U.S. Department of Justice

Criminal Division

Appellate Section *Washington, D.C. 20530*

July 21, 2017

MEMORANDUM

TO: All Federal Prosecutors

FROM: Patty Merkamp Stemler
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SUBJECT: Guidance on Prior Sex Offense Convictions under the Sex Offender Notification and Registration Act (SORNA), 42 U.S.C. § 16901 *et seq*.

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The Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. § 16901 *et seq*., defines what constitutes a sex offense and establishes a system of "tiers" that corresponds to the severity of a sex offender's sex offense. A sex offender who knowingly fails to register or update his sex offender registration as required by SORNA is subject to criminal prosecution under 18 U.S.C. § 2250. This memorandum summarizes case law and provides guidance on how to classify prior sex offense convictions and determine a sex offender's tier. Specifically, the memorandum discusses whether the categorical, modified categorical, or circumstance-specific approach applies to different provisions within SORNA.

I. The Categorical Approach, the Modified Categorical Approach, and the Circumstance-Specific Approach

Courts deciding whether a defendant's prior conviction qualifies as a sex offense or, if it does, in which tier the defendant belongs, must first determine whether to consider that prior conviction under the "categorical," the "modified-categorical," or the "circumstance-specific" approach. *See, e.g. United States v. Hill*, 820 F.3d 1003, 1005 (8th Cir. 2016), *cert. denied*, 137 S. Ct. 829 (2017); *United States*

v. Price, 777 F.3d 700, 708 (4th Cir.), *cert. denied*, 135 S. Ct. 2911 (2015). The relevant statutory language determines which approach applies. The applicable approach, in turn, determines the universe of information a court may consider. This section provides a brief overview of these approaches.[1]

- Categorical Approach

In a series of cases beginning with *Taylor v. United States*, 495 U.S. 575 (1990), the Supreme Court established that courts analyzing prior convictions for purposes of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B), should use a "formal categorical approach." 495 U.S. at 600. In the absence of particular statutory features described below, courts considering prior convictions (for purposes of the ACCA and the Sentencing Guidelines) employ the categorical approach. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013); *United States v. Conde-Castaneda*, 753 F.3d 172, 176 (5th Cir. 2014) ("The categorical approach is the default test.") (citing *Descamps*), *cert. denied*, 135 S. Ct. 311 (2014).

The "central feature" of the categorical approach is "a focus on the elements, rather than the facts." *Descamps*, 133 U.S. at 2285; *see Mathis v. United States*, 136 S. Ct. 2243, 2248-49 (2016) (reaffirming this view). Thus, sentencing courts "'look only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses" to determine whether those elements match the elements of the generic crime at issue. *Id.* at 2283. If the statute under which a defendant was convicted "sweeps more broadly than the generic crime," the defendant's prior conviction does not categorically match the generic crime regardless of the defendant's actual conduct. *Id.*

Under the categorical approach, a sentencing court may consult only the statutory language of the defendant's prior conviction.

- Modified Categorical Approach

In *Taylor*, the Supreme Court recognized that a "narrow range of cases" may require a sentencing court analyzing a prior conviction "to go beyond the mere fact of conviction." 495 U.S. at 602. Thus was born what came to be called the "modified categorical" approach. *Descamps*, 133 S. Ct. at 2281. The Supreme Court has described the modified categorical approach as a "variant" of the categorical approach. *Id.*

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[1] The Department has issued guidance on application of the categorical and modified categorical approaches following the Supreme Court's decisions in *Descamps v. United States*, 133 S. Ct. 2276 (2013) and *Mathis v. United States*, 136 S. Ct. 2243 (2016). *See* dojnet.doj.gov/usao/eousa/ole/usabook/memo/descamps.docx and dojnet.doj.gov/usao/eousa/ole/usabook/memo/mathis.docx.

The modified categorical approach applies to a defendant's prior conviction under a "divisible" statute. *See Mathis*, 136 S. Ct. at 2249. A statute is divisible when it "comprises multiple, alternative versions of the crime." *Descamps*, 133 S. Ct. at 2284. Where a defendant's statute of conviction is phrased in the alternative, the sentencing court must determine whether those alternatives are elements (in which case the statute is divisible and the modified categorical approach applies) or means (in which case the statute is not divisible and the categorical approach must be used). *See Mathis*, 136 S. Ct. at 2256. The Department's guidance following the *Mathis* case discusses this sometimes confusing area of law. Prosecutors with specific questions should contact their appellate liaison at Criminal Appellate.

