

ably be mitigating evidence is also damaging, he or she faces an impossible decision. If counsel decides to forego presentation of the evidence, counsel's performance may be subsequently determined to be ineffective because the choice was prejudicial (the client received the death penalty). If defense counsel proffers the controversial evidence, and the client gets the death penalty, counsel will be chastised for introducing evidence that was prejudicial to the client. Moreover, every criminal defendant who persuades a court that his or her counsel was ineffective will argue that if the deficiency was prejudicial in this case, it must be prejudicial in his or her case. Because the panel majority misconceives the *Strickland* standard for ineffective assistance of counsel and then applies it in such a way as to suggest an irrebuttable presumption of prejudice from a counsel's deficient strategic decision, I dissent from our decision not to rehear this matter en banc.



UNITED STATES of America,
Plaintiff-Appellee,
v.
MI KYUNG BYUN, aka Mi Kyung
Mechanic, Defendant-
Appellant.
No. 07-10254.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Sept. 26, 2007.
Filed July 1, 2008.

Amended Aug. 14, 2008.

Background: After defendant pleaded guilty to importation into the United States of any alien for the purpose of prostitution, the District Court of Guam, Francis M. Tydingco-Gatewood, Chief Dis-

trict Judge, determined that she had committed a "sex offense" within the meaning of the Walsh Act and was therefore subject to the Act's registration requirements. Defendant appealed.

Holding: The Court of Appeals, Berzon, Circuit Judge, held that as a matter of first impression, defendant's conviction for importation of an alien for purposes of prostitution, which her plea agreement revealed was committed against a minor, was a specified offense against a minor and thus made her a "sex offender" for purposes of the Sex Offender Registration and Notification Act (SORNA) and thus subject to its registration requirements.

Affirmed.

Opinion, 530 F.3d 1139, amended and superseded.

1. Mental Health ☞469(2)

Defendant's conviction for importation of an alien for purposes of prostitution, which her plea agreement revealed was committed against a minor, was a specified offense against a minor and thus made her a "sex offender" for purposes of the Sex Offender Registration and Notification Act (SORNA) and thus subject to its registration requirements; defendant's offense entailed the importation of a 17-year-old woman into Guam with the intent that she engage in sexual contact with customers in defendant's club. Sex Offender Registration and Notification Act, § 111, 42 U.S.C.A. § 16911; Immigration and Nationality Act, § 278, 8 U.S.C.A. § 1328.

2. Statutes ☞199

The specific reference to an "element" requires an analysis of the statutory elements, rather than an examination of the underlying facts.

3. Mental Health ~~469(2)~~

Under the Sex Offender Registration and Notification Act (SORNA), a non-categorical approach as to the age of the victim is to be used in determining whether a particular conviction is for a “specified offense against a minor.” Sex Offender Registration and Notification Act, § 111(7), 42 U.S.C.A. § 16911(7).

OPINION

BERZON, Circuit Judge:

After Mi Kyung Byun pleaded guilty to a violation of 8 U.S.C. § 1328, “importation into the United States of any alien for the purpose of prostitution,” the district court determined that she had committed a “sex offense” within the meaning of Section 111 of Title I of the Adam Walsh Child Protection and Safety Act of 2006 (“Act” or “Walsh Act”), Pub.L. No. 109-248, 120 Stat. 587, 591 (codified at 42 U.S.C. § 16911), and is therefore subject to the Act’s registration requirements. Byun appeals that determination, maintaining that her offense is not covered by the Act. We conclude that Byun’s offense is a “specified offense against a minor” and therefore a “sex offense” within the meaning of the Act.

I.

Mi Kyung Byun and her husband owned and operated a night club in Guam, Club Azabu. At the club, Byun maintained two rooms in which female employees could engage in sexual acts with the club’s clients. Byun also arranged for her female staff members to leave the club with clients and have sex with them for a fee.

Byun was indicted on May 31, 2000 on four counts of alien smuggling, including one count of importing aliens into the United States for purposes of prostitution, in violation of 8 U.S.C. § 1328, and one count of transporting a minor in foreign commerce with the intent that the minor engage in prostitution, in violation of 18 U.S.C. § 2423(a). She ultimately pleaded guilty to three counts of alien smuggling in violation of 8 U.S.C. §§ 1324 and 1328, but did not plead guilty to transporting a mi-

Before: JOHN R. GIBSON,* MARSHA S. BERZON, and CARLOS T. BEA, Circuit Judges.

ORDER AND AMENDED OPINION

ORDER

The mandate issued on July 24, 2008, is recalled. The opinion filed on July 1, 2008, slip op. at 7929, 530 F.3d 1139, 2008 WL 2579666, is amended as follows:

Slip op. at 7929, caption: Change <United States District Court for the District of Guam> to <District Court of Guam>.

Slip op. at 7929, caption: Change <John S. Unpingco, District Judge, Presiding> to <Francis M. Tydingco-Gatewood, Chief Judge, Presiding>.

No further petitions shall be entertained. The mandate shall issue forthwith.

* The Honorable John R. Gibson, Senior United States Circuit Judge for the Eighth Circuit,

sitting by designation.

nor for purposes of prostitution in violation of 18 U.S.C. § 2423(a). In the plea agreement, Byun admitted that she “induced” Youn Be Seo, a citizen of Korea, “to come to Guam by offering to employ [her] at the Club . . . intend[ing] that during the course of [her] employment at the Club . . . [she] would engage in sexual contact with the Club’s customers, and perform sexual acts for money,” and acknowledged that “[a]t the time [Byun] solicited Youn Be Seo to come to Guam, and at all times thereafter, [Byun] knew Seo was seventeen years old.” At sentencing, the district court sentenced Byun to fifteen months imprisonment and three years of supervised release.

On July 27, 2006, while Byun was on supervised release, Congress passed the Walsh Act. Title I of the Walsh Act, the Sex Offender Registration and Notification Act (“SORNA”), requires every jurisdiction in the United States to maintain a sex offender registry that complies with SORNA’s specifications. 42 U.S.C. § 16912.¹ SORNA defines the terms “sex offenders,” and “sex offense,” mandates that sex offenders register, and divides sex offenders into “tiers,” based on the severity of their crime, which determine the details of the registration requirement. § 16911.

In response to the Walsh Act, Byun’s probation officer determined that Byun was a tier II sex offender subject to SORNA’s registration requirements and provided her an “offender notice and acknowledgment of duty to register as a sex offender.” Byun signed the form and registered with the Sex Offender Registry Office the same day. Nine days later she filed a motion requesting that the district

1. All statutory citations are to Title 42 of the United States Code unless otherwise indicated.
2. SORNA also includes in the definition of sex offenses certain specified federal crimes not

court “vacat[e] and set[] aside the determination” of the probation officer, because she “has never been convicted of a sex offense.”

The district court denied the motion, holding that Byun had been convicted of a “sex offense” within the meaning of SORNA, is therefore a “sex offender,” and is properly classified as a “tier II sex offender.” Byun appeals the determination that she is a sex offender for purposes of SORNA.

II.

The Sex Offender Registration and Notification provisions of the Walsh Act are intended to “establish[] a comprehensive national system for the registration” of “sex offenders and offenders against children.” § 16901. Section 111 of SORNA identifies those individuals who are subject to the registration requirement. According to section 111, a “sex offender” is “an individual who was convicted of a sex offense.” § 16911(1). A sex offense, in turn, is:

- (i) a criminal offense that has an element involving a sexual act or sexual contact with another; [or]
- (ii) a criminal offense that is a specified offense against a minor. . . .²

§ 16911(5)(A). “Specified offense against a minor” is defined in a separate provision:

(7) Expansion of definition of “specified offense against a minor” to include all offenses by child predators

The term “specified offense against a minor” means an offense against a minor that involves any of the following:

relevant here, § 16911(5)(A)(iii); certain military offenses, § 16911(5)(A)(iv); and an attempt or conspiracy to commit any sex offense, § 16911(5)(A)(v).

- (A) An offense (unless committed by a parent or guardian) involving kidnapping.
- (B) An offense (unless committed by a parent or guardian) involving false imprisonment.
- (C) Solicitation to engage in sexual conduct.
- (D) Use in a sexual performance.
- (E) Solicitation to practice prostitution.
- (F) Video voyeurism as described in [18 U.S.C. § 1801].
- (G) Possession, production, or distribution of child pornography.
- (H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.
- (I) Any conduct that by its nature is a sex offense against a minor.

§ 16911(7).

Section 111 goes on to divide sex offenders into three “tiers,” depending on the nature of their offense. Tier II sex offenders—the category that, according to the district court, includes Byun—are, as here pertinent, those

whose offense is punishable by imprisonment for more than 1 year and—
(A) [whose offense] is comparable to or more severe than the following offenses,

3. 18 U.S.C. § 1591 provides, in relevant part, that “[w]hoever knowingly . . . in or affecting interstate or foreign commerce . . . recruits, entices, harbors, transports, provides, or obtains by any means a person . . . knowing that . . . the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished. . . .” *Id.* § 1591(a).

4. 18 U.S.C. § 2422(b) provides that:

Whoever, using the mail or any facility or means of interstate or foreign commerce, . . . knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which

when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

- (i) sex trafficking (as described in [18 U.S.C. § 1591³]);
- (ii) coercion and enticement (as described in [18 U.S.C. § 2422(b)⁴]);
- (iii) transportation with intent to engage in criminal sexual activity (as described in [18 U.S.C. § 2423(a)⁵]);
- (iv) abusive sexual contact (as described in [18 U.S.C. § 2244]); [or]

(B) involves—

- (i) use of a minor in a sexual performance;
- (ii) solicitation of a minor to practice prostitution; or
- (iii) production or distribution of child pornography; . . .

§ 16911(3).

Sex offenders must “register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.” § 16913(a). To keep her registration current, an offender must, “after each change of name, residence, employment, or student status,” appear in person in one of the jurisdictions in which she is required to register and noti-

any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

5. 18 U.S.C. § 2423(a) provides:

Transportation with intent to engage in criminal sexual activity.—A person who knowingly transports an individual who has not attained the age of 18 years in interstate or foreign commerce, or in any commonwealth, territory, or possession of the United States, with the intent that the individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, shall be fined under this title and imprisoned not less than 10 years or for life.

fy it of the changed information. § 16913(c). In addition, all sex offenders are required to “appear in person” at regular intervals: “each year, if the offender is a tier I sex offender; . . . every six months, if the offender is a tier II sex offender; and . . . every 3 months, if the offender is a tier III sex offender.” § 16916. The duration of the registration requirement varies depending on the tier of the sex offender: tier I sex offenders must comply with the registration requirements for a period of 15 years; tier II sex offenders, for a period of 25 years; and tier III sex offenders, for life. § 16915(a).

The consequences of failing to comply with SORNA’s registration requirements are significant. A sex offender may be imprisoned for up to ten years for knowing failure to comply with SORNA’s requirements, and an individual convicted of a crime of violence after failing to comply with the registration requirements is subject to a mandatory minimum five-year term of imprisonment. 18 U.S.C. § 2250(a), (c).

III.

The question before us is whether Byun’s conviction for importation of an alien for purposes of prostitution, 8 U.S.C. § 1328, makes her a “sex offender” for purposes of SORNA and thus subject to

6. This is a question of first impression in this circuit. Although there are a number of district court decisions in other circuits regarding SORNA, they address retroactivity issues and constitutional challenges based on the Ex Post Facto Clause, the non-delegation doctrine, the Commerce Clause, and the Due Process Clause, not the appropriate interpretation of the “sex offender” definition. See, e.g., *United States v. Madera*, 474 F.Supp.2d 1257 (M.D.Fla.2007) (retroactivity, nondelegation doctrine, Ex Post Facto, Due Process, and Commerce Clauses), *rev’d*, 528 F.3d 852 (11th Cir.2008) (reversing district court’s retroactivity determination); *United States v. Mason*, 510 F.Supp.2d 923 (M.D.Fla.2007)

its registration requirements.⁶ We conclude that Byun’s conviction under 8 U.S.C. § 1328—which her plea agreement reveals was committed against a minor—is a “specified offense against a minor” and therefore a sex offense. § 16911(7)(I).

A.

Byun was convicted of a violation of 8 U.S.C. § 1328, which provides, in relevant part, that:

[t]he importation into the United States of any alien for the purposes of prostitution, or for any other immoral purpose, is forbidden. Whoever shall, directly or indirectly, import, or attempt to import into the United States any alien for the purpose of prostitution or for any other immoral purpose, or shall hold or attempt to hold any alien for any such purpose in pursuance of such illegal importation, or shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, any alien, in pursuance of such illegal importation, shall be fined under Title 18, or imprisoned not more than 10 years, or both.

Thus, at a minimum, conviction under the applicable provisions of 8 U.S.C. § 1328 requires proof that (1) defendant imported

(retroactivity, nondelegation doctrine, Ex Post Facto, Due Process, and Commerce Clauses); *United States v. Templeton*, No. CR-06-291, 2007 WL 445481 (W.D.Okla. Feb. 7, 2007) (retroactivity, Ex Post Facto, Due Process, and Commerce Clauses); *United States v. Kapp*, 487 F.Supp.2d 536 (M.D.Pa.2007) (retroactivity); *United States v. Roberts*, No. 07 CR 70031, 2007 WL 2155750 (W.D.Va. July 27, 2007) (retroactivity); *United States v. Hinnen*, 487 F.Supp.2d 747 (W.D.Va.2007) (retroactivity, nondelegation, Due Process, Equal Protection, and Commerce Clauses). Byun has not raised a challenge to the retroactivity or constitutionality of SORNA.

a person into the United States; (2) that person was an alien; and (3) defendant imported the alien for the purpose of having him or her engage in prostitution or for some other immoral purpose.⁷

We assume for purposes of our initial analysis, in Part III.A, that we may consider the fact that Byun's crime was committed against a minor, even though the age of the victim was not an element of her crime of conviction. Having determined that, assuming the age of Byun's victim is taken into account, her crime was a sex offense, we then consider in Part III.B whether the statute might instead require a categorical approach to the age of the victim of the crime, and conclude that it does not.

Under SORNA, Byun qualifies as a "sex offender" if she was convicted of a "sex offense." § 16911(1). A "sex offense" is defined as either "a criminal offense that has an element involving a sexual act or sexual contact with another," § 16911(5)(A)(i), or "a criminal offense that is a specified offense against a minor," § 16911(5)(A)(ii). Byun's offense entailed the importation of a seventeen-year-old woman into Guam with the intent that she engage in sexual contact with customers in Byun's club. We conclude this offense was a "specified offense against a minor," and thus qualifies as a sex offense under § 16911(5)(A)(ii). Because we hold Byun committed a sex offense under § 16911(5)(A)(ii), we do not address wheth-

er Byun's crime qualifies as a sex offense under § 16911(5)(A)(i) ("a criminal offense that has an element involving a sexual act or sexual contact with another").⁸

We recognize that the government contended to the district court only that Byun was a sex offender under § 16911(5)(A)(i); the government did not assert Byun was a sex offender under § 16911(5)(A)(ii). Although we do not, as a general rule, "consider issues not passed upon below," this court has discretion to consider an issue not raised to the trial court when it is "purely one of law and either does not affect or rely upon the factual record developed by the parties . . . or the pertinent record has been fully developed." *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir.1978). Whether Byun qualifies as a sex offender under § 16911(5)(A)(ii) is purely an issue of law, and the only facts relevant to this inquiry are the undisputed facts admitted by Byun in her plea agreement. Further, Byun is not prejudiced by our consideration of this question, which she specifically addressed in her briefs both to the district court and to this court, and which was discussed during oral argument. See *Patrin*, 575 F.2d at 712. Thus, we exercise our discretion to consider whether Byun qualifies as a sex offender under § 16911(5)(A)(ii), and we hold that she does.

Turning to the list of "specified offense[s] against a minor," we find that the crime of which Byun was convicted does

7. Although the statute allows conviction both for importation for the purpose of prostitution and for importation for some other immoral purpose, we conclude, for purposes of our analysis, that Byun was convicted of importation for the purpose of prostitution, as the charging documents so indicate.
8. In her brief, Byun primarily argues that her offense is not one having an "element involving a sexual act or sexual contact with another" because it does not require that *any* indi-

vidual actually engage in a sexual act. Many of the specified offenses against a minor, however, do not require that any person engage in a sexual act. See § 16911(7)(A)-(G). As we ultimately conclude that Byun's offense is a specified offense against a minor, we need not determine whether offenses having an "element involving a sexual act or sexual contact with another" include those in which only an intent that a sexual act occur is required, not the act itself.

not neatly correspond to any of the listed “specified offenses.” In particular, whether Byun was convicted of or admitted to “[s]olicitation to practice prostitution,” § 16911(7)(E), the most likely listed crime, is not clear. Solicitation is generally defined as “[t]he criminal offense of urging, advising, commanding, or otherwise inciting another to commit a crime.” BLACK’S LAW DICTIONARY (8th ed.2004). None of the offenses of which Byun was convicted had solicitation as an element.

Even assuming that we can look to the underlying facts of Byun’s crime, Byun’s plea agreement does not conclusively establish that she solicited Seo to practice prostitution. The plea agreement states that “[b]etween January and March 31, 2000, defendant encouraged and induced Youn Be Seo . . . to come to Guam by offering to employ [her] at the Club” and that Byun “intended that . . . [Seo] would engage in sexual contact with the Club’s customers, and perform sexual acts for money.” The plea agreement makes clear that Byun induced Seo to come to the United States by offering her employment of some kind in her club, and that Byun intended that Seo would engage in prostitution once she arrived. But the plea agreement never explicitly states that Byun solicited, urged, advised, or otherwise incited Seo to engage in prostitution. It seems likely from the circumstances that such solicitation of Seo eventually occurred, but that fact was not explicitly admitted in the plea agreement. We thus cannot find, on the basis of the record, that Byun solicited a minor to practice prostitution.

This determination is not, however, the end of the story. The category of “specified offense[s] against a minor” also includes a catchall provision for “conduct that by its nature is a sex offense against a minor.” For two reasons, we conclude that Byun’s offense likely falls within this

category. First, the strong similarity of Byun’s offense to at least one of the listed offenses, i.e., solicitation of a minor to practice prostitution, supports a conclusion that the catchall provision includes Byun’s crime. See *Gutierrez v. Ada*, 528 U.S. 250, 255, 120 S.Ct. 740, 145 L.Ed.2d 747 (2000) (“[A] word is known by the company it keeps.”) (alteration in original) (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S.Ct. 1061, 131 L.Ed.2d 1 (1995)); *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003) (noting that “[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words”) (alteration in original) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15, 121 S.Ct. 1302, 149 L.Ed.2d 234 (2001)). As a common sense matter, transporting a minor to the United States with the intent that she engage in prostitution is no less “conduct that by its nature is a sex offense against a minor” than is soliciting a minor to the same end. The “transportation with intent” conduct in which Byun engaged was almost certain to end in Byun urging, advising, commanding, or otherwise inciting Seo to practice prostitution, unless Byun was deflected from carrying out her intent. Moreover, neither the transportation nor the solicitation crimes require that any prostitution actually occur, but both may well result in prostitution by a minor. The catchall “specified offense” category therefore likely includes crimes such as Byun’s.

Second, Byun’s offense appears to be a “tier II” sex offense within the meaning of the statute, a circumstance that supports the conclusions both that it must be a “sex offense” of some kind, and, more specifically, that it is a “specified offense against a

minor.” The tier II sex offender category provides significant guidance in determining whether Congress intended that certain crimes be treated as sex offenses under SORNA.⁹ Because an individual must be a sex offender before she can be a “tier II sex offender,” it follows that Congress must have determined that those crimes listed in § 16911(3) (defining tier II offenses) were themselves “sex offenses.”

The tier II definition indicates that individuals whose “offense” is one of the listed crimes, or a crime “comparable to or more severe than” them, when committed against a minor, are tier II sex offenders. One of the listed offenses in the tier II sex offender category, 18 U.S.C. § 2423(a), forbids knowingly transporting a minor in interstate or foreign commerce with the intent that the minor engage in prostitution. *Id.* The crime of which Byun was convicted, 8 U.S.C. § 1328, contains all of the elements of 18 U.S.C. § 2423(a), with the exception of the requirement that the victim be a minor.¹⁰ Moreover, Byun’s offense also seems to parallel, but for absence of the “minor” element, 18 U.S.C. § 1591, a tier II offense which makes crim-

inal knowingly “transport[ing]” an individual in interstate or foreign commerce with knowledge “that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act.” 18 U.S.C. § 1591(a). Assuming, as we have for this part of our analysis, that we may consider that Byun’s victim was a minor, Byun’s offense is “comparable to or more severe than” the listed tier II offenses under § 2423(a) and 1591(a) and therefore falls within the category of tier II offenses.

[1] That Byun’s offense is comparable to a listed tier II offense supports not only the general conclusion that her crime is a “sex offense,” but that it is, more particularly, a “specified offense against a minor.” In general, the list of tier II sex offenses closely corresponds to the list of “specified offense[s] against a minor” in § 16911(7). Nearly all of the listed offenses in tier II necessarily involve minor victims, and many overlap significantly with the specified offenses against a minor.¹¹ For example, tier II offenses include “coercion and enticement” of a minor to engage in prosti-

9. Byun argues, correctly, that the “tier II” category does not provide the definition of a “sex offense”; that definition is contained in 16911(5). Nonetheless, the definition of “sex offense” is appropriately interpreted in the context of the statute as a whole, and the “tier II” category sheds significant light on the “sex offense” definition.

10. 8 U.S.C. § 1328 prohibits “directly or indirectly . . . import[ing]” an individual for purposes of prostitution, while 18 U.S.C. § 2423(a) prohibits “knowingly transport[ing]” a minor in interstate or foreign commerce for such purpose. Although the language of these two elements is somewhat different, it is clear from our case law that Byun was convicted of a crime with an element of “knowingly transporting” for purposes of 18 U.S.C. § 2423(a). We have held that evidence of an intent to import for purposes of prostitution is necessary for a conviction under 18 U.S.C. § 1328, so no conviction

can be had under that statute without proving that the defendant knew she was transporting an individual in interstate commerce. *See United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1194 n. 8 (9th Cir.2000) (en banc) (citing *Pena-Cabanillas v. United States*, 394 F.2d 785, 789 n. 4 (9th Cir.1968)). Moreover, a conviction for violation of 18 U.S.C. § 2423(a) does not require that the defendant personally (or “directly”) transport the victim: “knowing[] transport[ation]” occurs when a defendant “causes the transport of” a minor for purposes of prostitution. *United States v. Johnson*, 132 F.3d 1279, 1285 (9th Cir.1997) (rejecting the argument that a defendant who had arranged with a foreign exchange program to have a Norwegian teenager travel to his home in California had not “knowingly transport[ed]” him).

11. Tier II also includes offenses that “occur[] after the offender becomes a tier I sex offender.” § 16911(3)(C).

tution (18 U.S.C. § 2422(b)), § 16911(3)(A)(ii); “use of a minor in a sexual performance,” § 16911(3)(B)(i); and “production or distribution of child pornography,” § 16911(3)(B)(iii). As the tier II list—which, as noted, appears to include Byun’s offense—informs our interpretation of “specified offense[s] against a minor,” we are convinced that the offenses against minors listed as tier II crimes either correspond directly to one of the spelled-out “specified offense[s] against a minor” listed in § 16911(7) or are included in the catchall category of “conduct that by its nature is a sex offense against a minor.” Thus, if we may consider the fact that Byun’s offense was in fact against a minor, her crime qualifies as a specified offense against a minor under the catchall category of “conduct that by its nature is a sex offense against a minor.”

B.

We have assumed to this point that we may consider the fact that Byun committed her crime against a minor. The crime of which Byun was convicted, however, violation of 8 U.S.C. § 1328, does not have as an element that the victim was a minor. Our determination that Byun committed a “specified offense *against a minor*,” as well as that her offense is a tier II sex offense, thus depends on an examination of the underlying facts of Byun’s crime, which reveal that one of Byun’s victims was only 17 years old. *See* § 16911(3)(A) (an offense is a tier II offense when, among other things, it is “committed against a minor”). Consequently, before we may finally conclude that Byun is a sex offender, we must consider whether the statute permits examination of the underlying fact of the age of Byun’s victim, or rather requires a “categorical” approach as to that circumstance.

In the contexts of immigration law and of the enhancement of criminal sentences, courts usually apply a categorical, or modi-

fied categorical, approach to determine whether the crime of which the defendant was convicted meets the statutory requirements to have immigration consequences or provides the basis for a sentencing enhancement, rather than allowing examination of the underlying facts of an individual’s crime. *See, e.g., Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (concluding that a categorical or a modified categorical, rather than a “factual approach,” was required to determine whether the defendant had committed “burglary” for purposes of sentence enhancement); *Li v. Ashcroft*, 389 F.3d 892, 895–96 (9th Cir.2004) (holding that to determine whether a crime of conviction is an aggravated felony, the court makes a categorical comparison between the generic crime and the crime of which the person has been convicted); *see also United States v. Rodriguez-Guzman*, 506 F.3d 738, 746–47 (9th Cir.2007) (applying modified categorical approach, which permits examination of the record of conviction, in Sentencing Guidelines case because “the statute of conviction is overly inclusive”). *But cf. United States v. Belless*, 338 F.3d 1063, 1065–67 (9th Cir.2003) (holding that for purposes of conviction under 18 U.S.C. § 922(g)(9)-possession of a firearm by one “who has been convicted in any court of a misdemeanor crime of domestic violence”—the earlier crime of conviction need not have as an element that the victim had a domestic relationship to the perpetrator); *Tokatly v. Ashcroft*, 371 F.3d 613, 622 (9th Cir.2004) (stating that the categorical approach is not applied in the immigration context when Congress has specifically made conduct, rather than conviction, the basis for removal).

In *Taylor*, the Supreme Court explained why the sentencing statute in question called for a categorical approach. First, the statute in *Taylor* referred to persons who had been “convict[ed]” of certain

crimes, rather than persons who had “committed” such crimes, reflecting Congress’s intent that “the sentencing court . . . look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.” *Id.* at 600, 110 S.Ct. 2143. Second, the legislative history of the act suggested that Congress “generally took a categorical approach to predicate offenses,” because “no one suggested that a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case.” *Id.* at 601, 110 S.Ct. 2143. Third, the “practical difficulties and potential unfairness of a factual approach are daunting.” *Id.*

Taylor thus instructs that in determining whether a provision of federal law calls for a categorical approach or an examination of “the facts underlying prior convictions,” we turn to the ordinary tools of statutory construction, relying primarily on the language of the statute but making reference to the legislative history and practical effects to the extent necessary to illuminate the meaning of the plain language. *See also Belless*, 338 F.3d at 1066–67 (determining whether a statute called for a categorical or non-categorical approach by relying primarily on the language of the statute, but also considering the practical concern that very few state statutes include as an element the conduct that Congress hoped to address).

Applying this approach to the “tier II” category, we conclude that, as to whether an individual is a “tier II” offender, the language of the statute points strongly toward a non-categorical approach with regard to the age of the victim. The statute provides that an individual is a tier II sex offender when his or her crime is “comparable to or more severe than” a violation of § 2423(a) “when committed against a minor.” § 16911(3)(A) (emphasis added).

The use of the word “committed,” rather than “convicted” persuasively indicates that, in determining whether the victim of Byun’s crime was a minor, we may consider not only the elements of the crime of which Byun was convicted but her actual conduct. *See Belless*, 338 F.3d at 1067 (assuming that use of “committed” with regard to one aspect of a crime allowed application of noncategorical approach with regard to that aspect); *cf. Taylor*, 495 U.S. at 600, 110 S.Ct. 2143 (noting that the use of the word “convicted,” rather than “committed,” required an examination only of the elements necessary for a conviction, rather than any underlying acts).

[2] While the language of the statute is somewhat more ambiguous with regard to whether a categorical approach must be applied to all elements of a “specified offense against a minor,” the close connection between “specified offense[s] against a minor” and tier II offenses, as well as the history of the statute, support the conclusion that a non-categorical approach to the age of the victim is permitted with respect to that category as well. Section 16911(1) defines a sex offender as “an individual who was *convicted* of a sex offense” (emphasis added), rather than an individual who committed, or engaged in conduct constituting, such an offense. But the statute then goes on to describe the two applicable definitions of “sex offense” in quite different ways: The language used in defining the first category of “sex offenses” suggests strongly that only a categorical approach is appropriate as to that category, as it includes only criminal offenses having an “element involving a sexual act or sexual contact with another.” § 16911(5)(A)(I) (emphasis added). The specific reference to an “element” requires an analysis of the statutory elements, rather than an examination of the underlying facts. *See United States v. Sherbondy*,

865 F.2d 996, 1005 (9th Cir.1988) (holding that the use of “the phrase ‘as an element’ requires an examination of the statute that delineates the offense of which the defendant was convicted and precludes any inquiry into the defendant’s actual conduct.”).

In contrast, the “sex offense” category here pertinent, “a criminal offense that is a specified offense against a minor,” contains no reference to the crime’s “elements.” Further, the definition of “specified offense[s] against a minor” begins with language stating that such offenses must be “against a minor” and then lists offenses such as “kidnapping,” “false imprisonment,” and “[u]se in a sexual performance,” § 16911(7)(A), (B), (D), that do not refer to the identity of the victim. That is, the definition suggests that *any* kidnapping offense becomes a “specified offense against a minor” when the victim is a minor. Finally, and critically, the list of specified offenses against a minor includes “[a]ny conduct that by its nature is a sex offense against a minor,” § 16911(7)(I) (emphasis added), suggesting again that for the category of “specified offense[s] against a minor,” it is the underlying “conduct,” not the elements of the crime of conviction, that matter.

12. We have previously considered whether a statute might permit one element or aspect of a crime to be determined by looking to the underlying facts, while a “conviction” is required as to the other elements of the crime. In *United States v. Belless*, we concluded that, under 18 U.S.C. § 922(g)(9), which makes possession of a firearm illegal for anyone “who has been convicted in any court of a misdemeanor crime of domestic violence,” domestic violence crimes were “those crimes that are *in fact* committed against persons who have a domestic relationship specified in the statute.” 338 F.3d at 1066 (emphasis added). *See also White v. Dept. of Justice*, 328 F.3d 1361, 1364–67 (Fed.Cir.2003) (similarly holding that a non-categorical approach was permitted with regard to the nature of the defendant’s relationship with the victim). In

[3] In sum: Congress did not define “specified offense against a minor” in terms of elements, spoke of “an offense against a minor” and then listed broad offenses such as kidnapping, and expressly referred to “conduct” in one part of the definition. The tier II sex offender provision also clearly permits a non-categorical approach to determining the age of the victim of the crime, and given the close connection between these two sections of the statute, Congress likely intended that both be interpreted similarly with regard to ascertaining the age of the victim. Given all these textual clues, and even though use of the word “convicted” at the outset with regard to “sex offender[s]” creates a modicum of ambiguity, the best reading of the statutory structure and language is that Congress contemplated a non-categorical approach as to the age of the victim in determining whether a particular conviction is for a “specified offense against a minor.”¹²

The legislative history of the statute fully supports this conclusion. This history shows that Congress intended to include all individuals who commit sex crimes against minors, not only those who were convicted under a statute having the age of

Tokatly v. Ashcroft, in contrast, we concluded that a categorical approach must be applied with respect to all aspects of a “crime of domestic violence” in the immigration context, despite the fact that the immigration statute arguably drew a distinction between the element of “violence” and the requirement that the crime be committed within a domestic relationship. 371 F.3d at 624. Our decisions in *Tokatly* and *Belless* are not easily reconciled. *See Cisneros-Perez v. Gonzales*, 465 F.3d 386, 392 (9th Cir.2006). We need not determine, however, whether this case is more similar to *Belless* or *Tokatly*, because there is substantially more support, both in the text of the statute and the legislative history, that Congress intended that the identity of the victim may be established without application of a categorical approach.

the victim as an element. The Act is entitled the “Adam Walsh Child Protection and Safety Act,” and the legislative history reveals substantial discussion of the necessity of identifying all child predators.¹³ See, e.g., H.R. REP. NO. 109–218, at 22–23 (2005) (stating, in a section entitled “Background and Need for the Legislation,” that “[t]he sexual victimization of children is overwhelming in magnitude,” and noting that the median age of the victims of imprisoned sex offenders in one study “was less than 13 years old”); 152 Cong. Rec. H657, H676 (daily ed. Mar. 8, 2006) (statement of Rep. Sensenbrenner) (purpose of the act is to “better protect our children from convicted sex offenders”); *id.* at H682 (statement of Rep. Poe) (bill will “mak[e] sure that our children are safer” and target “child predators”); *id.* at S8013 (statement of Sen. Hatch) (in explaining his support for the bill, stating “I am determined that Congress will play its part

in protecting the children of . . . America”). The language of the statute similarly evidences Congress’s intent to require all those who commit sex crimes against children to register as sex offenders. The section defining “specified offense[s] against a minor” is entitled “[e]xpansion of definition of ‘specified offense against a minor’ to include all offenses by child predators,” § 16911(7). See *Bhd. of R.R. Trainmen v. Baltimore & Ohio R.R. Co.*, 331 U.S. 519, 529, 67 S.Ct. 1387, 91 L.Ed. 1646 (1947) (noting that “[f]or interpretative purposes, [the heading of a section is] of use . . . when [it] shed[s] light on some ambiguous word or phrase,” but it “cannot . . . limit that which the text makes plain”).¹⁴

Given the language and structure of the statute, as well as its legislative history, we conclude that, as to the age of the victim, the underlying facts of a defendant’s offense are pertinent in determining wheth-

13. Much of what ultimately became the Adam Walsh Act was introduced in the House in 2005 as part of a larger bill containing provisions on gang violence and protection for federal judges. H.R. 3132, 109th Cong. (2005). H.R. 3132 contains the same definition of a “specified offense against a minor,” but does not contain the definitions of different tiers of sex offenders. The bill was reintroduced in the house in 2006 as H.R. 4472, 109th Cong. (2006), without a new report and was passed under “suspension of the rules,” according to which “floor debate is limited, all floor amendments are prohibited, and a two-thirds vote is required for final passage.” Elizabeth Rybicki, CRS Report for Congress, *Suspension of the Rules in the House: Principal Features*, available at <http://www.rules.house.gov/Archives/98-314.pdf>. The Senate version of the bill, S. 1086, 109th Cong. (2006), was reported out of committee in March of 2006 without a written committee report. The cited House Report was thus prepared only with regard to H.R. 3132.

14. Were we interpreting a criminal statute, we would be considerably more hesitant to conclude that an element, such as the age of a victim, can be determined by a judge after examining the underlying facts of a crime.

As the Supreme Court noted in *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (plurality opinion), allowing a judge in a criminal proceeding to look beyond charging documents to the underlying facts of an earlier offense may well implicate the Sixth Amendment’s requirement that all facts, other than that of a prior conviction, that increase the maximum punishment for a crime must be proven to a jury beyond a reasonable doubt. *Id.* at 25, 125 S.Ct. 1254. Here, however, we are faced not with a statute that imposes criminal punishment, but rather with a civil statute creating registration requirements. See *Smith v. Doe*, 538 U.S. 84, 105–06, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (holding that Alaska’s sex offender registration statute is civil and non-punitive, and therefore retroactive application of the Act does not violate the Ex Post Facto clause); *Hatton v. Bonner*, 356 F.3d 955, 961–67 (9th Cir.2004) (reaching the same conclusion regarding California’s sex offender registration statute). Byun does not argue that Sixth Amendment protections are at issue here. We do not, of course, decide any Sixth Amendment question, as none is before us.

er she has committed a “specified offense against a minor” and is thus a sex offender.¹⁵ Because Byun’s plea agreement reveals that she in fact imported a minor for purposes of prostitution, her offense is a “specified offense against a minor” and she is a sex offender under SORNA.

AFFIRMED.



UNITED STATES of America,
Plaintiff-Appellee,

v.

Norma HERNANDEZ-ORELLANA,
Defendant-Appellant.

United States of America,
Plaintiff-Appellee,

v.

Maritza Olmeda Drewry, Defendant-
Appellant.

Nos. 06-50584, 06-50620.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted June 3, 2008.

Filed Aug. 20, 2008.

Background: Defendants were convicted in the United States District Court for the Southern District of California, Napoleon A. Jones, J., of conspiracy to bring aliens from Mexico to the United States for financial gain. Appeal was taken.

Holdings: The Court of Appeals, Tallman, Circuit Judge, held that:

(1) defendant’s right of confrontation was not violated by district court’s refusal to sever defendant’s trial from that of co-defendant;

15. As it is not necessary to our holding, we draw no conclusion as to whether a non-

(2) evidence was sufficient to support finding that defendant knew of or acted in reckless disregard as to the illegal status of individuals in her vehicle, as required to sustain conviction for unlawfully transporting an illegal alien within the United States;

(3) Evidence that defendants engaged in the act of picking up aliens at a location near the border and transported them within the United States was insufficient to sustain conviction for substantive charge of bringing illegal aliens into the United States for financial gain; and

(4) evidence was sufficient to support finding that defendants entered into a criminal conspiracy which intended to bring aliens into the United States for financial gain.

Affirmed in part, reversed in part, and remanded.

1. Criminal Law ☞1139, 1148

An appellate court reviews constitutional questions de novo and a district court’s determination that severance was unnecessary for abuse of discretion.

2. Criminal Law ☞1044.2(2)

As a general rule, a party must renew her pre-trial severance motion at the conclusion of the presentation of evidence.

3. Criminal Law ☞1044.2(2)

Defendant failed to preserve for appellate review claim that trial court erred in failing to sever her trial from that of codefendant, given that defendant failed to renew pre-trial severance motion at the conclusion of the presentation of evidence.

categorical approach is permitted with regard to any facts other than the age of the victim.

2013 WL 530575

Only the Westlaw citation is currently available.
United States District Court, C.D. Illinois.

Jeremy S. CARY, Petitioner,

v.

UNITED STATES of America, Respondent.

No. 12-cv-1469.

|

Feb. 12, 2013.

Attorneys and Law Firms

Jeremy S. Cary, Marianna, FL, pro se.

Kirk Schoenbein, U.S. Atty, Peoria, IL, for Respondent.

ORDER & OPINION

JOE BILLY McDADE, Senior District Judge.

*1 This matter is before the Court on Petitioner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. 1), filed on November 13, 2012. Respondent filed a Response (Doc. 14) and Petitioner filed a Reply (Doc. 16). For the reasons stated below, Petitioner's Motion is granted.

PROCEDURAL HISTORY

Petitioner was convicted of failure to register as a sex offender in violation of 18 U.S.C. § 2250(a) after a guilty plea, without a plea bargain. (Doc. 1 at 1). The presentence investigation report (PSR) stated that "the defendant was required to register as a Tier III offender." (11-cr-10054, Doc. 15 at 5). Under the sentencing guideline for a failure to register offense, this corresponded with a base offense level of 16. U.S. Sentencing Guidelines Manual § 2A3 .5. The total offense level was calculated as 13, incorporating a three level reduction for acceptance of responsibility. (11-cr-10054, Doc. 15 at 6). Based on Petitioner's criminal history, the guidelines range for this offense level was calculated as thirty-three to forty-one months' imprisonment and supervised release for life. (11-cr-10054, Doc. 15 at 18–19). Petitioner was sentenced to thirty-three months of incarceration, the lowest end of the guidelines range for the calculated offense level. (Doc. 1 at 1). He was also sentenced to twenty years

of supervised release, below the guidelines recommendation. (Doc. 1 at 1). His supervised release included a condition that Petitioner install filtering software on his computer at his cost and allow his probation officer to monitor his computer use. (11-cr-10054, Doc. 18 at 4). Petitioner did not appeal this sentence. (Doc. 1 at 2).

In Petitioner's § 2255 Motion, he raises five grounds to challenge his conviction and sentence. His first claim is that he received ineffective assistance of counsel based on the failure to argue certain points Petitioner wanted raised during his sentencing hearing. This claim is closely related to the other four arguments raised in the Petition: that he should have received a downward departure based on family responsibilities, that the Court abused its discretion in setting a supervised release condition limiting Petitioner's use of computers, that a twenty-year supervised release term is "greater than necessary punishment," and that his calculated base offense level was "improper and unconstitutional." (Doc. 1 at 4–14).

DISCUSSION

A sentence may be vacated, set aside, or corrected pursuant to § 2255 if the sentence "was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255(a). "[R]elief under § 2255 is an extraordinary remedy because it asks the district court essentially to reopen the criminal process to a person who already has had an opportunity for full process." *Almonacid v. United States*, 476 F.3d 518, 521 (7th Cir.2007). Thus, § 2255 is limited to correcting errors of a constitutional or jurisdictional magnitude or errors constituting a fundamental defect that results in a complete miscarriage of justice. *E.g., Belford v. United States*, 975 F.2d 310, 313 (7th Cir.1992), overruled on other grounds by *Castellanos v. United States*, 26 F.3d 717 (7th Cir.1994).

*2 "A § 2255 motion is not a substitute for a direct appeal." *Coleman v. United States*, 318 F.3d 754, 760 (7th Cir.2003). Where a petitioner failed to appeal his sentence, his claims in a § 2255 motion may be procedurally barred. Constitutional issues are barred unless the petitioner can show good cause for and prejudice from the failure to appeal the issue, or if refusal to hear the issue would result in a fundamental miscarriage of justice. See *Prewitt v. United States*, 83 F.3d 812, 816 (7th Cir.1996). "[N]onconstitutional issues that could have been but were not raised on direct appeal" cannot be raised in a

§ 2255 motion regardless of cause or prejudice. *Belford*, 975 F.2d at 313; *see also Lanier v. United States*, 220 F.3d 833, 842 (7th Cir.2000).¹ However, to the extent such claims form the basis for ineffective assistance of counsel claims, they may be considered in that context. *See Belford*, 975 F.2d at 313 n. 1. An ineffective assistance of counsel claim may be raised in a § 2255 motion regardless of whether it could have been raised on appeal. *Massaro v. United States*, 538 U.S. 500, 504 (2003).

I. Failure to Award Downward Departure

Among Petitioner's claims is an argument that he was entitled to a downward departure from the sentencing guidelines range because of his family responsibilities. (Doc. 1 at 10). Petitioner also claims his counsel was ineffective for failure to ask the Court for this downward departure. (*See* Doc. 1 at 10). Neither of these arguments entitles Petitioner to relief.

First, as a stand-alone claim, this nonconstitutional claim for failure to award the departure is procedurally barred for failure to appeal the issue. Though neither Petitioner nor his counsel specifically asked for a downward departure pursuant to U.S. Sentencing Guidelines Manual § 5H1.6, both made it known to the Court that Petitioner's girlfriend had recently given birth to a child.² (*See* 11-cr-10054, Docs. 14–1, 23). Petitioner could have appealed the Court's decision not to reduce his sentence on this basis, but did not. Thus, the claim is procedurally barred as defaulted.

The Court also finds Petitioner's claim that his counsel was ineffective for failing to ask for a downward departure under § 5H1.6 to be without merit. To succeed on an ineffective assistance of counsel claim, Petitioner must show both that his counsel's performance was deficient, and that he was prejudiced by the deficiency such that the result would have been different without the error. *Strickland v. Washington*, 466 U.S. 688, 687–91 (1984). Here, Petitioner is unable to show deficient performance or prejudice with respect to this claim.

Petitioner's counsel was not deficient for failure to ask the Court specifically for a family ties and responsibility downward departure or for any advice that Petitioner not do so himself. First, as stated directly in § 5H1.6, “family ties and responsibilities are not ordinarily relevant to determining whether a departure may be warranted.” U.S. Sentencing Guidelines Manual § 5H1.6. Second, Petitioner's counsel did point to Petitioner's claim that he had to care for his newborn son at the sentencing hearing. (11-cr-10054, Doc. 23 at 21).

Simply because he did not ask for the downward departure by name was not deficient performance. Also, Petitioner did ask the Court for a downward departure on this basis. (11-cr-10054, Doc. 14–1 at 5). The Court, aware of the possible grounds for departures, found the fact that Petitioner had a new baby did not entitle him to a lesser sentence. Thus, there is also no prejudice from any failure to argue this ground at sentencing.

