circuits which have approved the Congressional delegation to the Attorney General. See, *e.g.*, *Keuhl*, *supra*. In this Circuit, this rationale fails in the present context for the same reason that this Court recently rejected it in *Reynolds*.

This Court sensibly ruled in *Reynolds* 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." *Id.*

512. And just as a "[m]ere restatement of the public safety rationale offered in the statute cannot constitute good cause" to dispense with an advance comment period under the APA, so the same "mere restatement" could not provide an "intelligible principle" guiding the Attorney General's exercise of judgment whether to extend SORNA's registration requirement on a blanket basis to all pre-2006 sex offenders. Any implementation of a statute must be consistent with its primary purpose; Congress thus provided no "principle" at all for the decision whether to extend SORNA backwards in such an extreme manner, with no cost-benefit analysis at all of the factors mentioned previously, or of anything else. "If the mere assertion that such [real or perceived] harm might" occur "were enough to establish," *id.*, an "intelligible principle," then the "intelligible principle" standard imposes no limitation at all on Congressional delegation of the responsibility for filing in the gaps in a legislative enactment – a result that would be plainly unconstitutional under the non-delegation doctrine. Thus, just as in *Reynolds*, the government cannot "rely on nothing more than the nature of the harm being regulated [by SORNA] to justify" its position. *Id.* 514.

B. When the Legislature empowers an Executive agency, and in particular the Attorney General, to decide what conduct will constitute a crime, Congress must "meaningfully constrain" the exercise of that delegated authority.

Even if consistency with the general purposes of the legislation at issue can sometimes constitute an "intelligible principle" in the ordinary civil, administrative

context where delegation issues have traditionally arisen, it could not do so in a criminal case. Again, the rationale this Court articulated in the *Reynolds* case on remand provides the definitive guidance:

> The liberty interest at stake [in a criminal prosecution] is greater than the ordinary civil interests litigated in administrative cases. This forecloses our adoption of the Government's position that notice and comment are somehow less important in criminal cases, and thus easier to waive for good cause, because the procedural delay allows criminal harm to continue during the time required to comply ....

Id. at 511. For this same reason of constitutional policy, even if the mere invocation of SORNA's statutory policy would qualify as an "intelligible principle" for application of the non-delegation rule in a civil case, the Court should adopt the standard suggested by the Supreme Court in *Touby*, and referenced by this Court in *Amirnazmi*, that is, a standard of whether Congress has provided the Executive with a principle that "meaningfully constrains" its exercise of the delegated authority. Because Congress failed to articulate any such constraint for the Attorney General's exercise of the authority vested in him by SORNA's section 16913(d) , that provision is unconstitutional under the non-delegation doctrine.

For these reasons, expanding on and complementing those discussed by the appellant, NACDL urges this Court to reject the Attorney General's Final Rule on

constitutional grounds and reverse appellant Cooper's conviction for failing to register.

CONCLUSION

For the foregoing reasons, the appellant's conviction in the District of Delaware for failure to register under SORNA in 2011-12 on account of his 1999 Oklahoma state court convictions must be reversed.

Respectfully submitted,

Dated: July 10, 2013

s/Peter Goldberger

JENNY CARROLL
Seton Hall Univ. School of Law
Newark, NJ 07102
(973) 642-8528
jenny.carroll@shu.edu

PETER GOLDBERGER
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
peter.goldberger@verizon.net

Third Circuit Co-Vice-Chairs, NACDL Amicus Curiae Committee
and Counsel for Amicus Curiae, National Ass'n of Criminal Defense Lawyers

REQUIRED CERTIFICATIONS

A. Bar Membership. I certify that the attorney whose name and signature appear on this brief is a member of the Bar of this Court.

B. Type-Volume. This brief was prepared in a 14-point Times New Roman, proportional typeface. Pursuant to Fed.R.App.P. 29(c)(7) and 32(a)(7)(C), I certify, based on the word-counting function of my word processing system (Word 2003), that this brief complies with the type-volume limitations of Rule 29(d), in that the brief contains 3872 words, including footnotes.

C. Electronic Filing. I certify pursuant to LAR 31.1(c) that the text of the electronically filed version of this brief is identical to the text in the paper copies of the brief as filed with the Clerk. The anti-virus program Avast! vers. 7.0, with current updates, has been run against the electronic (PDF) version of this brief before submitting it to this Court's CM/ECF system, and no virus was detected.

/Peter Goldberger

CERTIFICATE OF SERVICE

On July 10, 2013, I served a copy of the foregoing brief on counsel for the parties, via ECF filing and first class mail, addressed to:

Edward J. McAndrew, Esq.
Assistant U.S. Attorney
1007 No. Orange St. Suite 700
Wilmington, DE 19801

Daniel I. Siegel, Esq.
Ass't Federal Public Defender
800 King St., Suite 200
Wilmington, DE 19801

s/Peter Goldberger