When the modified categorical approach applies, the sentencing court may look to certain other documents beyond the text of the statute of conviction. But the universe is limited to "*Shepard*" documents following the Supreme Court's decision in *Shepard v. United States*, 544 U.S. 13 (2005). Those include the indictment, jury instructions, and plea agreement and colloquy. *Mathis*, 136 S. Ct. at 2249.

- Circumstance-Specific Approach

In *Nijhawan v. Holder*, 557 U.S. 29 (2009), the Supreme Court introduced a third analytical category for considering prior convictions: the "circumstance-specific" approach. *Id.* at 34. The question in *Nijhawan* concerned whether an immigration petitioner's prior fraud conviction constituted an "aggravated felony," which was defined in part as a fraud crime "in which the loss to the victim * * * exceeds $10,000." *Id.* at 32 (citing 8 U.S.C. § 1101(a)(43)(M)(i)) (emphasis omitted). Comparing that provision with a number of other provisions in the "aggravated felony" definition in § 1101(a)(43), the Court observed that the statute "contains some language that refers to generic crimes and some language that almost certainly refers to the specific circumstances in which a crime was committed." *Id.* at 38.

The *Nijhawan* Court concluded that the reference to a monetary threshold in Section 1101(a)(43)(M)(i) permitted a court to consider the "specific circumstances surrounding an offender's commission of a fraud * * * crime on a specific occasion." 557 U.S. at 40. The Court identified two core features of Section 1101(a)(43)(M)(i) that warranted that conclusion. First, the statute's use of the phrase "an offense * * * in which" referred to conduct involved "in" the commission of an offense, not the elements of it. *Id.* at 38-39. Second, a categorical approach would render Section 1101(a)(43)(M)(i) meaningless because the $10,000 monetary threshold aligned with no potential federal and very few state fraud statutes. *Id.* at 39-40; *see also id.* at 37-38 (observing that where language creating an exception to a passport forgery offense for an alien whose forgery aims to assist his family, that language "must refer to the particular circumstances in which an offender committed the crime on a particular occasion").

As the approach's shorthand name suggests, a court applying the circumstance-specific approach may consider the circumstances—that is, the conduct—underlying a defendant's conviction. *See also Johnson v. United States*, 135 S. Ct. 2551, 2579-80 (2015) (Alito, J., dissenting) (referring to this approach as the "conduct-specific" approach).

II. Prior Sex Offense Convictions Under SORNA

Although the Supreme Court has not considered whether the approaches described above—the categorical, the modified categorical, and the circumstance-specific approaches—apply to prior sex offense convictions, courts of appeals have regularly looked to cases such as *Taylor*, *Descamps*, and *Nijhawan* when analyzing a defendant's prior conviction for SORNA purposes. *See, e.g.*, *Hill*, 820 F.3d at 1005; *United States v. Rogers*, 804 F.3d 1233, 1236 (7th Cir. 2015); *United States v. Morales*, 801 F.3d 1, 5-6 (1st Cir. 2015); *United States v. White*, 782 F.3d 1118, 1131-37 (10th Cir. 2015); *Price*, 777 F.3d at 708; *United States v. Gonzalez-Medina*, 757 F.3d 425, 429-32 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1529 (2015); *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1133-40 (9th Cir.), *cert. denied*, 135 S. Ct. 124 (2014). This section flags a number of issues that arise when considering the prior conviction of a potential SORNA defendant. Sections III and IV then provide a provision-by-provision analysis of the applicability of the above-described approaches to SORNA.