II. Supervised Release Claims

*3 Petitioner argues that the Court abused its discretion in ordering Petitioner's computer use monitored as a condition of his supervised release. (Doc. 1 at 9). He also argues that twenty years of supervised release is too long. (Doc. 1 at 14).³ Petitioner asserts the condition and length of his supervised release are “greater than necessary” punishment. (Doc. 1 at 14).

As with the downward departure claim, these nonconstitutional claims were procedurally defaulted by Petitioner's failure to appeal his sentence. *See Belford*, 975 F.2d at 313. Both the length of supervised release and the computer monitoring condition were clearly laid out in the Court's judgment. Petitioner had a full opportunity to appeal his supervised release sentence but did not. Thus, these claims are procedurally barred and will not be addressed on the merits.

III. Improper Guidelines Calculation

Finally, Petitioner also argues that his base offense level under the sentencing guidelines was improperly calculated and his counsel was ineffective for failing to notice or argue this point. (Doc. 1 at 5–7). The Seventh Circuit has held that a petitioner cannot raise a claim of misapplication of the sentencing guidelines in a § 2255 motion. *See Scott v. United States*, 997 F.2d 340, 342–43 (7th Cir.1993). However, Petitioner's ineffective assistance of counsel claim, based on the failure to object to the sentence calculation, is cognizable. *See Massaro*, 538 U.S. at 504.

Petitioner was convicted of failure to register as a sex offender, in violation of 18 U.S.C. § 2250. (Doc. 1 at 1). Under the sentencing guidelines, the base offense level is determined by calculating which “tier” the offender falls under based on the underlying sex offense. U.S. Sentencing Guidelines Manual § 2A3.5. The base offense level for a Tier III offender is 16, for Tier II offenders it is 14, and for Tier I offenders it is 12. The tiers are defined in 42 U.S.C. § 16911.

The PSR stated that Petitioner's underlying sex offense made him a Tier III offender, which corresponds with a base offense level of 16. (11-cr-10054, Doc. 15 at 5). Petitioner argues that he should have been a Tier II or even possibly a Tier I offender, which would have resulted in a lower base offense level. (Doc. 1 at 5–7). Petitioner was required to register as a sex offender because of a conviction for Aggravated Criminal Sexual Abuse, in violation of 720 Ill. Comp. Stat. 5/12–16(d) (current version at 720 Ill. Comp. Stat. 5/11–1.60). Petitioner argues that his offense would make him a Tier II offender at most, because Tier III offenses only involve force, threat of force, or victims under the age of thirteen. (Doc. 1 at 6–7).

Under 42 U.S.C. § 16911, an offense must be “comparable to or more severe than” the listed crimes to fall under that tier. To be a Tier III offender, the offense must be punishable by more than a year of prison and be comparable to or more severe than the specified examples: “aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18)” or “abusive sexual contact … against a minor who has not attained the age of 13 years.” 42 U.S.C. § 16911(4)(A).⁴ A Tier II offender is an offender whose offense is punishable by imprisonment for more than a year and is comparable to or more severe than the enumerated examples. *Id.* at § 16911(3). Finally, a Tier I offender is a sex offender who does not come within the other two tiers. *Id.* at § 16911(2).

*4 In determining under which tier an offender falls, if the applicable criminal statute proscribes different types of conduct that would place an offender in different tiers, the Court may consider additional materials, including the charging instrument. *See United States v. Taylor*, 644 F.3d 573, 576–77 (7th Cir.2011), *cert denied*, 132 S.Ct. 1049 (2012). This is called the modified categorical approach. Here, the Illinois statute for Aggravated Criminal Sexual Abuse proscribes a wide range of conduct, including sexual abuse involving use or threat to use a weapon and sexual abuse of a physically handicapped person. 720 Ill. Comp. Stat. 5/12–16. Some of the proscribed conduct may qualify the offender as a Tier III offender under 42 U.S.C. § 16911, but not all of it. Thus, the modified categorical approach requires looking beyond the title of the statute and determining which specific offense was committed.

It is undisputed that Petitioner was convicted under subsection (d) of the Illinois Aggravated Criminal Sexual Abuse statute, which prohibits “an act of sexual penetration or sexual conduct with a victim who is at least 13 years of age but

under 17 years of age and the person is at least 5 years older than the victim.” 720 Ill. Comp. Stat. 5/12–16(d). It appears no court has decided under which tier Petitioner's specific sex offense falls. However, it seems clear that Petitioner's prior sex offense was not of a nature that would qualify him as a Tier III offender. Respondent concedes as much in its brief. (Doc. 14 at 20).⁵ Thus, Petitioner's counsel's failure to object to the base offense calculation in the PSR was an error.

To satisfy the performance prong for an ineffective assistance of counsel claim, however, counsel's performance must fall below an “objective standard of reasonableness under prevailing professional norms.” *Shell v. United States*, 448 F.3d 951, 954 (7th Cir.2006). There is a strong presumption that counsel is effective. *E.g., Fountain v. United States*, 211 F.3d 429, 434 (7th Cir.2000). Though the entire course of representation may be taken into consideration, the right to effective counsel can be violated by “even an isolated error of counsel if that error is sufficiently egregious and prejudicial.” *Murray v. Carrier*, 477 U.S. 478, 496 (1986). For example, deficient performance has been found where counsel failed to make an argument based on case law from other circuits that certain offenses should be grouped for sentencing purposes. *United States v. Glover*, 149 F.Supp.2d 371, 380–81 (N.D.Ill.2001).

Here, though Petitioner's counsel performed adequately in most respects, his failure to challenge the base offense level based on a Tier III offender determination was deficient performance, far below an objective standard of reasonableness. A defense attorney has an obligation to review the PSR and ensure its accuracy. The guidelines range calculation is especially important, as it is the starting point from which the sentence is determined. Though perhaps not as obvious as many sentencing guidelines, an attorney should be able to calculate the proper tier under sentencing guideline § 2A3.5 and 42 U.S.C. § 16911. There may be close cases in which the failure to discover and raise the issue of an improper tier under guideline § 2A3.5it would not be deficient. This is not one of those cases. Petitioner's offense clearly did not involve force or threat of force or a victim under the age of 13, so certainly did not qualify him as a Tier III offender. Additionally, this could not have been a strategic decision on counsel's part. This error was egregious and important enough to constitute ineffective assistance.

*5 Respondent gestures to an indictment for Predatory Criminal Sexual Assault of a Child, which was the first charge filed against Petitioner in the state case that led to his

sex offense conviction, and was included in the discovery materials from the criminal case. Respondent seems to hint that perhaps counsel mistakenly thought Petitioner was convicted of this crime, which involves a child under twelve and would be a Tier III offense. However, this charge was dropped, and the record clearly shows that Petitioner was convicted of Aggravated Criminal Sexual Abuse based on sexual conduct with a victim between thirteen and seventeen. If counsel did make this mistake, it would certainly not support an argument that his performance was within the standard of reasonableness.

Petitioner also must show prejudice by his counsel's deficient performance. For a claim that counsel failed to raise an argument at sentencing, the Petitioner must show "a reasonable probability that his underlying argument would have been accepted at the sentencing hearing." *Welch v. United States*, 604 F.3d 408, 425 (7th Cir.2010). As Respondent begrudgingly admits, any increase in the length of incarceration due to guidelines miscalculation constitutes prejudice. *Glover v. United States*, 531 U.S. 198, 204 (2001). Though *Glover* was decided before the guidelines were held to be advisory, the principle has been reaffirmed since. See, e.g., *United States v. Jones*, 635 F.3d 909, 916 (7th Cir.2011) ("In the sentencing context, an attorney's unreasonable failure to identify and bring to a court's attention an error in the court's Guidelines calculations that results in a

longer sentence may constitute ineffective assistance entitling the defendant to relief."). Even if, as Respondent argues, Petitioner's guideline range should be calculated as thirty to thirty-seven months, (Doc. 14 at 19), such that his current sentence still falls within the range, Petitioner has been prejudiced. This Court sentenced Petitioner to the bottom of the guidelines range, stating "I have been thinking of a basis to sentence you below the advisory guideline range, and I can't find one." (11-cr-10054, Doc. 23 at 28). Had Petitioner's counsel alerted the Court to the improperly calculated offense level and guidelines range, there is a reasonable probability Petitioner would have received a lower sentence. Thus, he was prejudiced by his counsel's deficient performance and is entitled to relief.

CONCLUSION

For the foregoing reasons, Petitioner's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 (Doc. 1) is GRANTED. The Court will schedule the case for resentencing. IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 530575

Footnotes

- 1 A claim of actual innocence may also excuse procedural default, see, e.g., *Bousley v. United States*, 523 U.S. 614, 622 (1998), but that exception is inapplicable here, as Petitioner does not and would have no ground to allege that he is actually innocent of failing to register as a sex offender.
- 2 To the extent Petitioner raises changes in his family situation since that time, they are irrelevant to whether the Court should have granted, or his counsel should have argued for, a downward departure at the time of sentencing.
- 3 To the extent Petitioner's ineffective assistance of counsel claim includes an argument that his counsel improperly advised him not to argue against the computer condition or length of supervised release, it is clearly without merit. Such advice was not unreasonable, there is no showing that the Court would have changed the supervised release had such arguments been raised.
- 4 Tier III offenses also include those involving kidnapping or committed after the offender becomes a Tier II offender, but neither of those are relevant to this case.

5 The government argues that Petitioner's offense "would certainly fit into Tier II." (Doc. 14 at 20). However, that is not entirely clear, and is best resolved through resentencing.

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Only the Westlaw citation is currently available.
United States District Court, N.D. West Virginia,
Martinsburg.

Richard Shawn EDWARDS, Petitioner,
v.
UNITED STATES of America, Respondent.

Criminal Action No. 3:15-CR-9
|
Civil Action No. 3:16-CV-134 (GROH)
|
Signed 12/21/2017

Attorneys and Law Firms

Paul T. Camilletti, U.S. Attorney's Office, Martinsburg, WV,
for Respondent.

REPORT AND RECOMMENDATION

JAMES E. SEIBERT, UNITED STATES MAGISTRATE
JUDGE

*1 On September 19, 2016, the *pro se* Petitioner filed a Motion¹ Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody. ECF No. 49. On that same date, a notice of deficient pleading issued which advised Petitioner that his motion needed to be filed on court-approved forms. ECF No. 53. On October 11, 2016, Petitioner filed his motion on the court-approved forms. ECF No. 55. On October 12, 2016, an Order Directing Respondent to Answer was entered. ECF No. 57. On November 8, 2016, the Government filed its response to the motion to vacate. ECF No. 68. On November 28, 2016, Petitioner filed his response² to the Government's answer. ECF No. 69. Following his release from incarceration, on October 30, 2017, Petitioner provided the Court with a change of address. ECF No. 80. Petitioner remains on supervised release for five years following his release from imprisonment. ECF No. 41 at 3. This matter is pending before the undersigned for an initial review and Report and Recommendation pursuant to 28 U.S.C. § 636 and Local Rule of Prisoner Litigation Procedure 2.

I. FACTUAL AND PROCEDURAL HISTORY

On March 17, 2015, Petitioner was charged in a single count indictment in the United States District Court for the Northern District of West Virginia. ECF No. 1. On June 17, 2015, Petitioner entered a plea of guilty to the indictment. ECF Nos. 32, 65. On September 21, 2015, the Pre-Sentence Investigation Report was filed with the Court. ECF No. 40. On that same date, Petitioner was sentenced to a term of 30 months of incarceration for his plea, followed by five years of supervised release. ECF No. 41 at 2–3.

In his October 11, 2016 Motion to Vacate under 28 U.S.C. § 2255, Petitioner raises three grounds for relief: (1) that the District Court improperly calculated his base level offense and criminal history score under the United States Sentencing Guidelines (“the Guidelines”), because some of his prior criminal history was “for charges from the same common set of events”; (2) that he received ineffective assistance of counsel who recommended that he enter a plea of guilty; (3) that the Sex Offender Registration and Notification Act (“SORNA” or “the Act”)³ was inapplicable to his conduct and violates the due process clause; and (4) that because he received ineffective assistance of counsel, he involuntarily entered a guilty plea to a crime which he was actually innocent of committing. ECF No. 55 at 5, 6, 7, 9, 10–11. In his § 2255 motion, Petitioner requested that the Court vacate his sentence and conviction and the case be dismissed. *Id.* at 15. On November 8, 2016, the Respondent filed an Answer which denied the allegations in the Petition. ECF No. 68.

II. STANDARD OF REVIEW

A. Review of Petitions for Relief

*2 Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and this Court's local rules, the undersigned is authorized to review such petitions for relief and submit findings and recommendations to the District Court. This Court is charged with screening Petitioner's case to determine if “it plainly appears from the motion, any attached exhibits, and the record of prior proceedings that the moving party is not entitled to relief.” Rule 4, Rules Governing Section 2255 Proceedings for the United States District Courts.

B. Pro Se Litigants.

Because Petitioner is a prisoner seeking redress from a governmental entity or employee, the Court must review the complaint to determine whether it is frivolous or malicious. Pursuant to 28 U.S.C. § 1915A(b), the Court is required to perform a judicial review of certain suits brought by prisoners and must dismiss a case at any time if the Court determines that the complaint is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief against a defendant who is immune from such relief.

Courts must read *pro se* allegations in a liberal fashion. Haines v. Kerner, 404 U.S. 519, 520 (1972). However, a complaint is frivolous if it is without arguable merit either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989) (superseded by statute). The Supreme Court in Neitzke recognized that:

Section 1915(d)⁴ is designed largely to discourage the filing of, and waste of judicial and private resources upon, baseless lawsuits that paying litigants generally do not initiate because of the costs of bringing suit and because of the threat of sanctions for bringing vexatious suits under Federal Rule of Civil Procedure 11. To this end, the statute accords judges not only the authority to dismiss a claim based on an indisputably meritless legal theory, but also the unusual power to pierce the veil of the complaint's factual allegations and dismiss those claims whose factual contentions are clearly baseless. Examples of the former class are claims against which it is clear that the defendants are immune from suit...

490 U.S. at 327.

C. Motions made Pursuant to 28 U.S.C. § 2255.

A motion made pursuant to 28 U.S.C. § 2255 is a collateral attack on a conviction or sentence imposed in a separate proceeding. To succeed on such a motion, the movant must prove one of the following, that: (1) the conviction or sentence was imposed in violation of the laws or Constitution of the United States; (2) the court in imposing sentence lacked jurisdiction; (3) the sentence exceeded the maximum

authorized by law; or (4) the sentence was otherwise subject to collateral attack. 28 U.S.C. § 2255(a).

The United States Supreme Court has “long and consistently affirmed that a collateral challenge may not do service for an appeal.” United States v. Frady, 456 U.S. 152, 165 (1982). Petitioners are limited in the issues which may be addressed in cases brought pursuant to § 2255. Petitioners who fail to raise issues on direct appeal or who raise issues on direct appeal which are decided there, are both precluded from addressing those same issues in § 2255 proceedings. “Nonconstitutional claims that **could** have been raised on direct appeal, but were not, may not be asserted in collateral proceedings.” Stone v. Powell, 428 U.S. 465, 477, n.10, (1976) (emphasis in original) (*citing* Sunal v. Large, 332 U.S. 174, 178–79 (1947)); *see also* United States v. Linder, 552 F.3d 391, 396–97 (4th Cir. 2009) (A petitioner who waives the right to appeal “is not precluded from filing a petition for collateral review. But he is precluded from raising claims that are the sort that **could have** been raised on appeal.”) (*Quoting* Brian R. Means Fed. Habeas Practitioner Guide, Jurisdiction ¶ 1.23.0) (2006–2007) (emphasis in original) (internal citations omitted). Similarly, the Supreme Court has long held that the general rule that “claims not raised on direct appeal may not be raised on collateral review unless the petitioner shows cause and prejudice.” Massaro v. United States, 538 U.S. 500, 504 (2003).

*3 The Fourth Circuit has also held that when a petitioner raises issues which have been previously appealed and decided, that petitioner “will not be allowed to recast, under the guise of collateral attack, questions fully considered” in earlier decisions. Boeckenhaupt v. United States, 537 F.2d 1182, 1183 (4th Cir. 1976), *citing* Herman v. United States, 4th Cir., 227 F.2d 332 (1955); Accord United States v. Harrison, No. 96–7579, 1997 WL 499671, at *1 (4th Cir. August 25, 1997) (unpublished).

“It is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked.” Mabry v. Johnson, 467 U.S. 504, 508 (1984); Bousley v. United States, 523 U.S. 614, 621 (1998). “In order to collaterally attack a conviction or sentence based upon errors that could have been but were not pursued on direct appeal, the movant must show cause and actual prejudice resulting from the errors of which he complains or he must demonstrate that a miscarriage of justice would result from the refusal of

the court to entertain the collateral attack.” United States v. Mikalajunas, 186 F.3d 490, 492–93 (4th Cir. 1999).

A constitutional error that could have been, but was not raised on appeal, may not be raised for the first time in a § 2255 motion, unless it passes a two part-test which requires the movant to show either (1) “cause” that excuses the failure to raise the error on appeal and “actual prejudice” resulting from the error, or (2) that a miscarriage of justice would occur if the court refuses to entertain a collateral attack. (*citing Bousley*, 523 U.S. at 621–22); *Frady*, 456 U.S. at 167–68.

The Supreme Court has recognized that it has not strictly defined “cause” because of “the broad range of potential reasons for an attorney’s failure to comply with a procedural rule, and the virtually limitless array of contexts in which a procedural default can occur.” *Reed v. Ross*, 468 U.S. 1, 13, (1984) (*Citing Wainwright v. Sykes*, 433 U.S. 72, 87 (1977)). The Supreme Court explained that, “[u]nderlying the concept of cause, however, is at least the dual notion that, absent exceptional circumstances, a defendant is bound by the tactical decisions of competent counsel.” *Id.* (*Citing Wainwright v. Sykes, supra*, at 91, and n. 14; *Henry v. Mississippi*, 379 U.S. 443, 451 (1965)). To establish “actual prejudice,” contemplated in the first prong, the movant must show that the alleged error resulted in an “actual and substantial disadvantage,” rather than a mere possibility of prejudice. *Satcher v. Pruitt*, 126 F.3d 561, 572 (4th Cir. 1997) (*quoting Murray v. Carrier*, 477 U.S. 478, 494 (1986)).

To demonstrate a miscarriage of justice, contemplated in the second prong, the movant must prove “actual innocence” of the crime for which he was convicted, substantiating that “it is more likely than not, in light of all the evidence, that no reasonable juror would have convicted him.” *Bousley*, 523 U.S. at 623 (*quoting Schlup v. Delo*, 513 U.S. 298, 327–28 (1995)).

III. ANALYSIS

This Court has reviewed Petitioner’s motion to vacate [ECF No. 55], the Government’s response [ECF No. 68] and Petitioner’s reply [ECF No. 69] and determined that the moving party is not entitled to relief. Although this Court has liberally read the *pro se* allegations, Petitioner has failed to state a claim upon which relief can be granted. In his first claim, Petitioner argues that he was improperly sentenced because his criminal history was improperly calculated. In

his second and fourth claims, Petitioner argues that he received ineffective assistance of counsel because his counsel recommended he enter a plea of guilty, which he now claims he entered involuntarily, to a crime which he claims he was actually innocent of committing. In his third claim, Petitioner argues that the registration requirements of SORNA were applied retroactively in violation of his due process rights and the prohibition against *ex post facto* laws. All of Petitioner’s claims fail because his sentence was properly calculated, he cannot meet the two-prong standard to demonstrate ineffective assistance of counsel, he voluntarily entered his plea and he fails to prove that he was actually innocent of failure to register under SORNA.

A. Petitioner’s First Claim for Relief: Calculation of Sentence

*4 Petitioner’s first claim for relief regarding calculation of his sentence fails to state a claim upon which relief can be granted because (1) Petitioner’s sentence was properly calculated; and (2) Petitioner failed to directly appeal this issue, and cannot now meet the two-pronged standard to collaterally attack his sentence.

1. Petitioner’s sentence was properly calculated.

In 1993, Petitioner was convicted in Maryland of second degree rape and sentenced to 10 years of imprisonment. ECF No. 40 at 8. He and his counsel concede that at the time he committed this act he was at least 18 years of age, but the victim, whom he considered his girlfriend was only 13 years old. ECF Nos. 40 at 7, 66 at 8:22–25. Accordingly, Petitioner was required to register as a Tier II offender pursuant to 34 U.S.C. § 20911, which provides in part that:

The term “tier II sex offender” means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

- (i) sex trafficking (as described in section 1591 of Title 18);
- (ii) coercion and enticement (as described in section 2422(b) of Title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a))¹ of Title 18;

(iv) abusive sexual contact (as described in section 2244 of Title 18);

(B) involves—

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

Petitioner asserts that pursuant to Guidelines § 2A3.5, the correct Base Offense Level range should “begin[] at a base offense level of 12.” ECF No. 55 at 5. Petitioner was sentenced on September 21, 2015, when the applicable portion of Guidelines § 2A3.5 provided:

(a) Base Offense Level (Apply the greatest):

(1) **16**, if the defendant was required to register as a Tier III offender;

(2) **14**, if the defendant was required to register as a Tier II offender; or

(3) **12**, if the defendant was required to register as a Tier I offender.

U.S. Sentencing Guidelines Manual (U.S. Sentencing Comm'n 2014). The Fourth Circuit has recognized that:

The Guidelines provide, with respect to sentencing for a conviction under 18 U.S.C. § 2250, that a sex offender who failed to register be treated based on the seriousness of his underlying sex offense, creating a tripartite classification that identifies Tier I, Tier II, and Tier III offenders. *See* U.S.S.G. § 2A3.5(a); *id.* § 2A3.5 cmt. n.1 (incorporating the tier classifications from 42 U.S.C. § 16911).

Pursuant to 34 U.S.C. § 20911, Petitioner was required to register as a Tier II Offender. According to Guidelines § 2A3.5(a)(2), the appropriate Base Level Offense for a Tier II Offender was 14. Consistent with Guidelines § 2A3.5(a)(2), the Presentence Investigation Report concluded that Petitioner's Base Offense Level was 14, with a reduction of two levels based on acceptance of responsibility. ECF No. 40 at 5–6. At the sentencing hearing on September 21, 2015, the District Court judge confirmed in its findings that:

*5 Defendant's underlying sex offense conviction required him to register as a Tier II Offender. So pursuant to Guidelines 2A3.5(a)(2), the base offense level is 14. Then there's a two-level reduction for acceptance of responsibility under 3E1.1(a), bringing us to a total offense level of 12.

Defendant has a criminal history category of VI, based on 24 points.

With a criminal history Category of VI, and a total offense level of 12, the Guidelines recommend imprisonment in the range of 30 to 37 months.

ECF No. 66 at 5:3–13. After making these findings, the Court inquired, “[a]re there any legal objections to the tentative Guidelines announced by the Court?” *Id.* at 5:20–21. Counsel for the Government and Petitioner agreed there were no objections to the findings, and the Court ruled that, “the Guidelines as announced will be the advisory Guidelines applicable to sentencing in this matter.” *Id.* at 5:22–6:1. The Court then considered the sentencing memorandum Petitioner's counsel filed on his behalf, and the argument made by Petitioner's counsel. *Id.* at 6:2–14:13. Following presentations by the Petitioner, a witness on his behalf, and counsel for the Government, the Court sentenced Petitioner to imprisonment for 30 months, the lowest end of the applicable Guidelines range. *Id.* at 17:3–7. The Court noted during sentencing that Petitioner's criminal history included at least five convictions for offenses related to his failure to register as a sex offender. *Id.* at 26:7–12.

2. Petitioner failed to directly appeal this issue, and cannot now meet the two-pronged standard to collaterally attack his sentence.

The calculation of Petitioner's sentence by the sentencing court was a proper subject for direct appeal, however,

Petitioner failed to directly appeal his conviction and sentence. In order to collaterally attack his sentence based upon errors that could have been but were not pursued on direct appeal, he must either: (1) show cause and actual prejudice resulting from the errors of which he complains; or (2) he must demonstrate that a miscarriage of justice would result from the refusal of the court to entertain the collateral attack. Mikalajunas, *supra*, 186 F.3d at 492–93.

Petitioner cannot demonstrate that he is entitled to relief under 28 U.S.C. § 2255, following his failure to appeal his sentence because he cannot show that there was any cause for failure to do so or that he suffered any actual prejudice for failing to do so. Petitioner's appellate rights were not constrained by a plea agreement in the case. Petitioner broadly asserts that he did not raise the issue in his direct appeal because of "Ineffective Assistance of Counsel" without any further description. ECF No. 55 at 5. Although the concept of "ineffective assistance of counsel" is of Constitutional import, employment of the phrase alone does not entitle Petitioner to relief. He does not assert any reason for his failure to appeal his sentence or conviction.

Moreover, Petitioner cannot demonstrate any miscarriage of justice as contemplated in the second prong of Mikalajunas, although he contends he was "actually innocent" of the crime for which he was convicted. Petitioner's assertion that he is actually innocent of failure to register pursuant to SORNA, is based on his misstatement of the applicability of the Act to his conduct, as discussed under Section C herein regarding his third claim for relief. Further, Petitioner's claim of actual innocence directly contradicts his admission at plea entry:

*6 THE COURT: Now if the government had to go to trial in this case, the government would have to prove the following elements of the Title 18 United States Code § 2250(a) against you beyond a reasonable doubt:

First, that you were required to register under the Sex Offender Registration and Notification Act, being Title 42, United States Code § 16913(a),

Second, that you were previously convicted of a sex offense,

Third, that you traveled in interstate commerce, and

Fourth, that you knowingly failed to register as required under the Sex Offender Registration and Notification Act.

Sir, do you understand the elements of the statute under which you have been charged?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Considering those definitions, sir, do you consider yourself to be guilty of violating Title 18 United States Code § 2250(a)?

THE DEFENDANT: Yes, sir.

ECF No. 65 at 10:11–11:6.

Essentially, Petitioner contends that he cannot be convicted of violating SORNA, which became effective in 2006, because he was convicted of the underlying sexual offense in 1993, prior to the enactment of SORNA. Recently such reasoning was rejected in United States v. Cammerto, 859 F.3d. 311 (4th Cir. 2017), where the Fourth Circuit affirmed the conviction of a defendant who committed the underlying sexual offense prior to the enactment of SORNA, but who committed the interstate travel and failure to register after the enactment of SORNA. Cammerto was convicted in 1999 in Georgia of rape and kidnapping. Following his August 2013 release from prison, Cammerto was charged in January 2014 with a violation of SORNA for moving without notifying Georgia authorities. In December 2015, Cammerto pled guilty to failing to register, in violation of 18 U.S.C. § 2250. The Fourth Circuit upheld Cammerto's conviction for failure to register which contained time elements similar to those present here. On December 22, 1993, Petitioner was convicted of second degree rape in the Circuit Court of Allegany County, Maryland, and sentenced to ten years of imprisonment. ECF No. 40 at 4, 7. As alleged in the indictment, following his release from incarceration, "from on or about October 31, 2014, to on or about February 11, 2015," Petitioner, a person required to register under SORNA, engaged in interstate travel and knowingly failed to register. ECF No. 1. Cammerto instructs that Petitioner could properly be convicted of a violation of 18 U.S.C. § 2250 even if his predicate sexual offense conviction predated the enactment of SORNA.

Petitioner's first ground for relief fails because the errors of which he complains should have been pursued by direct appeal, and he is unable to show cause to demonstrate any miscarriage of justice or his actual innocence which would justify consideration of those issues in this § 2255 proceeding.

B. Petitioner's Second and Fourth Claims for Relief: Ineffective Assistance of Counsel.

Petitioner's second and fourth claims for relief both regard his assertion that he received ineffective assistance of counsel. Considered on their merits, Petitioner's ineffective assistance of counsel claims do not meet the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that Petitioner show that: (1) his counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694.

*7 In *Padilla v. Kentucky*, 559 U.S. 356, 366–67 (2010), the Supreme Court, quoting its opinion in *Strickland*, recognized that it has repeatedly held:

"The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, at 688, 104 S.Ct. 2052. We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable" *Ibid.*; *Bobby v. Van Hook*, 558 U.S. 4, —, 130 S.Ct. 13, 16, 175 L.Ed.2d 255 (2009) (*per curiam*); *Florida v. Nixon*, 543 U.S. 175, 191, and n. 6, 125 S.Ct. 551, 160 L.Ed.2d 565 (2004); *Wiggins v. Smith*, 539 U.S. 510, 524, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Williams v. Taylor*, 529 U.S. 362, 396, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000).

As summarized by the Fourth Circuit in *United States v. Powell*, 850 F.3d 145, 149 (4th Cir.), *cert. denied*, 138 S. Ct. 142, 199 L.Ed. 2d 188 (2017):

To demonstrate deficient performance, "the defendant must show that [his] counsel's representation fell below an objective standard of reasonableness," as measured by "prevailing professional norms." *Id.* at 688, 104 S.Ct. 2052. This is a high bar because it "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."

In *Strickland* the Supreme Court recognized that, "[j]udicial scrutiny of counsel's performance must be highly deferential," and that courts should also "recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689, 690.

Further, Petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Petitioner has failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness in regard to either his second or fourth claims, but even if he had done so, Petitioner has further failed to demonstrate that the result of the proceeding would have been different as a result of such alleged error.

1. Petitioner's Second Claim For Relief: Ineffective Assistance of Counsel During the Guilty Plea

Petitioner claims that following his 1993 conviction he was required to register in Maryland as a sexual offender "for a ten year period, beginning in 1996," which expired in 2006, and "thus, he had no legal requirement to register" under SORNA. ECF Nos. 55 at 7, 49⁵ at 7. Petitioner argues that his counsel's recommendation to plead guilty to a violation of failure to register under SORNA which occurred from 2014 through 2015, fell below an objective standard of reasonableness because "in pleading guilty, he would be admitting guilt to a crime which by its very terms, he did not commit." ECF No. 55 at 7.

*8 As recently recognized by the Fourth Circuit, "the 'requirements of SORNA apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.' 28 C.F.R. § 72.3." *United States v. Dunkel*, 685 Fed.Appx. 234, 237 (4th Cir. 2017), *cert. denied*, No. 17–549, 2017 WL 4551934 (Nov. 13, 2017). See also *Cammerto*, *supra*. Accordingly, it is clear that the registration requirements of SORNA applied to the actions of Petitioner, who was convicted of a sex offense in 1993, prior to the 2006 enactment of the statute, but who failed to register in 2014 through 2015, more than eight years after the effective date of SORNA.

Petitioner has made no showing that his counsel's performance fell below an objective standard of reasonableness in relation to his recommendation that Petitioner enter a guilty plea to a statute which unequivocally applied to his actions. Furthermore, even if counsel's actions were deemed to fall below an objective standard of

reasonableness, Petitioner is unable to demonstrate that the result would have been different.

Petitioner concedes he was convicted in Maryland in 1993 of a sexual offense which required him to register as a sexual offender in that state for a period of ten years, beginning in 1996 and ending in 2006. Petitioner contests the application of SORNA to his conduct because he believes that he served his sentence and registered for the time period proscribed by Maryland state courts. Petitioner appears to disregard the authority of Congress to enact legislation that criminalizes conduct which occurs during interstate commerce. Nonetheless, cases involving registration under SORNA have repeatedly been presented to the Supreme Court and Circuit Courts of Appeal, none of which have found the Act to be unconstitutional.

Petitioner entered a guilty plea to 18 U.S.C. § 2250 which provides in part:

(a) In general.—Whoever—

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

At the plea entry hearing the Government presented its witness, John Hare, a senior inspector with the United States Marshals Service who serves as the Sex Offender Investigations Coordinator for the Northern District of West Virginia. ECF No. 65 at 11:16–14:6. Mr. Hare testified that Petitioner is a sex offender who had a previous conviction for second degree rape in Allegany County, Maryland, and that as a result of that conviction Petitioner is required to register as a sex offender. *Id.* at 12:5–12. Mr. Hare further testified that

Petitioner was required to notify authorities when he moved his residence, and that Petitioner was last registered as living in Ridgeley, West Virginia. *Id.* at 12:16–25. Mr. Hare also testified that when authorities determined Petitioner failed to update his annual registration with the West Virginia State Police they found he was no longer living in Ridgeley, West Virginia, but was instead living in Cumberland, Maryland, where he had not registered. *Id.* at 13:1–24. Mr. Hare testified that Petitioner had traveled from West Virginia to Maryland where he was arrested for failure to register. *Id.* at 13:25–14:6.

*9 After counsel for the government presented its witness, the Court conducted a colloquy on the evidence presented during which time the Petitioner answered eight separate questions regarding his guilt:

THE COURT: Mr. Edwards, is the evidence the government attorney just presented substantially correct, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Did the testimony of the government's witness accurately reflect your involvement in what occurred?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Edwards, could you explain to me what you did that makes you guilty of failure to register in violation of Title 18 United States Code § 2250(a)?

THE DEFENDANT: I moved from West Virginia to Maryland and I didn't update my registry, Your Honor.

THE COURT: Okay. You were required to register under the Sex Offender Registration Notification Act; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And you were previously convicted of a sex offense?

THE DEFENDANT: Yes, sir, back in 1993.

THE COURT: Had you traveled in interstate commerce between states?

THE DEFENDANT: Yes.

THE COURT: And did you knowingly fail to register as required under the Sex Offender Registration and Notification Act?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Did these acts occur from on or about October 31, 2014 until on or about February 11, 2015 in the Northern District of West Virginia?

THE DEFENDANT: Yes, Your Honor.

ECF No. 65: 14:22–16:1.

The evidence presented by the Government proved the four elements of failure to register under 18 U.S.C. § 2250. That evidence was confirmed by Petitioner in his colloquy with the Court. Petitioner has failed to demonstrate that the result of his prosecution would have been different if his counsel had not recommended entry of a guilty plea. Rather, had Petitioner been convicted at trial, he would have faced a higher Base Level Offense for sentencing. However, because Petitioner entered his plea and “clearly demonstrate[d] acceptance of responsibility for his offense,” pursuant to Guidelines § 3E1.1(a) he received a two-level reduction in Base Level Offense at sentencing. ECF No. 40 at 6.

Accordingly, Petitioner's allegation of ineffective assistance of counsel in Ground Two, based on counsel's recommendation that Petitioner enter a guilty plea, is without merit.

2. Petitioner's Fourth Claim for Relief: Ineffective Assistance of Counsel led to an Involuntary Guilty Plea

Petitioner claims that his guilty plea was “fundamentally involuntary,” and entered into because his counsel failed to “investigate[] the predicate offense ... before... urg[ing] him to enter a guilty plea.” ECF No. 55 at 11. Petitioner further claims that he was “innocent as a matter of fact and law, and had no duty nor obligation to register under 18 U.S.C. § 2250(a).” *Id.* at 12.

However, the transcript from Petitioner's plea entry demonstrates that Petitioner entered his guilty plea knowingly and voluntarily and that he was satisfied with his counsel. The court inquired regarding whether Petitioner's interaction with his lawyer, to which Petitioner confirmed that he had

adequate time to consult with his counsel, that his lawyer answered his questions about how best to proceed in the case, had not failed to do anything which Petitioner asked him to do, and that he was completely satisfied with the legal advice he received from his counsel. ECF No. 65 at 7:12–24. During the plea colloquy the Court inquired as to whether Petitioner was entering his plea voluntarily:

*10 THE COURT: Has any person forced you, threatened you, coerced you, intimidated you, or talked you into entering a guilty plea against your will?

THE DEFENDANT: No, Your Honor.

THE COURT: Are you acting voluntarily and of your own free will in entering this guilty plea?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Are you pleading guilty because you are guilty of the crime charged in Count 1 of the indictment?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Edwards, has anyone promised you or told you something that is different from what I have told you today to get you to plead guilty?

THE DEFENDANT: No.

THE COURT: Are you pleading guilty to protect anyone, sir?

THE DEFENDANT: No, Your Honor.

THE COURT: Has anyone promised or predicted the exact sentence which would be imposed upon you in this matter?

THE DEFENDANT: No, Your Honor.

THE COURT: Do you understand that at this time no one could know the exact sentence which would be imposed in this case?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Edwards, have you been able to fully understand what is going on in these proceedings today?

THE DEFENDANT: Yes, sir.

THE COURT: Based on your responses, Mr. Edwards, I find that your guilty plea is voluntary.

ECF No. 65 at 24:23–26:4. Other than the bald assertion contained in his § 2255 motion, nothing in the record establishes that Petitioner's guilty plea was involuntary.

Petitioner's claim that his counsel provided ineffective assistance because he "failed to adequately investigate" the predicate offense before recommending a plea entry is unfounded. As acknowledged by his counsel at plea entry, there was no meritorious legal defense if Petitioner's case went to trial. ECF No. 65 at 16:2–5. Nothing in the record, including the instant § 2255 motion, suggests that Petitioner was not convicted of a sexual offense against a minor in 1993. That conviction combined with the provisions of SORNA which required Petitioner to register as a sexual offender, met the first and second elements of a violation of 18 U.S.C. § 2250. To meet the third and fourth elements of the statute, the Government was required to prove that the Petitioner engaged in interstate travel and knowingly failed to register under SORNA. Petitioner last registered in December 2013 indicating he lived in Ridgely, West Virginia. ECF No. 40 at 4. He was arrested in Maryland on February 11, 2015. *Id.* at 5. Based on his last registration in West Virginia and arrest in Maryland, it is clear that Petitioner engaged in interstate travel. Further, Petitioner had been convicted of failure to register at least three times previously, in 2003, 2004 and 2012. *Id.* at 4. The 2003 and 2004 convictions for failure to register occurred prior to the enacted of SORNA, however, the 2012 conviction occurred afterward. It is clear that Petitioner knew he was required to register, as evidenced by his convictions, and his most recent registration in December 2013.

Even if Counsel did not investigate the "conditions of the sentence imposed by the State sentencing Court" as alleged by Petitioner, such a failure would not fall below an objective standard of reasonableness in the provision of assistance of counsel. Counsel's confirmation that Petitioner was convicted of a sexual offense which required Petitioner to register under SORNA was sufficient investigation for counsel to advise him regarding his legal liability for his violation of 18 U.S.C. § 2250. Additionally, Petitioner cannot meet the second prong of Strickland, in that he cannot demonstrate that but for counsel's unprofessional errors, the result of the proceeding would have been different. Accordingly, Petitioner's fourth claim for relief is without merit.

C. Petitioner's Third Claim For Relief: Applicability of SORNA

*11 Petitioner claims that SORNA cannot be applied to his actions committed from 2014 through 2015 because the Act was passed after his 1993 second degree rape conviction. The Supreme Court addressed the retroactive applicability of SORNA in Carr v. United States, 560 U.S. 438, 441–42 (2010), where Justice Sotomayor wrote:

Since 1994, federal law has required States, as a condition for the receipt of certain law enforcement funds, to maintain federally compliant systems for sex-offender registration and community notification. In an effort to make these state schemes more comprehensive, uniform, and effective, Congress in 2006 enacted the Sex Offender Registration and Notification Act (SORNA or Act) as part of the Adam Walsh Child Protection and Safety Act, Pub.L. 109–248, Tit. I, 120 Stat. 590. Among its provisions, the Act established a federal criminal offense covering, *inter alia*, any person who (1) "is required to register under [SORNA]," (2) "travels in interstate or foreign commerce," and (3) "knowingly fails to register or update a registration." 18 U.S.C. § 2250(a). At issue in this case is whether § 2250 applies to sex offenders whose interstate travel occurred prior to SORNA's effective date and, if so, whether the statute runs afoul of the Constitution's prohibition on *ex post facto* laws. See Art. I, § 9, cl. 3. Liability under § 2250, we hold, cannot be predicated on pre-SORNA travel.

In Carr, the Court found that SORNA could not be applied to Carr's actions, however, the facts are distinguishable to those presented here. Carr was convicted of sexual abuse in state court in May 2004, and after a period of incarceration, was released from custody on July 3, 2004, when he registered as a sex offender as required by state law. In late 2004 or early 2005, prior to SORNA's enactment, Carr moved out of state and failed to register in his new state of residence. In 2006, SORNA was enacted. In August 2007, Carr was indicted for failing to register in violation of 18 U.S.C. § 2250, based on his interstate travel and failure to register which occurred before the enactment of SORNA. The Supreme Court found that Carr could not be guilty of any failure to register under SORNA which occurred before the effective date of the Act. Although Petitioner was convicted of his underlying sexual offense prior to the enactment of SORNA, as was Carr, by contrast, Petitioner's violation of § 2250 was based on his interstate travel which occurred after the enactment of SORNA.

Petitioner also claims that the application of SORNA to his failure to register pursuant to 18 U.S.C. § 2250 in 2014 and

2015, based on his 1993 conviction for second degree rape, violates the *ex post facto* prohibition of the United States Constitution. However, that contention is a misstatement of the law. In Weaver v. Graham, 450 U.S. 24, 28, (1981), the Supreme Court explained:

The *ex post facto* prohibition [U.S. Const., Art. I, § 9, cl. 3; Art. I, § 10, cl. 1] forbids the Congress and the States to enact any law “which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.” *Cummings v. Missouri*, 4 Wall. 277, 325–326, 18 L.Ed. 356 (1867). See *Lindsey v. Washington*, 301 U.S. 397, 401, 57 S.Ct. 797, 799, 81 L.Ed. 1182 (1937); *Rooney v. North Dakota*, 196 U.S. 319, 324–325, 25 S.Ct. 264, 265–266, 49 L.Ed. 494 (1905); *In re Medley*, 134 U.S. 160, 171, 10 S.Ct. 384, 387, 33 L.Ed. 835 (1890); *Calder v. Bull*, 3 Dall. 386, 390, 1 L.Ed. 648 (1798).

*¹² (footnotes omitted). In regard to SORNA, the act which became punishable following the 2006 enactment of the statute, was failing to register as a sexual offender. SORNA was enacted nearly a decade before Petitioner failed to register in late 2014 through early 2015. There is no *ex post facto* component of SORNA as relates to Petitioner's failure to register from 2014 through 2015. No additional punishment has been prescribed in relation to his 1993 conviction. Instead, starting in 2006, it became a federal offense to fail to comply with SORNA requirements when both engaging in interstate travel and failing to register. Petitioner's violation of SORNA occurred more than eight years after enactment of the statute, and thus his arguments that the Act violates the prohibition against *ex post facto* laws is unfounded.

Petitioner is unable to demonstrate that the 2006 provisions of SORNA were improperly applied to his acts committed in 2014 and 2015. Accordingly, Petitioner has not proved that: his conviction or sentence was imposed in violation of the laws or Constitution of the United States; the court in imposing sentence lacked jurisdiction; the sentence exceeded the maximum authorized by law; or the sentence was

otherwise subject to collateral attack. Accordingly, he is not entitled to relief under 28 U.S.C. § 2255, and his third claim for relief is without merit and should be denied.

IV. RECOMMENDATION

For the reasons set forth herein, it is recommended that the Petitioner's motions to vacate filed pursuant to 28 U.S.C. § 2255 [ECF Nos. 49, 55] be **DENIED** and the petition be **DISMISSED**.

Any party may, within fourteen (14) days after being served with a copy of this Report and Recommendation, file with the Clerk of the Court written objections identifying the portions of the Report and Recommendation to which objection is made, and the basis for such objection. A copy of such objections should also be submitted to the Honorable Gina M. Groh, Chief United States District Judge. Failure to timely file objections to the Report and Recommendation set forth above will result in waiver of the right to appeal from a judgment of this Court based upon such Report and Recommendation. 28 U.S.C. § 636(b)(1); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); Thomas v. Arn, 474 U.S. 140 (1985); Wells v. Shriners Hosp., 109 F.3d 198 (4th Cir. 1997).

This Report and Recommendation completes the referral from the District Court. The Clerk is directed to terminate the Magistrate Judge association with this case.

The Clerk of the Court is directed to send a copy of this Order to the Petitioner by certified mail, return receipt requested, to his last known address as reflected on the docket sheet and to counsel of record via electronic means.