- Relevant SORNA provisions

SORNA defines a sex offender as an individual "convicted of a sex offense," 42 U.S.C. § 16911(1), defines the term "sex offense," 42 U.S.C. § 16911(5), (7), & (8), and requires sex offenders to register and keep their registrations current in jurisdictions where they reside, work, and are a student, 42 U.S.C. § 16913. How frequently and for how long a sex offender must appear in person to update a registration depends on the sex offender's "tier." 42 U.S.C. §§ 16915 & 16916. SORNA includes three tiers—tier I, tier II, and tier III—and a sex offender's tier depends on the severity of his prior sex offense conviction. *See* 42 U.S.C. § 16911(2)-(4). A sex offender's knowing failure to register or keep his registration current subjects him to federal prosecution under 18 U.S.C. § 2250.

The question of which approach to employ arises in two ways under SORNA. First, because Section 2250 applies only to someone whose prior sex offense conviction requires him to "register under [SORNA]," courts assess whether a defendant's prior conviction qualifies as a "sex offense" as defined by SORNA. Courts therefore compare an individual's prior conviction to SORNA's definitions of sex offense found in 42 U.S.C. §§ 16911(5)(A), 16911(7), and 16911(8).

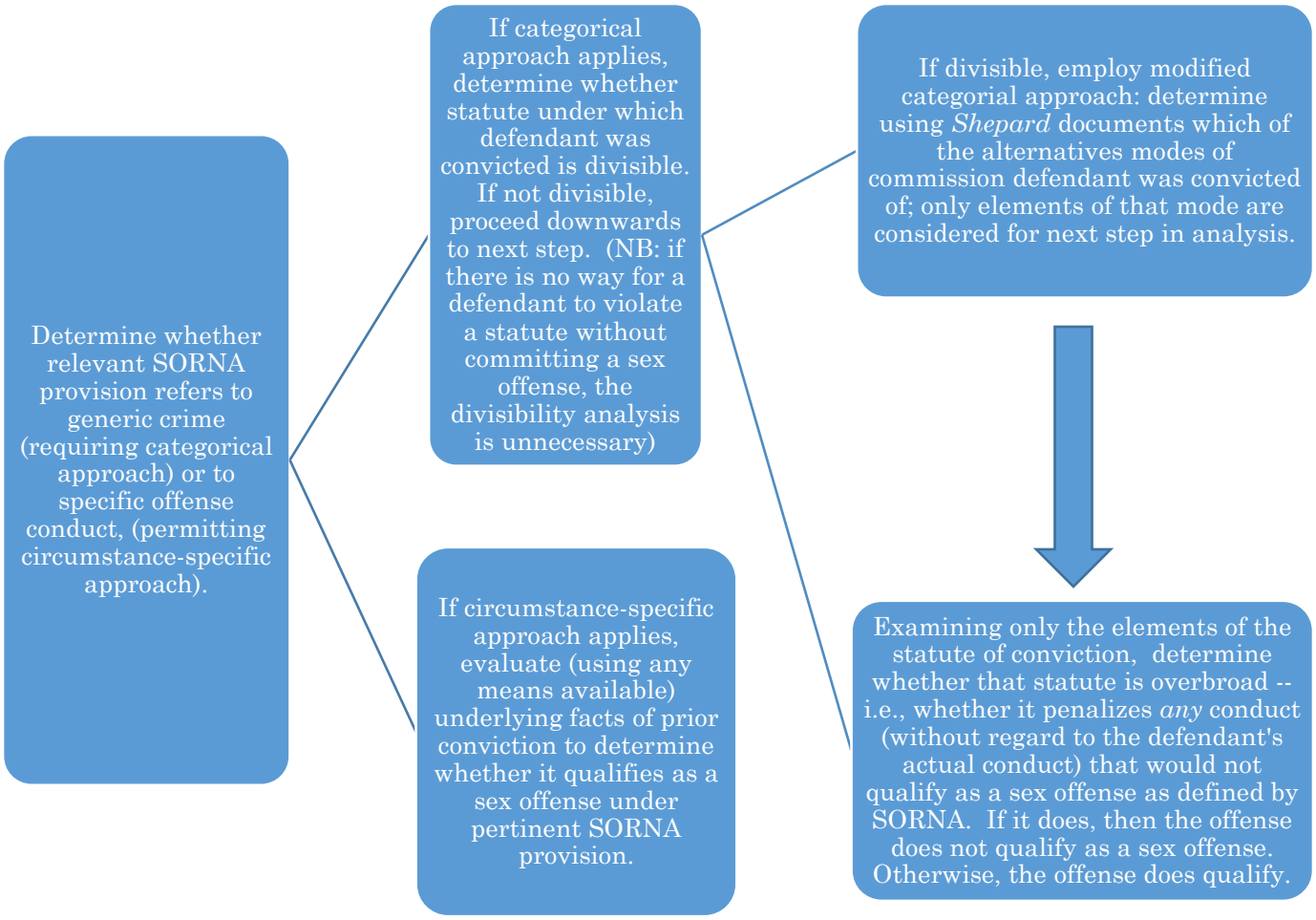
Second, courts consider what approach to take when asked to decide a sex offender's tier. As noted above, a sex offender's tier affects how long his registration duty lasts (which may be relevant to determining whether an individual with a dated conviction was under a federal obligation to register at a given time) and how often he must update his registration. 42 U.S.C. §§ 16915, 16916. A sex offender's tier also has consequences for his Sentencing Guidelines range. *See* U.S.S.G. § 2A3.5(a) (setting different base offense level depending on the defendant's tier); U.S.S.G. § 2A3.5, cmt. n.1 (indicating that definition of a sex offender's tier has the meaning given in SORNA).

Two additional notes on the system of tiers in SORNA are appropriate. First, a sex offender's tier for purposes of SORNA registration and prosecution depends solely on Sections 16911(2)-(4), not on any state-law[2] designation. A sex offender whose prior sex offense conviction arose under state law may be subject to state requirements that are more or less demanding than SORNA. *See* Office of the Att'y Gen., U.S. Dep't of Justice, *The National Guidelines for Sex Offender Registration and Notification* (*Guidelines*), 73 Fed. Reg. 38,030, 38,046 (July 2, 2008) (explaining that SORNA's establishment of "minimum national standards" does not prevent SORNA jurisdictions from creating state-law registration requirements for "broader classes of convicted offenders than those identified in SORNA" or for "certain classes of non-convicts"). Those requirements do not affect the tier analysis under SORNA. Second, a sex offender's tier remains consistent for all SORNA purposes, *i.e.*, registration requirements, criminal prosecution, and at sentencing. More information on the system of "tiers" in SORNA can be found in the *Guidelines*, 73 Fed. Reg. at 38,052-53.

- Methodology

Following *Nijhawan*, prosecutors should take a provision-by-provision approach to determine whether a defendant's prior conviction qualifies as a "sex offense" under SORNA, and, if so, into which tier the sex offender falls. *See, e.g.*, *Gonzalez-Medina*, 757 F.3d at 429. As described above, the language of the specific SORNA provision will determine which approach applies. Generally, the analysis will proceed as follows:

[2] This guidance often refers to convictions under state law. A defendant's registration obligations under SORNA also arise for sex offense convictions under tribal, territorial, military, and foreign law. References in this guidance to state law, which comprise the majority of prior sex-offense conviction, should be understood to include these other convictions.



Sections III and IV below provide guidance on how to conduct this analysis with respect to the definitional and "tiering" provisions in SORNA.[3]

III. SORNA Provisions Related to the Definition of a Sex Offense

A. Definition of Sex Offense – 42 U.S.C. § 16911(5)(A)

SORNA's primary source for the definition of a sex offense is Section 16911(5)(A). That Section includes five subsections, though only the first two require detailed analysis.

[3] Note that Child Exploitation and Obscenity Section (CEOS) and the Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (SMART) maintain a chart that covers the tiering of certain federal convictions. Prosecutors should consider contacting CEOS if they have tiering questions.

- Section 16911(5)(A)(i)

Section 16911(5)(A)(i) defines a sex offense as a "criminal offense that has an element involving a sexual act or sexual contact with another." Congress's use of the term "element" strongly suggests that this provision refers to a generic crime. *See Nijhawan*, 557 U.S. at 36. Thus, courts considering this provision have uniformly reached the conclusion that prior convictions must be analyzed categorically.[4] *United States v. Faulls*, 821 F.3d 502 (4th Cir. 2016); *Rogers*, 804 F.3d at 1236-37; *Gonzalez-Medina*, 757 F.3d at 430; *United States v. George*, 223 F. Supp. 3d 159, 165-67 (S.D.N.Y. 2016).