All Citations

Not Reported in Fed. Supp., 2017 WL 7102896

Footnotes

¹ The motion was initially filed as a petition in civil action number 3:16-CV-134, but all docketing thereafter was entered under the instant original criminal action number, 3:15-CR-9.

- 2 The response was styled by Petitioner as "Traverse".
- 3 As of September 1, 2017, SORNA is codified at 34 U.S.C. § 20901. Previously the Act was codified at 42 U.S.C. § 16901, effective July 27, 2006 through August 31, 2017.
- 4 The version of 28 U.S.C. § 1915(d) which was effective when Neitzke was decided provided, "The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious." As of April 26, 1996, the statute was revised and 28 U.S.C. § 1915A(b) now provides, "On review, the court shall identify cognizable claims or dismiss the complaint, or any portion of the complaint, if the complaint—(1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief."
- 5 Although the Court notes that Petitioner's initial motion to vacate cited here was not filed on court-approved forms, in his refiled motion to vacate [ECF No. 55 at 7] Petitioner indicates that his argument on Ground Two continues on to an attached page which is not attached. Accordingly, the Court refers in part to the argument fully asserted under Ground Two in the initial motion to vacate [ECF No. 49].

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

UNITED STATES OF AMERICA,

Plaintiff,

v.

Case No. 20-CR-227

MARK R. ELLICKSON,

Defendant.

**REPORT AND RECOMMENDATION
ON DEFENDANT'S MOTION TO DISMISS**

On December 1, 2020, a grand jury sitting in the Eastern District of Wisconsin returned a one-count indictment against defendant Mark R. Ellickson, charging Ellickson with failing to register as a convicted sex offender in violation of 18 U.S.C. § 2250(a). *See* ECF No. 1. Ellickson was arraigned on the charges and entered a plea of not guilty. *See* ECF No. 3. The matter is assigned to U.S. District Judge Lynn Adelman for trial and to this court for resolving pretrial motions. *See* 28 U.S.C. § 636; Fed. R. Crim. P. 59; E.D. Wis. Gen. L. R. 72. Now, Ellickson has filed a motion to dismiss the indictment. He argues that his underlying conviction did not require him to register as a sex offender and, even if it did, he is merely a “Tier I” offender whose registration period has expired.

LEGAL STANDARD

“A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits.” Fed. R. Crim. P. 12(b)(1). Certain motions, including ones alleging that an indictment fails to state an offense, must be made before trial. *See* Fed. R. Crim. P. 12(b)(3)(B)(v). “[A]t the pretrial stage, the indictment ordinarily should

be tested solely by its sufficiency to charge an offense, regardless of the strength or weakness of the government's case." *United States v. Risk*, 843 F.2d 1059, 1061 (7th Cir. 1988) (citing *United States v. Sampson*, 371 U.S. 75, 78–79 (1962)). However, a district court may dismiss an indictment prior to trial when the material facts are undisputed, *see Risk*, 843 F.2d at 1061, and the defense involves a purely legal question, *see United States v. Yasak*, 884 F.2d 996, 1001 n.3 (7th Cir. 1989) (citations omitted).

DISCUSSION

In 1997, an Illinois state court convicted Ellickson of aggravated criminal sexual abuse for sexually penetrating a victim under the age of thirteen years old, in violation of 720 ILL. COMP. STAT. 5/12-16(c)(1)(i) (1993),¹ a statute I will refer to simply as Section 5/12-16. The government contends that Ellickson's 1997 state conviction serves as a predicate offense requiring him to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA). SORNA categorizes sex offenders into three tiers depending upon the severity of the underlying conviction. These tiers govern the length of the period during which a qualifying offender must register: fifteen years for a Tier I offender, twenty-five years for a Tier II offender, and life for a Tier III offender. 34 U.S.C. § 20915 (defining the duration of registration for each tier of offender). The failure to register constitutes an independent crime. *See* 18 U.S.C. 2250.

A. The Defendant is a SORNA Tier I Offender

Because I find the issue dispositive, I will accept the reply brief's invitation to take up Ellickson's second argument first. Ellickson argues that he is a Tier I offender (at most), which means he was required to register for the fifteen-year period following his conviction. Because

¹ Renumbered to 720 ILL. COMP. STAT. 5/11-1.60.

he was convicted of the underlying offense in 1997, he was required to register until 2012. The indictment charges him with failing to register in 2018, long after his obligation to register lapsed. Accordingly, he believes the indictment must be dismissed.

Ellickson was convicted of violating Section 5/12-16, an Illinois statute that criminalizes “aggravated criminal sexual abuse if . . . the accused was 17 years of age or over and . . . commit[ed] an act of sexual conduct with a victim who was under 13 years of age when the act was committed.” In turn, the statute defines “sexual conduct” as “any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, or any part of the body of a child under 13 years of age.” Section 5/12-16. As already noted, SORNA classifies state offenses into three tiers. Tier 1 serves as a kind of catch-all, or default, tier that encompasses any offenses that do not fit within Tiers II or III. *United States v. Walker*, 931 F.3d 576, 579 (7th Cir. 2019) (“If a sex offender does not satisfy the requirements of Tier II or Tier III, then he is a Tier I offender.”) Accordingly, in determining the appropriate tier for an offense, courts rely on the process of elimination.

The classification of offenses under SORNA is governed by *Walker*, where the Seventh Circuit reversed a conviction from this district on the basis that the defendant was a Tier I offender whose obligation to register had expired. In *Walker*, the Seventh Circuit clarified that courts must compare the underlying state offense with appropriate federal statutes by employing a two-step “hybrid approach.” *Id.* The first part of this approach is categorical, while the second part looks at the specific circumstances of the underlying offense. This two-step process is used because of SORNA’s structure, which requires that a Tier II or Tier III offender: (1) commit an offense that contains certain elements (the categorical analysis) and

that (2) the victim is under a certain age (the fact-specific analysis). 34 U.S.C. § 20915; *see Walker*, 931 F.3d at 580. The hybrid approach means that a court must first employ the categorical approach to determine whether the offender’s “prior offense matches a federal statute. If it does, a court would then look beyond the statutory text and determine whether the specific offense ‘was committed ‘against a minor.’” *Id.* (quoting 34 U.S.C. § 20911). If there is no categorical match, then the analysis ends. *Id.* at 581. (“We must first consider whether his Colorado conviction is a categorical . . . If it is, we *then* consider the age of the victim to complete the tier-classification determination.”) (italics in original).

A prior offense matches a federal statute when “the elements of the predicate offense are the same (or narrower) than [that of] the federal offense.” *Id.* 579 (citing *Descamps v. United States*, 570 U.S. 254, 260-61 (2013)). A court must “‘compare’ what the state law offense requires—not what an individual defendant did—to the Tier III [or II] requirements.” *United States v. Barcus*, 892 F.3d 228, 232 (6th Cir. 2018). However, “if the elements of the state conviction sweep more broadly such that there is a ‘realistic probability . . . that the State would apply its statute to conduct that falls outside’ the definition of the federal crime, then the prior offense is not a categorical match,” and the indictment cannot stand. *Walker*, 931 F.3d at 580 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)); *see also Barcus*, 892 F.3d at 232 (recognizing that, “[i]f the elements [of the state law] ‘sweep more broadly’ than the Tier III [or II] offenses,” then the state law is neither comparable to nor more severe than the listed Tier III or II federal offenses) (quoting *Descamps*, 570 U.S. at 261).

The government argues that the defendant is a Tier III offender and that 18 U.S.C. § 2243 is the appropriate statute to compare to the underlying state offense. However, § 2243 applies to sexual acts with persons who have “attained the age of 12 years but [] not attained

the age of 16 years.” 18 U.S.C. § 2243(a)(1). Here, the defendant was convicted of an Illinois statute prohibiting sexual conduct “with a victim who was *under* 13 years of age when the act was committed.” Section 5/12-16 (italics added). Thus, because the Illinois statute applies to victims under 13, it is not a good match with § 2243, which applies to victims aged 12 to 15. It’s true that there is some overlap with respect to victims aged 12, but that does not mean the statutes are a match. To match, the state statute must be “the same [as] (or narrower)” than the federal statute. *Walker*, 931 F.3d at 579. Here, the statutes largely apply to differently aged victims, and so the differences between the two statutes exceed any common ground they might share. Because the Illinois statute includes victims from infancy all the way through age 12, it is much broader than § 2243, which applies only to victims between 12 and 15. *Id.* at 582 (finding no match because the state statute “sweeps more broadly than § 2243(a) because it covers sexual contact against some victims under 12, and § 2243(a) does not.”)²

Instead, a closer match appears to be § 2241(c), which prohibits sexual acts with persons under age 12. It’s true that the Illinois statute is somewhat broader than § 2241(c)—it applies to victims under age 13, whereas § 2241(c) only kicks in for victims under age 12. *Walker*, 931 F.3d 576, 582 (7th Cir. 2019) (finding no match because “the Colorado statute is broader than § 2241(c) to the extent that it covers some victims between the ages of 12 and 15, and § 2241(c) does not.”) However, a small difference between the statutes does not necessarily preclude matching. *United States v. Flint*, No. CR 17-00140-01, 2018 WL 473427, at *4 (W.D. La. Jan. 18, 2018) (“There is some debate among the circuits whether a small difference in the age range of the victim between the state and federal statutes is fatal to a

² The government states that § 2243 and the Illinois statute both “condemn the specific sex offense of abuse of a child under the age of 13,” but that simply seems to be erroneous. ECF No. 16 at 8. Both statutes would condemn the abuse of a child aged 12, but that is the only similarity.

finding that the state statute is comparable to or more severe than the federal offense.”) (citing cases).

The larger problem with § 2241(c)—and, in fact, any of the potentially matching federal statutes—involves the difference between the Illinois and federal definitions of sexual conduct. In short, Illinois defines sexual conduct far more broadly than the federal statute does. Illinois defines “sexual conduct” as “any knowing touching or fondling by the victim or the accused, either directly or through clothing, of the sex organs, anus, or breast of the victim or the accused, *or any part of the body of a child under 13 years of age.*” Section 5/12-16 (emphasis added). Thus, in Illinois a defendant could be convicted for touching “any part of the body of a child under 13 years of age” (so long as the touching is for the purpose of sexual gratification). By contrast, all of the potentially matching federal statutes at issue here employ a narrower definition of sexual contact: under 18 U.S.C. § 2246(3), “sexual contact” is defined as: “the intentional touching, either directly or through the clothing of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(3). *See United States v. Barcus*, 892 F.3d 228, 232 (6th Cir. 2018). Thus, a person could be convicted under the Illinois statute for a range of conduct—kissing, touching an outer thigh, etc.—that is not outlawed by any of the potentially matching federal statutes.

The differences between the Illinois and federal definitions are not merely hypothetical, either. As Ellickson points out, Illinois courts have actually applied Section 5/12-16 to convict defendants who touched a “part of the body of a child under 13 years of age” that is not covered by the federal definition. For instance, in *People v. Calusinski*, the court affirmed the conviction of a defendant, clarifying that the state’s definition of “sexual

conduct” includes merely kissing so long as it was for the purpose of “sexual excitement and arousal.” 733 N.E.2d. 420, 426 (Ill. App. Ct. 2000). And, as the court in *People v. Priola* found: “[e]vidence that defendant touched any part of . . . [the victim's] body for purposes of his sexual gratification or arousal [is] . . . sufficient to support his conviction” under Section 5/12-16. 561 N.E.2d 82, 90 (Ill. App. Ct. 1990) (citing *People v. Thingvold*, 384 N.E.2d 489 (Ill. App. Ct. 1978)). The court confirmed that “since ‘sexual conduct’ is defined, in part, as the intentional or knowing touching or fondling of any part of the body of a child under 13 years of age for the purpose of sexual gratification or arousal of the accused or the victim . . . it was not necessary to allege in the charging instrument in this case that defendant touched a specific part of the victim's body.” *Id.*

The Illinois courts make it clear that the statutory definition has teeth; in short, the cases demonstrate a “realistic probability . . . that the State would apply its statute to conduct that falls outside” the definition of the federal crime. *Walker*, 931 F.3d at 579 (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). This means “the prior offense is not a categorical match.” *Id.* Therefore, I conclude that Section 5/12-16 is not comparable to any potentially matching federal statute because it prohibits the touching of “*any* part of the body of a child under 13 years of age” whereas the federal definition prohibits the touching of specific, enumerated body parts. Because it is not a match, that ends the inquiry.

A Louisiana district court reached exactly this conclusion. *United States v. Flint*, No. CR 17-00140-01, 2018 WL 473427, at *4 (W.D. La. Jan. 18, 2018). In *Flint*, as here, the defendant’s underlying offense was a conviction under Illinois’ Section 5/12-16. The parties agreed that the defendant had been convicted of the same provision at issue here: he was 17 or older and committed an act of sexual conduct with a victim under age 13. *Id.* at *3. The

district court observed that “[t]he Illinois offense criminalizes all touching of a minor under thirteen with sexual intent whereas the federal statute only criminalizes intentional touching of one or more specific body parts.” *Id.* The court also noted that “[t]he fact of convictions where a defendant did not touch any of the body parts listed in the federal statute conclusively demonstrates that Illinois courts do, on occasion, apply the statute to touching that would not be criminalized under the federal statute.” *Id.* As such, the *Flint* court concluded that “[b]ecause … the elements of [Section 5/12-16], as explicated by the Illinois courts, may be satisfied by facts that do not satisfy the elements of the federal offense of Abusive Sexual Contact, the Illinois statute is not ‘comparable to or more severe than’ the federal statute,” and thus the defendant was neither a Tier III nor Tier II offender. *Id.* at *6 (citing 34 U.S.C. § 20911). Because he was a Tier I offender, and because more than fifteen years had elapsed since the underlying conviction, the court dismissed the indictment. I conclude the same result should follow here.

The government’s opposition simply overlooks the fact that the Seventh Circuit has set forth the categorical analysis courts must employ in these situations. The circuit didn’t just drop hints, either: it unequivocally held that that the first part of any classification analysis under SORNA is a categorical, element-by-element analysis. “Because SORNA instructs us to compare Walker’s offense to the ‘offenses’ described in corresponding sections of the Federal Criminal Code (18 U.S.C. § 2244 and offenses listed therein), we employ the ‘categorical approach.’” *Walker*, 931 F.3d at 579. “The [Supreme] Court has made clear that in a categorical analysis, there are no exceptions to the elemental comparison. ‘For more than 25 years, we have repeatedly made clear that application of the [categorical approach] involves, and involves only, comparing elements.’” *Walker*, 931 F.3d at 581 (quoting *Mathis*

v. United States, — U.S. —, 136 S. Ct. 2243, 2257 (2016)). Because *Walker* is clear that judges must limit the first part of the analysis to an element-by-element comparison between the state and federal statutes, I decline the government’s invitation to focus on the specific circumstances of the underlying offense. That’s because, under the categorical analysis, “the actual facts underlying the defendant’s conviction don’t matter.” *Id.* at 579.³

In sum, because the defendant was convicted of a state offense that criminalized more conduct than any comparable federal offense, there is no categorical match with any of the offenses set forth in Tier II or III. He is therefore a Tier I offender who was under no obligation to register during the period set forth in the indictment. I will therefore recommend that the indictment be dismissed.

B. Sufficiency of Ellickson’s Underlying Conviction

For completeness, I will also address Ellickson’s broader argument, which is that his predicate offense did not require him to register as a sex offender at all. Any individual who was convicted of a “sex offense” is a sex offender subject to SORNA’s registration requirement. 34 U.S.C. § 20911(1). A sex offense is defined as “a criminal offense that has an element involving a sexual act or sexual contact with another [or] a criminal offense that is a specified offense against a minor.” 34 U.S.C. § 20911(5)(A)(i),(ii). The definition also uses a residual clause to encompass “[a]ny conduct that by its nature is a sex offense against a minor.” 34 U.S.C.A. § 20911(7)(I) (emphasis added). The government contends that

³The government relies on *Nijhawan v. Holder*, U.S. 29, 41 (2009) and *United States v. Price*, 777 F.3d 700, 708 (4th Cir. 2015). The court in *United States v. Price* only used the “circumstance-specific approach” to determine whether the defendant’s underlying conviction was a “specified offense against a minor,” a prerequisite before concluding that the defendant was a sex offender and thus subject to 18 U.S.C. § 2250. *Id.* And the *Price* court didn’t sanction the “circumstance-specific approach” beyond that limited analysis. Likewise, the Supreme Court in *Nijhawan* held that the circumstance-specific approach was appropriate for analyzing 8 U.S.C. § 1227, a federal immigration law that permits the deportation of any “alien who is convicted of an aggravated felony.” In fact, the *Walker* court relied on *Nijhawan* to conclude that courts should follow the hybrid approach set forth herein.

Ellickson's conviction amounts to an offense against a minor that involved "conduct that by its nature is a sex offense against a minor."

Once again, the court must determine whether to use a categorical or circumstance-specific approach in determining whether the state charge fits within SORNA's definition. The Seventh Circuit has not answered this question, but the weight of authority that has considered this issue, and the statutory language itself, favor the application of the circumstance-specific approach. *See e.g., United States v. Mi Kyung Byun*, 539 F.3d 982, 992 (9th Cir. 2008) ("suggesting that for the category of 'specified offense[s] against a minor,' it is the underlying 'conduct,' not the elements of the crime of conviction, that matter"); *United States v. Price*, 777 F.3d 700, 708 (4th Cir. 2015) (holding that the circumstance-specific approach "is applicable to . . . analysis under [34 U.S.C. § 20911(7)]"); *United States v. Schofield*, 802 F.3d 722, 729 (5th Cir. 2015) (recognizing that "circuit precedent . . . tend[s] to favor the application of the non-categorical approach" to the residual clause set forth in 34 U.S.C. § 20911(7)(I)); *United States v. Hill*, 820 F.3d 1003, 1006 (8th Cir. 2016) (affirming the application of the circumstance-specific approach to determine whether an underlying conviction qualifies as "conduct that by its nature is a sex offense against a minor"); *see also United States v. Dodge*, 597 F.3d 1347 (11th Cir. 2010) (same).

Further, the language of the statute lends itself to the circumstance-specific approach. The residual clause sweeps in any "*conduct* that by its nature is a sex offense against a minor." 34 U.S.C. 20911(7)(I) (emphasis added). The word "conduct" suggests we must look at what the defendant actually did, not the universe of activities the statute might have proscribed. Nowhere does the residual clause refer to the "elements" of the underlying conviction, a term that would have suggested the application of the categorical approach. *See Price*, 777 F.3d at

708 (recognizing that “the [Supreme] Court has interpreted the words ‘conviction’ and ‘element’ . . . [to] implicat[e] the categorical and modified categorical frameworks” (citing *Taylor v. United States*, 495 U.S. 575, 600–01 (1990)). To the contrary, the “residual clause requires an inquiry into the ‘nature’ of the conduct,” and thus, “[b]ecause the focus of the residual clause inquiry is conduct, and not whether the defendant was convicted of a particular crime,” the circumstance-specific approach is more appropriate. *Schofield*, 802 F.3d at 728 (citing statutory language); *see also Price*, 777 F.3d at 708 (recognizing 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” (citing *Nijhawan*, 557 U.S. at 37)).

Although the Seventh Circuit has not spoken on this specific issue, it had occasion to interpret the phrase “[a]n offense involving consensual sexual conduct,” contained in 34 U.S.C. § 20911(5)(C). *See United States v. Rogers*, 804 F.3d 1233, 1237 (7th Cir. 2015). There, the Seventh Circuit recognized that the use of “fact-specific language,” namely the word “conduct,” strongly “suggest[ed] that a conduct-based inquiry applies.” *Id.* (affirming that, because the phrase “doesn’t refer to elements . . . [,] [t]he categorical approach does not apply”). There is no reason that such logic cannot be applied here, where the residual clause also uses similar, fact-specific language evincing the necessity for a conduct-based, as opposed to categorical, inquiry.

In light of the authority cited above as well as the statutory language, I conclude that the government has the better argument here. It’s true, as Ellickson argues, that *Walker* found the circumstance-specific approach *generally* incompatible with the “‘text of SORNA . . . and the Supreme Court’s precedent.’” ECF No. 17 at 9 (quoting *Walker*, 931 F.3d at 581).

However, in *Walker*, the government argued that, once the court determined that the victim was younger than thirteen years of age, the court need not employ the categorical approach at all to determine that the defendant qualified as a Tier III offender because the actual victim's age "places [the defendant's] offense within the scope of 'abusive sexual contact.'" *Id.* The *Walker* court was responding to a wholly different argument in commenting that the government's "approach is inconsistent with both the text of SORNA . . . and the Supreme Court's precedent." *Id.*

Here, applying the circumstance-specific approach, the information upon which Ellickson was convicted indicates that he committed an "act of sexual penetration" against a victim who was "under thirteen years of age." ECF No. 16-2 at 2; *see Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005)) (permitting courts to examine certain judicial records, like the information, to determine the factual basis of the underlying conviction). Therefore, I conclude that Ellickson's conviction was an offense that involved "conduct that by its nature is a sex offense against a minor," and thus Ellickson qualifies as a sex offender. However, as stated above, even though Ellickson qualifies as a sex offender, he is a Tier I offender whose registration period ended in 2012, and thus Ellickson was under no obligation to register during the period set forth in the indictment.

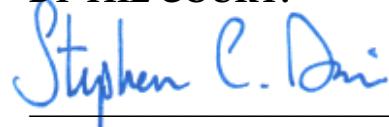
CONCLUSION

NOW, THEREFORE, IT IS HEREBY RECOMMENDED that Defendant's motions to dismiss, ECF Nos. 14, be **GRANTED**.

Your attention is directed to 28 U.S.C. § 636(b)(1)(B) and (C), Fed. R. Crim. P. 59(b), and E.D. Wis. Gen. L. R. 72(c), whereby written objections to any recommendation herein, or part thereof, may be filed within fourteen days of service of this Recommendation. Objections are to be filed in accordance with the Eastern District of Wisconsin's electronic case filing procedures. Failure to file a timely objection with the district judge shall result in a waiver of your right to appeal. If no response or reply will be filed, please notify the district judge in writing.

Dated at Milwaukee, Wisconsin, this 12th day of February, 2021.

BY THE COURT:



STEPHEN C. DRIES
United States Magistrate Judge

“encompass complex cultural issues that must be addressed and accounted for.”

This would go well beyond the prevailing professional norms for postconviction capital representations in 1998, and state-habeas counsel was not ineffective for not conducting such an investigation given the limited time and resources available. “*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence.” *Wiggins*, 539 U.S. at 533, 123 S.Ct. 2527.

It is not disputed that Ayestas had a history of substance abuse nor that Ayestas was diagnosed with a mental illness after conviction. Ayestas, though, has not explained how state-habeas counsel was ineffective, or even how his proposed investigation might uncover evidence that differs not only in degree but in kind from the facts known to state-habeas counsel. Investigations are not reasonably necessary “when the sought-after assistance would only supplement prior evidence.” *Smith v. Dretke*, 422 F.3d 269, 288 (5th Cir. 2005).

Given the evidence that state-habeas counsel was not deficient, joined with the unlikelihood of locating new information suggesting otherwise, funding for investigatory services cannot be reasonably necessary.

AFFIRMED.



UNITED STATES of America,
Plaintiff – Appellee,

v.

Johnny ESCALANTE, also known as
Manuel Rojas, Defendant –
Appellant.
No. 18-10408

United States Court of Appeals,
Fifth Circuit.

Filed August 2, 2019

Background: Defendant pled guilty in the United States District Court for the Northern District of Texas, David C. Godbey, J., to failing to register as sex offender, and he appealed.

Holdings: The Court of Appeals, Jennifer Walker Elrod, Circuit Judge, held that:

- (1) fact that Utah’s statute prohibiting unlawful sexual activity with minor did not provide affirmative defense based on reasonable belief that other person was at least 16 years old did not preclude defendant’s Utah conviction from serving as predicate offense under Sexual Offense Registration and Notification Act (SORNA);
- (2) defendant’s Utah conviction could not serve as proper SORNA predicate for tier II sex offender designation; and
- (3) district court’s error in sentencing defendant based on tier II sex offender designation was not harmless.

Vacated and remanded.

1. Criminal Law ☞1139

For properly preserved claims, Court of Appeals reviews district court’s interpretation and application of Sentencing Guidelines de novo.

2. Mental Health ☞469(3)

Court must employ categorical approach when classifying tier of defendant’s state law sex offense under Sexual Offense Registration and Notification Act (SOR-

NA), and if statute of conviction sweeps more broadly than referenced federal offense, state offense cannot serve as proper predicate. 34 U.S.C.A. § 20911; U.S.S.G. § 2A3.5.

3. Mental Health ☞469.5

Fact that Utah's statute prohibiting unlawful sexual activity with minor did not provide affirmative defense based on reasonable belief that other person was at least 16 years old did not preclude defendant's Utah conviction for unlawful sexual activity with minor from serving as predicate offense in determining tier of defendant's state law sex offense under Sexual Offense Registration and Notification Act (SORNA) in sentencing him for failing to register as sex offender; only elements of offenses to be compared mattered. 18 U.S.C.A. § 2243(c)(1); 34 U.S.C.A. § 20911; Utah Code Ann. § 76-5-401; U.S.S.G. § 2A3.5.

4. Mental Health ☞469(3)

When classifying sex offender tier levels, Sexual Offense Registration and Notification Act (SORNA) requires circumstance-specific inquiry into victim's age to determine whether victim was, in fact, minor at time of offense. 34 U.S.C.A. § 20911.

5. Mental Health ☞469.5

Utah offense of unlawful sexual activity with minor swept more broadly than comparable federal offense, and thus could not serve as proper predicate for Sexual Offense Registration and Notification Act (SORNA) tier II sex offender designation in sentencing defendant for failing to register as sex offender; federal statute required that victim be 12–15 years old and that offender be four years older than victim, and Utah statute required that victim be 14–15 years old, but did not require government to prove age differential. 18 U.S.C.A. § 2243(a); 34 U.S.C.A. § 20911(3);

Utah Code Ann. § 76-5-401; U.S.S.G. § 2A3.5.

6. Courts ☞107

Court of Appeals is not bound by its unpublished opinions.

7. Mental Health ☞469(3)

Sexual Offense Registration and Notification Act (SORNA) does not permit court, when applying categorical approach to determine sex offender tier levels, to conduct circumstance-specific inquiry into offender-victim age differential that is built into corresponding cross-referenced offense as element of crime. 34 U.S.C.A. § 20911.

8. Criminal Law ☞1177.3(1)

District court's error in determining that defendant's Utah conviction for unlawful sexual activity with minor was predicate offense for tier II sex offender designation under Sexual Offense Registration and Notification Act (SORNA) in sentencing him for failing to register as sex offender was not harmless, even though court upwardly varied from Guidelines at sentencing, absent showing that court would have imposed same sentence in absence of error. 18 U.S.C.A. § 2243(a); 34 U.S.C.A. § 20911; Utah Code Ann. § 76-5-401; U.S.S.G. § 2A3.5.

9. Criminal Law ☞1177.3(1)

Harmless error doctrine only applies to Guideline calculation errors when government convincingly demonstrates both (1) that district court would have imposed same sentence had it not made error, and (2) that it would have done so for same reasons it gave at prior sentencing.

Appeal from the United States District Court for the Northern District of Texas, David C. Godbey, U.S. District Judge

James Nicholas Bunch, Esq., Assistant U.S. Attorney, James Wesley Hendrix, Assistant U.S. Attorney, Jamie Lynn Hoxie, Assistant U.S. Attorney, U.S. Attorney's Office, Northern District of Texas, Dallas, TX, for Plaintiff-Appellee.

Kevin Joel Page, Erin Brennan, Federal Public Defender's Office, Northern District of Texas, Dallas, TX, Brandon Elliott Beck, Federal Public Defender's Office, Northern District of Texas, Lubbock, TX, for Defendant-Appellant.

Before SMITH, WIENER, and ELROD, Circuit Judges.

JENNIFER WALKER ELROD,
Circuit Judge:

Johnny Escalante failed to register as a sex offender when he travelled to Texas. The district court concluded that his prior Utah conviction for unlawful sexual activity with a minor classified him as a tier II sex offender, and he was sentenced based on the corresponding Guidelines range. Because the district court deviated from the categorical approach to classify him as a tier II sex offender, we VACATE and REMAND for resentencing.

I.

The Sexual Offense Registration and Notification Act of 2006 (SORNA)¹ requires sex offenders to update their registration after a change in residence. *See* 34 U.S.C. § 20913(c). Failing to do so is a

federal crime when the offender travels in interstate commerce. *See* 18 U.S.C. § 2250. Section 2A3.5 of the Guidelines provides three base offense levels when a sex offender is found guilty of failing to register. Those levels correspond with the sex offender tiers in 34 U.S.C. § 20911.² Relevant to this case, a tier II sex offender is someone "whose offense . . . is comparable to or more severe than the following offenses, when committed against a minor[:] . . . abusive sexual contact (as described in section 2244 of title 18)[]" 34 U.S.C. § 20911(3).

In 2010, Escalante was convicted in Utah for unlawful sexual activity with a minor.³ At the time of the offense, Escalante was 35 years old and the victim was 14. After being released from prison, Escalante travelled to Texas and failed to update his registration. He was subsequently identified by law enforcement during an unrelated traffic stop and charged for failing to register as a sex offender. He pleaded guilty. In the factual resume that he signed as part of his plea agreement, he admitted that: (1) he was required to register as a sex offender due to the 2010 Utah conviction; (2) he travelled to Texas; and (3) he knowingly failed to update his registration.

The Pre-Sentence Report (PSR) concluded that Utah's crime of unlawful sexual activity with a minor was comparable to abusive sexual contact as described in 18 U.S.C. § 2244,⁴ and therefore recom-

1. Pub. L. No. 109-248 (codified at 34 U.S.C. § 20911 *et seq.*).

2. *E.g.*, If the defendant was a tier III sex offender, the base offense level for failing to register is 16. If tier II, then 14; if tier I, then 12. U.S.S.G. § 2A3.5 (U.S. Sentencing Comm'n 2017).

3. *See* Utah Code Ann. § 76-5-401 (2010) (criminalizing sexual activity with a person aged 14–15 under circumstances not amount-

ing to, *inter alia*, rape or aggravated sexual assault).

4. 18 U.S.C. § 2244 cross-references several other statutes. Of those, only 18 U.S.C. § 2243—sexual abuse of a minor or ward—arguably corresponds with Utah's crime of unlawful sexual activity with a minor. 18 U.S.C. § 2243(a) criminalizes sexual acts with someone who is (1) 12–15 years old and (2) at least four years younger than the offender.

mended that Escalante be categorized as a tier II offender with a Guidelines imprisonment range of 27–33 months. However, the PSR also urged the court to consider an upward departure based on Escalante’s history of domestic violence, parole violations, and high risk of recidivism.

Escalante objected to the PSR, arguing, as relevant here, that the Utah statute “sweeps more broadly than the federal statute” and therefore, under the categorical approach, cannot serve as a predicate for classification as a tier II offender. Specifically, Escalante pointed to the facts that: (1) 18 U.S.C. § 2243(c)(1) permits an affirmative defense if the defendant reasonably believed the victim to be over 16, whereas Utah’s relevant statute did not; and (2) 18 U.S.C. § 2243(a)(2) requires the government to prove a four-year age differential, whereas Utah’s relevant statute did not.⁵

At sentencing, the district court overruled Escalante’s objections, adopted the PSR as its factual findings, and upwardly varied from the Guidelines to sentence Escalante to 48 months’ imprisonment. Escalante repeated his objections at sentencing and timely appealed. We have jurisdiction to review Escalante’s sentence under 18 U.S.C. § 3742.

II.

[1] “For properly preserved claims, this court reviews the district court’s interpretation and application of the Sentencing Guidelines *de novo*.” *United States v. Young*, 872 F.3d 742, 745 (5th Cir. 2017) (citation omitted).

III.

[2] We employ the categorical approach when classifying the SORNA tier

5. Instead, Utah considered the four-year age differential a mitigating factor which, if established by the defendant, will reduce the crime

of a defendant’s state law sex offense. See *Young*, 872 F.3d at 746 (joining four other circuits in employing the categorical approach in such cases). “Under the categorical approach, the analysis is grounded in the elements of the statute of conviction rather than a defendant’s specific conduct.” *United States v. Rodriguez*, 711 F.3d 541, 549 (5th Cir. 2013) (en banc), abrogated on other grounds by *Esquivel-Quintana v. Sessions*, — U.S. —, 137 S. Ct. 1562, 198 L.Ed.2d 22 (2017). If the statute of conviction “sweeps more broadly” than the referenced federal offense, the state offense cannot serve as a proper predicate. See *Descamps v. United States*, 570 U.S. 254, 261, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013).

On appeal, Escalante repeats the objections he made to the PSR, arguing that the district court erred by not considering that the Utah conviction offense and the corresponding federal offense had different possible affirmative defenses. He also argues that the district court erred by considering the specific circumstances of his offender-victim age differential when categorizing his sex offender tier level. In response, the government contends that the district court did not err, but, even if it did, that any such error would be harmless. We address each argument in turn.

1.

First, we address Escalante’s affirmative defenses argument. Escalante observes that 18 U.S.C. § 2243(c)(1) permits an affirmative defense if a defendant can establish, by a preponderance of the evidence, that he reasonably believed that the other person was at least 16 years old. In

to a misdemeanor and not require registration. Compare Utah Code Ann. § 76-5-401(3)(b) (2010) with 18 U.S.C. § 2243(a)(2).

contrast, the Utah statute that he was convicted under provided no such affirmative defense. *See* Utah Code Ann. § 76-5-401 (2010).

Escalante argues that whether that affirmative defense was available “reflects an enormous difference in culpability” because it distinguishes between intentional and unintentional conduct. He argues that because a mental state defense exists for one offense and not for the other, the two offenses reach “significantly different” classes of offenders. Specifically, he argues that § 2243 offenders are more culpable and blameworthy as a class than § 76-5-401 offenders because they all knew, or should have known, that the victim was under 16. Therefore, he asserts, it is immaterial whether the defendant’s mental state is an element that needs to be proven by the government or an affirmative defense that needs to be proven by the defendant. Either way, Escalante argues, the class of people who are § 76-5-401 offenders could include people with less culpability than the class of people who are § 2243 offenders, and, therefore, § 76-5-401 cannot serve as a predicate for classifying him as a tier II offender under the categorical approach.

Escalante cites *United States v. Roebuck*, 2015 WL 13667427 (D.N.M. Jan. 26, 2015) (unpublished), as supporting case law. In *Roebuck*, the district court addressed this question when determining the tier level of a Texas statutory rape offense that, like Utah’s, did not include an affirmative defense for reasonably believing the victim to be 16. *Id.* at *5–6. Without offering much analysis, the *Roebuck* court concluded that because § 2243 permits an affirmative defense that the Texas law did not, the “Texas statute sweeps more broadly than the federal statute” and could not serve as a predicate offense for

classification as a tier II sex offender. *Id.* at *6.

[3] We reject Escalante’s argument. The Supreme Court has repeatedly articulated that the categorical approach looks *exclusively* to the elements of the offenses to be compared. *See, e.g., Mathis v. United States*, — U.S. —, 136 S. Ct. 2243, 2248, 195 L.Ed.2d 604 (2016) (directing that courts “focus *solely* on whether the elements of the crime of conviction sufficiently match the elements of [the predicate crime]” (emphasis added)); *Descamps*, 570 U.S. at 261, 133 S.Ct. 2276 (holding that courts “may look *only* to the statutory definitions—*i.e.*, the elements—of a defendant’s prior offenses” (emphasis added, citation and quotation marks omitted)); *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (holding that courts “look *only* to the fact of conviction and the statutory definition of the prior offense” (emphasis added)).

The Supreme Court has defined “elements” in this context to be “the ‘constituent parts’ of a crime’s legal definition—the things the ‘prosecution must prove to sustain a conviction.’” *Mathis*, 136 S. Ct. at 2248 (quoting Black’s Law Dictionary 634 (10th ed. 2014)). Despite Escalante’s assertion to the contrary, it is black letter law that an affirmative defense (or the absence thereof) is not the same thing as an element of the crime. *See generally Martin v. Ohio*, 480 U.S. 228, 234–35, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987) (discussing affirmative defenses and the elements of a crime as different things, and holding it constitutional for the defendant to bear the burden of proving the former but not the latter). Moreover, we agree with the government that the unpublished district court opinion in *Roebuck* fails to offer any appreciable analysis on this point and so we give its holding to the contrary little weight.

This conclusion aligns with that of at least two of our sister circuits. *See United States v. Velasquez-Bosque*, 601 F.3d 955, 963 (9th Cir. 2010) (“The availability of an affirmative defense is not relevant to the categorical analysis.”); *Donawa v. U.S. Attorney Gen.*, 735 F.3d 1275, 1282 (11th Cir. 2013) (rejecting a comparison under the categorical approach when the *mens rea* component was an element of the federal statute, but its absence was an affirmative defense in the state statute because “[a]n affirmative defense generally does not create a separate element of the offense that the government is required to prove in order to obtain a conviction”). Conversely, we have not identified any circuits expressly holding that different affirmative defenses should be considered under the categorical approach.

As a secondary point, we note the practical difficulty that would accompany expanding the categorical approach to include consideration of all the different permutations of potential affirmative defenses. One of the reasons that the Supreme Court gave for implementing the categorical approach in the first place was that the “practical difficulties” of the alternative were deemed to be “daunting.”⁶ *See Taylor*, 495 U.S. at 601–02, 110 S.Ct. 2143. However, requiring an examination of all the affirmative defenses that could have possibly been raised under state law for someone charged with a state crime (even if, like here, the defendant personally could not assert the defenses, and thus they were not raised in the proceedings below), and then trying to align all those

⁶. *But see Lewis v. Chicago*, 560 U.S. 205, 217, 130 S.Ct. 2191, 176 L.Ed.2d 967 (2010) (“[I]t is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted.”).

⁷. Though it does not impact the analysis, Utah’s statute has since been amended to only

possible defenses with the defenses permitted under federal law would make applying the categorical approach an even more daunting task than it already is. Escalante argues that the expansion he seeks would only apply to this defense for this specific offense, but, as a matter of logic, it is hard to see why it would stop there.

For those reasons, we reject Escalante’s argument to consider different permissible affirmative defenses, and we consider only the elements of the offenses to be compared when applying the categorical approach.

2.

Second, we address Escalante’s argument that the district court erred by considering the specific circumstances of his offender-victim age differential when determining his sex offender tier level.

Escalante argues that Utah’s § 76-5-401 offense sweeps more broadly than “abusive sexual contact (as described in section 2244 of title 18)—which cross-references to 18 U.S.C. § 2243(a)—because § 2243(a) requires, as an element, that the government prove at least a four-year age differential. *See* 18 U.S.C. § 2243(a)(2) (requiring the government to prove the victim “is at least four years younger than the person so engaging”). Utah’s § 76-5-401, as it existed in 2010, did not require the government to prove any age differential.⁷ The Utah statute still took into account whether the offender was within a four-year age range,

apply to persons 18 and older who engage in sexual activity with persons aged 14–15. Thus, Utah’s law does in fact now require the government to prove an age differential of at least two years (which is still smaller than the four-year age differential required under 18 U.S.C. § 2243).

but made that a mitigating factor which, if proven by the defendant, reduced the crime to a misdemeanor. *See Utah Code. Ann. § 76-5-401(3)(b)*. Looking solely at their elements, the Utah statute criminalized consensual sexual activity between an 18-year-old and a 15-year-old, but the federal statute does not. Escalante therefore asserts that applying the categorical approach means that the Utah offense is overly broad and cannot be considered comparable to § 2243(a) (as cross-referenced by § 2244) for the purpose of classifying him a tier II sex offender.

The government responds by noting that this court has expressly left open the question of whether the categorical approach should be used when considering the specific circumstances of the victim's age for SORNA tier classifications. *See Young*, 872 F.3d at 747–48 (“[T]his opinion should not be read as holding that the categorical approach applies . . . when it comes to the specific circumstance of the victims' ages. . . . We save discussion of any argument on [that] point for a day when it is properly raised.”). The government points out that at least three other circuits have adopted a circumstance-specific approach when considering the victim's age for the purpose of SORNA's §§ 20911(2)–(4) tier classifications. *See United States v. Berry*, 814 F.3d 192, 197 (4th Cir. 2016) (“[T]he language of Section 16911(3)(A), like the language of Section 16911(4)(A), instructs courts to apply the categorical approach when comparing prior convictions with the generic offenses listed except when it comes to the specific circumstance of the victims' ages.”); *United States v. White*, 782 F.3d 1118, 1135 (10th Cir. 2015) (“[W]e conclude Congress intended courts 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.”); *United States v. Byun*, 539 F.3d 982, 991 (9th Cir. 2008) (“[A]s to whether an individual is a ‘tier II’ offender, the language of the statute points strongly toward a non-categorical approach with regard to the age of the victim.”). Conversely, the parties do not brief, and we are not aware of, any circuits to expressly hold the opposite.

We now address the question we left open in *Young*—does SORNA require courts to perform a circumstance-specific inquiry to determine whether the victim was a minor when applying the categorical approach to classify sex offender tier levels? In *Nijhawan v. Holder*, the Supreme Court recognized that federal statutes may impute the categorical approach by referring to generic or cross-referenced crimes, but then require circumstance-specific inquiries to determine whether specific conditional or modifying requirements are also met. 557 U.S. 29, 37–40, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009) (noting, *inter alia*, that the phrases “if committed for commercial advantage,” “for the purpose of assisting . . . ,” and “in which the loss . . . ” required a circumstance-specific inquiry into those underlying facts even though the offenses themselves were cross-referenced statutes that should be compared under the categorical approach). This hybrid approach—for lack of a better term—turns on how the circumstance-specific conditions modify the generic or cross-referenced offenses.

[4] Applying that hybrid approach to this case, SORNA's sex offender tier classification imposes circumstance-specific conditions on the cross-referenced offenses. Title 34 U.S.C. § 20911(3) modifies the cross-referenced offenses with “when committed against a minor,” and 34 U.S.C. § 20911(4)(A)(ii) modifies the cross-referenced offenses with “against a minor who

has not attained the age of 13 years.” Therefore, in alignment with every other circuit to consider the question, we hold that when classifying sex offender tier levels under 34 U.S.C. §§ 20911(2)–(4), the text of SORNA requires a circumstance-specific inquiry into the victim’s age to determine whether the victim was, in fact, a minor at the time of the offense.⁸

However, that does not end the inquiry in this case. Here, the government urges us to look at the facts not only to determine whether the victim was a minor, but also to determine whether the offender-victim age differential existed. Accordingly, the government needs to establish that the relevant statutory text permits departure from the categorical approach not only when considering the victim’s age (i.e., to ascertain whether he or she is a minor), but also when a cross-referenced federal crime includes, as an element, an age differential that the state crime of conviction does not. This is an apparent matter of first impression, as the parties have not briefed, nor have we identified, any other circuits to specifically address this question.

Coming back to the basics, a state sex offense is a tier II sex offense for SORNA sentencing purposes when, *inter alia*, it “is comparable to or more severe than [abusive sexual contact as described in § 2244] when committed against a minor.” 34 U.S.C. § 20911(3) (emphasis added). Abusive sexual contact under 18 U.S.C. § 2244

includes, *inter alia*, sexual abuse of a minor under 18 U.S.C. § 2243(a). Section 2243(a) requires that the victim be 12–15 years old and that the offender be four years older than the victim. The Utah statute under which Escalante was convicted required that the victim be 14–15 years old, but would not require the government to prove an age differential.