Note also that SORNA does not define the terms "sexual act" and "sexual contact." Prosecutors should rely on "regular usage to see what Congress probably meant." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569 (2017) (quoting *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006)). At least one court has defined those terms for purposes of SORNA by referring to the definitions in 18 U.S.C. § 2246. *See George*, 223 F. Supp. 3d at 161-62. The definitions from Section 2246 may be relevant, *see Guidelines*, 73 Fed. Reg. at 38,051, but because Congress did not specifically incorporate them into SORNA, prosecutors may argue for a broader definition of those terms, *cf. United States v. Sinerius*, 504 F.3d 737, 743 (9th Cir. 2007) (rejecting defendant's argument that "sexual abuse" should be defined by reference to 18 U.S.C. § 2242 because Congress's decision *not* to refer to that provision reflects a congressional intent to define the term "as a generic offense"), *cert. denied*, 552 U.S. 1211 (2008).

- Section 16911(5)(A)(ii)

Section 16911(5)(A)(ii) defines a sex offense as a "criminal offense that is a specified offense against a minor." This language is materially identical to Section 16911(7), which in turn expands the definition in a number of ways. See *infra* at 7-8. The important point here is that courts have generally concluded that the circumstance-specific approach applies to these provisions insofar as the court may consult evidence to determine the age of the victim. *See, e.g.*, *Price*, 777 F.3d at 708-09.

- Section 16911(5)(A)(iii)

Section 16911(5)(A)(iii) simply cross-references a number of federal offenses. No analysis is therefore necessary because this provision applies only to those cross-referenced federal crimes.

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[4] As Sections I and II above explain, a court's determination that a prior conviction must be analyzed categorically gives rise to the question whether the categorical or modified categorical approach applies. Those Sections describe the proper analysis.

- Section 16911(5)(A)(iv)

Similarly, Section 16911(5)(A)(iv) cross-references any "military offense" that the Secretary of Defense identifies under a specific provision. No analysis is necessary because this provision applies only to those cross-referenced military offenses.

- Section 16911(5)(A)(v)

Section 16911(5)(A)(v) defines a sex offense as including "an attempt or conspiracy to commit an offense described" in any of the previous four subsections. Thus, which approach to apply will usually depend on the analysis called for by the relevant subsection. Note, however, that in some circuits, courts will consider whether the conspiracy or attempt matches generic conspiracy and attempt. *See, e.g.*, *United States v. Gonzalez-Monterroso*, 745 F.3d 1237, 1244-45 (9th Cir. 2014) (attempt under Delaware law is broader than federal attempt and therefore defendant's Delaware conviction for attempted rape does not qualify as "crime of violence" under § 2L1.2 of the Sentencing Guidelines).

B. Definition of Specified Offense Against a Minor – 42 U.S.C. § 16911(7)

As its header explains, Section 16911(7) expands the "definition of 'specified offense against a minor' to include all offenses by child predators." The term "specified offense against a minor" is defined as an "offense against a minor that involves" nine specified categories of conduct. *See* 42 U.S.C. § 16911(7)(A) through (I). Courts construing "specified offense against a minor" in the context of SORNA requirements have uniformly held that a circumstance-specific approach is appropriate. *See Hill*, 820 F.3d at 1005; *Price*, 777 F.3d at 709; *Gonzalez-Medina*, 757 F.3d at 431; *United States v. Dodge*, 597 F.3d 1347, 1354 (11th Cir.) (en banc), *cert. denied*, 562 U.S. 961 (2010); *United States v. Mi Kyung Byun*, 539 F.3d 982 (9th Cir.), *cert. denied*, 555 U.S. 1088 (2008); *Suhail v. U.S. Attorney General*, 2015 WL 7016340, at *7 (E.D. Mich. Nov. 12, 2015).