[5, 6] The conditional language of “when committed against a minor” permits the government to conduct a circumstance-specific inquiry into whether the victim was a minor (which she was in this case), but it does not suggest that the court can abandon the categorical approach and conduct a circumstance-specific inquiry when looking at an offender-victim age differential that is required as an element of the cross-referenced federal offense. Sections 20911(2)–(4) of SORNA do not contain any conditional language referring to the offender’s age or the offender-victim age differential—nor does 18 U.S.C. § 2244’s description of abusive sexual contact, which cross-references to sexual abuse of a minor under 18 U.S.C. § 2243. Looking solely at the elements then, the Utah offense criminalizes consensual sexual contact between an 18-year-old and a 15-year-old, whereas the federal statute does not. Thus, under the categorical approach, the Utah offense “sweeps more broadly” than the comparable federal offense and cannot serve as a proper predicate for a SORNA tier II sex offender designation.⁹

8. Or, in the case of a tier III categorization under § 20911(4)(A)(ii), whether the victim was, in fact, younger than 13.

9. The government draws our attention to *United States v. Coleman*, 681 F. App’x 413 (5th Cir. 2017) (unpublished), for the proposition that under SORNA a comparable state offense can be “slightly broader” than the corresponding federal offense. In *Coleman*, the appellant argued that a Minnesota statute was not a proper SORNA predicate because

that statute required “sexual or aggressive intent” while the relevant federal statute required “intent to abuse . . . or gratify the sexual desire[.]” *Id.* at 417; compare 18 U.S.C. § 2246(3), with Minn. Stat. § 609.341. We held that the abusive intent of the federal statute was analogous to the aggressive intent of the Minnesota statute. *Coleman*, 681 F. App’x at 417. However, we then also noted that “even if” aggressive intent was slightly broader than abusive intent, other “[c]ourts

The government places a lot of weight on *United States v. Gonzalez-Medina*, wherein we held that we must consider the specific circumstances of the victim-offender age differential when determining whether an offense is a “sex offense” at all under 34 U.S.C. § 20911(5)(C). 757 F.3d 425, 431 (5th Cir. 2014). Section 20911(5)(C) is an exception to SORNA, stating that “[a]n offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter . . . if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.” *Gonzalez-Medina* involved a situation where a 24-year-old offender violated a Wisconsin statute that criminalized sexual activity with persons 16–17 years old. 757 F.3d at 427. He subsequently argued that he was not required to register as a “sex offender” at all because, under the categorical approach, the Wisconsin statute did not include the age dif-

ferential exception for when an offense is deemed a “sex offense” under SORNA. *Id.* at 428–29. We disagreed with that argument, concluding that “the language, structure, and broad purpose of SORNA all indicate that Congress intended a non-categorical approach to the age-differential determination in [34 U.S.C. § 20911(5)(C)].”¹⁰ *Id.* at 432.

Nonetheless, there are several reasons why the government’s emphasis on *Gonzalez-Medina* is unavailing in this case.

First, and most importantly, the age differential for the § 20911(5)(C) exception is actually in SORNA’s text as an exception to when state offenses can even constitute a “sex offense.” Conversely, the age differential relevant for classifying tier II sex offenders under § 20911(3) is not actually found in SORNA, but rather it is built in as an element of one of the many corre-

have stated that, given SORNA’s broad purpose, a comparable statute can be ‘slightly broader’ than the federal crime.” *Id.* at 416–18 (citing *United States v. Forster*, 549 F. App’x 757, 769 (10th Cir. 2013) (unpublished), and *United States v. Morales*, 801 F.3d 1, 7–8 (1st Cir. 2015)).

The Tenth Circuit’s *Forster* opinion, for its part, suggested that because SORNA uses the word “comparable,” a corresponding state offense could possibly be “slightly broader”; however, it then went on to hold that there was no distinction between the SORNA tier and state offense in question, both of which referenced minors younger than 13. 549 F. App’x at 769. And the First Circuit’s *Morales* opinion, while suggesting that “‘comparable to’ may, as the government argues, provide us some flexibility in examining the offenses,” declined to give any flexibility in that case because “the question of age is so essential to the framework that the congressional cut-off must be strictly construed.” 801 F.3d at 7–8.

We are not bound by our unpublished opinions. *Ballard v. Burton*, 444 F.3d 391, 401 n.7 (5th Cir. 2006); 5th Cir. R. 47.5.4. Moreover, we are skeptical that courts applying the categorical approach have leeway to hold that a

broader offense can still be a predicate when it is deemed only “slightly broader.” The Supreme Court has had many opportunities to articulate how lower courts should conduct the categorical approach, and the government does not point us to any decision wherein the Supreme Court suggested that a state offense which criminalized broader conduct than the corresponding federal crime could constitute a valid predicate if it was only “slightly broader.” Cf., e.g., *Esquivel-Quintana*, 137 S. Ct. at 1568 (articulating the categorical approach as an examination of whether the elements of the state offense “would fall within the federal definition of the crime[,]” not whether they come close to falling within that federal definition). Nonetheless, even assuming that the categorical approach could be “slightly broader” under SORNA, a statutory rape offense that criminalizes conduct without an age differential requirement is more than “slightly broader” than one which does require an age differential.

10. *Gonzalez-Medina* refers to 42 U.S.C. § 16911 when discussing SORNA. That provision has since been re-codified at 34 U.S.C. § 20911 (effective Sep. 1, 2017).

sponding offenses that SORNA cross-references.

Second, the text of the § 20911(5)(C) exception states that it is applicable to offenses “involving . . . conduct . . . [if] the offender was not more than 4 years older than the victim.” That “involving conduct” verbiage is consistent with circumstance-specific inquiries. *See Gonzalez-Medina*, 757 F.3d at 430. However, the text of § 20911(3), which is at issue in this case, does not use that verbiage when classifying a tier II sex offender, and instead lists corresponding “offenses” against which to compare the conviction offense, modified only by the conditional language of “when committed against a minor.”

And third, *Gonzalez-Medina* held that SORNA was intended to cast a wide net, and that a categorical exception for any conviction involving consensual conduct that did not require a four-year age differential as an element—to include child pornography—“would frustrate SORNA’s broad purpose” of requiring sex offenders to register. *Id.* at 431. However, those purposive concerns are not as strong for sex offender tier classifications. Applying the categorical approach to the age differentials built into the cross-referenced corresponding offenses would not mean that Escalante does not have to register under SORNA at all; instead, it means that his failure to register imposes a sentencing baseline of 12 points rather than 14.

Moreover, applying the categorical approach to age differentials built into the

cross-referenced statutes does not leave §§ 20911(2)–(4), or any subsection thereof, without meaningful application. *Cf. Nijhawan*, 557 U.S. at 39, 129 S.Ct. 2294 (not applying the categorical approach where doing so would leave a subparagraph “with little, if any, meaningful application”). Instead, § 20911(3)’s “when committed against a minor” language still causes tier II classification for an array of offenses based only on the fact that they were committed against minors,¹¹ as well as for statutory rape offenses wherein the government had to prove a four-year age differential.¹²

As a final point, our decision in *Rodriguez* warrants discussion. In *Rodriguez*, our court, sitting en banc, had the task of defining the generic term “sexual abuse of a minor” for the crime-of-violence enhancement under § 2L1.2(b)(1)(A)(ii) of the Guidelines. We rejected the argument that Texas’s statutory rape law was too broad to serve as a predicate offense because it only required a three-year, not a four-year, age differential. 711 F.3d at 544, 562 n.28 (“We reject this argument because the definitions of ‘sexual abuse of a minor’ in legal and other well-accepted dictionaries do not include such an age-differential requirement.”). *Esquivel-Quintana* abrogated *Rodriguez*’s holding that the generic age of a “minor” for consensual sex offenses could be higher than 16; however, *Esquivel-Quintana* did not abrogate *Rodriguez*’s holding that the generic crime of “sexual abuse of a minor” does not require an age

11. The offenses for which an offender is classified as tier II based solely on the fact that the victim was a minor include sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, and abusive sexual contact (which, in addition to the offense of sexual abuse of a minor or ward at issue here, also includes sexual abuse and aggravated sexual abuse.).

See 34 U.S.C. § 20911(3) and, as cross-referenced, 18 U.S.C. §§ 2244 and 2243.

12. For statutory rape offenses where the government did not have to prove a four-year age differential, offenders still have to register under SORNA, but as tier I offenders rather than tier II.

differential.¹³ That holding remains the law of this circuit.

However, that holding is distinguishable from the facts of this case in an important way: *Rodriguez* dealt with the generic term “sexual abuse of a minor”; this case deals with the phrase “abusive sexual contact (as described in section 2244 of title 18).” *See* 34 U.S.C. § 20911(3)(A)(iv). In other words, SORNA does not classify someone as a tier II offender based on comparing their offenses to a *generic* offense; It classifies them based on comparing their offenses to a *specified* other offense. In this case, the specified other offense—sexual abuse of a minor under 18 U.S.C. § 2243(a)—does in fact require a four-year age differential.

Based on that reasoning, we hold—in alignment with every other circuit to consider the issue—that SORNA requires a circumstance-specific inquiry into the victim’s age when classifying sex offender tier levels to determine whether the victim was a minor, or, in the case of a tier III categorization under § 20911(4)(A)(ii), whether the victim was younger than 13.

[7] We also hold, as a matter of apparent first impression, that the text of SORNA does not permit a court, when applying the categorical approach to determine sex offender tier levels, to conduct a circumstance-specific inquiry into an offender-victim age differential that is built into one of the corresponding cross-referenced offenses as an element of the crime. In this case, looking solely at the elements, the Utah offense under which Escalante was convicted sweeps more broadly than the cross-referenced federal offense corresponding to tier level II. Accordingly, the

¹³. See also *Shroff v. Sessions*, 890 F.3d 542, 545 (5th Cir. 2018) (holding that because *Escalante* “focused on the age requirement and did not make an express holding on the requirement of sexual contact” that it did

district court erred by categorizing Escalante as a tier II sex offender.

3.

Last, we address the harmlessness argument. Escalante’s sentence was based on a Guidelines calculation that categorized him as a tier II offender. The government argues that even if the district court erred by classifying Escalante as a tier II sex offender, any such error would be harmless because the district court upwardly varied from the Guidelines at sentencing. That variance, the government asserts, was based on his significant criminal history and likelihood of recidivism, and therefore had nothing to do with the sex offender tier at which he was classified.

[8, 9] Nonetheless, we agree with Escalante that the government has not cleared the “high hurdle” necessary for holding the sentencing error to be harmless. *See United States v. Halverson*, 897 F.3d 645, 652 (5th Cir. 2018) (quoting *United States v. Ibarra-Luna*, 628 F.3d 712, 714 (5th Cir. 2010)). Under our precedent, the harmless error doctrine only applies to Guideline calculation errors when the government “convincingly demonstrates both (1) that the district court would have imposed the same sentence had it not made the error, and (2) that it would have done so for the same reasons it gave at the prior sentencing.” *Id.* The “crux” of the inquiry is “whether the district court *would* have imposed the same sentence, not whether the district court *could* have imposed the same sentence.” *Id.* (quoting *United States v. Delgado-Martinez*, 564 F.3d 750, 753 (5th Cir.

not abrogate this court’s precedent regarding the contact requirement); *United States v. Montes-Barrientos*, 742 F. App’x 18, 19 (5th Cir. 2018) (unpublished) (noting that *Shroff*’s holding on that point was not dicta).

2009)). And “[t]he record must show ‘clarify of intent’ expressed by the district court[.]” *Id.* (quoting *United States v. Shepherd*, 848 F.3d 425, 427 (5th Cir. 2017)).

Here, the government has not argued, nor does a review of the sentencing transcript clearly indicate, that the district court would have imposed the same 48-month sentence regardless of the Guidelines range suggested by the sex offender tier. Instead, all the government argues is that the district court’s rationale would have supported an upward variance from whatever baseline that the Guidelines suggested. That is not enough. *See, e.g., Ibarra-Luna*, 628 F.3d at 719 (“[W]e are convinced that the explanation the district court gave for imposing an above-Guidelines sentence would have led it to do so even if it had considered the correct Guidelines range. . . . [But w]e cannot state with the requisite certainty, however, that the district court would have imposed precisely the same sentence.”); *United States v. Martinez-Flores*, 720 F.3d 293, 300 (5th Cir. 2013) (holding the error harmful where “the district court did not clearly state (and we cannot glean from the record) that it would impose the same sentence if [the Guidelines calculation had been corrected]”). Escalante’s erroneous classification as a tier II sex offender was not harmless.

IV.

In summary, the district court erred by deviating from the categorical approach to consider the circumstance-specific facts of the offender-victim age differential when

classifying Escalante as a tier II sex offender under SORNA, and by sentencing him based on a Guidelines range that was derived from that tier II categorization. Because the record does not convey the district court’s clear intent to impose the same sentence absent that Guidelines error, we must VACATE and REMAND for resentencing.

* * * *

This outcome is required by faithful adherence to precedent that has struggled to grapple with the expansion and byzantine-like application of the categorical approach. However, it is not lost on us that adherence to the categorical approach leads to a result in this case that is almost certainly contrary to any plain reading of the statute. Persons who commit sex offenses against minors would, under any plain reading of SORNA, be expected to register as tier II sex offenders. In this case, the victim was 14. Escalante was 35. He abused a minor under any jurisdiction’s definition of minor. Nonetheless, application of the categorical approach means that he is not a tier II sex offender because Utah’s statute for unlawful sexual activity with a minor did not require the same age differential that the referenced federal statute did—even though Escalante was not even close to being within that age differential at the time of the offense.

In the nearly three decades since its inception,¹⁴ the categorical approach has developed a reputation for crushing common sense in any area of the law in which its tentacles find an inroad.¹⁵ What began

14. See *Sessions v. Dimaya*, — U.S. —, 138 S. Ct. 1204, 1252, 200 L.Ed.2d 549 (2018) (Thomas, J., dissenting) (“The categorical approach originated with Justice Blackmun’s opinion for the Court in *Taylor v. United*

States, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).’).

15. See, e.g., *United States v. Lewis*, 720 F. App’x 111, 120 (3d Cir. 2018) (Roth, J., concurring in the judgment) (describing the cate-

as an effort by the Supreme Court to simplify the judiciary's job when determining whether a state crime constituted generic "burglary" has now metastasized into something that requires rigorous abstract reasoning to arrive at the conclusion that a 35-year-old who sexually abused a 14-year-old cannot be categorized as a tier II sex offender—notwithstanding the fact that his crime was actually "committed against a minor"—because it is theoretically possible that someone else could be convicted under the statute without being four years older than the victim.

Members of this court have been critical of the counterintuitive—and all too often absurd—conclusions that can result when the categorical approach wraps its tentacles around a sentencing decision.¹⁶ We have said that "[e]xcept as otherwise directed by the Supreme Court, sentencing should not turn on reality-defying distinctions." *United States v. Reyes-Contreras*, 910 F.3d 169, 186 (5th Cir. 2018) (en banc) (citation omitted). Unfortunately, application of the categorical approach here leads us inexorably to the conclusion that this is such a case.

gorical approach as "willful blindness—which may allow violent offenders to evade accountability"; *United States v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017) (observing that the categorical approach carries judges "down the rabbit hole ... to a realm where we must close our eyes as judges It is a pretend place in which a crime that the defendant committed violently is transformed into a non-violent one Curiouser and curiouser it has all become[J]"); *United States v. Chapman*, 866 F.3d 129, 136–38 (3d Cir. 2017) (Jordan, J., concurring) (expressing dismay at the "kudzu quality of the categorical approach, which seems to be always enlarging its territory[,] and which "often asks judges to feign amnesia," and to "ignore facts already known and instead proceed with eyes shut"); *United States v. Faust*, 853 F.3d 39, 61 (1st Cir. 2017) (Lynch, J., concurring) (observing that the categorical approach "can lead courts to reach counterintuitive results, and ones which are not what Congress intended"); *United States v. Doctor*, 842 F.3d 306, 313–15 (4th Cir. 2016) (Wilkinson, J., concurring) (stating that the categorical ap-

Somewhere along the way, when developing the categorical approach, the federal judiciary has gotten lost. *See also Mathis*, 136 S. Ct. at 2266–68 (Alito, J., dissenting) (analogizing the evolution of the categorical approach to someone who reportedly had the wrong address in her GPS for what was supposed to be a less-than-an-hour trip, but who then drove across Europe in the other direction for multiple days before entertaining the thought that she was not going where she first set out to go). Perhaps one day the Supreme Court will consider revisiting the categorical approach and setting the federal judiciary down a doctrinal path that is easier to navigate and more likely to arrive at the jurisprudential destinations that a plain reading of our criminal statutes would suggest.¹⁷



proach has caused judges to "swap[] factual inquiries for an endless gauntlet of abstract legal questions[,]'" and recommending that the categorical approach should "loosen[] its present rigid grip upon criminal sentencing").

16. See, e.g., *United States v. Herrold*, 883 F.3d 517, 550 (5th Cir. 2018) (en banc) (Haynes, J., dissenting) (observing that "arcane technicalities" should not allow criminals to evade sentencing enhancements (quoting *Taylor*, 495 U.S. at 589, 110 S.Ct. 2143)), cert. granted, judgment vacated, (495 U.S. 575, 139 S.Ct. 2712, 109 L.Ed.2d 607 (2019)); *United States v. Castillo-Rivera*, 853 F.3d 218, 244 (5th Cir. 2017) (en banc) (Higginson, J., concurring in part and dissenting in part) ("Our ongoing struggle to apply the categorical approach while respecting the congressional purpose to enhance punishment for similar recidivists may justify Supreme Court intervention yet again."); *Rodriguez*, 711 F.3d at 545 n.2 (observing that the current form of the categorical approach begets "confusion and gymnastics," and suggesting that the Supreme Court should provide clarity on the issue).

arbitration agreement. Thus, the judgment of the district and bankruptcy courts is correctly affirmed.

Andrew S. Oldham, Circuit Judge,
concurring in the judgment:

I would decide this case under Texas Civil Practice and Remedies Code § 171.088(a)(4). It provides for vacatur of an arbitration award if “there was no agreement to arbitrate, the issue was not adversely determined in a proceeding under Subchapter B, and the party did not participate in the arbitration hearing without raising the objection.” *Ibid.* This text is most naturally read to authorize vacatur where “there was no agreement to arbitrate [the claim at issue].” Here there was such an agreement, and that “issue” was “adversely determined” against Amberson by a Texas state court. That’s the end of this case in my estimation.

I don’t understand the relevance of § 171.008(a)(3)(A)’s reference to arbitrators who “exceed their powers.” I would not, as the majority does, construe (a)(3)(A) to extend to disputes over the “scope” of an arbitration agreement while limiting (a)(4) to disputes over the “existence” of such an agreement. In my view, both “scope” and “existence” questions fit comfortably within (a)(4).

It’s also important, in my view, that Texas’s courts have applied § 171.088(a)(4) even where the party fighting an arbitration award raises “scope” questions. See *Southwinds Express Construction, LLC v. D.H. Griffin of Texas, Inc.*, 513 S.W.3d 66, 84 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (Frost, C.J., concurring) (explaining that applying § 171.088(a)(3)(A) to circumstances like those in issue here would render portions of § 171.088(a)(4) “meaningless”); *Kreit v. Brewer & Pritchard, P.C.*, 530 S.W.3d 231, 241–43 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) (ap-

plying § 171.088(a)(4) over (a)(3) where a party raised the “scope” question of whether persons were covered by an agreement).



UNITED STATES of America,
Plaintiff—Appellee,

v.

John David NAVARRO, Defendant—
Appellant.

No. 19-50662

United States Court of Appeals,
Fifth Circuit.

FILED November 23, 2022

Background: Government filed petition to revoke supervised release of defendant who was previously convicted, on a guilty plea, of failing to register as a sex offender in violation of the Sex Offender Registration and Notification Act (SORNA). The United States District Court for the Western District of Texas, David Counts, J., entered revocation order. Defendant appealed, challenging the underlying SORNA conviction.

Holdings: The Court of Appeals, Smith, Circuit Judge, held that:

- (1) in a matter of first impression, SORNA conviction is based on violation of SORNA’s registration requirements, which are independent of state law;
- (2) defendant had no duty to register, as required to support SORNA conviction; and
- (3) SORNA conviction would be vacated under plain error standard.

Vacated and remanded.

Haynes, Circuit Judge, concurred in the judgment only.

18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20913(a).

1. Criminal Law \bowtie 273(4.1)

The factual conduct admitted by the defendant must be sufficient as a matter of law to establish a violation of the statute to which he entered his plea. Fed. R. Crim. P. 11(b)(3).

7. Mental Health \bowtie 433(2)

The Sex Offender Registration and Notification Act (SORNA) does not give states the power to decide whether sex offenders must register as a matter of federal law. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20913(a).

2. Criminal Law \bowtie 1031(4)

When a defendant challenges the basis of his guilty plea for the first time on appeal, the Court of Appeals reviews for plain error. Fed. R. Crim. P. 52(b).

8. Mental Health \bowtie 433(2)

The Sex Offender Registration and Notification Act (SORNA) requires sex offenders to register with state-run sex-offender registries and to keep their registrations current. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20913(a).

3. Mental Health \bowtie 433(2)

Sex offender registries are governed by a combination of state and federal law, and Texas law and the Sex Offender Registration and Notification Act (SORNA) set different registration requirements. 18 U.S.C.A. § 2250(a); Tex. Crim. Proc. Code Ann. art. 62.001(5)(H).

9. Mental Health \bowtie 469(2)

The Sex Offender Registration and Notification Act (SORNA) does not adopt states' separate requirements for who must register and when; SORNA sets its own rules for when sex offenders must register with state authorities. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20913(a).

4. Stipulations \bowtie 3

A court is not bound by parties' stipulations of law, particularly when those stipulations are erroneous.

10. Mental Health \bowtie 469(2)

Federal law, not state law, determines whether an individual has a duty to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA). 18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20913(a).

5. Mental Health \bowtie 469.5

A conviction under the Sex Offender Registration and Notification Act (SORNA) for failure to register as a sex offender is not rendered insufficient because the defendant had no duty to register as a sex offender under state law; rather, a SORNA conviction is based on violation of SORNA's registration requirements, which are independent of state law. 18 U.S.C.A. § 2250(a).

11. Mental Health \bowtie 469.5

Defendant previously convicted of attempted sexual assault of a child in violation of Colorado law over 20 years ago had no duty to register under the Sex Offender Registration and Notification Act (SORNA), and thus, could not be convicted for failure to register in violation of SORNA; although defendant qualified as a sex offender, who initially had a duty to register beginning at the conclusion of his prison sentence for the Colorado offense, the Col-

6. Mental Health \bowtie 433(2)

The Sex Offender Registration and Notification Act (SORNA) does not create a national sex offender registry and, instead, requires offenders to register in the state in which they live, work, or study.

orado statute of conviction did not categorically qualify as a “comparable” tier II offense, as it was broader than crimes listed under SORNA as tier II offenses, so that defendant only had duty to register for 15 years after his release from prison, as his offense only qualified as SORNA tier I offense. 18 U.S.C.A. §§ 2241(c), 2243(a), 2250(a); 34 U.S.C.A. § 20913(a); Colo. Rev. Stat. Ann. § 18-3-405(1); 28 C.F.R. § 72.7(a)(1).

See publication Words and Phrases for other judicial constructions and definitions.

12. Mental Health ☞469(3)

A sex offender’s tier, which determines how long the offender is required to comply with the registration requirements under Sex Offender Registration and Notification Act (SORNA), is dictated by the nature of his underlying offense. 34 U.S.C.A. §§ 20911, 20913(a), 20915.

13. Mental Health ☞469(4)

To determine whether a sex offender’s predicate state conviction is “comparable” to a crime listed in the Sex Offender Registration and Notification Act (SORNA), in order to evaluate offender’s tier, which, in turn, determines how long the offender is required to comply with SORNA’s registration requirements, a court use the “categorical approach,” pursuant to which only the elements of the underlying offense are examined to see if the elements match the elements of the listed SORNA crime. 18 U.S.C.A. §§ 2241(c), 2244(a); 34 U.S.C.A. §§ 20911, 20913(a), 20915.

14. Mental Health ☞469(2)

Under the categorical approach for determining whether a prior state conviction is comparable to crime listed under the Sex Offender Registration and Notification Act (SORNA), the specific circumstances of the defendant’s crime are irrelevant; all that matters is whether the

elements of the state statute match the elements of the listed federal crime. 18 U.S.C.A. §§ 2241(c), 2244(a); 34 U.S.C.A. §§ 20911, 20913(a), 20915.

15. Mental Health ☞469(2)

Under the categorical approach for determining whether a prior state conviction is comparable to crime listed under the Sex Offender Registration and Notification Act (SORNA), if the state crime sweeps more broadly than the listed federal offense, it is not comparable and, therefore, cannot be a predicate SORNA offense. 18 U.S.C.A. §§ 2241(c), 2244(a); 34 U.S.C.A. §§ 20911, 20913(a), 20915.

16. Mental Health ☞469(2)

Under the categorical approach for determining whether a prior state conviction is comparable to crime listed under the Sex Offender Registration and Notification Act (SORNA), the state crime sweeps more broadly, and thus, is not a “comparable offense” under SORNA, when it criminalizes more conduct than the listed federal crime would reach by its terms. 18 U.S.C.A. §§ 2241(c), 2244(a); 34 U.S.C.A. §§ 20911, 20913(a), 20915.

See publication Words and Phrases for other judicial constructions and definitions.

17. Mental Health ☞469(4)

Once a prior state crime is judged to be “comparable” to a crime listed under the Sex Offender Registration and Notification Act (SORNA) under the categorical approach, for purpose of determining if and for how long SORNA’s registration requirements apply, a court may conduct a circumstance-specific inquiry to decide whether the crime of conviction was against a “minor” within the meaning of SORNA. 18 U.S.C.A. §§ 2241(c), 2244(a); 34 U.S.C.A. §§ 20911, 20913(a), 20915.

18. Mental Health ↪469(2)

Colorado offense of sexual assault of a child swept more broadly than comparable tier II offense listed under Sexual Offense Registration and Notification Act (SORNA), which mandates that offender comply with registration requirements for 25 years; listed SORNA offenses required that minor victim be 12 to 16 years old and that offender be at least four years older than victim, or that victim was under the age of 12, but Colorado statute of conviction criminalized sexual contact with victims younger than 12. 18 U.S.C.A. §§ 2241(c), 2243(a); 34 U.S.C.A. §§ 20911, 20915; Colo. Rev. Stat. Ann. § 18-3-405(1).

19. Criminal Law ↪1030(1)

To succeed under the plain-error standard of review, a defendant must establish the following: first, the district court erred; second, the error is plain, clear, or obvious, rather than subject to reasonable dispute; and third, the error affects the defendant's substantial rights, which generally means that there must be a reasonable probability that, but for the error, the outcome of the proceeding would have been different. Fed. R. Crim. P. 52(b).

20. Criminal Law ↪1030(1)

If a defendant shows that the first three prongs of the plain-error standard are met, an appellate court may grant relief if it concludes that the error had a serious effect on the fairness, integrity or public reputation of judicial proceedings. Fed. R. Crim. P. 52(b).

21. Criminal Law ↪273(4.1), 1031(4)

District Court's acceptance of defendant's guilty plea for failure to register as a sex offender in violation of the Sex Offender Registration and Notification Act (SORNA) amounted to error that was "plain," as required to support reversal under plain error standard of review, where defendant no longer had duty to

register under SORNA at time of the alleged crime. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. §§ 20911, 20913(a), 20915.

See publication Words and Phrases for other judicial constructions and definitions.

22. Criminal Law ↪1030(1)

On plain-error review, the Court of Appeals determine whether the law was "settled" based on the law at the time of the appeal, not the time of conviction.

23. Criminal Law ↪1031(4)

District Court's acceptance of defendant's guilty plea for failure to register as a sex offender in violation of the Sex Offender Registration and Notification Act (SORNA) when defendant had no duty to register at time of alleged offense affected defendant's substantial rights, as required to support reversal under plain error standard of review; defendant would not have pled guilty if he knew that he no longer had duty to register. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. §§ 20911, 20913(a), 20915; Fed. R. Crim. P. 52(b).

24. Criminal Law ↪1031(4)

A defendant challenging sufficiency of guilty plea pursuant to the plain-error standard of review must show reasonable probability that, but for error, he would not have entered plea. Fed. R. Crim. P. 11, 52(b).

25. Criminal Law ↪1030(3)

Court of Appeals would grant relief under plain error standard of review by vacating defendant's conviction for failure to register in violation of the Sex Offender Registration and Notification Act (SORNA), where defendant was actually innocent of the offense, since he no longer had duty to register at time of alleged offense; allowing improper conviction to stand would undermine integrity of judicial proceedings. 18 U.S.C.A. § 2250(a); 34

U.S.C.A. §§ 20911, 20913(a), 20915; Fed. R. Crim. P. 52(b).

26. Criminal Law ~~1030(3)~~

Under the plain-error standard of review, the Court of Appeals must correct a forfeited error that causes the conviction or sentencing of an actually innocent defendant.

Appeal from the United States District Court for the Western District of Texas, USDC No. 7:19-CR-35-1, Walter David Counts, III, U.S. District Judge

Joseph H. Gay, Jr., Mara Asya Blatt, Esq., Assistant U.S. Attorneys, U.S. Attorney's Office, Western District of Texas, San Antonio, TX, for Plaintiff-Appellee.

Bradford W. Bogan, Assistant Federal Public Defender, Maureen Scott Franco, Federal Public Defender, Federal Public Defender's Office, Western District of Texas, San Antonio, TX, for Defendant-Appellant.

Before SMITH, BARKSDALE, and HAYNES, Circuit Judges.

JERRY E. SMITH, Circuit Judge:^{*}

In 1998, John Navarro pleaded guilty of attempted sexual assault of a minor in Colorado. In 2013, Navarro moved to Texas. In 2019, law enforcement discovered that Navarro was not registered as a sex offender in Texas and arrested him. Navarro pleaded guilty of failing to register as required by the federal Sex Offender Registration and Notification Act ("SORNA"), a crime under 18 U.S.C. § 2250(a).

* Judge Haynes joins only in the judgment vacating the conviction and remanding accordingly; she would have granted the government's unopposed motion to vacate and remand.

1. Both the investigation preceding Navarro's arrest in Texas and the factual basis support-

He completed his term of imprisonment but violated the terms of his supervised release twice and is serving an 11-month revocation sentence.

Navarro claims that his guilty plea for failing to register as a sex offender was insufficient as a matter of law because in 2019 he did not have an obligation to register as a sex offender. Agreeing, we vacate the conviction and remand.

I.

Over twenty years ago, Navarro was convicted of a sex offense in Colorado. State police received disturbing reports from child services in October 1997 and, after investigating further, they arrested Navarro on the suspicion that he had engaged in sexual contact with his two younger half-brothers. Once he was in custody, he waived his *Miranda* rights and signed a confession. Navarro admitted that he inappropriately touched his half-brothers' genitals and pressured one of them to perform sexual acts on him. Navarro was nineteen at the time; his siblings were around six and eight. He pleaded guilty of attempted sexual assault of a child under COLO. REV. STAT. § 18-3-405 (1998). He was sentenced to three years in prison, beginning July 22, 1998. He served his term of imprisonment.

In 2013, Navarro moved to Odessa, Texas.¹ At no point did he register as a sex offender with the county sex registration office or otherwise. In January 2019, a Deputy U.S. Marshal was notified that Navarro was living and working in the state. After confirming that Navarro had been convicted in Colorado of a criminal sexual

ing his guilty plea averred that Navarro had been living and working in Odessa since August 2015. ROA.90, 120. But Navarro separately stated that he moved to Odessa in late 2013. ROA.125.

offense, the Marshals' Office sought and obtained an arrest warrant. Authorities discovered Navarro at a detention center in Odessa, where he was being held on an out-of-state warrant from Colorado. After he was transferred into federal custody, Navarro was indicted on one count of failure to register as a sex offender under § 2250(a).

With the advice of counsel, Navarro entered a voluntary guilty plea before a magistrate judge. The plea was accompanied by a short, one-page document laying out the factual basis for the plea. The document noted Navarro's conviction for a sex offense, his move to Texas, and his failure to register with the state. The district court accepted his guilty plea.

At sentencing, the court adopted the recommendations in the presentence report. According to the report, Navarro's base offense level was 14, which applies "if the defendant was required to register as a Tier II offender" under SORNA. U.S.S.G. § 2A3.5(a)(2) & n.1. Combining that base offense level with Navarro's criminal history, the guideline range was 15–21 months' imprisonment and 5 years' supervised release. The court sentenced Navarro to 21 months and to 5 years of supervised release.

Navarro filed a timely notice of appeal, but COVID extensions and issues with Navarro's appellate counsel delayed briefing and oral argument. In the meantime, Navarro completed his prison sentence.

Since then, Navarro has violated the terms of his supervised release twice. The second violation occurred in 2022, when he failed to participate in a required sex offender treatment program. In May 2022, he was given an 11-month revocation sentence with no supervised release. He continues to challenge his original § 2250(a) conviction while he serves his term of imprisonment. He asks this court to vacate

the underlying conviction and end his resultant revocation sentence.

II.

[1] A guilty plea must be supported by a sufficient factual basis. FED. R. CRIM. P. 11(b)(3). "[T]he factual conduct admitted by the defendant" must be "sufficient as a matter of law to establish a violation of the statute to which he entered his plea." *United States v. Trejo*, 610 F.3d 308, 313 (5th Cir. 2010) (emphasis removed).

[2] Because Navarro challenges the basis of his guilty plea for the first time on appeal, we review for plain error. See *United States v. Escajeda*, 8 F.4th 423, 426 (5th Cir. 2021); FED. R. CRIM. P. 52(b). We first analyze whether the facts accompanying Navarro's plea were sufficient to establish guilt under § 2250(a) "as a matter of law." *Trejo*, 610 F.3d at 313 (emphasis removed). Concluding the factual basis was insufficient, we then consider whether that was plain error.

III.

Section 2250(a) has three elements. First, an individual must be a "sex offender" who is "required to register under the Sex Offender Registration and Notification Act." § 2250(a)(1), (2)(A). Second, he must travel in interstate commerce. § 2250(a)(2)(B). Third, he must "knowingly fail[] to register or update a registration as required by [SORNA]." § 2250(a)(3).

[3] Navarro's central contention is that he did not have a duty to register as a sex offender under the first prong of § 2250(a). Yet our circuit has not been precise about which law determines a sex offender's duty to register. Sex offender registries are governed by a combination of state and federal law, and Texas and SORNA set different registration requirements. This

case requires us to decide whether SORNA (federal law) or Texas (state law) defined Navarro's duty to register.

Navarro maintains that both state and federal law are relevant. In his view, § 2250(a) requires the government to prove that he had an obligation to register under SORNA and under Texas law. In its initial briefing, the United States did not contest that premise, insisting instead that both SORNA and Texas law required Navarro to register. Yet after the briefs were filed (and before oral argument), the United States conceded that Navarro had no obligation to register under Texas state law.² Because the government agreed with Navarro's framing that a state-law duty to register was a necessary component of § 2250(a), it moved to vacate the conviction and remand; it moved separately for an expedited ruling on the motion to vacate. Navarro—for obvious reasons—did not oppose the motions. This panel carried both motions with the case and heard oral argument as scheduled.

[4] Despite the parties' agreement that Navarro's conviction should be vacated, we are not bound to grant their requested relief on that basis.³ Notably, the United States has not abandoned its position that Navarro had a duty to register as a sex offender under SORNA. Instead, it contends that even if Navarro was obligated to register under SORNA, the fact that he

2. Texas requires sex offenders to register with the state if their out-of-state crime of conviction was "substantially similar" to a Texas sex offense. TEX. CODE CRIM. PROC. arts. 62.001(5)(H), 62.051(a). Such sex offenders must register for life. *Id.* art. 62.101(a). By contrast, offenders convicted of "attempt" of a reportable offense need only register for 10 years following their release from prison. See *id.* art. 62.101(b); 62.001(5)(G). Navarro's predicate sex offense was reportable in Texas, see ROA.279, but he pleaded guilty of "attempted" sexual assault of a minor in Colorado. ROA.122, 230. He finished his prison sentence for that crime in 2001. *Id.* Thus, his 10-

had no state-level duty to register is sufficient to vacate a § 2250(a) conviction. But that conclusion does not follow from the statute and the caselaw. We write especially to clarify the law in this regard.

The government's concession raises a narrow but nonetheless critical issue of first impression for this circuit: Is a conviction under § 2250(a) insufficient merely because the defendant had no duty to register as a sex offender under *state* law?

We conclude that the answer to the question is "no." Section 2250(a) makes criminal the failure to register under the federal SORNA. States are free to impose stronger or weaker registration requirements on sex offenders, but whether an individual complies with state law has no bearing on whether he has discharged his SORNA obligations. Thus, the United States's admission that Navarro had no duty to register under state law is not enough to render his conviction *ipso facto* invalid.

A.

Whether a person has an obligation to register as a sex offender under § 2250(a) is determined by federal law. Section 2250(a) is clear about which law applies—it incorporates SORNA by reference three separate times.⁴ It states in no uncertain

year obligation to register ended in 2011, years before he moved to Texas and long before he was arrested for failure to register as a sex offender.

3. "A court is not bound by the parties' stipulations of law, particularly when those stipulations are erroneous." *King v. United States*, 641 F.2d 253, 258 (5th Cir. Unit B Mar. 1981).

4. The threshold element of the crime is that the defendant was "required to register under the Sex Offender Registration and Notification Act." § 2250(a)(1) (emphasis added). The indi-

terms that individuals are guilty of the offense if they are “required to register under [SORNA]” and fail to do so. § 2250(a). SORNA, in turn, lays out a complex regime for who must register as a sex offender and for how long, depending on the nature of an individual’s sex offense. See 34 U.S.C. §§ 20911–15.

[5] Yet the parties put a critical gloss on the statutory scheme. They insist that an individual cannot be convicted under § 2250(a) unless he had *both* an obligation to register as a sex offender under SORNA *and* an obligation to register under state law.

That interpretation has no basis in the statutory text. Neither § 2250(a) nor SORNA refers to a state’s registration requirements. SORNA applies to “sex offender[s],” a term defined by federal statute. See §§ 20911(1), 20913(a). Those offenders are required to “register, and keep the registration current, in each jurisdiction” where they “reside[].” § 20913(a). SORNA also specifies when the obligation to register begins and when it ends, depending on what kind of sex crime the offender committed. See §§ 20913(b), 20915. To put it another way: SORNA establishes of its own force who must register, where they must register, and for how long they must register. Failure to follow any of those rules is a federal crime. § 2250(a). A state may impose differing obligations on sex offenders, but that has no impact on whether an individual is “required to register under [SORNA].” *Id.*

[6] Navarro points out that SORNA does not create a national sex offender

vidual must be “a sex offender as defined for the purposes of the *Sex Offender Registration and Notification Act*.” § 2250(a)(2)(A) (emphasis added). And he must “knowingly fail[] to register or update a registration as required by the *Sex Offender Registration and Notification Act*.” § 2250(a)(3) (emphasis added).

registry and, instead, requires offenders to register in the state in which they live, work, or study. See § 20913(a). Navarro contends that because individual states maintain their own registries, state law necessarily controls whether an individual has an obligation to register.

[7] Yet in § 20913(a), SORNA merely tells sex offenders *where* to register; it does not give states the power to decide *whether* offenders must register as a matter of federal law. If § 20913(a) really delegated such power to states—or implicitly incorporated states’ registration requirements—it would obviate the rest of SORNA’s registration scheme. It would mean that even where SORNA required an individual to register for a period of years, if a state imposed a lesser obligation on that offender (or even no obligation at all), he would not violate SORNA and could not be convicted under § 2250(a).

Indeed, the parties all but concede that their view makes SORNA’s registration requirements superfluous. The United States represented at oral argument that if state registration requirements are different from the federal ones, the state requirements “trump[].”⁵ So too, Navarro’s counsel agreed that even though § 2250(a) criminalizes a failure to register under SORNA, SORNA mandates that sex offenders follow their respective states’ registration requirements.⁶ Again, however, SORNA does not merely direct sex offenders to follow state law registration rules: It sets up *its own* requirements for which sex offenders have to register and when.

5. Oral Argument at 11:25, *United States v. Navarro* (No. 19-50662), https://www.ca5.uscourts.gov/OralArgRecordings/19/19-50662_11-9-2022.mp3.

6. *Id.* at 4:15.

§§ 20911–15. It is inconceivable that Congress would go to the trouble of devising SORNA’s elaborate scheme only for a state’s weaker registration requirements to supplant the federal ones.

Instead of the statutory text, the parties rely on *United States v. Shepherd*, 880 F.3d 734 (5th Cir. 2018) (Smith, J.). The *Shepherd* panel summarized the requirements of § 2250(a) by stating that a “defendant is subject to SORNA’s provisions if . . . he or she . . . knowingly fails to register or update his or her registration as required by state law.” *Id.* at 740 (quoting *United States v. LeTourneau*, 534 F. Supp. 2d 718, 720 (S.D. Tex. 2008)) (emphasis added). The parties place all their weight on that final phrase. To them, *Shepherd* means that a defendant has a duty to register as a sex offender for the purposes of § 2250(a) only if state law requires him to register.

[8, 9] But *Shepherd* does not go as far as the parties say. First, the quoted language is accurate in the narrow sense that sex offenders must register in the state where they reside, work, or go to school—that much SORNA says. Compare *id.*, with § 20913(a). Sex-offender registries are creatures of state law. Therefore, “SORNA requires sex offenders to register with state-run sex-offender registries and to keep their registrations current.” *United States v. Torres*, 767 F.3d 426, 427 (5th Cir. 2014) (emphasis added). SORNA does not, however, adopt states’ separate requirements for who must register and when—SORNA sets its own rules for when sex offenders must register with state authorities.

Second, and more importantly, *Shepherd* does not control this dispute because it did

not directly interpret the meaning of § 2250(a) or SORNA. Though the defendant in *Shepherd* was convicted under § 2250(a), his appeal was based on a 28 U.S.C. § 2255 motion that sought to invalidate his guilty plea because of ineffective assistance of counsel. *Shepherd*, 880 F.3d at 737. The court dealt only with the ineffective-assistance claim and explicitly declined to determine whether Shepherd was actually innocent under § 2250(a). *Id.* at 740. In resolving the ineffective-assistance question, the court emphasized that counsel in *Shepherd* was abnormally inept: He advised the defendant to plead guilty, even though state caselaw suggested that the defendant had no duty to register in the state. *Id.* at 741–43. The attorney later testified that he would have advised his client to plead differently if he had done further research. *Id.* at 743. The *Shepherd* court held that such failure was ineffective assistance of counsel because it would have demonstrably changed the attorney’s recommendation to plead guilty. *Id.* at 746.

Critically, this court did *not* hold that Shepherd’s conviction under § 2250(a) was invalid just because he had no duty to register under Texas law—the question of actual innocence was left open. See *id.* There is thus no Fifth Circuit precedent that justifies a departure from SORNA’s unambiguous language.

[10] The weight of additional authority confirms our limiting reading of *Shepherd*. In direct appeals of SORNA convictions, both our court and the Supreme Court have articulated the requirements of § 2250(a) in a way that makes certain that federal law determines whether an individual has a duty to register as a sex offender under SORNA (not state law).⁷ Meanwhile,

⁷. See *Carr v. United States*, 560 U.S. 438, 447, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010) (“§ 2250(a) can only be satisfied when a per-

son ‘is required to register under the Sex Offender Registration and Notification Act.’” (quoting § 2250(a))); *United States v. Mont-*

our sister circuits have consistently held that an individual can be convicted of failing to register under SORNA even if the state does not require him to register.⁸ Similarly, in its most recent rulemaking, the Justice Department clarified that “SORNA’s registration requirements are independent of state law registration requirements,” so “SORNA requires sex offenders to register in states whose own laws do not require registration by those offenders.”⁹

In short, a § 2250(a) conviction imposes a duty to register under SORNA. And SORNA sets federal registration requirements that are independent of state law.¹⁰ Although we accept the government’s concession that Navarro did not have a duty to register under Texas law, that has no

gomery, 966 F.3d 335, 337 (5th Cir. 2020) (noting that § 2250 criminalizes the failure to register under SORNA); *see also United States v. Gonzalez-Medina*, No. 1:12-CR-830, 2013 WL 12098680, at *3 (S.D. Tex. Apr. 17, 2013) (“18 U.S.C. § 2250(a) . . . imposes a duty to register on sex offenders, regardless of whether state law requires them to register or not.”), *aff’d*, 757 F.3d 425 (5th Cir. 2014).