The Fourth Circuit provided the most detailed analysis of this issue when it concluded that "the text, structure, and purpose of the relevant SORNA provisions" demonstrated that Congress intended the circumstance-specific approach to apply to an analysis of subsection (7)(I), which is the catch-all provision that categorizes "any conduct that by its nature is a sex offense against a minor" as a sex offense under SORNA." *Price*, 777 F.3d at 708 & n.8. *Price* first emphasized that where a statute contains language that refers to specific circumstances or conduct, the Supreme Court "has determined that Congress meant to allow the circumstance-specific approach's more searching factual inquiry concerning a prior offense." *Id.* at 708-09 (citing *Nijhawan,* 557 U.S. at 37). In contrast to 42 U.S.C. § 16911(5)(A)(i)'s reference to the

"element[s]" of the offense, § 16911(7)(I) refers to the "conduct" underlying the prior offense, which indicated Congress's intent to "cover a broader range of prior offenses than those reached by subsection (5)(A)(i)." *Id.* (citing *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005)). The court next reasoned that the circumstance-specific approach furthers SORNA's purpose of protecting the public, and specifically children, from sex offenders. *Id.* at 709. Finally, the court concluded that the "Sixth Amendment concerns" militating in favor of the categorical approach "in other contexts" do not apply because a jury must still conclude that a defendant is a "sex offender" as defined under SORNA. *Id.* at 709-10.

Note that *Price* alternates its analysis between a broad focus on § 16911(7) generally, and a more particularized focus on subsection 16911(7)(I). Most of the court's analysis, is applicable to the other eight subsections.[5] Specifically, subsection (I) is sufficiently broad to encompass almost any conduct that could potentially implicate subsections (C) through (H). That leaves subsections (A) and (B), both of which describe an offense "involving" certain types of conduct (kidnapping and false imprisonment, respectively) that do not necessarily constitute a "sex offense against a minor." Those subsections' use of the term "involves" as well as the reference to the offense being "committed" by a particular person suggests that the circumstance-specific approach should also apply. *See Rogers*, 804 F.3d at 1236-37; *White*, 782 F.3d at 1133 n.15.

At the same time, some courts could be troubled by applying the circumstance-specific approach to Section 16911(7)—and other provisions that use the phrase "involved"[6]—in light of two rationales underlying the use of the categorical approach: (1) fact-finding on the underlying sex offense could run afoul of the Sixth Amendment right to a jury trial and (2) such fact-finding could create unwieldly collateral trials, particularly at sentencing. *See Descamps*, 133 S. Ct. at 2288-89. The fact that prosecutors must prove the defendant's prior sex offense conviction beyond a reasonable doubt to establish a violation of 18 U.S.C. § 2250 should mitigate this concern. Moreover, prosecutors should consider introducing proof at trial or in the factual basis of a plea agreement and plea colloquy concerning the conduct of the underlying sex offense to avoid problems at sentencing. In the absence of adverse circuit precedent, prosecutors may argue that the use of the term "involves" in Section 16911(7) triggers a circumstance-specific analysis.

[5] The *Price* court's discussion of the "any conduct" language is particular to subsection (I) and not applicable to the other eight subsections.

[6] *See* Sections 16911(5)(C), 16911(3)(B), and 16911(4)(B).

C. Offenses Involving Consensual Sexual Conduct – 42 U.S.C. § 16911(5)(C)

42 U.S.C. § 16911(5)(C), known colloquially as the "Romeo and Juliet exception," provides that consensual sexual conduct is not considered a sex offense under SORNA unless the victim was (1) under the custodial authority of the offender; (2) under 13 years old; or (3) was over 13, under 18, and the offender was at least four years older than the victim. We have taken the position that the government must prove beyond a reasonable doubt that the criteria for this exception are not satisfied. *Gonzalez-Medina*, 757 F.3d at 432. Because this provision is on its face grounded in *conduct* rather than the elements of an offense, and it necessarily requires courts to examine the facts of the underlying offense to ascertain the relationship between the age of both victim and offender, a circumstance-specific approach applies.