8. *Willman v. Att’y Gen.*, 972 F.3d 819, 824 (6th Cir. 2020) (“[F]ederal SORNA obligations are independent of state-law sex offender duties.”), *cert. denied*, — U.S. —, 141 S. Ct. 1269, 209 L.Ed.2d 10 (2021); *United States v. Del Valle-Cruz*, 785 F.3d 48, 55 (1st Cir. 2015) (holding that SORNA’s registration obligations do not depend on state registration requirements); *United States v. Billiot*, 785 F.3d 1266, 1269 (8th Cir. 2015) (“SORNA imposes an independent *federal* obligation for sex offenders to register that does not depend on, or incorporate, a state-law registration requirement.”); *United States v. Pendleton*, 636 F.3d 78, 86 (3d Cir. 2011) (“[Defendant’s] federal duty to register under SORNA was not dependent upon his duty to register under [state] law.”); *cf. United States v. Taylor*, 777 F.3d 434, 442–43 & n.4 (7th Cir. 2015) (describing how SORNA imposes registration obligations independent of state law); *United States v. Brown*, 586 F.3d 1342, 1349 (11th Cir. 2009) (noting widespread agreement that “a sex offender is not exempt

bearing on whether he had a duty to register under § 2250(a).

B.

[11] Because Navarro was convicted for failing to register “under [SORNA],” § 2250, we cannot vacate his conviction unless we determine that he had no duty to register under SORNA. After carefully parsing our precedents, we conclude that Navarro had no duty to register under SORNA in 2019.

1.

There is no dispute that Navarro initially fell within the ambit of SORNA. Because he was a “sex offender” within the meaning of the statute,¹¹ Navarro had a

from SORNA’s registration requirements merely because the jurisdiction in which he is required to register has not yet implemented SORNA”).

9. Registration Requirements Under the Sex Offender Registration and Notification Act, 86 Fed. Reg. 69856, 69866 (Dec. 8, 2021).
10. State law is relevant only in one narrow circumstance. If it is impossible for an offender to register in the state in which he resides, either because that state lacks proper procedures or does not allow that offender to register, then the offender has an affirmative defense to a § 2250(a) charge. *See* 18 U.S.C. § 2250(c); 28 C.F.R. §§ 72.7(g)(2), 72.8(a)(2) & ex. 2. Said another way, where an offender has a duty to register under SORNA in a given state, he must register if it is *possible* for him to do so, regardless of whether the state requires him to. There was no contention in this case, however, that it was impossible for Navarro to register in Texas.
11. SORNA requires all “sex offender[s]” to register. § 20913(a). A “sex offender” is defined broadly as “an individual who was convicted of a sex offense,” § 20911(1), while a “sex offense” includes, among other things, a state or federal criminal offense “that has an element involving a sexual act or sexual contact with another,” § 20911(5)(A)(i). Navarro

duty to register beginning at the conclusion of his first prison sentence. *See* § 20913(a)–(b); *see also* 28 C.F.R. § 72.7(a)(1). Navarro was convicted of his predicate sex offense in July 1998. Given his three-year sentence, his obligation to register began (at the latest) around July 2001.

2.

The more difficult issue is how long Navarro's registration requirement lasted. SORNA divides the universe of sex offenders into three "tiers," and the length of an offender's duty to register depends on his assigned "tier." *See* §§ 20911, 20915. A tier I offender must keep his registration current for 15 years; a tier II offender must do so for 25 years; a tier III offender's registration obligation lasts for life. § 20915(a).

[12] A defendant's "tier" is dictated by the nature of his underlying offense. Tier I is the baseline—all offenders who are not tier II or tier III offenders are tier I offenders by default. § 20911(2). A tier II offender is an individual who, among other things, was convicted of an offense "against a minor" that "is comparable to or more severe than" a list of enumerated federal crimes. *See* § 20911(3). An offender is tier III if he is convicted of an offense that "is comparable to or more severe than" a list of more egregious federal sex crimes. *See* § 20911(4).

If Navarro was a tier II offender, then his 25-year registration obligation would have run from 2001 to 2026, and he would have been required to register in Texas in

was convicted under COLO. REV. STAT. § 18-3-405(1) (1998), an element of which involves "knowingly subject[ing]" a child "to any sexual contact." Because the state offense has "sexual contact" as an element, Navarro committed a "sex offense" and is a "sex offender" for the purposes of SORNA.

2019. But Navarro contends that he was a tier I offender. If he is correct, then his 15-year registration obligation would have expired in 2016, three years before he was federally indicted for failure to register.

The district court treated Navarro as a tier II offender.¹² Recall that an offender qualifies as tier II if his sex offense was "committed against a minor" and "is *comparable* to or more severe than" a list of federal crimes, including, "abusive sexual contact (as described in section 2244 of Title 18)." § 20911(3)(A)(iv) (emphasis added). "[A]busive sexual contact," in turn, is defined as any of six additional federal crimes. 18 U.S.C. § 2244(a). Two of those six crimes are relevant here:

1. 18 U.S.C. § 2243(a), which criminalizes "knowingly engag[ing] in a sexual act" with a "minor" who is at least twelve but not yet sixteen, so long as the victim is at least four years younger than the perpetrator.
2. 18 U.S.C. § 2241(c), which prohibits "knowingly engag[ing] in a sexual act with another person who has not attained the age of 12 years."

Because Navarro's conduct would satisfy the second of those two federal offenses (§ 2241(c))—his half-brothers were both younger than twelve when he abused them—the United States asserts that Navarro's predicate crime was "comparable" to "abusive sexual contact" and was thus a tier II offense.

[13] Though that approach is facially plausible, it is not how our circuit has interpreted and applied SORNA. To deter-

- 12.** The district court did not state this explicitly, but the court adopted the pre-sentence report, which gave Navarro the recommended sentence of a tier II offender. *See* ROA.121, 132; *see also* U.S.S.G. § 2A3.5(a)(2) & n.1.

mine whether an offender's predicate offense is "comparable" to a crime listed in SORNA, we use the "categorical approach" that is familiar to federal criminal law. *United States v. Escalante*, 933 F.3d 395, 398 (5th Cir. 2019); *United States v. Young*, 872 F.3d 742, 745–46 (5th Cir. 2017).

[14–17] Under the categorical approach, the specific circumstances of a defendant's crime are irrelevant. All that matters is whether the elements of the state crime match the elements of the federal crime. *Descamps v. United States*, 570 U.S. 254, 260–61, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). If the state crime "sweeps more broadly" than the federal offense, it is not comparable and, therefore, cannot be a predicate offense. *United States v. Montgomery*, 966 F.3d 335, 338 (5th Cir. 2020) (quoting *Descamps*, 570 U.S. at 261, 133 S.Ct. 2276). A crime "sweeps more broadly" when it criminalizes more conduct than the federal crime would reach by its terms. *See id.*¹³

[18] Using the categorical approach, we readily conclude that Navarro's Colorado statute of conviction is broader than either of the federal crimes listed in tier II of SORNA. Navarro's crime of conviction proscribes sexual contact with a child younger than fifteen, so long as the offender is at least four years older than the

13. Once a crime is judged to be "comparable" under the categorical approach, a court may conduct a second "circumstance-specific inquiry" to decide whether the crime of conviction was against a "minor" (the second requirement of SORNA's tier II status). *See Escalante*, 933 F.3d at 401–02 (citing § 20911(3)). But there is no dispute that Navarro committed his crime against two minors. The contested question is whether the Colorado statute of conviction is "comparable" to one of the federal crimes that can justify a tier II offense. *See* § 20911(3)(A). To answer that question, we use the categorical approach.

victim. COLO. REV. STAT. § 18-3-405(1) (1998). The two relevant federal statutes criminalize slightly different conduct—§ 2243(a) criminalizes sexual acts with a minor between the ages of twelve and sixteen so long as the victim is at least four years younger than the offender, and § 2241(c) prohibits all sexual acts with children younger than twelve.

There is some overlap between those statutes, as the government points out. Nevertheless, under the categorical approach, overlap is not enough. Colorado's statute is broader than § 2243(a) because it criminalizes sexual contact with children younger than twelve, while § 2243(a) only criminalizes contact with children between twelve and sixteen years of age. Meanwhile, the Colorado statute is broader than § 2241(c) because it covers illicit sexual contact with twelve-to fourteen-year-olds, but § 2241(c) stops before age twelve. In short, the Colorado statute "sweeps more broadly" than either of the comparable federal statutes. *Descamps*, 570 U.S. at 261, 133 S.Ct. 2276.¹⁴

Our conclusion follows directly from *Escalante*, in which this court held that a Utah sex offense was not "comparable" to any of the federal crimes in SORNA's tier II. 933 F.3d at 400–01. Escalante was convicted under a Utah statute that criminal-

14. The United States makes a passing suggestion that Navarro may have been a tier III offender because tier III includes sexual activity with children younger than thirteen. But the same categorical analysis that applies to the tier II offense of sexual contact with a child under twelve would apply to the tier III offense. Compare § 20911(3)(A)(iv) (incorporating 18 U.S.C. § 2244 (incorporating 18 U.S.C. § 2241(c))), with § 20911(4)(A)(ii). Why those two nearly identical crimes are in separate tiers appears to be a confusing quirk of SORNA—or perhaps a congressional oversight.

ized consensual sexual activity with someone aged fourteen to fifteen. *See id.* at 397 n.3. The only federal crime in SORNA's tier II that was theoretically comparable was § 2243(a), which criminalizes sex with twelve-to fifteen-year-olds. But the federal statute "requires, as an element, that the government prove at least a four-year age differential" between the offender and the victim. *Escalante*, 933 F.3d at 400. In other words, "[T]he Utah statute criminalized consensual sexual activity between an 18-year-old and a 15-year-old," while the federal statute did not. *Id.* at 401. Therefore, the court held that "under the categorical approach, the Utah offense 'sweeps more broadly' than the comparable federal offense and cannot serve as a proper predicate for a SORNA tier II sex offender designation." *Id.* at 402 (quoting *Des camps*, 570 U.S. at 261, 133 S.Ct. 2276).

This case presents the same situation—by criminalizing conduct that the federal statutes do not, Colorado's statute sweeps too broadly to serve as a predicate SORNA offense.

Escalante also rebuts the government's contention that Navarro's crime is "comparable" to a tier II offense because it is narrower than some of the offenses listed in SORNA. Namely, § 2243(a) criminalizes sex with fifteen-year-olds where there is a four-year age gap between the participants whereas the Colorado statute does not. *Compare* § 2243(a), *with* COLO. REV. STAT. § 18-3-405 (1998). But the state statute in *Escalante* was narrower in the same sense—the relevant federal statutes criminalized some conduct that the Utah statute did not. *See Escalante*, 933 F.3d at 397 n.3. Nevertheless, *Escalante* held that the Utah statute swept "more broadly" because it criminalized more conduct than the federal statute. *Id.* at 402 (quotation omitted). Similarly, the Colorado statute criminalizes conduct that neither § 2243(a)

nor § 2241(c) criminalizes. That over-inclusiveness means the statutes are not "comparable." *Escalante*, 933 F.3d at 402.

Navarro's claim finds additional support in *United States v. Walker*, 931 F.3d 576 (7th Cir. 2019) (Barrett, J.). Walker was convicted under the same Colorado statute as Navarro and failed to register after he was released. *Id.* at 578. The Seventh Circuit had to decide whether the Colorado statute was "comparable" to any of the offenses in SORNA's tier II. *Id.* (quoting § 20911(3)(A)(iv)). After adopting the categorical approach, Judge Barrett held that it was not. *Id.* at 580, 582. As in this case, the United States in *Walker* suggested that the Colorado statute prohibited the same conduct as did §§ 2243(a) and 2241(c). *Id.* at 582. Still, the court reasoned that "the Colorado statute sweeps more broadly than § 2243(a) because it covers sexual contact against some victims under 12, and § 2243(a) does not." *Id.* Meanwhile, Colorado's statute is broader than § 2241(c) because the state law "covers some victims between the ages of 12 and 15, and § 2241(c) does not." *Id.* In other words, "a conviction under the Colorado statute doesn't necessarily satisfy the elements of either federal offense and so fails the categorical analysis." *Id.* The Seventh Circuit's persuasive conclusion is equally applicable here.

In sum, Navarro had no federal duty to register as a sex offender in 2019. He was a tier I offender under SORNA, and so his 15-year duty to register ended in 2016 and was no longer operative at the time of his indictment. Therefore, Navarro could not be convicted of a § 2250(a) offense, and, as the government now concedes (albeit for a different, flawed reason), the factual basis supporting his guilty plea was insufficient as a "matter of law." *Trejo*, 610 F.3d at 313.

IV.

[19, 20] Our final consideration is whether Navarro's faulty conviction is "plain error." To succeed under plain-error review, a defendant must establish four things. First, the district court must err. *Greer v. United States*, — U.S. —, 141 S. Ct. 2090, 2096, 210 L.Ed.2d 121 (2021). Second, the error must be "plain," *id.*, "clear[,] or obvious, rather than subject to reasonable dispute." *Puckett v. United States*, 556 U.S. 129, 135, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009). Third, "the error must affect 'substantial rights,' which generally means that there must be 'a reasonable probability that, but for the error, the outcome of the proceeding would have been different.'" *Greer*, 141 S. Ct. at 2096 (quoting *Rosales-Mireles v. United States*, — U.S. —, 138 S. Ct. 1897, 1904–05, 201 L.Ed.2d 376 (2018)). Finally, "[i]f those three requirements are met, an appellate court may grant relief if it concludes that the error had a serious effect on 'the fairness, integrity or public reputation of judicial proceedings.'" *Id.* at 2096–97 (quoting *Rosales-Mireles*, 138 S. Ct. at 1905).

Even though plain error is an exacting standard, *see, e.g., United States v. Young*, 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), all four elements are met here.

First, the district court erred. *Greer*, 141 S. Ct. at 2096. Navarro did not have an obligation to register "under [SORNA]" in 2019. § 2250(a). The admitted facts were insufficient to establish his guilt as a matter of law. *Trejo*, 610 F.3d at 313; *see also* FED. R. CRIM. P. 11(b)(3).

15. *See Young*, 872 F.3d at 746 ("[I]n line with at least four other circuits, we follow the categorical approach in determining whether [a state offense] is comparable to or more severe than the generic crimes listed in 34 U.S.C. § 20911(4)(A)."); *Escalante*, 933 F.3d at 398 ("We employ the categorical approach

[21] Second, the error was "plain." *Greer*, 141 S. Ct. at 2096. It is well-established that this circuit takes a categorical approach to interpreting SORNA's tiers.¹⁵ Nevertheless, the district court treated Navarro as a tier II offender without any meaningful comparison of the state and federal statutes.

[22] The government suggests that the categorical approach to comparing SORNA offenses may not have been evident to the district court at the time it accepted Navarro's guilty plea. *See United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (noting that a district court's mistake cannot be plain error if the law was unclear). Yet on plain-error review, we determine whether the law was "settled" based on the law at the time of the appeal, not the time of conviction. *United States v. Escalante-Reyes*, 689 F.3d 415, 423 (5th Cir. 2012) (en banc). As of this appeal, the Fifth Circuit has stated, in at least three precedential opinions, that we use the categorical approach to compare offenses under SORNA. *See Young*, 872 F.3d at 746; *Escalante*, 933 F.3d at 398; *Montgomery*, 966 F.3d at 338. Our most recent opinion made clear that any predicate state offense that criminalizes more conduct than a related federal offense "sweeps more broadly" and therefore cannot be "comparable." *Montgomery*, 966 F.3d at 338 (quotations omitted). In treating Navarro's Colorado conviction as a tier II offense, the district court departed from that established mandate.

[23, 24] Third, the error affects substantial rights. *Greer*, 141 S. Ct. at 2096. A

when classifying the SORNA tier of a defendant's state law sex offense."); *Montgomery*, 966 F.3d at 338 ("Our court and others determine an offender's SORNA tier by comparing the offense for which they were convicted with SORNA's tier definitions using the categorical approach.").

defendant challenging the sufficiency of a guilty plea under Rule 11 must show “a reasonable probability that, but for the error, he would not have entered the plea.” *United States v. Dominguez Benitez*, 542 U.S. 74, 83, 124 S.Ct. 2333, 159 L.Ed.2d 157 (2004). It is hard to deny that Navarro would not have pleaded guilty if he had correctly understood the tier of his predicate sex offense. Similarly, the district court would likely not have accepted the guilty plea if it had known Navarro had failed to satisfy the first element of the crime.¹⁶ Indeed, in *Montgomery*, this court held that the failure correctly to classify a defendant’s tier under SORNA was “plain error” both because the correct tiering was “clear under current law” and because the mistake “resulted in [the defendant’s] serving additional time in prison.” 966 F.3d at 339. The same is true here.¹⁷

[25, 26] Finally, affirming Navarro’s conviction would undermine the integrity of judicial proceedings by permitting the continued punishment of a man who is not guilty of the crime charged. *See Greer*, 141 S. Ct. at 2097. We have been instructed to “correct a plain forfeited error that causes the conviction or sentencing of an actually innocent defendant.” *See Olano*, 507 U.S. at 736, 113 S.Ct. 1770. We accordingly conclude that the error is reversible.

* * *

The judgment of conviction is VACATED. The motions carried with the case are DENIED as moot, and the case is REMANDED for the district court to ensure the termination of Navarro’s revocation

16. *See United States v. Smith*, 997 F.3d 215, 225 (5th Cir. 2021) (vacating a guilty plea that was accepted by the district judge when the defendant was likely “innocent” of the underlying crime).

sentence and for any other proceedings not inconsistent with this opinion.



**Ornella Angelina HAMMERSCHMIDT,
Petitioner,**

v.

**Merrick GARLAND, U.S. Attorney
General, Respondent.**

No. 21-60462

United States Court of Appeals,
Fifth Circuit.

FILED November 28, 2022

Background: Noncitizen, a native and citizen of Venezuela, petitioned for review after Board of Immigration Appeals (BIA) adopted and affirmed immigration judge’s (IJ) denial of her application for asylum, withholding of removal under Immigration and Nationality Act (INA), and protection under Convention Against Torture (CAT).

Holdings: The Court of Appeals, Haynes, Circuit Judge, held that:

- (1) criminal alien bar did not preclude Court of Appeals from exercising jurisdiction;
- (2) noncitizen’s conviction constituted aggravated felony;
- (3) IJ applied correct legal test in determining that noncitizen committed “particularly serious” crime;

17. Although Navarro’s current imprisonment is due to a revocation sentence, it was based on a violation of a supervised release that was itself imposed because of his erroneous § 2250(a) conviction. *See United States v. Navarro*, 7:19-CR-35-1 (W.D. Tex. May 24, 2022), ECF No. 82.

gan's apartment door to suggest that the door led to another apartment, as opposed to the mudroom or porch. This testimony provided a sufficient basis from which the jury could conclude that the officers reasonably believed that a suspect was behind the door of what turned out to be Ms. Bogan's apartment. Consequently, we shall not disturb the jury's verdict.

Conclusion

For the reasons set forth above, we affirm the judgment of the district court.

AFFIRMED



UNITED STATES of America,
Plaintiff-Appellee,

v.

Kenneth Lee TAYLOR, Defendant-
Appellant.

No. 10-3132.

United States Court of Appeals,
Seventh Circuit.

Argued Feb. 11, 2011.

Decided July 7, 2011.

Background: Defendant pleaded guilty in the United States District Court for the Southern District of Illinois, Michael J. Reagan, J., to charge of not registering as sex offender in violation of Sex Offender Registration and Notification Act (SORNA). Defendant appealed.

Holdings: The Court of Appeals, Bauer, Circuit Judge, held that:

(1) de novo review applied to question of whether district court committed re-

versible error by using modified categorical approach to calculate sentence;

- (2) district court had appropriately examined limited set of additional materials, such as charging instrument, under modified categorical approach, to determine which portion of statute applied under which defendant previously had pleaded guilty; and
- (3) district court did not abuse its discretion in sentencing defendant.

Affirmed.

1. Criminal Law \rightsquigarrow 1139

De novo review applied to question of whether district court committed reversible error by using modified categorical approach to calculate sentence to be imposed upon defendant who pleaded guilty to not registering as sex offender in violation of SORNA, since it was question of law. 18 U.S.C.A. § 2250; Adam Walsh Child Protection and Safety Act of 2006, § 111, 42 U.S.C.A. § 16911; U.S.S.G. § 2A3.5, 18 U.S.C.A.

2. Sentencing and Punishment \rightsquigarrow 781

When a statute proscribes multiple types of conduct, some of which would constitute a violent felony and some of which would not, a judge may examine a limited range of additional material in order to determine whether the defendant pleaded guilty to the portion of the statute that constitutes a violent felony.

3. Sentencing and Punishment \rightsquigarrow 781

After defendant pleaded guilty to charge of not registering as sex offender in violation of SORNA, district court in sentencing defendant appropriately examined limited set of additional materials, such as charging instrument, under modified categorical approach, to determine which portion of statute applied under which defendant previously had pleaded guilty which

prohibited multiple types of conduct, including “forcible sodomy,” that was considered to be offense with different elements than “sodomy” alone. UCMJ, Art. 125, 10 U.S.C.A. § 925; 18 U.S.C.A. § 2250; Adam Walsh Child Protection and Safety Act of 2006, § 111, 42 U.S.C.A. § 16911; U.S.S.G. § 2A3.5, 18 U.S.C.A.

4. Mental Health ☞469.5

Sentencing and Punishment ☞66, 111

District court did not abuse its discretion in sentencing defendant to prison term of 18 months that was below United States Sentencing Guidelines (USSG) range and supervised release term of 20 years that was within Guideline range for violation of Sex Offender Registration and Notification Act (SORNA); although district court had found that defendant was not dangerous and that he maintained steady employment, defendant had committed very serious sex offense and intentionally refused to register as sex offender for seven years and then, while out on bond for failing to register as sex offender, defendant again changed residences without updating his registration. 18 U.S.C.A. § 2250; Adam Walsh Child Protection and Safety Act of 2006, § 111, 42 U.S.C.A. § 16911.

5. Sentencing and Punishment ☞651

Where a sentence is within the advisory United States Sentencing Guidelines (USSG) range, the sentence is presumed reasonable.

Todd M. Schultz (argued), Office of the Federal Public Defender, East St. Louis, IL, for Defendant–Appellant.

Before BAUER, POSNER and WILLIAMS, Circuit Judges.

BAUER, Circuit Judge.

Kenneth Lee Taylor entered an open plea of guilty, without the benefit of a plea agreement, for failing to register as a sex offender in violation of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250. The district court judge sentenced Taylor to eighteen months in prison, twenty years of supervised released, and a \$100 special assessment fee. We affirm.

I. BACKGROUND

Taylor was serving in the Navy when he was charged with forcible sodomy in violation of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 925. He pleaded guilty, and a general court-martial sentenced him to seven months in prison.

As required by SORNA, Taylor registered as a sex offender in 2003 and listed an address in East St. Louis as his residence. In 2006, the Illinois State Police discovered that Taylor was no longer residing at his registered address and that he had not updated his registration to reflect this change. Despite many attempts, authorities did not locate Taylor until early 2010.

In April 2010, Taylor pleaded guilty to failing to register as a sex offender. While released on bond and awaiting sentencing, Taylor again changed residences without updating his sex offender registration or notifying the United States Probation Office.

The district court judge classified Taylor as a Tier III sex offender and calculated the United States Sentencing Guideline

range to be 24 to 30 months in prison and 5 years to life of supervised release. The judge sentenced Taylor to 18 months in prison and 20 years of supervised release, but he indicated a willingness to reduce the supervised release term if Taylor remained out of trouble for a “significant” amount of time.

II. ANALYSIS

The defendant presents two issues on appeal. He first argues that the district court improperly classified Taylor as a Tier III sex offender, and he then argues that his sentence is unreasonable. We disagree.

A. The Statutory Framework

SORNA requires sex offenders to register in the jurisdictions in which they live, work, or go to school. 18 U.S.C. § 2250. The term “sex offender” is defined as “an individual who was convicted of a *sex offense*.” 42 U.S.C. § 16911 (emphasis added). A sex offense is “a *criminal offense* that has an element involving a sexual act or sexual contact with another,” and a criminal offense is “a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105–119 (10 U.S.C. 951 note)).” *Id.* (emphasis added).

Public Law 105–119, referenced above, provides that the Secretary of Defense “shall specify categories of conduct punishable under the Uniform Code of Military Justice which encompasses a range of conduct comparable to that described in . . . the Violent Crime Control and Law En-

1. Courts-martial recognize the offense of “forcible sodomy.” See, e.g., *United States v. Rangel*, 64 M.J. 678, 684 (A.F.Ct.Crim.App. 2007) (explaining that force is an element of the offense of “forcible sodomy”). According to the Manual for Courts-Martial, “[t]hat the

forcement Act of 1994 (42 U.S.C. § 14071(a)(3)(A) and (B)).” Section 14071 of the Violent Crime Control Act established the Jacob Wetterling Act, and 32 C.F.R. § 635.7 (which was enacted under the authority of the Jacob Wetterling Act) states,

Soldiers who are convicted by court-martial for certain sexual offenses must comply with all applicable state registration requirements in effect in the state in which they reside. . . . This is a statutory requirement based on the Jacob Wetterling Act, and implemented by DOD Instruction 1325.7.

DOD Instruction 1325.7, in turn, contains a “Listing of Offenses Requiring Sex Offender Processing.” It provides, “convictions of any of the following offenses punishable under the Uniform Code of Military Justice shall trigger requirements to notify State and local law enforcement agencies and to provide information to inmates concerning sex offender registration requirements.” See <http://www.dtic.mil/whs/directives/corres/pdf/132507p.pdf> (last visited July 1, 2011). One of the listed offenses is “Forcible Sodomy.”¹ *Id.*

Therefore, through a series of cross references, SORNA requires individuals who are convicted of certain sex offenses under the UCMJ—including forcible sodomy—to register as a sex offender.

In addition to defining the terms “sex offender” and “sex offense,” 42 U.S.C. § 16911 classifies sex offenders into three different categories:

(2) Tier I sex offender

act was done by force and without the consent of the other person” may be added as an “element” under UCMJ Article 125, as applicable. Manual For Courts-Martial United States, pt. IV, ¶ 51(b) (2008).

The term "Tier I sex offender" means a sex offender other than a Tier II or Tier III sex offender.

(3) Tier II sex offender

The term "Tier II sex offender" means a sex offender other than a Tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses ...

(iv) abusive sexual contact (as described in section 2244 of Title 18). . . .

(4) Tier III sex offender

The term "Tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses ...

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18). . . .²

These tier levels are incorporated into the United States Sentencing Guidelines and used to determine the defendant's base offense level. U.S.S.G. § 2A3.5.

B. Modified Categorical Approach

[1] To calculate the advisory Guideline range for a violation of SORNA, the judge must first determine the defendant's tier classification. See U.S.S.G. § 2A3.5. The judge usually accomplishes this task by examining the elements of the statute under which the defendant was convicted. This is called the "categorical approach." See *United States v. Smith*, 544 F.3d 781, 786 (7th Cir.2008); *Begay v. United States*, 553 U.S. 137, 141, 128 S.Ct. 1581, 170

2. Taylor concedes that forcible sodomy is similar to a violation of 18 U.S.C. § 2241, which provides, "Whoever, in the special maritime and territorial jurisdiction of the United

L.Ed.2d 490 (2008). However, because the statute under which Taylor was convicted prohibited all sodomy—whether consensual, forcible, or involving a child—the judge in this case also examined the charging document to determine the type of sodomy to which the defendant pleaded guilty. This is called the "modified categorical approach." See *Smith*, 544 F.3d at 786. Taylor contends that the judge's use of the modified categorical approach constitutes reversible error, a question of law which we review de novo. *United States v. Franco-Fernandez*, 511 F.3d 768, 769 (7th Cir.2008).

[2] Although we have never addressed whether a judge may use the modified categorical in this particular circumstance, we have held that when a statute prescribes multiple types of conduct, some of which would constitute a violent felony and some of which would not, a judge may examine a "limited range of additional material" in order to determine whether the defendant pleaded guilty to the portion of the statute that constitutes a violent felony. See *id.* (citing *Shepard v. United States*, 544 U.S. 13, 16–17, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005); *Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990); *United States v. Spells*, 537 F.3d 743, 749 (7th Cir.2008); *United States v. Mathews*, 453 F.3d 830, 833–34 (7th Cir.2006)). The rationale behind this rule applies with equal force to this case.

[3] Taylor was convicted under 10 U.S.C. § 925, a statute that prohibits sodomy in all its forms. It is therefore impossible to determine from the face of the statute whether Taylor pleaded guilty to forcible sodomy, consensual sodomy, or

States ... knowingly causes another person to engage in a sexual act by using force against that other person," shall be imprisoned for up to life.

sodomy of a child. Consequently, under the categorical approach, forcible sodomy convictions under 10 U.S.C. § 925 would always be a Tier I offense. We need not confine ourselves to the categorical approach in this case, however, because the statute at issue here prohibits multiple types of conduct, including “forcible sodomy,” which is considered to be an offense with different elements than “sodomy” alone. *See supra Part A; United States v. Woods*, 576 F.3d 400, 403–07 (7th Cir. 2009). We therefore affirm the district court’s use of the modified categorical approach and hold that a judge may examine a limited set of additional materials—such as the charging instrument in this case—to determine the portion of 10 U.S.C. § 925 to which the defendant pleaded guilty.

C. Reasonableness of the Sentence

[4] The Sentencing Guideline range for Taylor’s offense was 24 to 30 months in prison and 5 years to life of supervised release. Although the judge sentenced Taylor to a prison term that was below the Guideline range (18 months) and a supervised release term that was within the Guideline range (20 years), Taylor challenges his sentence as unreasonable. We review the substantive reasonableness of his sentence for abuse of discretion.³

[5] A sentencing judge must consult the Sentencing Guidelines and consider the factors set forth in 18 U.S.C. § 3553(a). Where, as here, a sentence is within the advisory Guideline range, the sentence is presumed reasonable. *See United States v. Hills*, 618 F.3d 619, 636 (7th Cir. 2010).

Although the district court found that Taylor is not dangerous and that he maintained steady employment, the district

3. The government argues that we should review the sentence for plain error because Taylor failed to object to his sentence as unreasonable in the district court. We have

court also noted that Taylor committed a very serious sex offense and intentionally refused to register as a sex offender for seven years. Then, while out on bond for failing to register as a sex offender, Taylor again changed residences without updating his registration. The judge was rightly concerned by this, especially in light of the fact that SORNA requires Taylor to register for the rest of his life. Given these facts, we cannot say that Taylor has overcome the presumptive reasonableness of his sentence.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the defendant’s sentence.



John A. LOGAN, Plaintiff–Appellant,

v.

Donna WILKINS, M.D., et al.,
Defendants–Appellees.

No. 10-1415.

United States Court of Appeals,
Seventh Circuit.

Argued Dec. 2, 2010.

Decided July 8, 2011.

Background: Former owner of a mobile home park brought action under § 1983 against local government officials and a private individual, alleging that defendants conspired to deprive him of the park, in

repeatedly rejected this argument. *See United States v. Dale*, 498 F.3d 604, 610 & n. 5 (7th Cir. 2007).

2019 WL 3891252

Only the Westlaw citation is currently available.
United States District Court, D. Montana,
Billings Division.

UNITED STATES of America, Plaintiff,

v.

Joseph Matthew BALLANTYNE, Defendant.

CR 19-42-BLG-SPW

|

Signed 08/19/2019

Attorneys and Law Firms

Karla E. Painter, U.S. Attorney's Office, Billings, MT, for Plaintiff.

OPINION AND ORDER

SUSAN P. WATTERS, U.S. DISTRICT JUDGE

*1 Before the Court is Defendant Joseph Ballantyne's motion to dismiss (Doc. 15) the indictment. For the following reasons, Ballantyne's motion is granted.

I. Background

On June 12, 1987, in Colorado state court, Ballantyne was sentenced to 14 years in prison for Second Degree Sexual Assault. On or before January 24, 2001, Ballantyne was released. (Doc. 16 at 3; Doc. 26 at 10). Upon his release, Ballantyne was required to register as a sex offender under the Sex Offender Registration and Notification Act, 34 U.S.C. § 20901 et seq. The length of time Ballantyne was required to register under SORNA depended upon his tier classification. SORNA classifies sex offenders as either a one, a two, or a three. 34 U.S.C. § 16911(2-4). A tier three offender is required to register for life, a tier two offender is required to register for 25 years, and a tier one offender is required to register for 15 years. 34 U.S.C. § 20915(a). Ballantyne's registration period began when he was released from prison in 2001. *United States v. Del Valle-Cruz*, 785 F.3d 48, 55 (1st Cir. 2015).

The tier assigned to Ballantyne depended upon his 1987 conviction. If Ballantyne's 1987 conviction was comparable to or more severe than abusive sexual contact against a minor under the age of 13, he was designated a tier three. 34 U.S.C. §

2091 1(4)(A)(ii). If his conviction was comparable to or more severe than abusive sexual contact, he was designated a tier two. 34 U.S.C. § 20911(3)(A)(iv). If his conviction was not comparable to either of those offenses, he was designated a tier one.¹ 34 U.S.C. § 20911(2).

On April 4, 2019, Ballantyne was indicted on one count of Failure to Register as a Sexual Offender, in violation of 18 U.S.C. § 2250(a). (Doc. 1). The indictment stated Ballantyne was "a person required to register under the Sex Offender Registration and Notification Act," who had failed to register from approximately October 26, 2018, until April 4, 2019. (Doc. 1). Ballantyne filed a motion to dismiss the indictment, arguing he is a tier one offender and his obligation to register expired in 2016. The government responded Ballantyne is at least a tier two and his duty to register does not expire until 2026 at the earliest.

In a separate case in 2011, the Presentence Investigation Report determined Ballantyne was a tier three offender based on his 1987 conviction. (CR 11-43-BLG-SPW, Doc. 46 at 5). Here, the government states that case's PSR properly adjudicated Ballantyne's tier designation, but does not argue Ballantyne's motion is barred by res judicata. The government's lack of argument on res judicata leads the Court to believe the government believes the PSR was correct rather than binding.

II. Discussion

*2 To determine Ballantyne's tier classification, the Court employs the categorical approach. *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1133 (9th Cir. 2014) (citing *Taylor v. United States*, 495 U.S. 575 (1990)). Under the categorical approach, the Court compares the statutory definition of the prior offense with the elements of the federal offense the government contends is "comparable" to the prior offense. *Cabrera-Gutierrez*, 756 F.3d at 1133. The prior offense is "comparable" to the federal offense if it is defined more narrowly than, or has the same elements as, the federal offense. *Cabrera-Gutierrez*, 756 F.3d at 1133. The prior offense is not "comparable" to the federal offense if the statute defining the prior offense "sweeps more broadly" than the federal offense. *Cabrera-Gutierrez*, 756 F.3d at 1133. The Court may not consider the facts giving rise to the prior offense, even if the facts show the defendant's conduct satisfies the federal elements. A comparison of the elements is the only relevant inquiry.² *Cabrera-Gutierrez*, 756 F.3d at 1133.

The federal offense the government contends is “comparable” to Ballantyne’s prior offense is either Abusive Sexual Contact against a minor under the age of 13 (tier three) or Abusive Sexual Contact (tier two). Because both offenses are premised on the crime of Abusive Sexual Contact, the parties agree the Court should compare Second Degree Sexual Assault with the federal crime of Abusive Sexual Contact. If the crimes categorically match, the Court should then use the age of the victim to determine whether Ballantyne is a tier two or a tier three. *United States v. Mi Kyung Byun*, 539 F.3d 982, 993 (9th Cir. 2008).

The statute under which Ballantyne was convicted provided “[a]ny actor who knowingly inflicts sexual penetration or sexual intrusion on a victim commits sexual assault in the second degree if” Colo. Rev. Stat. § 18-3-403 (repealed 2000). The statute then lists several subsections which contain additional elements to complete the crime, such as the actor knows the victim is incapable of appraising the nature of the victim’s conduct or the actor knows the victim erroneously believes the actor to be the victim’s spouse. Colo. Rev. Stat. § 18-3-403 (a-h) (repealed 2000). The parties agree the Court does not need to consider the particular subsection Ballantyne was convicted under because regardless of the subsection involved, the offense had to include either “sexual penetration” or “sexual intrusion.” The parties further agree the analysis rests squarely on the definition of “sexual intrusion” because the categorical inquiry “need focus only on the conduct falling at the least egregious end of [the state statute’s] range of conduct.” *United States v. Baza-Martinez*, 464 F.3d 1010, 1014 (9th Cir. 2006) (citation and internal quotation omitted). The Court notes again neither party argues “sexual penetration” and “sexual intrusion” are themselves divisible elements.

The Federal statute criminalizing Abusive Sexual Contact provides “[w]hoever ... knowingly engages in or causes sexual contact with or by another person” 18 U.S.C. § 2244(a). Like the Colorado statute, the federal statute then lists several subsections which contain additional elements to complete the crime, such as rendering the victim unconscious or administering a drug which impairs the victim’s ability to control his or her conduct. 18 U.S.C. § 2244(a)(1) (citing 18 U.S.C. § 2241(b)(1-2)). Also similar to the Colorado statute, the parties agree the Court does not need to consider the particular subsection Ballantyne’s prior offense might compare to because the federal offense must include “sexual contact.”

*3 What this boils down to, according to the parties, is whether “sexual intrusion” sweeps more broadly than “sexual contact.” “Sexual intrusion” means “any intrusion, however slight, by any object or any part of a person’s body, except the mouth, tongue, or penis, into the genital or anal opening of another person’s body if that sexual intrusion can reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse.”³ Colo. Rev. Stat. § 18-3-401(6). “Sexual contact” means “the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(3).

Ballantyne argues sexual intrusion sweeps more broadly for two reasons, both of which are based on the intent required. First, Ballantyne argues sexual intrusion requires only the general intent of a “knowing” sexual intrusion whereas “sexual contact” requires the specific intent of an “intentional” touching. Second, Ballantyne argues sexual intrusion requires an objective standard for determining intent whereas sexual intrusion requires a subjective standard. To the first argument, the government responds both sexual intrusion and sexual contact have general and specific intent elements. To the second argument, the government responds Colorado caselaw has interpreted the statute to require a subjective standard. The parties’ arguments are conflated—which is unavoidable under the circumstances—but broadly speaking, Ballantyne believes sexual intrusion requires a general intent whereas sexual contact requires a specific intent and the government believes they both require a specific intent.

Broken down in plain language, the statutes mostly match. The Colorado statute criminalizes “knowing” sexual intrusion and the federal statute criminalizes “knowing” sexual abuse. Sexual intrusion requires an intrusion that “can reasonably be construed” for “the purposes of” sexual arousal, abuse, etc. Sexual abuse requires an intentional contact “with the intent to” sexually arouse, abuse, etc.

An obvious difference, which Ballantyne argues is material because it is an objective standard, is the phrase “reasonably be construed.” In *People v. West*, the defendant challenged the phrase “reasonably be construed” as void for vagueness. 724 P.2d 623, 625 (Colo. 1986). The Colorado Supreme Court rejected the challenge and held “reasonably be construed” was a legislative effort to permit the jury to conclude beyond

a reasonable doubt, based on circumstances, that a touching occurred with the specific intent or purpose of sexual arousal. 724 P.2d at 628. The Colorado Supreme Court acknowledged “reasonably be construed” could cause a jury to believe the prosecution’s burden was less than beyond a reasonable doubt, though, so it suggested omitting “reasonably be construed” from the jury instructions and instead using only “for the purposes of” to avoid a constitutional issue. 724 P.2d at 629. In *People in Interest of J.A.*, the Colorado Supreme Court affirmed *West*’s jury instruction practice of omitting the language “reasonably be construed” and using only “for the purposes of.” 733 P.2d 1197, 1199 (Colo. 1987). A month later, the Colorado Court of Appeals held a trial court’s instructions were erroneous because the phrase “reasonably be construed” was not omitted from the instructions. *People in Interest of B.D.S.*, 739 P.2d 902, 904 (Colo. Ct. App. 1987). A few months after that, the Colorado Supreme Court again held “reasonably be construed” should be replaced with only “for the purposes of.” *People v. Jensen*, 747 P.2d 1247, 1255-1256 (Colo. 1987). In *People v. Fell*, while reviewing a sufficiency of the evidence claim, the Colorado Court of Appeals interpreted the phrase to mean the jury may infer the defendant’s purpose based on the circumstances, in accordance with *West*. 832 P.2d 1015, 1021 (Colo. Ct. App. 1991). The issue was revisited in *People v. Moore*, where the Colorado Supreme Court affirmed *West*’s interpretation, holding “reasonably be construed” encompassed a specific intent that the touching be done for the purpose of sexual arousal. 877 P.2d 840, 847 (Colo. 1994).

*4 Contrary to Ballantyne’s assertion, there is nothing in Colorado’s precedent that suggests “reasonably be construed” is an objective standard. Although the word “reasonably” usually indicates an objective assessment, the Colorado courts have not interpreted the phrase in that manner. The only detailed discussion of the phrase’s meaning occurred in *West*, where the Colorado Supreme Court interpreted it to mean a jury could infer from the circumstances that a person acted with the specific intent or purpose of sexual arousal. Almost every discussion of the phrase after *West* concerned the phrase’s potential to unconstitutionally lower the prosecution’s burden. None of the cases mentioned an objective standard to determine mental state but instead agreed the act must be done with the specific intent to sexually arouse. Thus, the phrase “reasonably be construed” appears to mean no more than the jury may infer a person’s specific intent based on the circumstances, which is superfluous given juries in Colorado are already permitted to make inferences based on evidence,⁴ which partially explains why Colorado courts

were comfortable omitting the phrase from jury instructions. Ballantyne’s argument “reasonably be construed” is a material difference between the two statutes is therefore rejected.

Another clear difference is that sexual contact requires an intentional touching whereas sexual intrusion does not require an intentional intrusion. However, sexual intrusion also requires it to be done “for the purposes of” sexual arousal or abuse. Under normal legalese, “purpose” and “with the intent” mean the same thing. See *United States v. Lamott*, 831 F.3d 1153, 1156 (9th Cir. 2016) (citing *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000)). If “purpose” and “with the intent” mean the same thing, this difference is also immaterial because someone cannot intrude into the genitals or anus of another with the purpose, i.e., intent, to sexually arouse or abuse unless the intrusion was also intentional. One cannot simultaneously accidentally or merely knowingly intrude into another’s genitals or anus while also intending to sexually arouse themselves by doing so. A person intruding into another’s genitals with the intent to sexually arouse themselves is intentionally intruding into the other person.

But due to *People v. Vigil*, “purpose” does not mean “with the intent” here. In *Vigil*, the Colorado Supreme Court clarified that “for the purposes of” does not mean specific intent when, as here, the crime is more broadly defined with the general intent mental state of “knowingly.” 127 P.3d 916, 930-934 (Colo. 2006). The Colorado Supreme Court explained the legislature designated crimes as either general intent or specific intent by using “knowingly” for general intent and “intentionally” for specific intent. 127 P.3d at 931-933. The Colorado Supreme Court’s reasoning was based in part on the criminal code, which states “[a]ll offenses defined in this code in which the mental culpability requirement is expressed as ‘knowingly’ or ‘willfully’ are declared to be general intent crimes” and “[a]ll offenses defined in this code in which the mental culpability requirement is expressed as ‘intentionally’ or ‘with intent’ are declared to be specific intent offenses.” 127 P.3d at 931 (quoting Colo. Rev. Stat. §§ 18-1-501(6) and 18-1-501(5)). In its conclusion, the Colorado Supreme Court addressed its opinions in *West* and *Moore*, instructing that to the extent the cases are read to impose a specific intent on a crime which contains the phrase “for the purposes of” but is broadly defined with the general intent mental state of “knowingly,” the cases are incorrect. 127 P.3d at 934.

In effect, the *West* line of cases removed “reasonably be construed” from the statute while *Vigil* removed “for the

purposes of" and replaced it with simply knowingly. A person acts knowingly "with respect to a result of his conduct, when he is aware that his conduct is practically certain to cause the result." Colo. Rev. Stat. § 18-1-501(6). Constructing the Colorado statute under *Vigil* and *West*, it defines sexual intrusion as a knowing intrusion by any object or any part of a person's body, except the mouth, tongue, or penis, into the genital or anal opening of another persons' body knowing sexual arousal, gratification, or abuse is practically certain to result. The federal statute, on the other hand, defines sexual contact as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." The Ninth Circuit has made clear that intent to arouse or abuse in the federal statute means a purposeful touching with the desired result of arousal or abuse. *United States v. Sagg*, 125 F.3d 1294, 1295 (9th Cir. 1997); see also *United States v. Kenyon*, 481 F.3d 1054, 1067-1068 (8th Cir. 2007).

*5 The result is that the Colorado statute is quite a bit broader than the federal statute. For example, a person who suspects but isn't certain that he or she is a pedophile and intrudes into the genital or anal opening of a child with an object or his or her hand, knowing full well it is practically certain to at least abuse the child and perhaps also cause sexual arousal in himself or herself would be within the Colorado

statute but not within the federal statute because the person did not desire the result of arousal or abuse. Similarly, a person who intrudes into another person but is so intoxicated that he or she is incapable of forming a recognizable desire to arouse or abuse but is still aware of his or her conduct and that arousal or abuse is practically certain to result would be within the Colorado statute but not within the federal statute, assuming the other elements were met.⁵ The Colorado statute therefore sweeps more broadly than the federal statute, and as a result, cannot serve as a predicate crime for either a tier two or a tier three designation. *Cabrera-Gutierrez*, 756 F.3d at 1133. By default, Ballantyne is a tier one. As a tier one, Ballantyne's obligation to register expired in 2016. Because Ballantyne's registration period under SORNA expired in 2016, the indictment charging him with failure to register in 2018 and 2019 is without probable cause that a crime was committed and must be dismissed.

III. Conclusion and order

Ballantyne's motion to dismiss the indictment (Doc. 15) is granted.

All Citations

Not Reported in Fed. Supp., 2019 WL 3891252

Footnotes

- 1 Other offenses may result in classification as a tier three or tier two, but the parties agree that because Ballantyne was convicted of Second Degree Sexual Assault, he can only be designated a tier three or tier two if Second Degree Sexual Assault is comparable to or more severe than Abusive Sexual Contact.
- 2 There is an exception to the categorical approach, known as the modified categorical approach, which applies when the defendant was convicted under a statute that sets out multiple, divisible elements which effectively creates several different crimes under one statute. The modified categorical approach allows the Court to look at certain documents such as the indictment, jury instructions, and/or plea agreement to determine which of the divisible elements the defendant was convicted under. However, neither party argues the exception applies here.
- 3 The Court uses the current definition of "sexual intrusion" because it is the same as the 1987 version under which Ballantyne was convicted. (Doc. 26 at 5 n. 2).
- 4 Colorado Pattern Jury Instructions D:01 and D:11

- 5 Although not an element of either crime, it's worth pointing out voluntary intoxication is not a defense to the Colorado statute but is a defense to the federal statute. *Vigil*, 127 P.3d at 930-931; *United States v. Sayetsitty*, 107 F.3d 1405, 1412 (9th Cir. 1997).

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892 F.3d 228

United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Trevon BARCUS, Defendant-Appellant.

No. 17-5646

|

Argued: April 25, 2018

|

Decided and Filed: June 8, 2018

Synopsis

Background: Defendant was convicted upon guilty plea in the United States District Court for the Eastern District of Tennessee, [Thomas W. Phillips](#), J., of failing to register as a sex offender under Sex Offender Registration and Notification Act (SORNA). Defendant appealed.

Holdings: The Court of Appeals, [Cole](#), Chief Judge, held that:

- [1] district court committed plain error when it classified defendant as Tier III sex offender;
- [2] addition of criminal history points was warranted based on defendant's lifetime community supervision sentence; and
- [3] district court did not abuse its discretion in requiring defendant to undergo sex offender treatment.

Vacated and remanded.

Procedural Posture(s): On Appeal; Judgment.

West Headnotes (8)

[1] Mental Health Appeal

Tennessee crime of attempted aggravated sexual battery against victim less than 13 years of age was broader than comparable federal offense, and thus district court committed plain error when it classified defendant as Tier III sex offender under Sex Offender Registration and Notification Act (SORNA); Tier III sex

offender was person convicted of a felony that criminalized same conduct as, or was comparable to, aggravated sexual abuse, sexual abuse, or abusive sexual contact against someone under 13 as defined under federal criminal statutes, which required specific intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person," while elements of Tennessee aggravated sexual battery statute criminalized "sexual contact" that could be "reasonably construed" as being for purpose of sexual arousal, but did not require defendant to act with specific intent. [18 U.S.C.A. §§ 2241, 2242, 2244](#); [34 U.S.C.A. § 20911\(4\)](#); Tenn. Code Ann. §§ 39-13-501(6), 39-13-504.

11 Cases that cite this headnote

[2]

Sentencing and Punishment Probation and suspension of sentence

Defendant's lifetime community supervision sentence for attempted aggravated sexual battery under Tennessee law was criminal justice sentence within the meaning of Sentencing Guidelines, and thus addition of two criminal history points was warranted following defendant's conviction for failing to register as a sex offender under Sex Offender Registration and Notification Act (SORNA); by its own terms, "community supervision for life" had supervisory component in same manner as parole, which qualified as a criminal justice sentence under Guidelines, and district court evaluated defendant's criminal history and implications of Tennessee's community supervision for life and chose not to depart from the Guidelines. [18 U.S.C.A. § 2250\(a\)](#); [Tenn. Code Ann. §§ 39-13-524\(a\), 39-13-524\(c\), 39-13-524\(d\)\(1\)](#); [U.S.S.G. § 4A1.1\(d\)](#).

7 Cases that cite this headnote

[3]

Criminal Law Review De Novo

Court of Appeals reviews the district court's interpretation of the Sentencing Guidelines de novo. [U.S.S.G. § 1B1.1 et seq.](#)

2 Cases that cite this headnote

[4] Sentencing and Punishment ↗ Validity**Sentencing and Punishment ↗ Validity**

District court did not abuse its discretion by requiring defendant convicted of failing to register as a sex offender under Sex Offender Registration and Notification Act (SORNA) to undergo sex offender treatment with a psychosexual evaluation, mental health treatment, and polygraph testing as special conditions of supervised release; special sex offender conditions were reasonably related to nature and circumstances of defendant's SORNA violation, since his status as sex offender required his compliance with SORNA, and were reasonably related to defendant's personal history and characteristics, since defendant was convicted in state court of attempted aggravated sexual battery for having sex with a 12-year-old girl. [18 U.S.C.A. §§ 2250, 3553\(a\)\(1\), 3583\(d\)\(1\)](#).

[10 Cases that cite this headnote](#)

[5] Criminal Law ↗ Grant of probation or supervised release

Court of Appeals reviews the district court's imposition of special conditions of supervised release for abuse of discretion.

[2 Cases that cite this headnote](#)

[6] Federal Courts ↗ Abuse of discretion in general

An abuse of discretion occurs when Court of Appeals has a definite and firm conviction that the trial court committed a clear error of judgment by relying on clearly erroneous findings of fact, using an erroneous legal standard, or improperly applying the law.

[2 Cases that cite this headnote](#)

[7] Criminal Law ↗ Probation

Special conditions of supervised release are reviewed on appeal along two dimensions: procedural and substantive.

[8] Sentencing and Punishment ↗ Factors**Related to Offender**

Sentencing court's consideration of a defendant's history and characteristics is not limited to prior criminal convictions. [18 U.S.C.A. § 3553\(a\)\(1\)](#).

[1 Case that cites this headnote](#)

***230** Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville, No. 3:16-cr-00113-1—Thomas [W. Phillips](#), District Judge.

Attorneys and Law Firms

COUNSEL ARGUED: Jennifer Niles Coffin, FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC., Knoxville, Tennessee, for Appellant. Debra A. Breneman, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee. ON BRIEF: Jennifer Niles Coffin, FEDERAL DEFENDER SERVICES OF EASTERN TENNESSEE, INC., Knoxville, Tennessee, for Appellant. Kelly A. Norris, UNITED STATES ATTORNEY'S OFFICE, Knoxville, Tennessee, for Appellee.

Before: [COLE](#), Chief Judge; [GUY](#) and [DONALD](#), Circuit Judges.

OPINION

[COLE](#), Chief Judge.

This matter presents a familiar question in our court: what special penalties are placed on sex offenders for violating the law? Trevon Barcus is a sex offender. After cutting off his ankle bracelet and fleeing to Texas, Barcus pleaded guilty to failing to register as a sex offender as required by the Sex Offender Registration and Notification Act ("SORNA"). The district court sentenced him to 30 months of imprisonment and five years of supervised release with special sex offender conditions of supervision. Barcus now challenges his sentence on three fronts: (1) that the district court incorrectly classified him as a Tier III sex offender, (2) that the district court incorrectly interpreted the Sentencing Guidelines when it found that Tennessee "community supervision for life"

qualified as a criminal justice sentence, and (3) that the special sex offender conditions of supervision are unreasonable.

Because we agree that Barcus was incorrectly classified as a Tier III sex offender, we vacate Barcus's sentence and remand to the district court for resentencing.

I. BACKGROUND

At the age of 19, Trevon Barcus had sex with a 12-year-old girl. He pleaded guilty to attempted aggravated sexual battery in a Tennessee court. Because of this conviction, Barcus spent three years in prison, is subject to “community supervision for life” under Tennessee law, and is required to register as a sex offender under SORNA.

Soon after his release from prison, Barcus cut off his ankle monitoring bracelet and fled to Texas after “meeting some girls.” He returned to Kentucky, but still failed to register as required and was ultimately arrested. After his arrest, Barcus pleaded guilty to failing to register as a sex offender under SORNA in violation of [18 U.S.C. § 2250\(a\)](#).

***231** The Presentence Investigation Report (PSR) classified Barcus as a Tier III sex offender. A Tier III classification corresponds to a base level of 16, a higher offense level than a Tier II or Tier I sex offender. The PSR also applied two additional criminal history points, determining that Barcus committed the failure-to-register offense while under a criminal justice sentence because he is subject to community supervision for life under Tennessee law. Because of Barcus's difficult past—drug use, sexual abuse, and mental health issues—the PSR recommended special conditions of supervised release. These conditions included mental health and drug treatment and other “special conditions of supervision for sex offenders.” The sex offender special conditions, in part, require Barcus to participate in a sex offender mental health treatment program, submit to a psychosexual assessment, and complete polygraph testing.

Barcus objected to—and the district court overruled—the additional criminal history points for being under Tennessee's “community supervision for life” and the three special sex offender supervised release conditions. He did not object to his classification as a Tier III sex offender. The district court then adopted the PSR calculations and sentenced Barcus to a within-guidelines sentence of 30 months in prison and

imposed a five-year term of supervised release with the special sex offender conditions. Barcus appealed.

II. ANALYSIS

Both parties agree that Barcus is a sex offender who failed to register as necessary under SORNA. Nor is there any dispute that Barcus is subject to particular sentencing requirements for this violation because he is a sex offender. But the parties split over their degree and kind. This dispute raises three questions: (1) Did the district court correctly classify Barcus as a Tier III sex offender? (2) Did the district court correctly find that Barcus committed his registration offense while under a criminal justice sentence because he was under Tennessee “community supervision for life”? and (3) Were the mandated special sex offender conditions of supervised release reasonable?

1. Barcus Is Not a Tier III Sex Offender

[1] The district court incorrectly classified Barcus as a Tier III sex offender because his qualifying state conviction—Tennessee attempted aggravated sexual battery against a victim less than 13 years of age—is broader than the comparable offense under SORNA. The comparable federal offense requires Barcus to have acted with intent; the Tennessee offense does not.

Because Barcus failed to object to his classification below, we review for plain error. *United States v. Gardiner*, 463 F.3d 445, 460 (6th Cir. 2006). Incorrectly classifying a defendant as a Tier III sex offender is plain error. *United States v. Stock*, 685 F.3d 621, 629 (6th Cir. 2012); see also *Gardiner*, 463 F.3d at 461 (finding plain error where the district court erroneously applied a two-point enhancement that raised the defendant's adjusted offense level).

A defendant may be classified as a Tier III sex offender under SORNA if the defendant has a state-law conviction that is the same as or comparable to a specified federal offense. That is, a Tier III sex offender is a person convicted of a felony that criminalizes the same conduct as, or is “comparable” to, “aggravated sexual abuse or sexual abuse” as defined in § 2241 and § 2242 or “abusive sexual contact” against someone under 13 as defined in § 2244. [34 U.S.C. § 20911\(4\)](#). To answer whether Tennessee aggravated sexual battery is a ***232** Tier III sex offense, we join other circuits in applying the categorical approach. *United States v. White*, 782 F.3d

1118, 1130–35 (10th Cir. 2015) (applying the categorical approach to SORNA tier classifications); *See also United States v. Berry*, 814 F.3d 192, 196 (4th Cir. 2016); *United States v. Morales*, 801 F.3d 1, 6 (1st Cir. 2015).

Both the categorical approach and SORNA call for the same analysis: to “compare” what the state law offense requires—not what an individual defendant did—to the Tier III requirements. If the elements of the Tennessee aggravated sexual battery statute are the same as the Tier III requirements, or are defined more narrowly, then the Tennessee conviction is classified as a Tier III offense. *Descamps v. United States*, 570 U.S. 254, 261, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). If the elements “sweep[] more broadly” than the Tier III offenses, then it is not. *Id.*

We start with the elements of the state offense. Tennessee aggravated sexual battery is “unlawful sexual contact with a victim by the defendant or the defendant by a victim” if, as relevant to this case, “[t]he victim is less than thirteen (13) years of age.” *Tenn. Code Ann. § 39-13-504*. The Tennessee offense arguably defines multiple crimes, but “unlawful sexual contact” is an element of all of those variations, so we don’t need to make this analysis even more complicated by applying the modified categorical approach.

“Sexual contact,” as incorporated by reference into the statute, means “intentional touching … if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification.” *Tenn. Code Ann. § 39-13-501(6)*.

Next, we compare the elements of the relevant Tennessee statute to the Tier III requirements. And for all this groundwork (no one ever said the categorical approach was simple), our focus is on just one element: intent.

The Tennessee statute does not require the defendant to act with specific intent; the federal statute does. For our purposes, a Tier III sex offender is someone who engaged in a “sexual act” or “sexual contact” if the “sexual contact had been a sexual act.” *See 34 U.S.C. § 20911(4)* (incorporating 18 U.S.C. §§ 2241, 2242, 2244). As relevant here, a “sexual act” is “intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(2)(D). In the same vein, “sexual contact” “means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of

any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(3).

The parties rightly home in on the phrase “reasonably construed” in the Tennessee definition of sexual contact. The Tennessee statute criminalizes “unlawful sexual contact,” if that contact “can be *reasonably construed* as being for the purpose of sexual arousal or gratification.” *Tenn. Code Ann. § 39-13-501(6)* (emphasis added). The “reasonably construed” element does not ask the jury to determine the defendant’s actual intent. In fact, Tennessee courts have explained that the language of the statute does not impose a requirement that the sexual contact be with intent at all. *State v. Chisenhall*, No. M2003-956-CAA, 2004 WL 1217118, at *3 (Tenn. Crim. App. June 3, 2004). “The statute merely requires touching that can be ‘*reasonably construed* as being for’ ” arousal or gratification. *Id.* (citation omitted).

*233 The Tennessee statute asks the jury to make an objective, rather than subjective, inquiry. A Tennessee jury is asked whether the defendant’s conduct could be “reasonably construed” in a certain way; it is not asked whether the defendant in fact had the purpose of sexual gratification. *Smith v. Parker*, No. 10-1158, 2013 WL 5409783, at *10 (W.D. Tenn. Sept. 25, 2013) (noting that the Tennessee aggravated sexual battery statute “only requires an intentional touching that can be *reasonably construed*” as being for sexual arousal or gratification).

Tier III, on the other hand, requires actual intent, not a “reasonable” inference as to the defendant’s motives. The federal statute requires specific intent and “describes the state of mind that the *defendant* must have had.” *United States v. Shafer*, 573 F.3d 267, 277 (6th Cir. 2009) (quoting H.R. Rep. No. 99594, at 13 (1986)). Under the federal statute, a jury must determine that the defendant’s subjective intent was “to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(2)(D),(3). It does not ask that the jury make an objective inquiry into whether the defendant’s conduct might be “reasonably construed” as for sexual gratification.

The government disagrees. In its view, this reading of the Tennessee statute “imagin[es] unlikely crimes,” and there is no “realistic probability” that Tennessee has ever applied the statute in this way. (Appellant Br. 16 (citing *United States v. Verwiebe*, 874 F.3d 258, 260–61 (6th Cir. 2017).) But this application is not imaginary. Every time Tennessee applies

the aggravated sexual battery statute, it applies it in exactly this way. Tennessee courts have consistently emphasized that “there is no requirement that the sexual contact itself be for sexual arousal or gratification.” *Harrison v. Parris*, No. 16-cv-565, 2016 WL 6600429, at *6 (M.D. Tenn. Nov. 8, 2016), *aff’d*, 2017 WL 6049366 (6th Cir. Dec. 4, 2017) (internal citations omitted); *State v. Walton*, M2014-1337-CCA, 2015 WL 2257130, at *3 (Tenn. Crim. App. May 12, 2015) (concluding that a jury could have found beyond a reasonable doubt that the defendant touched the victim’s “intimate parts” and that touching “can be reasonably construed as being for the purpose of sexual arousal or gratification” (quoting § 39-13-501(6))).

The government also suggests that instead of applying the categorical approach wholesale, we should find a state statute which is “slightly broader” than the federal counterpart to still be “comparable” to the Tier III requirements. *United States v. Forster*, 549 Fed. Appx. 757, 769 (10th Cir. 2013); *see also Morales*, 801 F.3d at 7–8 (stating that the “comparable to” language may provide the court with “some flexibility in examining the offenses”). But *Mathis* shuts the door on this argument, and the out-of-circuit authorities the government points to for support were all decided before *Mathis*. *Mathis v. United States*, — U.S. —, 136 S.Ct. 2243, 195 L.Ed.2d 604 (2016). In *Mathis*, the Supreme Court told us to do the same thing under the ACCA that is called for by SORNA: to make a comparison. *Id.* at 2248. As *Mathis* put it, courts applying the categorical approach must “compare the elements of the [state] crime of conviction” to the generic offense. *Id.* at 2247. “[I]f the crime of conviction covers *any* more conduct than the generic offense,” then under the categorical approach the crimes are not comparable. *Id.* at 2248 (emphasis added). Here too, “if the crime of conviction” under Tennessee law “covers any more conduct” than the federal offense, the two crimes are not comparable under SORNA. *Id.*

***234** In short, Tennessee aggravated sexual battery does not require that the sexual contact be for arousal or gratification. The federal statute does. The state statute thus sweeps more broadly than the Tier III requirements. Barcus’s Tier III status subjected him to a higher adjusted offense level, a higher sentencing range, and thus, more time in prison. Because Tennessee aggravated sexual battery is not comparable to the Tier III requirements, the district court committed plain error when it erroneously classified Barcus as a Tier III sex offender. *United States v. Olano*, 507 U.S. 725, 734, 113

S.Ct. 1770, 123 L.Ed.2d 508 (1993); *Stock*, 685 F.3d at 629; *Gardiner*, 463 F.3d at 461.

2. The District Court Correctly Applied U.S.S.G. § 4A1.1(d)

[2] [3] We review the district court’s interpretation of the Guidelines de novo. *United States v. Schock*, 862 F.3d 563, 566–67 (6th Cir. 2017). Section 4A1.1 instructs a court to add two criminal history points “if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.” U.S.S.G. § 4A1.1(d). A “criminal justice sentence” involves a “custodial or supervisory component, although active supervision is not required for this subsection to apply.” U.S.S.G. § 4A1.1 cmt. n.4.

The district court added two points to Barcus’s criminal history score under § 4A1.1(d) because, under Tennessee law, someone convicted of attempted aggravated sexual battery is subject to “community supervision for life” upon release from prison or parole. *Tenn. Code Ann. § 39-13-524(a), (c)*. Because a Tennessee court imposed Barcus’s community supervision sentence, we examine how that sentence is treated under Tennessee law. *See United States v. DeJournett*, 817 F.3d 479, 483–84 (6th Cir. 2016). And that law states a “person on community supervision shall be under the jurisdiction, supervision and control of the department of correction in the same manner as a person under parole supervision.” *Tenn. Code Ann. § 39-13-524(d)(1)*. By its own terms, “community supervision for life” has a “supervis[ory]” component that is “in the same manner as … parole.” *Id.* As parole qualifies as a criminal justice sentence under § 4A1.1(d), so does “community supervision for life.”

Barcus argues that a blanket application of § 41A.1(d) to all sex offenders subject to Tennessee’s criminal supervision statute is inconsistent with the purpose of calculating criminal history under the Guidelines: preventing recidivism—and an individualized assessment of whether additional criminal history points would further that goal. But the district court did conduct this individualized assessment. It evaluated Barcus’s criminal history—he is a sex offender subject to community supervision for life—and applied § 4A1.1(d). Even more, the Guidelines empower the sentencing court to depart from this calculation if “reliable information” indicates that the defendant’s criminal history category “substantially under-represents” or “substantially over-represents” the seriousness of the defendant’s criminal history or likelihood

of recidivism. U.S.S.G. § 4A1.3. Here, the district court, after evaluating Barcus's criminal history and the implications of Tennessee's community supervision for life, was free to depart from the Guidelines. It didn't. The district court did not err in adding two criminal history points for committing the SORNA offense while under community supervision for life.

Barcus also argued—for the first time at oral argument—that deeming Tennessee community supervision for life a criminal *235 justice sentence under § 4A1.1(d) conflicted with the introductory commentary to the criminal history Guidelines. And that this Guideline commentary controls. *Stinson v. United States*, 508 U.S. 36, 38, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993). The introductory commentary states that the “specific factors” included in § 4A1.1 are “consistent with the extant empirical research assessing correlates of recidivism and patterns of career criminal behavior.” U.S.S.G. ch. 4, pt. A, introductory cmt. Barcus may well be correct that the current empirical research shows that sex offenders are not uniquely likely to recidivate, but changing the Guidelines to correspond to new empirical data is in the hands of the Commission, not this court. *See id.*

At base, Barcus's argument is that this is an unjust result. By being a Tennessee sex offender, he is subject to a two-point criminal history increase no matter what. But the commentary classifies Tennessee “community supervision for life” as a criminal justice sentence. U.S.S.G. § 4A1.1 cmt. n.4. The district court did not erroneously add two points to Barcus's criminal history score.

3. The District Court Did Not Abuse Its Discretion By Imposing Special Conditions of Supervised Release

[4] [5] [6] We review the district court's imposition of special conditions of supervised release for abuse of discretion. *United States v. Childress*, 874 F.3d 523, 526 (6th Cir. 2017). An abuse of discretion occurs when we have a “definite and firm conviction that the trial court committed a clear error of judgment” by relying on clearly erroneous findings of fact, using an erroneous legal standard, or improperly applying the law. *United States v. Carter*, 463 F.3d 526, 528 (6th Cir. 2006).

[7] Special conditions of supervised release are reviewed “along two dimensions:” procedural and substantive. *Id.* Because Barcus does not challenge the procedural aspect of the special conditions, we focus only on the substantive aspect.

Under this substantive aspect, a sentencing court may impose special supervised release conditions only if it meets three requirements. First, the conditions must be “reasonably related to” several sentencing factors. 18 U.S.C. § 3583(d)(1). These factors include “the nature and circumstances of the offense and the history and characteristics of the defendant” and “the need for the sentence imposed … to afford adequate deterrence to criminal conduct; … to protect the public from further crimes of the defendant; and … to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]” 18 U.S.C. § 3553(a)(1), (a)(2)(B)-(D). Second, the condition must “involve[] no greater deprivation of liberty than is reasonably necessary for” several sentencing purposes: “to afford adequate deterrence to criminal conduct; … to protect the public from further crimes of the defendant; and … to provide the defendant with needed educational or vocational training, medical care or other correctional treatment in the most effective manner.” 18 U.S.C. § 3583(d)(2); 18 U.S.C. § 3553(a)(2)(B)-(D). Third, the condition must be “consistent with any pertinent policy statements issued by the Sentencing Commission.” 18 U.S.C. § 3583(d)(3). *See Carter*, 463 F.3d at 529; *Childress*, 874 F.3d at 526. A condition must satisfy all three requirements but it need not satisfy every single factor and purpose within the first two requirements. *Carter*, 463 F.3d at 529–30.

Barcus challenges three special conditions: that he undergo a psychosexual *236 evaluation, participate in sex offender mental health treatment, and submit to polygraph testing. His challenge focuses on only the first and second requirements. Barcus argues that the special conditions are not “reasonably related” to either “the nature and circumstances of the offense” or “the history and characteristics of the defendant.” And, because the district court also ordered Barcus to receive mental health treatment, that the conditions constitute “a greater deprivation of liberty than reasonably necessary” to achieve the purposes of deterrence, protection of the public, and rehabilitation of the defendant. Both arguments are unavailing.

The special sex offender conditions are reasonably related to “the nature and circumstances” of Barcus's SORNA violation and his personal “history and characteristics.” First, the sex offender conditions are reasonably related to the “nature and circumstances of the offense:” failing to register under SORNA. *See 18 U.S.C. § 2250*. Failure to register is not a “sex offense” for setting the terms of supervised release. U.S.S.G. § 5D1.2 cmt. n.1. But this is not the end of the inquiry. We look

at whether the conditions bear a “reasonable relationship” to the instant offense. See *Carter*, 463 F.3d at 530; *United States v. Scott*, 270 F.3d 632, 636 (8th Cir. 2001). In *Carter*, for example, we concluded that being a felon in possession of a firearm had “nothing to do with sex.” 463 F.3d at 530. Here, the instant offense—failing to register as a sex offender—has everything to do with sex. It is Barcus’s status as a sex offender that put him in this position. The special sex offender conditions are “reasonably related” to his failure to comply with SORNA.

These special conditions are also reasonably related to “the history and characteristics of the defendant.” 18 U.S.C. § 3553(a)(1). Specifically, Barcus argues that because he committed a “single sex offense”—statutory rape charged as attempted aggravated sexual battery—six years before his instant offense, his “history and characteristics” are not reasonably related to the supervised release conditions. We addressed a similar argument in *Childress*, 874 F.3d at 527. There, we upheld special sex offender supervised release conditions based on a Tennessee conviction for aggravated assault where the offense conduct was two sexual acts with the defendant’s minor half-sister. *Id.* So too here. The parties do not dispute that Barcus was convicted of attempted aggravated sexual battery for having sex with a 12-year-old girl. While this act occurred six years ago, this is not so far in the past as to make the special sex offender conditions unreasonable. See *id.* (finding that the special supervised release conditions were reasonable when the defendant committed sexual acts against a minor fourteen years and five years before the special conditions were imposed). Besides, during four of those six years Barcus was incarcerated for committing that sexual act.

And more, none of the cases Barcus relies on can bear the weight he heaves on them. Barcus mainly relies on *United States v. Brogdon* where we upheld special sex offender conditions based on the defendant’s multiple prior convictions for indecent exposure. 503 F.3d 555, 565 (6th Cir. 2007). Because the Court highlighted that *Brogdon* did not “merely involve a single sexual offense,” Barcus argues that his single sexual offense should get him off the hook. *Id.* Not so. We have upheld special sex offender supervised release conditions on much less, including uncharged conduct that never resulted in conviction. See *United States v. Perkins*, 207 Fed.Appx. 559 (6th Cir. 2006). In *Brogdon*, the sex offender conditions were imposed as part of a sentence wholly

unrelated to sex: being a felon in possession of a firearm. As Barcus recognizes, “context *237 matters.” (Appellant Br. 33.) And, here, the sex offender conditions were imposed because Barcus failed to register as a sex offender.

[8] That said, “[a] sentencing court’s consideration of a defendant’s history and characteristics is not limited to prior criminal convictions.” *Childress*, 874 F.3d at 528. Barcus sporadically attended sex offender treatment before absconding to Texas after “meeting some girls.” (R. 25, PSR at ¶11, 30, PageID 164, 166.) Considering Barcus’s previous failure to comply with mandated sex offender treatment, reimposing those conditions was reasonable.

And in a last Hail Mary, Barcus argues that because he is already required to undergo mental health treatment, additional sex-offender specific conditions, including a polygraph, constitute “a greater deprivation of liberty than is reasonably necessary.” The district court imposes special supervised release conditions “to provide the defendant with the needed … medical care or other correctional treatment in the *most effective manner*.” 18 U.S.C. § 3553(a)(2)(D) (emphasis added). Barcus does not show that the additional conditions reduce the efficacy of his mental health treatment or that his proposal is the “most effective.” The crux of his argument is that the additional conditions are repetitive. But in light of Barcus’s admission that he needs mental health treatment, the district court did not make “a clear error of judgment” by imposing additional sex offender treatment. *Carter*, 463 F.3d at 528.

For these reasons, the district court did not abuse its discretion by requiring Barcus to undergo sex offender treatment with a psychosexual evaluation, mental health treatment, and polygraph testing.

III. CONCLUSION

Because the district court plainly erred when it classified Barcus as a Tier III sex offender, we vacate Barcus’s sentence and remand for resentencing consistent with this opinion.

All Citations

892 F.3d 228

774 Fed.Appx. 837

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee

v.

Warren D. BROWN, Defendant-Appellant

No. 18-20620

|

Filed May 22, 2019

Synopsis

Background: Defendant was convicted in the United States District Court, Southern District of Texas, of failing to register as a sex offender. Defendant appealed.

Holdings: The Court of Appeals, [Edith H. Jones](#), Circuit Judge, held that:

[1] District Court's determination that the Uniform Code of Military Justice (UCMJ) sexual assault statute and federal sexual abuse statute were comparable for purposes of classifying defendant as a tier III sex offender was not plainly erroneous, but

[2] District Court plainly erred in its determination that defendant's failure to register as a sex offender was a separate "sex offense" for purposes of calculating his term of supervised release.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (2)

[1] Mental Health Offenses and prosecutions

District court's determination that the Uniform Code of Military Justice (UCMJ) sexual assault statute and federal sexual abuse statute were comparable for purposes of classifying defendant as a tier III sex offender was not plainly erroneous, given the conflicting indications in federal case law about the applicable law. 42 U.S.C. § 20911; UCMJ, Art. 120, [10 U.S.C.A. § 920](#); [18 U.S.C.A. § 2250\(a\)](#).

[2]

Criminal Law Probation and related dispositions

District court plainly erred in its determination that defendant's failure to register as a sex offender was a separate "sex offense" for purposes of calculating his term of supervised release; the district court's error was clear, and it affected defendant's substantial rights, because the maximum permissible length of his supervised release would otherwise be five years, and the court gave no reason for assessing ten years. [18 U.S.C.A. § 2250](#).

***838** Appeal from the United States District Court for the Southern District of Texas, USDC No. 4:17-CR-81-1

Attorneys and Law Firms

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Before [HIGGINBOTHAM](#), [JONES](#), and [COSTA](#), Circuit Judges.

Opinion

[EDITH H. JONES](#), Circuit Judge:^{*}

This is an appeal from a district court's classification of a criminal defendant as a Tier III sex offender for sentencing purposes under 42 U.S.C. § 20911 (the Sex Offender

Registration and Notification Act), and its decision that the defendant's failure to register as a sex offender as required by federal law, [18 U.S.C. Sec. 2250\(a\)](#), was itself a sex offense. Because courts are divided about whether the Uniform Code of Military Justice statute under which the defendant was convicted is comparable to the federal sexual abuse statute, it was not plain error for the district court to determine that the two statutes were comparable and, consequently, to classify the defendant as a Tier III sex offender. The government concedes plain error, however, in the district court's assignment of the defendant's failure to register as a separate sex offense when calculating his period of supervised release. We AFFIRM the defendant's sentence, REVERSE the terms of his supervised release, and REMAND to the district court for proceedings consistent with this opinion.

I. BACKGROUND

Warren Brown was convicted in 2015 in a Navy court martial of one count of Abusive Sexual Contact and two counts of Sexual Assault in violation of the Uniform Code of Military Justice ("UCMJ") and sentenced to eighty-six months in prison with all but eighteen months suspended. The court martial found that Brown had assaulted a woman who was "incapable of consenting ... due to impairment by alcohol and that condition was known or reasonably should have been known" by Brown. Brown served his sentence and, upon his release from prison, signed a form that notified him to register as a sex offender under the Sex Offender Registration and Notification Act ("SORNA"). Brown moved to Houston immediately after he was released but never registered as a sex offender with the Houston Police Department or the Harris County Sheriff's Office.

Brown was indicted for this violation in 2018 and pleaded guilty to failing to register *839 as a sex offender in violation of [18 U.S.C. § 2250](#). Material for present purposes, the Pre-Sentence Report ("PSR") recommended that Brown's base offense level was that of a Tier III sex offender due to the length of Brown's military sentence. According to the final PSR calculation, Brown's sentencing-guideline range was 18 to 24 months. The PSR also recommended a guideline range for Brown's term of supervised release after his sentence of five years to life, and because "the instant offense of conviction is a sex offense," the PSR recommended life. The district court overruled Brown's stated objections, adopted in part the factual findings and guideline applications of the

PSR, and sentenced Brown to 18 months' imprisonment and ten years of supervised release.

II. STANDARD OF REVIEW

Because Brown raises new issues in this appeal that he did not raise in the district court, we review only for plain error. See *United States v. Buck*, 847 F.3d 267, 274 (5th Cir. 2017). Under plain-error review, an appellant must satisfy three conditions to obtain relief. First, he must show that the issue raised has not been "intentionally relinquished or abandoned." *Rosales-Mireles v. United States*, —U.S.—, 138 S. Ct. 1897, 1904, 201 L.Ed.2d 376 (2018). Second, the alleged error must be plain—that is, "clear or obvious, rather than subject to reasonable dispute." *United States v. Guillen-Cruz*, 853 F.3d 768, 770 (5th Cir. 2017) (internal quotation marks omitted). Finally, the appellant must show that the error "affected his substantial rights." *Id.* (citation omitted). In other words, he must demonstrate a "reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Rosales-Mireles*, 138 S. Ct. at 1905. If an appellant satisfies all three conditions, the court may "exercise its discretion" to correct the error if the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.*

III. DISCUSSION

Brown argues that the district court committed plain error by categorizing his prior conviction as a Tier III offense and by treating his failure to register as a sex offender as a separate sex offense when deciding supervised release.

A. Tier III Offense

[1] Federal law requires sex offenders to "register, and keep the registration current, in each jurisdiction where the offender resides [and] where the offender is an employee...." [34 U.S.C. § 20913](#) (formerly [42 U.S.C. § 16913](#)). Sex offenders who fail to register are assigned a base offense level according to the severity of the past offense. See [34 U.S.C. § 20911](#). Tier III sex offenses are the most severe, including offenses against victims under the age of 13, offenses against other kinds of vulnerable victims, and offenses involving the use of force. *Id.* To qualify as Tier III, an offense must be punishable by more than one year of imprisonment and be "comparable to or more severe than" one of the enumerated

offenses in the statute. *Id.* Brown contends that his offense under 10 U.S.C. § 920, the Sexual Assault statute in the Uniform Code of Military Justice, was not comparable to the enumerated offenses in § 20911(4)(A). Consequently, his offense was improperly classified under Tier III.

The enumerated offenses in § 20911(4)(A) are “aggravated sexual abuse or sexual abuse” and “abusive sexual contact … against a minor who has not attained the age of 13 years.” Brown’s offense did not involve a minor, thus the dispute in this case boils down to whether the offense of sexual assault under the *840 UCMJ is comparable to the federal sexual abuse offense listed in § 20911(4)(A)(i).

This court uses the categorical approach to determine whether an offense is “comparable to or more severe than” one of the enumerated offenses listed in § 20911. *United States v. Young*, 872 F.3d 742, 746 (5th Cir. 2017) (citations omitted). In doing so, the court does not look to the particular facts of the underlying conviction and focuses only on comparing the elements or statutory definition of the prior offense to those of the enumerated offense. *Taylor v. United States*, 495 U.S. 575, 600, 110 S. Ct. 2143, 2159, 109 L.Ed.2d 607 (1990).

Sexual assault under the UCMJ is defined in relevant part as “committ[ing] a sexual act upon another person … when the person *knows or reasonably should know* that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring.” 10 U.S.C. § 920(b)(2)(B) (emphasis added).

The federal sexual abuse statute defines sexual abuse in relevant part as “knowingly … engag[ing] in a sexual act with another person if that other person is incapable of appraising the nature of the conduct, or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.” 18 U.S.C. § 2242.

Both statutes proscribe nonconsensual sexual acts; the relevant inquiry is whether the *mens rea* of the federal sexual abuse statute (“knowingly”) applies equally to each element of the statute or only to the sexual act itself. If the federal sexual abuse statute only requires knowledge of the act but not knowledge of the victim’s ability to consent, then it would punish a broader range of conduct than the UCMJ sexual assault statute: a federal defendant would be guilty solely for performing the act on an unaware victim, while a military defendant must at least be negligent about the victim’s lack of capacity. If that were the case, there is no way a defendant could violate the UCMJ statute without also violating the

federal sexual abuse statute and the district court correctly considered the offenses comparable.

If, however, the federal sexual abuse statute requires a defendant to have knowledge of both the sexual act and the victim’s inability to consent, then the statute is narrower than the UCMJ sexual assault statute, which only requires a negligence (should have known) standard of awareness. The district court would have erred here when it found the defendant’s UCMJ conviction comparable to a conviction under the federal sexual abuse statute.

The interpretation of the *mens rea* of the federal sex abuse statute is a matter of first impression in this court. Although, in reviewing other criminal statutes, the Supreme Court has held that there are “strong textual reasons” to apply “knowingly” to each element of a statute, *see Flores-Figueroa v. United States*, 556 U.S. 646, 650, 129 S. Ct. 1886, 1890, 173 L.Ed.2d 853 (2009), the specific question before us remains unsettled. The pattern jury instructions recognize uncertainty about whether § 2242 contains a mens rea requirement. *See* Fifth Circuit Pattern Jury Instructions (Criminal Cases), 2.82B Sexual Abuse—Victim Incapable 18 U.S.C. § 2242(2), comment. The Eighth Circuit—over a spirited dissent—held that “knowingly” applies to every element of the statute. *United States v. Bruguier*, 735 F.3d 754, 758 (8th Cir. 2013). In contrast, the pattern jury instructions of the Ninth and Seventh Circuits do not include a knowledge requirement for the victim’s incapacity. *See* Manual of Model Criminal Jury Instructions for the District Courts of the Ninth Circuit, § 8.172 (2010); Pattern Jury *841 Instructions of the Seventh Circuit 625 (2012).

Given the unsettled state of the law and the plain error standard of review, this court need not weigh in on the underlying issue. To reverse for plain error, a district court’s error must be “clear or obvious, rather than subject to reasonable dispute.” *Guillen-Cruz*, 853 F.3d at 770. In the face of obviously conflicting indications about the applicable law, the district court’s determination that the UCMJ sexual assault statute and the federal sexual abuse statute are comparable was not plainly erroneous. Consequently, the decision to classify Brown as a Tier III sex offender in this case must be affirmed.

B. Categorization of Brown’s Failure-to-Register Offense

[2] Brown also appeals the district court’s determination that his failure to register as a sex offender was a separate “sex offense” for purposes of calculating his term of supervised

release. The government concedes plain error. An earlier decision of this court held that failing to register under SORNA does not qualify as a sex offense for guideline purposes. *United States v. Putnam*, 806 F.3d 853, 855 (5th Cir. 2015) (per curiam). The district court's error on this issue was clear, and it affected Brown's substantial rights, because the maximum permissible length of his supervised release would otherwise be five years. The court gave no reason for assessing ten years. Pursuant to *Rosales-Mireles*, 138 S. Ct. at 1904, this error warrants reversal.

IV. CONCLUSION

For these reasons, we **AFFIRM** Brown's sentence in part, **REVERSE** the length of his supervised release, and **REMAND** to the district court for further proceedings.

All Citations

774 Fed.Appx. 837

Footnotes

- * Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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2021 WL 3726899

Only the Westlaw citation is currently available.

United States District Court, D.
South Dakota, Southern Division.

UNITED STATES of America, Plaintiff
v.
Billy Frank BURCHELL, Defendant

4:21-cr-40025
|
Signed 08/23/2021

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

Lawrence L. Piersol, United States District Judge

*1 Pending before the Court is Defendant's Motion to Dismiss the Indictment (Doc. 28), which the Government resists (Doc. 31). Defendant has been charged with violating 18 U.S.C. § 2250(a) (Doc. 1). The Government alleges Defendant failed to register as a sex offender based on a prior state conviction and traveled in interstate commerce. For the reasons stated herein, the Defendant's Motion to Dismiss is granted.

Background

In 1990, Defendant was convicted in the State of Texas for violating Texas Penal Code Ann. § 22.011, prohibiting sexual assault. Defendant pleaded guilty to Count II of the Indictment, alleging Sexual Assault in the Second Degree, after a jury failed to reach a verdict. (Doc. 29, Ex C). He was sentenced to a prison term and was required to register as a sex offender. (Id.) The defense claims that Defendant is a Tier I sex offender, and the 15-year term for which he was required to register has expired. The Government alleges that Defendant is a Tier III sex offender who is required to register for life in connection with interstate travel, and that Defendant failed to do so. The problem before the Court is to determine the appropriate Tier for Defendant's offense of conviction and

thereby determine whether his failure to register could qualify as an offense under 18 U.S.C. § 2250(a).

Legal Analysis

1. Pretrial resolution

At the outset, the Court must address whether the issue presented is one for the jury or for the Court to resolve. Federal Rule of Criminal Procedure 12(b)(1) authorizes a party to "raise by pretrial motion any defense, objection, or request that the court can determine without trial on the merits." As a general matter, the Court does not look further than the indictment itself to determine its sufficiency. *United States v. Farm & Home Sav. Ass'n*, 932 F.2d 1256, 1259 n.3 (8th Cir. 1991). Where, as here, the Defendant's Motion to Dismiss raises a legal question, however, it is appropriate for the Court to resolve it in advance of trial. Accord, *United States v. Church*, 461 F. Supp. 3d 875, 881 (S.D. Iowa 2020); *United States v. Grant*, 2018 WL 4516008 (N.D. Ga. 2018). See also *United States v. Laney*, 2021 WL 1821188 (N.D. Iowa 2021) *report and recommendation adopted*, 2021 WL 2373845 (N.D. Iowa, March 26, 2021). In a different context, *United States v. Marrowbone*, 2014 WL 6694781 (D. S.D. 2014), explained that the rationale for the Court to address such issues pretrial is threefold: the difficulty for a jury in resolving this type of legal question; fairness to the defendant; and wise use of judicial resources. *Id.* at *2.

The parties agree (Doc. 29 and 31) that this case poses a legal question proper for determination by the Court, and not by the jury. The Court agrees.

2. Pertinent authority

The Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. §§ 20911-20932, sets forth a comprehensive system for registration by convicted sex offenders, as follows:

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

*2 (A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of title 18); or

(ii) abusive sexual contact (as described in section 2244 of title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

occurs after the offender becomes a tier II sex offender.

34 U.S.C. § 20911(4).

The statute further defines a Tier II offender as someone who has committed an offense involving a minor, which is not relevant here. 34 U.S.C. § 20911(3). A Tier I offender is one who does not qualify as either a Tier II or Tier III offender. 34 U.S.C. § 20911(2).

SORNA sets forth the periods of time during which an individual must register as a sex offender as follows:

(a) Full registration period

A sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b). The full registration period is--

- (1) 15 years, if the offender is a tier I sex offender;
- (2) 25 years, if the offender is a tier II sex offender; and
- (3) the life of the offender, if the offender is a tier III sex offender.