In *Gonzalez-Medina,* the Fifth Circuit examined this provision in detail and decided to apply the circumstance-specific approach because (1) the exception references the "conduct" "involved" in the offense rather than referring to the elements of the offense; (2) the other exception to the definition of sex offense, located in § 16911(5)(B), also calls for a non-categorical analysis; (3) other age-specific SORNA provisions similarly appear to call for a circumstance-specific, rather than categorical, approach as to age determinations; and (4) application of a non-categorical approach to ascertaining whether the age differential exception applies is most consistent with SORNA's broad purpose. *See* 757 F.3d at 428-431; s*ee also Rogers*, 804 F.3d at 1237 (agreeing with the analysis in *Gonzalez-Medina* because "the exception uses fact-specific language, strongly suggesting that a conduct-based inquiry applies.").

Less certain is whether the circumstance-specific approach also applies to determine whether the sexual conduct in question under Section 16911(5)(C) was consensual. The use of "involves" and "conduct" support applying the circumstance-specific approach, and prosecutors may so argue. But the only court to have assessed the phrase "consensual" appears to have concluded without analysis that the categorical approach applied. *See United States v. Alexander*, 802 F.3d 1134, 1138-42 (10th Cir. 2015).

D. Juvenile Adjudications – 42 U.S.C. § 16911(8)

SORNA requires those adjudicated delinquent as a juvenile to register as sex offenders, but only if the offender was at least 14 at the time of the offense, and "the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of Title 18), or was an attempt or conspiracy to commit such an offense." 42 U.S.C. § 16911(8). The reference to a specific federal statute suggests that the categorical approach (or the modified categorical approach) should be used to ascertain whether the underlying juvenile offense was comparable to or

more severe than aggravated sexual abuse. *See United States v. Johnson*, 2012 WL 5195976, at **5-6 (W.D. Wisc. Oct. 2012) (applying modified categorical approach under Section 16911(8)); *cf. White*, 782 F.3d at 1132. On the other hand, a circumstance-specific analysis likely applies to ascertaining the age of the offender at the time of his juvenile offense conduct, allowing courts to delve into the record to ascertain whether the offender was in fact at least 14 years of age. *Cf. Gonzalez-Medina*, 757 F.3d at 431 ("other age-specific SORNA provisions similarly appear to call for a circumstance-specific, rather than categorical, approach as to age determinations.").

IV. SORNA Provisions Related to a Sex Offender's Tier: 42 U.S.C. § 16911(2)-(4)

As discussed above, SORNA establishes (in 42 U.S.C. § 16911(2)-(4)) three tiers (I, II, III) that correspond to the severity of the underlying sex offense. Prosecutors seeking to bring SORNA charges should first ascertain the appropriate tier of the offender based on his prior sex offense in order to determine whether he was even required by SORNA to register at the time of offense conduct. Courts have "admitted difficulty" when faced with the question of which approach to apply to the tiering determination. *See United States v. Mulverhill*, 833 F.3d 925, 929-30 (8th Cir. 2016) (citing cases).

The tiering provisions categorize prior offenses using two types of language: (1) offenses against minors that are "comparable to or more severe than" various specified federal offenses, *see* § 16911(3)(A) and (4)(A); and (2) offenses that "involve" certain types of conduct, without reference to any particular federal statute, *see* § 16911(3)(B) and (4)(B). In addition, § 16911(3)(C) and 16911(4)(C) provide that an offender may be categorized as a Tier II or Tier III offender, respectively, based on offenses committed after the offender became a Tier I or Tier II offender, respectively.

A. Subsections 16911(3)(A) and (4)(A) (the "comparable to or more severe" provisions)

The use of the phrase "comparable to or more severe than" in Sections 16911(3)(A) and 16911(4)(A) appears to reflect Congress's intent to "apply a categorical approach to sex offender tier classifications designated by reference to a specific federal criminal statute, but to employ a circumstance-specific comparison for the limited purpose of determining the victim's age." *White*, 782 F.3d at 1135; *accord United States v. Berry*, 814 F.3d 192, 196-99 (4th Cir. 2016). The reference to specific federal statutes "strongly suggests a generic intent" and the parenthetical description of "as described in"—which appears in each subsection of Sections 16911(3)(A) and 16911(4)(A)—signals Congress's intent to direct courts to categorically compare the sex offense conviction with the cross-referenced federal statute. *See White*, 782 F.3d at 1132-33; *see also Morales*, 801 F.3d at 7-9 (applying

categorical approach to tiering determination under Section 16911(4)(A)). At the same time, courts may consult the specific circumstances to determine the age of the victim or the perpetrator. *See id.* at 1135; *accord Berry*, 814 F.3d at 196; *but see Morales*, 801 F.3d at 8-9 (appearing to assume that that a categorical approach applies across the entirety of § 16911(4)(A), including with respect to the age of the victim).