34 U.S.C. § 20915(a).

In addition to requiring registration by sex offenders, SORNA links to the federal criminal code to impose criminal responsibility on offenders who fail to comply. 18 U.S.C. § 2250(a) provides as follows:

Whoever --

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)

(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of conviction under Federal law (including the

Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

Shall be fined under this title or imprisoned not more than 10 years, or both.

To determine whether and at what level an individual qualifies as a sex offender, the Court must examine applicable sections of the federal criminal code, as well as the applicable state code. As provided in SORNA's definition of a Tier III offender, 34 U.S.C. § 20911(4), the pertinent provisions of the United States Code which must be compared with the state code are 18 U.S.C. §§ 2241 and 2242, which read as follows:

18 U.S.C. § 2241. Aggravated sexual abuse

(a) By force or threat.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly causes another person to engage in a sexual act--

*3 (1) by using force against that other person; or

(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping;

or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both.

(b) By other means.--Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly--

(1) renders another person unconscious and thereby engages in a sexual act with that other person; or

(2) administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and thereby--

(A) substantially impairs the ability of that other person to appraise or control conduct; and

(B) engages in a sexual act with that other person; or attempts to do so,

shall be fined under this title, imprisoned for any term of years or life, or both.

18 U.S.C. § 2242. Sexual abuse

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly--

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(2) engages in a sexual act with another person if that other person is--

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

The task for the Court is to examine these statutes and compare them to the Texas sexual assault statute in effect at the time of Defendant's conviction. At the time, the Texas statute read as follows:

Texas Penal Code Ann. § 22.011

(a) A person commits an offense if the person:

(1) intentionally or knowingly:

(A) causes the penetration of the anus or female sexual organ of another person who is not the spouse of the actor by any means, without that person's consent;

(B) causes the penetration of the mouth of another person who is not the spouse of the actor by the sexual organ of the actor, without that person's consent; or

(C) causes the sexual organ of another person who is not the spouse of the actor, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor[.]

The term "without the consent of the other person" was defined in § 22.011(b) and meant:

(1) the actor compels the other person to submit or participate by the use of physical force or violence;

*4 (2) the actor compels the other person to submit or participate by threatening to use force or violence against the other person, and the other person believes that the actor has the present ability to execute the threat;

(3) the other person has not consented and the actor knows the other person is unconscious or physically unable to resist;

(4) the actor knows that as a result of mental disease or defect the other person is at the time of the sexual assault incapable either of appraising the nature of the act or of resisting it;

(5) the other person has not consented and the actor knows the other person is unaware that the sexual assault is occurring;

(6) the actor knows that the other person submits or participates because of the erroneous belief that the actor is the other person's spouse;

(7) the actor has intentionally impaired the other person's power to appraise or control the other person's conduct by administering any substance without the other person's knowledge; or

(8) the actor compels the other person to submit or participate by threatening to use force or violence against any person, and the other person believes that the actor has the ability to execute the threat.

Texas Penal Code Ann. § 22.011 (1990).

3. Procedure for assessing whether the Texas statute is comparable to or more severe than §§ 2241 and 2242

Although the Eighth Circuit has not held that a categorial, rather than fact-specific, approach should be used in assessing whether the federal and state statutes are comparable in a case of this type, *United States v. Mulverhill*, 833 F.3d 925 (8th Cir. 2016), the Court has indicated that the categorical approach is the appropriate method. *United States v. Hall*, 722 F. App'x 375 (8th Cir. 2019) (unpublished). District courts in the Eighth Circuit have followed the weight of authority from other circuits and have employed the categorical approach. See, e.g., *United States v. Laney*, 2021 WL 1821188 (N.D. Iowa 2021); *United States v. Church*, 461 F. Supp. 3d 875, 883 (S.D. Iowa 2020). Decisions from several Courts of Appeal authorize the categorical approach. See, e.g. *United States v. Montgomery*, 966 F.3d 335 (5th Cir. 2020); *United States v. Escalante*, 933 F.3d 395 (5th Cir. 2019); *United States v. Barcus*, 892 F.3d 228 (6th Cir. 2018); *United States v. White*, 782 F.3d 1118, 1130 (10th Cir. 2015).

The rationale for choosing the categorical approach, as opposed to a fact-specific approach, is grounded in the pertinent statutory language. As the court explained in *United States v. Laney*, courts draw a distinction between legislative enactments that use the term “conduct” as opposed to the term “offense” or “elements.” 2021 WL 1821188, *2. The latter two terms indicate to courts that a categorical interpretation is intended, whereas use of the term “conduct” implicates a fact-specific approach. *Id.* (citing report and recommendation, 2021 WL 2373845, *10). See also *White*, 782 F.3d at 1132-33 (use of the term “offense” indicates a categorical analysis should be employed). The section of the SORNA statute pertinent to the case at bar employs the term “offense.” 34 U.S.C. § 20911(5)(A). The applicable sections of the federal code, §§ 2241 and 2242, describe elements rather than conduct. 18 U.S.C. §§ 2241 and 2242. The Texas statute at issue, Texas Penal Code Ann. § 22.011(a), uses the term “offense.”

***5** The parties have argued that the Court should employ a categorical analysis in this case (Doc. 29 and 31). The Court has considered the arguments of the parties and the reasoning in the cases cited herein and adopts the categorical method for analysis of the statutes at issue.

The Supreme Court has addressed use of the categorical approach to statutory analysis in several contexts, including in interpreting the Armed Career Criminal Act's enhancements

to sentences for prior “violent felonies.” In *Mathis v. United States*, the Court explained that the “categorical approach” to assessing prior offenses requires that the Court “focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the prior offense] while ignoring the particular facts of the case.” —U.S. —, 136 S.Ct. 2243, 2248, 195 L.Ed.2d 604 (2016).

In *United States v. Ballantyne*, the district court provided a brief summary of the steps involved in using the categorical approach in the context of an indictment for a violation of 18 U.S.C. § 2250(a) as follows:

Under the categorical approach, the Court compares the statutory definition of the prior offense with the elements of the federal offense the government contends is “comparable” to the prior offense.... The prior offense is “comparable” to the federal offense if it is defined more narrowly than, or has the same elements as, the federal offense.... The prior offense is not “comparable” to the federal offense if the statute defining the prior offense “sweeps more broadly” than the federal offense.... The Court may not consider the facts giving rise to the prior offense, even if the facts show the defendant's conduct satisfies the federal elements. A comparison of the elements is the only relevant inquiry. [citations omitted]

Ballantyne, 2019 WL 3891252, *2 (D. Mont. 2019).

As the court pointed out in *Church*, the defendant's offense of conviction does not have to be identical to the provisions in 18 U.S.C. §§ 2241 and 2242, allowing for some flexibility in analysis. 461 F. Supp.3d at 883 (cleaned up). The prior offense must be comparable to or more severe than the federal provisions, however, 34 U.S.C. § 20911(4), and the categorical analysis is not employed less stringently in the SORNA context than in other contexts. *Laney*, 2021 WL 1821188, at *21 (citing report and recommendation at *10).

4. Comparison of 18 U.S.C. §§ 2241 and 2242 with the pertinent Texas statutes

The parties agree that the Texas statute at issue contains two elements: 1--sexual penetration, 2—without consent. (Doc. 29, 31). These elements appear in Tex. Penal Code Ann. § 22.011(a) followed by a list in § 22.011(b) of circumstances evidencing lack of consent.

Most of the elements of Tex. Penal Code Ann. § 22.011 are comparable to those in 18 U.S.C. §§ 2241 and 2242. In making the comparison, it is helpful to examine whether the state statute includes “force, threats, coercion, or incapacitation,” because those are elements in the federal statutes set forth for comparison. *Church*, 461 F. Supp. 3d at 893. Thus, it appears that Tex. Penal Code Ann. §§ 22.011(b) (1)-(4), and (b)(7)-(8) do include an element of force or violence comparable, if not identical, to the federal code provisions. To illustrate, 18 U.S.C. § 2241(a)(1) proscribes a sexual act by use of force, while Tex. Penal Code Ann. § 22.011(b)(1) proscribes the use of force or violence. Compare Tex. Penal Code Ann. § 22.011(b)(1) with 18 U.S.C. § 2241(a)(1). Further, 18 U.S.C. § 2241(a)(2) proscribes use of threats of death, serious bodily injury or kidnapping of the victim or another, along with § 2242(1)’s proscription of use of threats to inflict lesser harm, while Tex. Penal Code Ann. §§ 22.011(b)(2) and (b)(8) proscribe threats of force or violence with present ability to inflict harm on the victim or another. Compare Tex. Penal Code Ann. §§ 22.011(b)(2) and (b)(8) with 18 U.S.C. §§ 2241(a)(1) and 2242(1). Incapacity of the victim is addressed in similar fashion by 18 U.S.C. §§ 2241(b)(1) and (b)(2) and by §§ 2242(2)(A) and (B), as compared to Tex. Penal Code Ann. §§ 22.011(b)(3), (b)(4), and (b)(7). Compare Tex. Penal Code §§ 22.011(b)(3), (b)(4), and (b)(7) with 18 U.S.C. §§ 2241(b)(1), (b)(2) and §§ 2242(2)(A) and (B).

*6 Not all of the provisions of the Texas statute are comparable to the federal provisions, however. The Texas statute provides at § 22.011(b)(6) that an individual “knows the other person submits or participates because of the erroneous belief that the actor is the other person’s spouse.” Tex. Penal Code Ann. § 22.011(b)(6). This section does not include an element of violence and has no analogue in 18 U.S.C. §§ 2241 or 2242. An example would be the case of bigamy, where the defendant has consensual sex with the second “wife” who is unaware of her purported husband’s other spouse. This would violate the Texas statute but not either 18 U.S.C. § 2241 or § 2242. Compare Tex. Penal Code Ann. § 22.011(b)(6) with 18 U.S.C. §§ 2241 and 2242.

In a similar situation requiring comparison of the Nebraska sexual assault statute with the federal provisions, the Iowa district court cited Neb. Rev. Stat. § 28-318(8)(a)(iv) (Reissue 1995) which defined “without consent,” in part, as follows: “the consent, if any was actually given, was the result of the actor’s deception as to the identity of the actor or the nature or purpose of the act on the part of the actor.” *Church*, 461 F.Supp.3d at 884. The court ruled the Nebraska statute was not narrower than or comparable to the federal statutes because deception is not included in the federal provisions. *Id.* Based on this and another dissimilarity the court granted the Motion to Dismiss. *Id.* at 894. Likewise, in the case before the Court, the state statute has a provision at § 22.011(b)(6) which does not appear in any form in 18 U.S.C. §§ 2241 or 2242, and therefore the elements of the statutes are not comparable.

A second provision of the Texas statute which is not comparable to the pertinent federal provisions is Tex. Penal Code Ann. § 22.011(b)(5) which provides “the other person has not consented and the actor knows the other person is unaware that the sexual assault is occurring.” An example of the application of § 22.011(b)(5) is where the actor has sex with a person who is not incapacitated but is sleeping and does not awaken. Lacking force, coercion, or threat means the federal statutes would not criminalize the conduct, 18 U.S.C. §§ 2241 and 2242, but Texas would do so. Also, it is unclear whether the consent must be given at the time or could have been given in advance. A similar situation was before the Ninth Circuit in addressing whether the Oregon sexual assault statute was narrower than or comparable to the federal provisions set forth for comparison. *United States v. Cabrera-Gutierrez*, 756 F.3d 1125 (9th Cir. 2014). In holding they were not comparable because the state statute “sweeps more broadly,” *id.*, at 1134, the court commented as follows:

By contrast, the generic federal crime of sexual abuse requires that a defendant cause another to engage in a sexual act by certain types of threat or fear or to engage in a sexual act with a victim who is mentally or physically incapable. 18 U.S.C. § 2242. The Oregon statute ... penalizes a broader class of behavior than the federal statute. Nonconsensual intercourse with a mentally and physically capable individual not involving a threat or the use of fear might violate [the Oregon

statute] but it would not violate 18 U.S.C. § 2242.

United States v. Cabrera Gutierrez, 756 F.3d 1125, 1134 (9th Cir 2014). While § 22.011 (b)(5) alone might not be enough to render § 22.011(b) sufficiently unlike the federal statute to determine they are not comparable, when coupled with § 20.011(b)(6), the two provisions render the state and federal statutes unlike. See, e.g., *Church*, 461 F.Supp.3d at 892.

CONCLUSION

The analysis of 18 U.S.C. §§ 2241 and 2242 as compared to Texas Penal Code Ann. § 22.011 demonstrates that the Texas

statute is not narrower than the federal provisions and the two are not comparable. As a result, Defendant is not a Tier III sex offender required to register in conjunction with interstate travel. His prior conviction in the state of Texas resulted in his being a Tier I offender. Therefore, Defendant did not violate 18 U.S.C. § 2250(a) and the indictment is dismissed.

Accordingly, IT IS ORDERED that Defendant's Motion to Dismiss the Indictment (Doc. 28) is granted.

All Citations

Not Reported in Fed. Supp., 2021 WL 3726899

859 F.3d 311

United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Scott Steward CAMMORTO, Defendant–Appellant.

No. 16-4280

|

Argued: May 11, 2017

|

Decided: June 13, 2017

Synopsis

Background: After defendant pled guilty to knowingly failing to register as sex offender, the United States District Court for the Western District of Virginia, No. 1:15-cr-00038-JPJ-PMS-1, James P. Jones, J., 2016 WL 1390028, sentenced him as Tier III sex offender, and he appealed.

[Holding:] The Court of Appeals, Niemeyer, Circuit Judge, held that defendant's prior Georgia rape conviction qualified as predicate offense that required him to be sentenced as Tier III sex offender.

Affirmed.

West Headnotes (7)

[1] Mental Health Persons and offenses included

Person who encouraged commission of offense was triable as principal under both Georgia rape statute and federal statute prohibiting aggravated sexual abuse, and thus defendant's prior Georgia rape conviction qualified as predicate offense that required him to be sentenced as Tier III sex offender under Sex Offender Registration and Notification Act (SORNA) following his conviction for failing to register as sex offender, even though Georgia permitted person who never touched victim, but merely encouraged another to commit crime, to be convicted of rape as aider or abettor, absent showing that Georgia

law actually swept broader than federal law with respect to its aiding-or-abetting liability. 18 U.S.C.A. §§ 2(a), 2241; 42 U.S.C.A. § 16911(4); Ga. Code Ann. §§ 16-2-20, 16-6-1; U.S.S.G. § 2A3.5(a).

6 Cases that cite this headnote

[2] Mental Health Persons and offenses included

In determining whether defendant's underlying sex offense is comparable to or more severe than enumerated federal offense, for purposes of determining his classification under Sex Offender Registration and Notification Act (SORNA), court must use categorical approach, under which it compares elements of underlying offense of conviction—not underlying facts—with elements of federal offense, and if there is realistic probability that defendant could be convicted of underlying offense for conduct that falls outside scope of federal offense, then underlying offense does not categorically qualify as basis for sentencing defendant as Tier III offender. 42 U.S.C.A. § 16911; U.S.S.G. § 2A3.5.

7 Cases that cite this headnote

[3] Sex Offenses Force or Coercion

Under Georgia law, “force” required to convict defendant of rape is shown if defendant's words or acts were sufficient to instill in victim reasonable apprehension of bodily harm, violence, or other dangerous consequences to herself or others. Ga. Code Ann. § 16-6-1.

[4] Sex Offenses Force or Coercion

Sex Offenses Force or coercion; resistance

Under Georgia law, force required to convict defendant of rape must always be proven as factual matter; it is never presumed because of victim's age. Ga. Code Ann. § 16-6-1.

[5] **Sex Offenses** ↗ Threats, fear, and intimidation

Sex Offenses ↗ Physical force or violence

“Force,” for purposes of federal aggravated sexual abuse statute, includes not only physical force, but also use of threat of harm sufficient to coerce or compel submission by victim, so long as that threat is sufficient to overcome, restrain, or injure person. 18 U.S.C.A. §§ 2241, 2254(a), (b).

1 Case that cites this headnote

[6] **Sex Offenses** ↗ Aiding and abetting

Under Georgia law, rape statute can be violated by aider or abettor. Ga. Code Ann. §§ 16-2-20, 16-6-1.

1 Case that cites this headnote

[7] **Sex Offenses** ↗ Aiding and abetting

Person who aided or abetted federal offense of aggravated sexual abuse can be convicted of that offense. 18 U.S.C.A. §§ 2(a), 2241.

1 Case that cites this headnote

Opinion

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Motz and Judge Thacker joined.

NIEMEYER, Circuit Judge:

Scott Cammerto pleaded guilty to knowingly failing to register in Virginia as a sex offender, in violation of 18 U.S.C. § 2250. *313 Based on his underlying conviction in Georgia for rape, the district court sentenced Cammerto as a Tier III offender pursuant to U.S.S.G. § 2A3.5(a)(1) and thus imposed an enhanced sentence of 41 months’ imprisonment. Cammerto now challenges the district court’s reliance on his Georgia rape conviction to find that he was a Tier III offender, contending that his Georgia rape conviction did not categorically match the federal crime so as to make him a Tier III offender.

We conclude that Cammerto’s Georgia rape conviction does indeed satisfy the requirements for finding him a Tier III offender, as the Georgia offense was categorically “comparable to or more severe than” the federal crime of aggravated sexual abuse, as described in 18 U.S.C. § 2241, which is one of the offenses defining a Tier III offender. 42 U.S.C. § 16911(4)(A)(i); *see also* U.S.S.G. § 2A3.5(a)(1); *id.* § 2A3.5 cmt. n.1 (incorporating definition of Tier III offender from 42 U.S.C. § 16911). Accordingly, we affirm.

I

In April 1999, Cammerto pleaded guilty in a Georgia state court to rape and kidnapping and was sentenced to 15 years’ imprisonment. As required by the Sex Offender Registration and Notification Act (“SORNA”), 42 U.S.C. § 16913, Cammerto registered as a sex offender in Georgia following his release from prison in August 2013.

In January 2014, however, Georgia authorities issued a warrant for Cammerto’s arrest after discovering that Cammerto had moved without notifying them, in violation of SORNA. Cammerto was later apprehended in Bristol, Virginia, after authorities there responded to an unrelated domestic violence incident. He was then charged for knowingly failing to update his sex-offender registration in Virginia, in violation of 18 U.S.C. § 2250, and pleaded guilty to that charge in December 2015.

*312 Appeal from the United States District Court for the Western District of Virginia, at Abingdon. James P. Jones, District Judge. (1:15-cr-00038-JPJ-PMS-1)

Attorneys and Law Firms

ARGUED: Brian Jackson Beck, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Abingdon, Virginia, for Appellant. Kevin Lee Jayne, OFFICE OF THE UNITED STATES ATTORNEY, Abingdon, Virginia, for Appellee. ON BRIEF: Larry W. Shelton, Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Roanoke, Virginia, for Appellant. John P. Fishwick, Jr., United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Roanoke, Virginia, for Appellee.

Before NIEMEYER, MOTZ, and THACKER, Circuit Judges.

In preparation for sentencing, the probation office issued a presentence report recommending that Cammerto be sentenced as a Tier III sex offender based on his underlying Georgia rape conviction. Cammerto objected to the recommendation, contending that his Georgia rape conviction did not render him a Tier III offender and that he should, instead, be classified as a Tier I offender, which would have reduced his base offense level from 16 to 12 and reduced his ultimate sentencing range from 33–41 months’ imprisonment to 24–30 months’ imprisonment. He argued that, under Georgia law, a person can be convicted of rape for aiding or abetting the perpetrator and that, in fact, he was convicted as an aider or abettor because he did not have intercourse with the victim. He reasoned that under the categorical approach, his conviction for aiding or abetting rape was not “comparable to or more severe than” the federal offense of aggravated sexual abuse under 18 U.S.C. § 2241 and therefore that his Georgia conviction did not qualify as a predicate offense rendering him a Tier III offender.

At sentencing, the district court rejected Cammerto’s objection. Applying the categorical approach, it compared the elements of the Georgia rape offense with the elements of federal aggravated sexual abuse under § 2241, which is a basis for finding a defendant a Tier III offender, and found the two to be “a categorical match.” The court explained that “under federal criminal law … aiding and abetting is not a separate offense from the crime,” and therefore that the enumerated federal crime of aggravated sexual abuse must be understood to encompass aiding and abetting that offense. Moreover, the court explained *314 that under the categorical approach, it could not peer into the factual record for Cammerto’s underlying conviction for rape, noting that “Cammerto did not plead guilty to aiding and abetting rape; he pled guilty to rape.” Based on its conclusion that Cammerto was a Tier III offender, the district court sentenced him to 41 months’ imprisonment.

From the district court’s judgment dated May 12, 2016, Cammerto appealed.

II

[1] Cammerto contends on appeal that, because a person who never even touched the victim may nonetheless be convicted in Georgia of rape as an aider or abettor, the Georgia rape offense is broader than the federal offense of aggravated

sexual abuse, and therefore, under the categorical approach, his rape conviction does not qualify as a predicate offense that renders him a Tier III sex offender.

To address Cammerto’s argument, we begin with the Sentencing Guidelines. The Guidelines provide, with respect to sentencing for a conviction under 18 U.S.C. § 2250, that a sex offender who failed to register be treated based on the seriousness of his underlying sex offense, creating a tripartite classification that identifies Tier I, Tier II, and Tier III offenders. *See U.S.S.G. § 2A3.5(a); id. § 2A3.5 cmt. n.1* (incorporating the tier classifications from 42 U.S.C. § 16911). Under § 16911(4), a defendant is a Tier III offender if he has been convicted of an offense that is “punishable by imprisonment for more than 1 year and,” as relevant here, “is comparable to or more severe than” an enumerated federal sexual offense “or an attempt or conspiracy to commit such an offense.” 42 U.S.C. § 16911(4)(A). One of the enumerated federal offenses is “aggravated sexual abuse,” as described in 18 U.S.C. § 2241. *Id. § 16911(4)(A)(i)*. Thus, a defendant may be sentenced as a Tier III sex offender if the sex offense for which he was required to register was “comparable to or more severe than” aggravated sexual abuse under § 2241.

[2] In determining whether the underlying sex offense is comparable to or more severe than the enumerated federal offense, we use the categorical approach, under which we compare the *elements* of the underlying offense of conviction—not the underlying facts—with the *elements* of the federal offense. *See United States v. Berry*, 814 F.3d 192, 195 (4th Cir. 2016). And if there is a “realistic probability” that the defendant could be convicted of the underlying offense for conduct that falls outside the scope of the federal offense, then the underlying offense does not categorically qualify as a basis for sentencing the defendant as a Tier III offender. *Id.* (quoting *United States v. Price*, 777 F.3d 700, 704 (4th Cir. 2015)).

The Georgia rape statute, under which Cammerto was convicted and for which he was subsequently required to register, provided that:

(a) A person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when

there is any penetration of the female sex organ by the male sex organ.

Ga. Code Ann. § 16–6–1 (1996). The federal statute defining aggravated sexual abuse, to which the rape statute must be compared, provides that “[w]hoever ... knowingly causes another person to engage in a sexual act ... by using force,” or “by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping,” or by rendering the victim unconscious, is guilty of the offense. 18 U.S.C. § 2241(a), (b).

***315 [3] [4] [5]** It is readily apparent from a comparison of the elements that the Georgia rape statute is narrower than the federal offense under § 2241, such that the rape statute qualifies as a predicate offense for sentencing a defendant as a Tier III offender. Under the Georgia statute, the defendant must (1) engage in penetration of the female sex organ (2) forcibly against the victim’s will. And “force is shown if the defendant’s words or acts were sufficient to instill in the victim a reasonable apprehension of bodily harm, violence, or other dangerous consequences to herself or others.” *State v. Collins*, 270 Ga. 42, 508 S.E.2d 390, 392 (1998) (internal quotation marks and citation omitted). Moreover, under Georgia law, force must always be proven as a factual matter; it is never presumed because of the age of the victim.* See *id.* at 391. The federal offense, by comparison, requires only that the defendant (1) engage in a *sexual act* (2) by force or threat of force against the victim or any other person or by incapacitating the victim. 18 U.S.C. § 2254(a), (b). And “force,” for purposes of the federal statute, includes not only physical force, but also “the use of a threat of harm sufficient to coerce or compel submission by the victim” so long as that threat is “sufficient to overcome, restrain, or injure a person.” *United States v. Johnson*, 492 F.3d 254, 257 (4th Cir. 2007) (quoting *United States v. Weekley*, 130 F.3d 747, 754 (6th Cir. 1997)).

While not disputing the apparent match, Cammerto argues that, because the Georgia offense can be violated where the defendant aids or abets a rape but does not personally perform the sexual act, the Georgia offense covers a broader range of conduct than the federal offense of aggravated sexual abuse and therefore does not qualify as a predicate offense. This argument, however, is grounded in a misunderstanding of aider-or-abettor liability, under both Georgia law and federal law.

[6] [7] To be sure, under Georgia law, the rape statute can be violated by an aider or abettor. See Ga. Code Ann. § 16–2–20 (1996) (providing that anyone who “[i]ntentionally aids or abets in the commission of the crime” is “concerned in the commission” and therefore “may be charged with and convicted of commission of the crime”). Thus, an aider or abettor of rape is, as with any other crime, treated as a principal. See *Hendrix v. State*, 239 Ga. 507, 238 S.E.2d 56, 57 (1977). But aiding-or-abetting liability does not broaden the Georgia law beyond the relevant federal offense because, under federal law, aiders and abettors are *also* treated as principals. See 18 U.S.C. § 2(a) (“[W]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal”). Thus, just as a person who aided or abetted rape can be convicted under the Georgia rape statute, so can a person who aided or abetted the federal offense of aggravated sexual abuse be convicted of that offense.

Indeed, Cammerto’s theory in relying on aiding-or-abetting liability to broaden the predicate offense was put to rest by the Supreme Court’s decision in ***316 *Gonzales v. Duenas-Alvarez***, 549 U.S. 183, 185, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007). In *Duenas-Alvarez*, the Court held that, where a state offense otherwise qualified as generic federal “theft,” the fact that the state offense could be committed through aiding or abetting had no effect on its status as a categorical match. *Id.* at 189–90, 127 S.Ct. 815. The Court explained that “every jurisdiction—all States and the Federal Government—has ‘expressly abrogated the distinction’ among principals and aiders and abettors” who are “present at the scene of the crime” or “help[] the principal before the basic criminal event took place.” *Id.* As a result, when employing the categorical approach:

“[T]he generic sense in which” the term “theft” “is now used in the criminal codes of most States” covers such “aiders and abettors” as well as principals. And the criminal activities of these aiders and abettors of a generic theft must themselves fall within the scope of the “theft” in the federal statute.

Id. at 190, 127 S.Ct. 815 (quoting *Taylor v. United States*, 495 U.S. 575, 598, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)).

Cammerto attempts to distinguish *Duenas-Alvarez* because the generic federal offense for Tier III status explicitly includes “attempt and conspiracy” along with the substantive offense and therefore reflects, as he argues, an intent to exclude aiding-or-abetting liability, whereas the federal

immigration statute in *Duenas-Alvarez* did not include liability for attempt or conspiracy. He argues that, in § 16911, which defines the three tiers of offense for U.S.S.G. § 2A3.5, Congress intended to capture three types of actors as Tier III offenders—those who actually commit the sex offense, those who attempt the offense, and those who conspire to do so—and by listing only those actors, it manifested its desire to exclude aiders and abettors. Congress' inclusion of attempt-or-conspiracy liability, however, in no way suggests that it intended to exclude aiders and abettors. Unlike with attempt, which is culpable only where expressly criminalized, *see, e.g.*, 18 U.S.C. § 1113 (attempted murder), or conspiracy, which is an independently chargeable crime, 18 U.S.C. § 371, there is no separate crime of “aiding” or “abetting” a federal offense, *see, e.g.*, *United States v. Lorick*, 753 F.2d 1295, 1297 (4th Cir. 1985) (“[S]ufficient evidence was adduced to convict the appellants as principals because each *either* committed the offense *or was an aider and abettor*” (emphasis added)). Therefore, the federal statute’s silence regarding aiding and abetting is not at all revealing. On the contrary, an express inclusion of “aiders and abettors” would have been redundant, given federal law’s pervasive provision that aiders and abettors are principals.

We add that Cammerto’s argument is not only wrong, but also untenable. Under his theory, any criminal law that confers principal liability on an aider or abettor would fall outside of its generic counterpart. Such a holding would mean that *no* federal offense could be treated as a predicate offense for purposes of ACCA, the Sentencing Guidelines, the Immigration and Nationality Act, or any other statute under which courts use the categorical approach. This is not to mention that the criminal systems of *all States* have abolished the distinction between principal and aider-or-abettor liability. *Duenas-Alvarez*, 549 U.S. at 189–90, 127 S.Ct. 815.

III

At oral argument, Cammerto argued for the first time that Georgia’s aiding-or-abetting law is broader than the federal aiding-or-abetting law. He reasons, therefore, that the Georgia rape law, taken with its broader aiding-and-abetting law, is accordingly *317 broader than the federal offense of aggravated sexual abuse, even though the federal offense can also be violated by aiding or abetting. Specifically, Cammerto points to the language of the Georgia statute defining parties to a crime, which treats as a principal anyone who “advises,

encourages, hires, counsels, or procures another to commit the crime,” Ga. Code Ann. § 16–2–20(b)(4). He focuses on Georgia’s inclusion of the word “encourages,” which does not appear in the equivalent federal statute. *See* 18 U.S.C. § 2(a) (treating as a principal anyone who “aids, abets, counsels, commands, induces or procures” the commission of a crime). For this reason, he maintains that the Georgia law does not qualify as a predicate offense for sentencing him as a Tier III offender.

While it is doubtful that Cammerto appropriately preserved this argument, *see IGEN Int’l, Inc. v. Roche Diagnostics GmbH*, 335 F.3d 303, 308 (4th Cir. 2003) (“Failure to present or argue assignments of error in opening appellant briefs constitutes a waiver of those issues”), we find it nonetheless unpersuasive.

In making this argument, Cammerto overlooks the fact that the Supreme Court has defined federal aiding and abetting to include encouragement, stating that “[i]n proscribing aiding and abetting, Congress [in § 2] used language that ‘comprehends all assistance rendered by words, acts, encouragement, support, or presence.’” *Rosemond v. United States*, — U.S. —, 134 S.Ct. 1240, 1246, 188 L.Ed.2d 248 (2014) (emphasis added) (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 178, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993)); *see also* LaFave, *Substantive Criminal Law* § 13.2 (2d ed. 2003) (“[I]t may generally be said that one is liable as an accomplice to the crime of another if he ... gave assistance or encouragement” (emphasis added)). Thus, contrary to Cammerto’s argument, a person who “encourages” the commission of an offense is triable as a principal under both the Georgia rape statute and the federal statute prohibiting aggravated sexual abuse.

The Supreme Court’s decision in *Duenas-Alvarez* forecloses Cammerto’s argument for the additional reason that Cammerto has failed to show that Georgia law *actually* sweeps broader than federal law with respect to its aiding-or-abetting liability. In *Duenas-Alvarez*, the Court rejected an argument that the California law of aider-or-abettor liability was broader than the generic version because the California law “ma[de] a defendant criminally liable for conduct that the defendant did not intend.” 549 U.S. at 191, 127 S.Ct. 815. The Court reviewed California cases and found that none showed that the State’s understanding of intent “extend[ed] significantly beyond the concept as set forth in the cases of other States.” *Id.* at 193, 127 S.Ct. 815. Importantly, the Court declined to explore fanciful hypotheticals that could support

a conviction in California, but not under a generic definition, explaining:

[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. *But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.*

Id. (emphasis added). Like the defendant in *Duenas-Alvarez*, Cammerto provides us *318 with no Georgia case, including his own, suggesting “a realistic probability” that Georgia would treat a defendant as a principal where that defendant would not be principal under federal law. Quite to the contrary, Georgia case law shows that, to warrant conviction

as a principal, an act of encouragement must go beyond mere “approval of the act.” *Bullard v. State*, 263 Ga. 682, 436 S.E.2d 647, 650 (1993) (reversing conviction for murder where defendant sat in car and did not protest while killer dismembered victim); *cf., e.g., Jordan v. State*, 272 Ga. 395, 530 S.E.2d 192, 194 (2000) (upholding murder conviction where defendant “donned camouflage pants and accompanied to the victim's home two armed men who had just discussed in his presence killing the victim,” then, after the killing, helped look for shotgun shells and bury the body); *Hendrix*, 238 S.E.2d at 57 (upholding rape conviction where defendant “helped quiet” the victim, “choked her[,] and threatened her life”).

* * *

In sum, we conclude that the underlying Georgia rape statute, on which the district court relied in sentencing Cammerto as a Tier III offender, sweeps no broader than the federal offense of aggravated sexual abuse in § 2241, and therefore the court properly used the Georgia rape conviction as a predicate offense to conclude that Cammerto should be sentenced as a Tier III offender. Accordingly, we affirm the judgment of the district court.

AFFIRMED

All Citations

859 F.3d 311

Footnotes

- * Georgia has since codified an exception to this rule where the victim is less than 10 years old. Ga. Code Ann. § 16–6–1(a)(2). Even if this exception applied at the time Cammerto was convicted, it would be of no consequence to our analysis. We have expressly held that the age of a victim is not subject to categorical-approach analysis, and thus we may take notice of the fact that the victim in Cammerto's case was 17 years old. See *Berry*, 814 F.3d at 199 (“[W]e apply the categorical approach in assessing whether a defendant's prior conviction constitutes a tier III sex offense under Section 16911(4)(A), *with the exception that we look to the specific circumstance of the victim's age*” (emphasis added)).

2024 WL 3381305

Only the Westlaw citation is currently available.
United States District Court, E.D. Tennessee,
Greeneville Division.

UNITED STATES of America, Plaintiff,
v.
David Allen CAPRI, II, Defendant.

2:23-CR-00105-DCLC-CRW

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Filed July 11, 2024

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

Clifton L. Corker, United States District Judge

*1 On August 8, 2023, the Grand Jury returned an indictment charging Defendant with failing to register and update his registration as required by the Sex Offender Registration and Notification Act (“SORNA”), in violation of 18 U.S.C. § 2250(a), for the time period from September 2021 to April 24, 2023 [Doc. 1]. On January 3, 2024, he pled guilty [Doc. 15]. A presentence report determined Defendant to be a Tier II offender due to his prior sex offense convictions for Sexual Misconduct with a Minor and Child Molesting under Indiana law and calculated his total offense level to be 13, criminal history category II, yielding an advisory guideline range of 15 to 21 months’ imprisonment [Doc. 19, ¶ 74].

Prior to sentencing, Defendant filed a Motion to Dismiss the Indictment, arguing that he was not a Tier II offender, but a Tier I offender. And, as a Tier I offender, the requirement to register under SORNA ended in February 2021, seven months prior to the time alleged in the indictment [Doc. 32]. The Government argues Defendant is properly classified as a Tier II offender but that if the Court finds the Defendant a Tier I offender, it agrees the indictment should be dismissed. [Doc. 33; Doc. 39, pgs. 9–10]. The Court heard oral argument on Defendant’s motion on June 6, 2024.

The facts of this case are not in dispute. On February 23, 2006, Defendant was convicted in the Superior Court for St. Joseph County, Indiana of Sexual Misconduct with a Minor, in violation of Ind. Code Ann. § 35-42-4-9(b) (2006), a Class C felony, and Child Molesting, in violation of Ind. Code Ann. § 35-42-4-3(b) (2006), also a Class C felony [Doc. 32-1, pg. 1; see Doc. 32, pg. 2]. He was sentenced to a concurrent term of imprisonment of four years on each count with the sentence suspended to three years’ probation [Doc. 32-1, pgs. 1–2]. It is undisputed that both convictions are sex offenses under SORNA which required him to register as a sex offender. See 34 U.S.C. § 20911(1). What is disputed is how long SORNA required him to register. The answer to that question depends on whether Defendant’s prior convictions under Indiana law classify him as a Tier I, Tier II, or Tier III sex offender. Tier I offenders must register for a period of 15 years, Tier II, 25 years, and for Tier III, the registration duration is life. 34 U.S.C. § 20915(a)(1)–(3). If Defendant is a Tier I offender, SORNA would have required him to register only until February 2021.

Relevant here, Tier II sex offenders are those whose underlying offense is “comparable to or more severe than ... abusive sexual contact (as described in section 2244 of Title 18).” 34 U.S.C. § 20911(3)(A).¹ Accordingly, the Court must compare Defendant’s underlying sex conviction under Indiana law to that of abusive sexual contact under 18 U.S.C. § 2244. The categorical approach is used to make that comparison. See *United States v. Barcus*, 892 F.3d 228, 231–32 (6th Cir. 2018). Under this approach, the Court considers “the statutory definition of the offense, rather than the manner in which an offender may have violated the statute in a particular circumstance.” *Sanchez-Perez v. Garland*, 100 F.4th 693, 697 (6th Cir. 2024)(citations omitted). If the statutory elements of the underlying state sex offense “covers any more conduct” than that of the federal offense, then the two offenses are not comparable under SORNA. *United States v. Barcus*, 892 F.3d 228, 233 (6th Cir. 2018). The focus is on “the minimum conduct criminalized by the state statute.” *United States v. Southers*, 866 F.3d 364, 367 (6th Cir. 2017) (quotations omitted). So, if the Indiana state statute “sweep[s] more broadly” or includes more conduct than the federal offense of abusive sexual conduct, the offenses are not comparable. *Barcus*, 892 F.3d at 232 (quoting *Descamps v. United States*, 570 U.S. 254, 261 (2013)).

*2 But when making the comparison, the Court does not abandon common sense. The categorical approach “is not an invitation to apply ‘legal imagination’ to the state

offense; there must be a ‘realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside ...’” of the federal offense. *Southers*, 866 F.3d at 367 (quoting *Moncrieffe*, 569 U.S. at 191). In other words, a defendant “‘must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.’” *Id.* (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

Turning to the federal offense first. Abusive sexual contact includes conduct where one “knowingly engages in or causes sexual contact with or by another person ...” including a minor. 18 U.S.C. § 2244(a)(3). “Sexual contact” means “the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(3). The definition requires the contact to involve specific body parts of the victim. In other words, sexual contact would not include body parts such as the hand, the back or the abdomen as they are not included in the itemization.

Now the Indiana offenses. First, Sexual Misconduct with a Minor, Ind. Code Ann. § 35-42-4-9(b) (2006), provides that sexual misconduct with a minor occurs when “[a] person at least eighteen (18) years of age who, with a child at least fourteen (14) years of age but less than sixteen (16) years of age, performs or submits to any fondling or touching of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person....” *Id.* Second, Child Molesting is defined as conduct when “[a] person who, with a child under fourteen (14) years of age, performs or submits to any fondling or touching, of either the child or the older person, with intent to arouse or to satisfy the sexual desires of either the child or the older person....”

Neither of the Indiana statutes exclude any parts of the human body that can be touched to constitute the sex offense. But the federal offense specifically identifies the body parts that must be involved in the offense to constitute the federal offense. While Indiana law criminalizes “any fondling” without limitation, the federal statute limits the offense to specific body parts. So, is the Defendant’s argument that Indiana law is broader an argument that defies common sense or essentially “legal imagination”? Or has Indiana law, in fact, been applied to at least one case which is in fact broader than the federal statute?

The Indiana appellate court answers that question. In *Bass v. State*, 947 N.E.2d 456, 458 (Ind. Ct. App. 2011), a jury convicted the defendant of child molesting based on his touching the minor victim’s back and sides with the intent to arouse or satisfy his own sexual desires. The defendant argued on appeal that just touching the back and sides was not sufficient but that touching the breasts or the genitals was necessary for a conviction. His argument was rejected. *Id.* at 460. The Indiana appellate court found that “touching a child’s breasts or genitals is not required to sustain a child molesting conviction ...” *Id.* “[T]he State had to prove that [the defendant] touched [the victim]’s back with intent to arouse or satisfy his own sexual desires.” *Id.* The appellate court held that because a reasonable factfinder could find the defendant had touched the minor’s back with intent to arouse his own sexual desires, the evidence was sufficient to uphold the conviction. *Id.*

*3 But the back and the sides of a minor are not included in the federal definition of “sexual contact.” See 18 U.S.C. § 2246(3). Thus, the Indiana statute is broader. And whether this broader application of Indiana law is a “realistic probability,” *Bass* answers that question. The Government counters that *Bass* is not enough. At oral argument, it asserted the *Bass* court “qualifi[ed]” its reasoning by citing to case law where defendants touched body parts included in the federal statute [Doc. 39, pg. 28]. But the *Bass* court was not qualifying its holding. It was simply pointing out that touching the “breasts or genitals” was not required to support a conviction. 947 N.E.2d at 460 (citing *Altes v. State*, 822 N.E.2d 1116, 1121–22 (Ind. Ct. App. 2005) and *Nuerge v. State*, 677 N.E.2d 1043, 1049 (Ind. Ct. App. 1997)). Again, *Bass* held the evidence was sufficient to convict a defendant under the Indiana statute based on touching only the victim’s “entire back and sides.” 947 N.E.2d at 460. Thus, an Indiana court can—and in fact did—sustain a conviction under the Indiana statute based on conduct the federal statute does not prohibit.

The Government further asserts that *Bass* is merely an “outlier[]” among the numerous cases Indiana has prosecuted [Doc. 39, pg. 30]. In *Burris*, the Government argued the court “should not allow ‘a few (potentially) outlier lower court decisions’” to disqualify a state statute as a predicate for Armed Career Criminal and Career Offender status. *United States v. Burris*, 912 F.3d 386, 401 (6th Cir. 2019). But the Sixth Circuit noted that the categorical approach requires only a “realistic probability[,]” and that the defendant had shown such a probability by pointing to state case

law. *Id.* (quoting *Duenas-Alvarez*, 549 U.S. at 193). Further supporting that conclusion, the Sixth Circuit noted that the state's highest court had not stepped in to temper a supposedly "outlier" view. *See id.* Here, *Bass* applied Indiana's statute to touching body parts not included in the federal definition of "sexual contact," and the Government has pointed to no case from the Indiana Supreme Court tempering that application. Accordingly, there is more than a "realistic probability" that Indiana would apply its child molestation statute to conduct the federal statute does not reach. Since Indiana law is broader than the federal statute, the statutes are not comparable under the categorical approach.

Defendant was also convicted under Indiana's sexual misconduct with a minor statute. But the relevant language in that statute is identical to the child molestation statute. *Compare* Ind. Code Ann. § 35-42-4-3(b) (2007) (prohibiting "perform[ing] or submit[ting] to any fondling or touching ... with intent to arouse or to satisfy the sexual desires of either the child or the older person"), *with* Ind. Code Ann. § 35-42-4-9(b) (2007) (prohibiting "perform[ing] or submit[ting] to any fondling or touching ... with intent to arouse or to satisfy the sexual desires of either the child or

the older person"). Thus, the sexual misconduct with a minor offense under Indiana law is similarly broader than the federal law as well.² Because neither Indiana statute is comparable to the federal offense of abusive sexual contact, Defendant is not a Tier II offender under the categorical approach. And because neither party asserts he is a Tier III offender, he is a Tier I offender under SORNA. He was no longer required to register under SORNA after February 2021. Because the indictment charged Defendant for failing to register beginning in September 2021, a time he was not required to register, it fails to state an offense and should be **DISMISSED**.

*⁴ At oral argument, the parties agreed that despite Defendant's guilty plea, if the Court found him to be a Tier I offender, the Indictment must be dismissed. The Court has made that finding. Accordingly, Defendant's motion [Doc. 32] is **GRANTED**, and the Indictment [Doc. 1] is **DISMISSED**.

SO ORDERED.