Note that some courts have relied on the word "comparable" in Sections 16911(3)(A) and 16911(4)(A) to interpret the categorical approach more flexibly than in the ACCA context. Recall that under *Descamps*, a prior conviction does not qualify as predicate for enhancement purposes where it "sweeps more broadly than the generic crime." 133 S. Ct. at 2283. Noting that SORNA's use of "comparable" does not require the underlying sex offense and the generic offense to be identical, the Fifth Circuit concluded (in an unpublished opinion) that a sex offense conviction can be "comparable" even where it is "slightly broader." *United States v. Coleman*, 2017 WL 1032094, at *3 (Mar. 15, 2017) (per curiam) (unpub.) (internal quotation marks omitted), *petition for cert. filed*, No. 16-9585 (June 13, 2017); *see United States v. Forster*, 549 F. App'x. 757, 769 (10th Cir. 2013) (unpub.) (applying the categorical approach to conclude that an Ohio law was "slightly broader" but nonetheless "comparable to" a cross-referenced federal statute so as to bring the defendant within the scope of tier III); *Morales*, 801 F.3d at 7-8 (acknowledging that the term "comparable" provides "some flexibility" when analyzing the underlying sex offense and the generic offense); *see also United States v. Cammorto*, 859 F.3d 311, 317-18 (4th Cir. 2017) (rejecting argument that aiding-and-abetting liability under Georgia law is broader than under federal law where defendant can show no "realistic probability" that Georgia would interpret the statute as defendant proposed) (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). Thus, where the two offenses are "nearly identical" or the underlying sex offense is only "slightly broader" than the generic offense, prosecutors may argue that the offenses are "comparable" for purposes of Sections 16911(3)(A) and 16911(4)(A).

B. Sections 16911(3)(B) and (4)(B) (the "involving" provisions)

Sections 16911(3)(B) and 16911(4)(B) refer to an offense that "involves" certain conduct. No court appears to have considered which approach to use when construing these Sections.

We have a plausible argument that courts should apply the circumstance-specific approach to these Sections. Similar to the provision at issue in *Nijhawan*, which used the phrase "an offense * * * in which" to refer to conduct involved "in" the commission of an offense, not the elements of it, *see* 557 U.S. at 38-39, these Sections refer to an offense that "involves" certain type of conduct. At least one court has contrasted the use of the phrase "convicted" in the definition of a sex offender—which typically triggers the categorical approach—with the mention in Section 16911(3)(B)

of "committed," which can trigger the circumstance-specific approach. *See United States v. Piper*, 2013 WL 4052897, at *8 (D. Vt. Aug. 12, 2013); *cf. White*, 782 F.3d at 1133 n.15 ("Congress's intent may be different with respect to [Section 16911](4)(B) because it does not reference a specific code section, uses the vague term 'involves,' and requires that the kidnapping be of a minor and not be committed by the minor's parent or guardian."). Moreover, at least some courts may be sympathetic to an argument that the "involving" language contained in those subsections allows for a circumstance-specific approach because that type of fact-specific language invites a conduct-based inquiry. *See, e.g.*, *Rogers*, 804 F.3d at 1237.

C. Subsections 16911(3)(C) and (4)(C) (the prior offense provisions)

Sections 16911(3)(C) and 16911(4)(C) move a sex offender up to the more stringent tier when he has already "become" a sex offender under a previous, less stringent tier. Prosecutors should consult a defendant's record and analyze what tier, if any, the defendant previously fell within. That analysis serves two functions: (1) to determine whether an individual was in fact required to register at the time of his alleged failure to register and (2) to determine which approach—categorical, modified categorical, or circumstance-specific—applies to his prior sex offense. For the latter inquiry, prosecutors should consult the guidance set out in the earlier portions of this memorandum.