All Citations

Slip Copy, 2024 WL 3381305

Footnotes

- 1 There are three additional ways a sex offender could be classified as a Tier II offender but the parties agree none of those apply in this case. [See Doc. 32, pg. 3; Doc. 35, pg. 3].
- 2 There is a second step to the categorical approach: if the Court concludes that a state statute is not a match for the federal statute, the Court determines whether the state statute is "divisible," and if so, the Court must verify whether the specific *subdivision* is categorically broader than the federal statute. *See United States v. Burris*, 912 F.3d 386, 393 (6th Cir. 2019). The parties do not address this step in their briefing. But even if the Indiana statutes are divisible, Defendant was convicted under the "fondling or touching" provisions, § 35-42-4-3(b) and § 35-42-4-9(b), which include conduct not prohibited by the federal statute [See Doc. 35-1, pgs. 1–2].

461 F.Supp.3d 875

United States District Court, S.D. Iowa, Western Division.

UNITED STATES of America, Plaintiff,
v.

Scott Lowell CHURCH, Defendant.

No. 1:19-cr-00052-RGE-HCA

|

Signed 02/04/2020

Synopsis

Background: Defendant was charged with failure to register as a sex offender. Defendant moved to dismiss the indictment, arguing that his duty to register expired prior to the events alleged in the indictment.

Holdings: The District Court, Rebecca Goodgame Ebinger, J., held that:

[1] looking past the four corners of indictment was proper on defendant's motion to dismiss;

[2] categorical approach applied to issue of whether defendant's sexual assault conviction under Nebraska law was comparable to or more severe than the federal crimes of aggravated sexual abuse or sexual abuse;

[3] defendant's conviction for first-degree sexual assault under Nebraska law was not comparable to federal sexual abuse charge; and

[4] defendant's conviction for first-degree sexual assault under Nebraska law was not comparable to federal aggravated sexual abuse charge, and therefore defendant was not subject to a lifetime registration requirement.

Motion granted.

Procedural Posture(s): Preliminary Hearing or Grand Jury Proceeding Motion or Objection.

West Headnotes (28)

[1] Indictments and Charging

Instruments Presumptions and burden of proof

The district court takes the allegations in the indictment as true for the purpose of considering a defendant's motion to dismiss.

[2] Sentencing and Punishment Physical injury and degree thereof

Serious personal injury is a sentencing consideration for Nebraska's first-degree sexual assault offense, not an element of the crime. Neb. Rev. Stat. § 28-319(2).

1 Case that cites this headnote

[3] Indictments and Charging

Instruments Act or Omission Constituting Offense

An indictment must allege that the defendant performed acts which, if proven, constitute the violation of law for which he is charged.

[4] Indictments and Charging

Instruments Sufficiency of accusation

If the acts alleged in the indictment do not constitute a violation of law, the indictment is properly dismissed.

[5] Indictments and Charging

Instruments Nature, Elements, and Incidents of Offenses in General

Indictments and Charging

Instruments Sufficiency of accusation

An indictment is insufficient only if it omits an essential element of the offense.

[6] Mental Health Offenses and prosecutions

Looking past the four corners of indictment of defendant for failing to register as a sex offender was proper on defendant's motion to dismiss that argued that his duty to register expired prior to the events alleged in the indictment; both defendant and government invited the court to consider facts outside the indictment, and defendant's defense that his duty to register had expired prior to the events was a pure question of law, based on undisputed facts, and thus could be resolved without a trial on the merits.

[7] **Indictments and Charging**

Instruments Construction as a whole

Ordinarily, a court does not look beyond the four corners of the indictment when judging its sufficiency.

[8] **Mental Health** Effect of assessment or determination; notice and registration

Tier III sex offenders under Sex Offender Registration and Notification Act (SORNA), the most egregious category, must register for life. 34 U.S.C.A. § 20913(a)(3).

2 Cases that cite this headnote

[9] **Mental Health** Persons and offenses included

Two analytical approaches apply to situations when comparing prior convictions with the generic or federal offenses listed in statutes requiring a predicate offense, like Sex Offender Registration and Notification Act (SORNA), the categorical approach and the circumstance-specific approach. 34 U.S.C.A. § 20911 et seq.

1 Case that cites this headnote

[10] **Sentencing and Punishment** Nature, degree, or seriousness of other misconduct

“Categorical approach” for comparing prior convictions with the generic or federal offenses listed in statutes requiring a predicate offense compares the elements of a prior offense with the elements of the listed offense; this approach

disregards the facts, or “means,” of a prior conviction and focuses on the elements of the crimes at issue and only if the elements of the prior offense are the same as, or narrower than, the elements of the listed offense, does the prior offense qualify as the listed offense.

1 Case that cites this headnote

[11] **Sentencing and Punishment** Nature, degree, or seriousness of other misconduct

“Circumstance-specific approach” for comparing prior convictions with the generic or federal offenses listed in statutes requiring a predicate offense requires a court to consider the facts behind the offense of conviction and ask if the offense, as committed, satisfies the elements of the listed offense.

[12] **Mental Health** Persons and offenses included

Even if Nebraska statute governing first-degree sexual assault was divisible, categorical approach, rather than the modified categorical approach, applied to issue of whether defendant's conviction under Nebraska statute was comparable to or more severe than federal crimes of aggravated sexual abuse or sexual abuse, as would render defendant a tier III offender under Sex Offender Registration and Notification Act (SORNA) with a lifetime duty to register; charging information and amended information, to which defendant pled guilty, listed two alternative subsections for lack-of-consent requirement and there was no other material to clarify applicable subsections, defendant and government agreed that the categorical approach applied, and the weight of authority outside the Eighth circuit applied such approach. 18 U.S.C.A. §§ 2241, 2242; 34 U.S.C.A. § 20911 et seq.

2 Cases that cite this headnote

[13] **Mental Health** Persons and offenses included

For purposes of Sex Offender Registration and Notification Act's (SORNA) Tier III provisions, the word "comparable" implies the offense of conviction need not be identical to a federal offense listed in the section. 34 U.S.C.A. § 20911(4)(A).

1 Case that cites this headnote

[14] Sentencing and Punishment ↗ Nature, degree, or seriousness of other misconduct

When comparing prior convictions under an alternatively-phrased statute with the generic or federal offenses listed in statutes requiring a predicate offense, a court's first task is to determine whether its listed items are elements or means; "elements" are the constituent parts of a crime's legal definition, the things the prosecution must prove to sustain a conviction, and "means," by contrast, are the factual methods of committing an element of an offense.

[15] Sentencing and Punishment ↗ Nature, degree, or seriousness of other misconduct

For purposes of determining what is an element or a means in an alternatively-phrased statute when comparing prior convictions with the generic or federal offenses listed in statutes requiring a predicate offense, a crime's elements are what a jury must find beyond a reasonable doubt to convict a defendant.

[16] Sentencing and Punishment ↗ Nature, degree, or seriousness of other misconduct

For purposes of determining what is an element or a means in an alternatively-phrased statute when comparing prior convictions with the generic or federal offenses listed in statutes requiring a predicate offense, the "elements" are what a defendant must admit to when he or she pleads guilty at a plea hearing.

[17] Sentencing and Punishment ↗ Nature, degree, or seriousness of other misconduct

For purposes of determining what is an element or a means in an alternatively-phrased statute when comparing prior convictions with the generic or federal offenses listed in statutes requiring a predicate offense, the "means," or the factual methods of committing an element of an offense, have no legal effect or consequence under the categorical approach.

[18] Sentencing and Punishment ↗ Nature, degree, or seriousness of other misconduct

A statute that lists alternative elements of a crime is "divisible," and if a statute is divisible, a court must review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element, along with the others, with those of the generic crimes or federal offenses listed in statutes requiring a predicate offense; this is known as the "modified categorical approach".

[19] Sentencing and Punishment ↗ Nature, degree, or seriousness of other misconduct

A statute that lists alternative means to commit a crime is "indivisible"; if a statute is indivisible, a court ignores the facts of the prior conviction and inquires, under the categorical approach, only whether the elements of the state crime and the generic offense make the requisite match to federal or generic offenses listed in statutes requiring a predicate offense.

[20] Sentencing and Punishment ↗ Nature, degree, or seriousness of other misconduct

If the alternatives listed in a statute for a crime correspond to different penalties, they are elements rather than means, for purposes of determining whether categorical or modified-categorical approach applied to a comparison of prior convictions with the generic or federal offenses listed in statutes requiring a predicate offense.

[21] Sentencing and Punishment  Nature, degree, or seriousness of other misconduct

If state law does not answer the question of whether a statute is divisible or indivisible, a federal court may “peek” at the record of the prior conviction for the limited purpose of determining whether the listed items are elements of the offense for purposes of determining whether categorical or modified-categorical approach applies to a comparison of prior convictions with the generic or federal offenses listed in statutes requiring a predicate offense; if an indictment and the corresponding jury instructions list each statutory alternative, that is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt, and conversely, where these documents reference only one statutory alternative, the alternatives are elements.

[22] Mental Health  Persons and offenses included

For purposes of duty to register as a sex offender, Nebraska's first-degree sexual assault statute has one set of elements and is therefore indivisible for purposes of comparing prior convictions of the offense with the generic or federal offenses listed in statutes requiring a predicate offense. Neb. Rev. Stat. § 28-319(1).

[23] Mental Health  Persons and offenses included

For purposes of sex offender registration requirement, when a statute is divisible, the court must review a limited class of record materials to identify the specific elements, from among the statutory alternatives, upon which the defendant's conviction rests in order to compare them to prior convictions with the generic or federal offenses listed in statutes requiring a predicate offense.

[24] Sentencing and Punishment  Nature, degree, or seriousness of other misconduct

For a plea-based conviction, the materials that court can review to identify the specific elements, from among the statutory alternatives of an divisible statute, for purposes of comparing prior convictions with the generic or federal offenses listed in statutes requiring a predicate offense, are the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.

[25] Mental Health  Persons and offenses included

Defendant's conviction for first-degree sexual assault under Nebraska law was not comparable to federal sexual abuse charge, for purposes of determining whether defendant's sexual assault conviction formed the basis of a lifetime duty to register under Sex Offender Registration and Notification Act (SORNA) as a Tier III offender, even though some subsections of the statutes appeared to be comparable, including the requirement of sexual penetration; Nebraska's definition of “without consent” reached situations where the victim withheld consent, whether verbally or by conduct, and situations where consent was obtained through deceptions, while federal sexual abuse charge did not cover those circumstances absent threats, fear, or incapacitation. 18 U.S.C.A. § 2242; 34 U.S.C.A. § 20911 et seq.; Neb. Rev. Stat. § 28-319(1).

[26] Mental Health  Effect of assessment or determination; notice and registration

Defendant's conviction for first-degree sexual assault under Nebraska law was not comparable to federal aggravated sexual abuse charge, and therefore defendant's sexual assault conviction did not form the basis of a lifetime duty to register under Sex Offender Registration and Notification Act (SORNA) as a Tier III offender; federal statute required more than the lack of consent required under

Nebraska statute and proscribed only discrete categories of nonconsensual sex that involved aggravating circumstances, and absent one of those aggravating circumstances, it did not prohibit nonconsensual sex. 18 U.S.C.A. § 2241; 34 U.S.C.A. § 20911 et seq.; Neb. Rev. Stat. § 28-319(1).

- [27] **Sex Offenses** ➡ Degrees and aggravated sex offenses in general

Statute governing aggravated sexual abuse charge proscribes only discrete categories of nonconsensual sex that involve aggravating circumstances. 18 U.S.C.A. § 2241.

- [28] **Sex Offenses** ➡ Degrees and aggravated sex offenses in general

Nebraska's first-degree sexual assault statute covers all nonconsensual sexual penetration, whether or not aggravating circumstances are present. Neb. Rev. Stat. §§ 28-318(8), 28-319(1).

1 Case that cites this headnote

the reasons set forth below, the Court grants Church's motion to dismiss.

II. BACKGROUND

[1] The Court takes the allegations in the indictment as true for the purpose of considering Church's motion to dismiss. *See Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 343 n.16, 72 S.Ct. 329, 96 L.Ed. 367 (1952). The following facts are either alleged in the indictment or submitted in the parties' briefing. *See* Def.'s Br. Supp. Mot. Dismiss Indictment 1-2, ECF No. 23-1; Gov't's Resist. Def.'s Mot. Dismiss Indictment 1-2, ECF No. 34.

[2] On June 22, 2001, Church was charged with first-degree sexual assault under Nebraska law. ECF No. 23-1 at 2. The information alleged that Church "did subject another person to sexual penetration without consent of the victim; knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct." *Id.*; Def.'s Ex. A Supp. Mot. Dismiss Indictment 2, ECF No. 23-2.¹ *880 Church pleaded no contest to the charge. ECF No. 23-1 at 2; ECF No. 23-2 at 6. He entered his plea to an amended version of the indictment with handwritten modifications indicating the crime was an attempt² and that it caused serious personal injury to the victim.³ ECF No. 23-1 at 2; ECF No. 23-2 at 5; *see* Def.'s Ex. B Supp. Mot. Dismiss Indictment, ECF No. 23-3. Church was sentenced to 15 to 30 months of imprisonment. ECF No. 23-1 at 2; ECF No. 23-2 at 7. He was released from prison on September 4, 2003. ECF No. 23-1 at 2; Def.'s Ex. C Supp. Mot. Dismiss Indictment, ECF No. 23-4.

On September 25, 2019—roughly sixteen years after his release from prison—Church was indicted in the Southern District of Iowa on one count of failure to register as a sex offender. ECF No. 2. The indictment alleges Church was required to register as a sex offender under the Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 20911 et seq. *Id.* It further alleges that, as early as April 2019 and continuing to on or about September 2019, Church traveled in interstate commerce from Idaho to Iowa after failing to register. *Id.*

Church now moves to dismiss the indictment. ECF No. 23; *see also* Def.'s Reply Br. Supp. Mot. Dismiss Indictment, ECF No. 35. The Government resists. ECF No. 34; *see also* Gov't's Sur-Reply Def.'s Mot. Dismiss Indictment, ECF No. 36.

Attorneys and Law Firms

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Bradley Ryan Hansen, Federal Public Defenders Office, Sioux City, IA, for Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS INDICTMENT

Rebecca Goodgame Ebinger, United States District Judge

I. INTRODUCTION

Defendant Scott Lowell Church was indicted on one count of failure to register as a sex offender. Redacted Indictment, ECF No. 2. He now moves to dismiss the indictment, arguing his duty to register expired prior to the events alleged in the indictment. Def.'s Mot. Dismiss Indictment, ECF No. 23. For

III. LEGAL STANDARD

[3] [4] [5] A criminal indictment must include “a plain, concise, and definite written statement of the essential facts constituting the offense charged.” Fed. R. Crim. P. 7(c)(1). “[A]n indictment must allege that the defendant performed acts which, if proven, constitute the violation of law for which he is charged. If the acts alleged in the indictment do not constitute a violation of law, the indictment is properly dismissed.” *United States v. Polychron*, 841 F.2d 833, 834 (8th Cir. 1988). A criminal defendant may move to dismiss an indictment for “failure to state an offense.” Fed. R. Crim. P. 12(b)(3)(B)(v). Generally, an indictment is insufficient only if it omits an essential element of the offense. *United States v. Hance*, 501 F.3d 900, 906 (8th Cir. 2007).

[6] [7] Ordinarily, a court does not look beyond the four corners of the indictment when judging its sufficiency. See *United States v. Farm & Home Sav. Ass'n*, 932 F.2d 1256, 1259 n.3 (8th Cir. 1991). But here, both parties invite the court to consider *881 facts outside the indictment. See ECF No. 23-1 at 2–3; ECF No. 34 at 1–2. Although the parties do not address the issue, other courts considering the sufficiency of SORNA-based indictments have reasoned that looking to extrinsic evidence is permissible when the material facts are undisputed and the challenge presents a pure question of law. *United States v. Grant*, No. 1:17-CR-236-AT-AJB, 2018 WL 4516008, at *2 (N.D. Ga. July 4, 2018), *report and recommendation adopted*, No. 1:17-CR-0236-AT, 2018 WL 4140870 (N.D. Ga. Aug. 30, 2018) (addressing whether a defendant had a duty to register under SORNA in a pretrial motion to dismiss the indictment because it was a pure legal question based on undisputed facts); *United States v. Marrowbone*, No. 3:14-CR-30071-RAL, 2014 WL 6694781, at *2 (D.S.D. Nov. 26, 2014) (same); cf. *United States v. Brown*, No. 11-174, 2012 WL 604185, at *4 (W.D. Pa. Feb. 24, 2012) (denying a defendant's motion to dismiss an indictment because the sufficiency of the indictment turned on “factual questions [that] cannot be addressed in the context of a motion to dismiss the indictment”). The Eighth Circuit has not addressed this issue.

The Court finds the reasoning of other district courts persuasive, and concludes that looking past the four corners of the indictment is proper here. As the district court noted in *Grant*, the Federal Rules of Criminal Procedure provide that “[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits.” 2018 WL 4516008, at *1 (alteration in original) (quoting Fed. R. Crim. P. 12(b)(1)). Consistent with

this rule, Church may raise his challenge to the indictment at this stage because it presents a pure question of law, based on undisputed facts, and thus it can be resolved without a trial on the merits. As the court noted in *Marrowbone*, “if [the defendant's] claim is valid, it would be unfair to [the defendant] and a waste of judicial resources to begin a trial on an indictment that would be dismissed on a legal issue.” 2014 WL 6694781, at *2. Therefore, the Court will accept the parties' invitation to look outside the indictment in ruling on Church's motion to dismiss.

IV. DISCUSSION

Church argues the indictment is legally insufficient because his duty to register as a sex offender expired before his alleged failure to register. ECF No. 23-1 at 3–10.⁴ The Government argues Church had a duty to register at the time of the events alleged in the indictment, and he failed to do so. ECF No. 34 at 2. The parties' dispute stems from their disagreement about Church's sex offender classification under SORNA.

[8] SORNA requires sex offenders to register, and to keep their registrations current, in the jurisdictions where they reside, work, and attend school. 34 U.S.C. § 20913(a). The length of a sex offender's duty to register depends on his or her tier classification. See *id.* § 20915(a). Tier III offenders—the “most egregious” category—must register for life. *United States v. Mulverhill*, 833 F.3d 925, 928 (8th Cir. 2016) (internal quotation marks omitted) (quoting *United States v. Morales*, 801 F.3d 1, 3 (1st Cir. 2015)); 34 U.S.C. § 20913(a)(3). Tier II offenders must register for twenty-five years. *882 34 U.S.C. § 20913(a)(2). And tier I offenders must register for fifteen years. *Id.* at § 20913(a)(1).

SORNA defines the tiers in part by reference to other federal statutes. A tier III sex offender is one whose offense of conviction is a felony that is (A) “comparable to or more severe than” (i) aggravated sexual abuse or sexual abuse as defined in 18 U.S.C. §§ 2241 and 2242, respectively, or (ii) abusive sexual contact as defined in 18 U.S.C. § 2244 against a minor under the age of thirteen; (B) involves kidnapping a minor; or (C) occurs when the offender is already a tier II offender. 34 U.S.C. § 20911(4). Tier II comprises sex offenders with certain prior felony convictions against minors and those who commit felonies while tier I offenders. *Id.* § 20911(3). Tier I is a catchall for sex offenders who do not qualify as tier II or tier III offenders. *Id.* § 20911(2).

Church contends he is a tier I offender, meaning his duty to register lasted only 15 years and expired in September 2018—several months before the events alleged in the indictment. ECF No. 23-1 at 3–10; *see* ECF No. 2. The Government argues Church is a tier III offender who must register for life. ECF No. 34 at 3–6. Relying on subsection (A)(i) of the tier III definition, the Government argues that Church's conviction for first-degree sexual assault in Nebraska is comparable to or more severe than aggravated sexual abuse or sexual abuse as defined in 18 U.S.C. §§ 2241 and 2242. *Id.*; *see* 34 U.S.C. § 20911(4)(A)(i). Church does not dispute that he is a sex offender under SORNA, and neither party argues Church is a tier II offender. Therefore, the sufficiency of the indictment turns on whether Church's Nebraska conviction is comparable to or more severe than the federal crimes of aggravated sexual abuse or sexual abuse, as they are defined in 18 U.S.C. §§ 2241 and 2242.

[9] [10] [11] Federal courts generally use one of two analytical approaches when comparing prior convictions with the generic or federal offenses listed in statutes requiring a predicate offense, like SORNA. *United States v. Berry*, 814 F.3d 192, 195 (4th Cir. 2016); *see Nijhawan v. Holder*, 557 U.S. 29, 34, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009). One is the “categorical approach,” which compares the “elements” of a prior offense with the elements of the listed offense. *See Mathis v. United States*, — U.S. —, 136 S. Ct. 2243, 2248, 195 L.Ed.2d 604 (2016); *see also Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (holding a state burglary conviction qualifies as “burglary” under the Armed Career Criminal Act if its statutory elements match the generic offense of burglary). This approach disregards the facts, or “means,” of a prior conviction and focuses on the elements of the crimes at issue. *Mathis*, 136 S. Ct. 2248. Only if the elements of the prior offense are the same as, or narrower than, the elements of the listed offense, does the prior offense qualify as the listed offense. *Id.* The other approach, called “circumstance-specific,” requires a court to consider the facts behind the offense of conviction and ask if the offense, as committed, satisfies the elements of the listed offense. *See Nijhawan*, 557 U.S. at 40, 129 S.Ct. 2294 (holding that whether a prior fraud or deceit offense involves loss in excess of \$10,000 to the victim and thus qualifies as an aggravated felony triggering deportation under the Immigration and Nationality Act depends on the specific circumstances of the offense).

Neither the Supreme Court nor the Eighth Circuit has decided which approach applies when comparing prior sex offenses

with the federal offenses listed in 34 U.S.C. § 20911(4)(A)(i). *See Mulverhill*, 833 F.3d at 929–30. Notably, the Eighth Circuit *883 has held courts should apply the circumstance-specific approach to decide whether a prior offense involves “conduct that by its nature is a sex offense against a minor,” under a separate provision of SORNA. *United States v. Hill*, 820 F.3d 1003, 1005 (8th Cir. 2016) (quoting 34 U.S.C. 20911(7)(I)). But, as the Eighth Circuit has since emphasized, *Hill* did not resolve which approach governs the provisions of SORNA applicable here. *Mulverhill*, 833 F.3d at 929–30; *see United States v. Hall*, 772 F. App'x 375, 375 (8th Cir. 2019) (unpublished) (suggesting the categorical approach applies without deciding the issue); *see also Nijhawan*, 557 U.S. at 37–38, 129 S.Ct. 2294 (observing that different provisions of the same statute may call for different approaches).

[12] Relying on an apparent consensus among circuits that have decided the issue—all of whom have held the categorical approach applies in this context—both parties ask the Court to apply the categorical approach. ECF No. 23 at 5; ECF No. 34 at 3; ECF No. 35 ¶ 1; *see United States v. Barcus*, 892 F.3d 228, 231–32 (6th Cir. 2018); *United States v. Young*, 872 F.3d 742, 746 (5th Cir. 2017); *Berry*, 814 F.3d at 197; *United States v. White*, 782 F.3d 1118, 1135 (10th Cir. 2015); *Morales*, 801 F.3d at 6; *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1133 (9th Cir. 2014); *United States v. Taylor*, 644 F.3d 573, 576–77 (7th Cir. 2011). Given the parties' agreement and the weight of authority outside the Eighth Circuit, the Court will apply the categorical approach.

[13] To apply the categorical approach, the Court must compare the elements of Church's offense of conviction—first-degree sexual assault under Nebraska law—to the federal crimes listed in 34 U.S.C. § 20911(4)(A)(i). Ordinarily, the elements of the offense of conviction must be the same as, or narrower than, those of the federally defined offense. *Mathis*, 136 S. Ct. at 2248. But SORNA's tier III provisions—unlike other statutory provisions which require the categorical approach—use the word “comparable.” 34 U.S.C. § 20911(4)(A); *cf. Taylor*, 495 U.S. at 600–02, 110 S.Ct. 2143. As other courts have noted, the word “comparable” implies the offense of conviction need not be “identical” to a federal offense listed in § 20911(4)(A). *United States v. Coleman*, 681 F. App'x 413, 416 (5th Cir. 2017) (unpublished). Instead, crimes may be comparable even if the elements of the offense of conviction are “slightly broader” than those of the listed offense. *Id.* (internal quotation marks omitted) (quoting *United States v. Forster*, 549 F. App'x 757, 769 (10th Cir. 2013) (unpublished)); *see Morales*, 801 F.3d

at 7 (noting the word “comparable” may allow for “some flexibility in examining the offenses”).

To identify the elements of each crime, the Court begins with the statutory definitions. Looking first to the federal offenses listed in 34 U.S.C. § 20911(4)(A)(i), there are two methods of committing the offense of aggravated sexual abuse under 18 U.S.C. § 2241: First, a person who “knowingly causes another person to engage in a sexual act—(1) by using force against that other person; or—(2) by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping” commits aggravated sexual abuse. 18 U.S.C. § 2241(a). Second, a person who “knowingly ... renders another person unconscious and thereby engages in a sexual act with that other person” or “administers to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance,” and as a result “substantially impairs the ability of that other person to appraise or control conduct” and then “engages in a sexual act with that other person” commits aggravated sexual abuse. *Id.* § 2241(b).

***884** As for sexual abuse under 18 U.S.C. § 2242, a person commits this offense if he or she “knowingly ... (1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping)” or “(2) engages in a sexual act with another person if that other person is ... (A) incapable of appraising the nature of the conduct ... or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.” 18 U.S.C. § 2242.

With these definitions in mind, the Court turns to Church's offense of conviction. Church was convicted of first-degree sexual assault under Nebraska law. At the time of his conviction, Nebraska's first-degree sexual assault statute provided in relevant part:

- (1) Any person who subjects another person to sexual penetration (a) without consent of the victim, or (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or (c)

when the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree.

Neb. Rev. Stat. § 28-319(1) (Reissue 1995).⁵ The term “without consent” was defined as:

- (a)(i) The victim was compelled to submit due to the use of force or threat of force or coercion, or (ii) the victim expressed a lack of consent through words, or (iii) the victim expressed a lack of consent through conduct, or (iv) the consent, if any was actually given, was the result of the actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor;
- (b) The victim need only resist, either verbally or physically, so as to make the victim's refusal to consent genuine and real and so as to reasonably make known to the actor the victim's refusal to consent; and
- (c) A victim need not resist verbally or physically where it would be useless or futile to do so.

Neb. Rev. Stat. § 28-318(8) (Reissue 1995).

The parties disagree on the elements of Nebraska's first-degree sexual assault statute. Church argues the statute has only one set of elements, making it “indivisible.” ECF No. 23-1 at 7–9. The Government argues the statute has alternative elements—only some of which apply here—making it “divisible.” ECF No. 36 at 1–2.⁶ Additionally, the parties disagree on ***885** how the elements of the Nebraska statute compare with the federal crimes listed in 34 U.S.C. § 20911(4)(A)(i). Church argues the elements of the Nebraska statute are broader than those of aggravated sexual abuse and sexual abuse under 18 U.S.C. §§ 2241 and 2242. ECF No. 23 at 6–7, 9–10; ECF No. 35 ¶¶ 5–7. The Government contends the Nebraska statute covers the same ground as both aggravated sexual abuse and sexual abuse, making it comparable to both statutes. ECF No. 34 at 5–6; ECF No. 36 at 3–4.

For the reasons discussed below, the Court concludes Nebraska's first-degree sexual assault statute has only one set of elements, meaning it is indivisible. Comparing these statutory elements to the elements of aggravated sexual abuse and sexual abuse under 18 U.S.C. §§ 2241 and 2242, the Court further concludes that Nebraska's statute reaches

a considerably larger range of conduct than both federal statutes. Because Nebraska's first-degree sexual assault statute is not comparable or more severe than either of the crimes listed in 34 U.S.C. § 20911(4)(A)(i), Church is a tier I offender whose duty to register under SORNA had expired at the time of the events alleged in the indictment.

A. Nebraska's First-Degree Sexual Assault Statute Is Indivisible.

Church argues the Nebraska statute has two elements: 1) sexual penetration, and 2) lack of valid consent. ECF No. 23-1 at 8. He argues that subsections (a), (b), and (c) are alternative means of satisfying the second element. *Id.* The Government disagrees, arguing that subsections (a), (b), and (c) create three different crimes. ECF No. 36 at 1–2.

[14] [15] [16] [17] Nebraska's first-degree sexual assault statute is "alternatively phrased," meaning it lists multiple items disjunctively. *Mathis*, 136 S. Ct. at 2256. When faced with an alternatively phrased statute, a court's first task is "to determine whether its listed items are elements or means." *Id.* "Elements" are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.' " *Id.* at 2248 (quoting Black's Law Dictionary 634 (10th ed. 2014)). At trial, a crime's elements are what a jury must find beyond a reasonable doubt to convict a defendant. *Id.* At a plea hearing, the elements are what a defendant must admit to when he or she pleads guilty. *Id.* "[M]eans," by contrast, are the factual methods of committing an element of an offense. *See id.* at 2248–49. They have no legal effect or consequence under the categorical approach. *Id.* at 2248.

[18] A statute that lists alternative elements is "divisible." *Id.* at 2249. If a statute is divisible, a court must "review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with the others) with those of the generic crime." *Id.* at 2256. This is known as the "modified categorical approach." *Id.* at 2249.

[19] A statute that lists alternative means is "indivisible." *Id.* at 2248–49. If a statute is indivisible, a court ignores the facts of the prior conviction and inquires "only whether the elements of the state crime and the generic offense make the requisite match." *Id.* at 2256 (emphasis omitted).

[20] [21] There are a few ways to tell whether a statute is divisible. First, a state court decision might answer

the question. *Id.* In *Mathis*, for example, Iowa's burglary statute was indivisible because an Iowa Supreme Court case described the alternative components—the types of premises to *886 which the statute applied—as "'alternative method[s]' of committing one offense, so that a jury need not agree whether the burgled location was a building, other structure, or vehicle." *Id.* (alteration in original) (quoting *State v. Duncan*, 312 N.W.2d 519, 523 (Iowa 1981)). Second, the statute itself might resolve the issue. *Id.* For example, if the statutory alternatives correspond to different penalties, they are elements. *Id.* Third, if state law does not answer the question, a federal court may "peek" at the record of the prior conviction for the "limited purpose of determining whether the listed items are elements of the offense." *Id.* at 2256–57 (alterations omitted) (internal quotation marks and citation omitted). If, for example, an indictment and the corresponding jury instructions list each statutory alternative, "[t]hat is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt." *Id.* at 2257. Conversely, where these documents reference only one statutory alternative, the alternatives are elements. *Id.*

[22] Here, Nebraska's statute is indivisible. To begin, the Nebraska Supreme Court provides guidance. In *State v. McCurdy*, the Nebraska Supreme Court described the elements of § 28-319 as follows: "To prove guilt under § 28-319, it must be shown that the offender subjected the victim to sexual penetration along with one of the three alternatives set forth in § 28-319(1)(a), (b), and (c)." 301 Neb. 343, 918 N.W.2d 292, 299 (2018). This description suggests that the alternative items listed in the Nebraska statute are not elements the prosecution must prove, but rather alternative means of satisfying a single element, which Church aptly calls "lack of valid consent." ECF No. 23-1 at 8. The Nebraska Supreme Court's analysis in *McCurdy* confirms this interpretation. The prosecutor had charged the defendant under subsections (a) and (b) of § 28-319(1), and the judge had instructed the jury on both alternatives. 918 N.W.2d at 299. The defendant appealed the sufficiency of the evidence, and the Nebraska Supreme Court held the defendant's conviction should be affirmed so long as the evidence supported a conviction under either subsection (a) or subsection (b). *Id.* at 300.

The other *Mathis* factors compel the same conclusion. Subsections (a), (b), and (c) carry the same penalties, which suggests they are alternative means of committing a singular

offense and do not define separate crimes. *See Mathis*, 136 S. Ct. at 2256; Neb. Rev. Stat. § 28-319. And the record of Church's prior conviction demonstrates that subsections (a), (b), and (c) are alternative means of satisfying a single element. As in *McCurdy*, both the original information and the amended information to which Church pleaded guilty list subsections (a) and (b), rather than specifying which one Church violated. ECF No. 23-2 at 2, 5; *McCurdy*, 918 N.W.2d at 299. Listing out the statutory alternatives in this manner “is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt.” *Id.* at 2257.

The Government disputes that § 28-319 is indivisible. Relying on *State v. Rossbach*, it argues that Nebraska's first-degree sexual assault statute lists three separate crimes: a) sexual penetration done without the consent of the victim; b) sexual penetration with a mentally or physically incapacitated victim; and c) sexual penetration by a nineteen-year-old where the victim is between twelve and sixteen years old. ECF No. 36 at 1–2 (citing 264 Neb. 563, 650 N.W.2d 242, 249–50 (Neb. 2002)).

Rossbach does not support the Government's argument. *Rossbach* held a victim's *887 lack of consent is not an element of first-degree sexual assault when the victim is incapable of resisting or appraising the nature of his or her conduct. 650 N.W.2d at 250. That holding clarifies the meaning of subsection (b)—not whether subsections (a), (b), and (c) are elements or means. Elsewhere in the opinion, the court states: “There are three distinct ways in which a perpetrator can commit the offense of first degree sexual assault under § 28–319(1).” *Id.* at 249. In other words, first-degree sexual assault is a singular crime that may be committed in alternative ways, rather than three separate crimes with distinct elements. The *Rossbach* holding is limited: a defendant may be convicted under subsection (b) even if the prosecution does not prove lack of consent. *See id.* at 250. This holding does not preclude a prosecutor from charging multiple subsections in the alternative—as happened in Church's case and in *McCurdy*. Thus, a prosecutor does not have to prove any one subsection beyond a reasonable doubt. *See* ECF No. 23-2 at 2, 5; *McCurdy*, 918 N.W.2d at 299.

[23] [24] Putting *Rossbach* aside, there is also a more fundamental problem with the Government's argument that the Nebraska statute is divisible. Even assuming the statute is divisible, the Government has not explained how the Court

should—or even could—apply the modified categorical approach to identify its elements. When a statute is divisible, the court must review a limited class of record materials to identify the specific elements—from among the statutory alternatives—upon which the defendant's conviction rests. *Mathis*, 136 S. Ct. at 2249. For a plea-based conviction, these materials are “the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Shepard v. United States*, 544 U.S. 13, 16, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005). Here, the only *Shepard* documents in the record are the charging information and the amended information to which Church pleaded guilty. ECF No. 23. Both documents list the alternative subsections (a) and (b) of Nebraska's statute. As such, even if the statute were divisible, the Court would have no basis for narrowing down the elements applicable to Church's conviction, beyond the elimination of subsection (c). And with no record materials to clarify the applicable subsections, two statutes cannot be considered comparable under the modified categorical approach. *See United States v. Montanez-Trejo*, 708 F. App'x 161, 168 (5th Cir. 2017) (unpublished) (holding the defendant's conviction for first-degree sexual assault under Neb. Rev. Stat. § 28-319 “does not qualify under the generic offense of sexual abuse of a minor given that the lone *Shepard*-approved document in the record does not clarify the subsection under which he was convicted” and declining to determine the divisibility of the statute).

First-degree sexual assault in Nebraska has two elements: 1) sexual penetration, and 2) lack of valid consent.⁷ Subsections (a), (b), and (c) list alternative means of *888 satisfying the second element. Because neither party disputes that Nebraska's definition of “sexual penetration” is comparable to the term “sexual act” in §§ 2241 and 2242, the only dispute is whether the second element of Nebraska's statute—lack of valid consent—criminalizes conduct that §§ 2241 and 2242 do not reach.

B. Nebraska's First-Degree Sexual Assault Statute Is Not Comparable to or More Severe Than the Federal Crimes of Aggravated Sexual Abuse or Sexual Abuse.

The parties primarily dispute how Nebraska's first-degree sexual assault statute compares with sexual abuse under § 2242, and only briefly discuss how it compares with aggravated sexual abuse under § 2241. The Court separately compares the Nebraska statute with these federal offenses.

1. The Nebraska statute is not comparable to sexual abuse under 18 U.S.C. § 2242.

[25] Church offers two reasons why Nebraska's first-degree sexual assault statute is not comparable to the federal crime of sexual abuse, as defined in 18 U.S.C. § 2242. ECF No. 23. First, he points to subsection (iv) of Nebraska's "without consent" definition, under which a person acts "without consent" if he or she obtains consent through deception. ECF No. 23; Neb. Rev. Stat. § 28-318(8)(iv). He argues the same conduct—sexually penetrating a person after obtaining that person's consent through deception—would not violate 18 U.S.C. § 2242. ECF No. 23. Second, and more broadly, Church argues that Nebraska's statute covers more conduct than § 2242 because it generally prohibits nonconsensual sexual penetration, whereas § 2242 proscribes only discrete categories of nonconsensual sex involving threats, fear, or victim incapacitation. ECF No. 35 ¶ 6.

In response, the Government argues the conduct covered by § 2242—engaging in a sexual act with a person who is physically or mentally incapacitated, or inducing a person to engage in a sexual act through threats or fear—is a "clear match" with Nebraska's "without consent" definition. ECF No. 34 at 6. Responding to Church's argument about deception-based consent, the Government contends that § 2242 forbids sexually penetrating a person after obtaining that person's consent through deception because it prohibits engaging in a sexual act with someone who is "incapable of appraising the nature of the conduct." *Id.*; ECF No. 36 at 3–4. Finally, the Government asserts that, even if there is a slight variation between the statutes, they are still "comparable," which is all that SORNA requires. ECF No. 34 at 6; ECF No. 36 at 4.

As some courts have observed, the text of § 2242 does not include a general prohibition on nonconsensual sex. *See, e.g., United States v. James*, 810 F.3d 674, 679 (9th Cir. 2016) ("Noticeably absent from 18 U.S.C. § 2242 is a provision punishing non-consensual intercourse."). Instead, it proscribes three discrete categories of inherently nonconsensual sexual acts: (1) sexual acts accomplished through making threats or instilling fear in the victim, where such threats or fear do not involve death, serious bodily injury, or kidnapping; (2)(A) sexual acts with persons who are "incapable of appraising the nature of the conduct"; and (2)(B) sexual acts with persons who are "physically incapable

of declining participation in, or communicating unwillingness in, that sexual act." 18 U.S.C. § 2242.

Some provisions of Nebraska's first-degree sexual assault statute appear comparable to § 2242. For example, subsection (b) of the Nebraska statute—which prohibits knowingly engaging in sexual penetration *889 with a victim who is "mentally or physically incapable of resisting or appraising the nature of his or her conduct"—tracks subsection (2) of § 2242, which prohibits sexual acts with incapacitated persons. *Compare* Neb. Rev. Stat. § 28-319(1)(b), with 18 U.S.C. § 2242(2); *see United States v. Bruguiere*, 735 F.3d 754, 760 (8th Cir. 2013) (en banc) (referring to § 2242(2) as "the victim-incapacity element of the offense"). Similarly, Nebraska's prohibition on sexual penetration accomplished without consent through force, threat of force, or coercion mirrors subsection (1) of § 2242, which proscribes sexual acts accomplished through threats or fear. *Compare* Neb. Rev. Stat. § 28-319(1)(a), and Neb. Rev. Stat. § 28-318(8)(a)(i), with 18 U.S.C. § 2242(1).

But other provisions of the Nebraska statute have no apparent analogue in § 2242. Namely, Nebraska's definition of "without consent" reaches situations where the victim withdraws consent—whether verbally or by conduct—and situations where consent is obtained through deception. Neb. Rev. Stat. § 28-319(1)(a); Neb. Rev. Stat. § 28-318(8)(a)(ii)–(iv). The plain language of § 2242 does not appear to reach these situations—at least absent threats, fear, or incapacitation—and some courts have concluded it does not. *See Cabrera-Gutierrez*, 756 F.3d at 1134 ("Nonconsensual intercourse with a mentally and physically capable individual not involving a threat or the use of fear might violate Or.Rev.Stat. § 163.425, but it would not violate 18 U.S.C. § 2242."); *cf. United States v. Villarreal*, No. CR 10-50082-JLV, 2012 WL 683356, at *9 (D.S.D. Mar. 2, 2012) (reasoning evidence only supported attempt under § 2242 because the defendant did not use force and the victim was awake and un intoxicated at the time of the alleged sexual abuse), *aff'd*, 707 F.3d 942 (8th Cir. 2013).

The Eighth Circuit has not addressed whether § 2242 prohibits all nonconsensual sex. But in summarizing the statutory elements, the Eighth Circuit has implied it does not. In *United States v. Ford*, the Eighth Circuit reviewed the defendant's kidnapping conviction, which the defendant argued was inconsistent with his acquittal at the same trial for sexual abuse under § 2242(2). 726 F.3d 1028, 1029 (8th Cir. 2013). In rejecting this argument, the court discussed the

elements of § 2242(2), and suggested that nonconsensual sex, without more, does not violate the statute:

To convict Ford on the sexual abuse count, the jury had to find all five elements of the offense beyond a reasonable doubt. Excluding the fourth and fifth elements, which concern jurisdiction, the jury might have reasonably doubted any or all of the remaining contested elements. These elements required proof that (1) “Ford … knowingly engage[d] in or attempt [ed] to engage in a sexual act with … Weston;” (2) either “Weston was incapable of appraising the nature of the conduct, or alternatively [that she] was physically incapable of declining participation in or communicating unwillingness to engage in the sexual act;” and (3) either “Ford knew that … Weston was incapable of appraising the nature of the conduct, or alternatively [that he knew that she] was physically incapable of declining participation in or communicating unwillingness to engage in the sexual act.” See 18 U.S.C. § 2242(2). A jury finding of reasonable doubt on any one of those three elements would require acquittal. Thus, it is entirely possible that the jury found beyond a reasonable doubt that “Ford … knowingly engage[d] in or attempt[ed] to engage in a sexual act with … Weston,” but it still acquitted him on the sexual abuse count because it reasonably doubted whether Weston *890 was incapacitated in some way or whether Ford knew that Weston was incapacitated.

Id. at 1032 (alterations in original) (emphasis added). The Eighth Circuit’s conclusion that a lack of incapacitation or knowledge “would require acquittal” implies that subsection (2) of § 2242 does not criminalize nonconsensual sex absent incapacitation. Although the Eighth Circuit addressed only subsection (2), its reasoning suggests that a defendant could not be convicted under subsection (1) absent threats or fear, even if the defendant committed a nonconsensual sex act. By contrast, Nebraska’s first-degree sexual assault statute expressly prohibits sexual penetration done “without consent.” See Neb. Rev. Stat. § 28-319(1)(a); Neb. Rev. Stat. § 28-318(8). It appears, therefore, that Nebraska’s first-degree sexual assault statute criminalizes a significant category of conduct that § 2242 does not reach.

The Government resists this conclusion for several reasons, but none of its arguments explains how § 2242 can be read to encompass nonconsensual sexual acts that do not involve threats, fear, or victim incapacitation. First, the Government asserts in conclusory fashion that § 2242 is a “clear match with Nebraska’s ‘without consent’ element of its sexual assault crime.” ECF No. 34 at 6. The Government provides no

analysis or support for this proposition beyond an inapposite quotation from *Bruguier*. *Id.* (quoting *Bruguier*, 735 F.3d at 762 (noting § 2422(2) covers a “victim’s incapacity or inability to consent”)). This argument does not address how § 2242(2) can be read to cover situations of nonconsent that do not involve incapacity or inability to consent—e.g., nonconsent expressed through words or conduct. See Neb. Rev. Stat. § 28-318(8)(a)(ii)–(iii).

Next, relying on the Nebraska Supreme Court’s decision in *State v. Willis*, the Government argues the Nebraska statute should be read narrowly as a “crime of violence” that requires victims to be “overcome” by threats, force, coercion, or deception. ECF No. 36 at 3 (quoting 223 Neb. 844, 394 N.W.2d 648, 650–51 (1986)). But *Willis* dealt with a prior version of Nebraska’s first-degree sexual assault statute, which provided in relevant part: “Any person who subjects another person to sexual penetration and (a) overcomes the victim by force, threat of force, express or implied, coercion, or deception … is guilty of sexual assault in the first degree.” 394 N.W.2d at 650 (omission in original) (internal quotation marks omitted) (quoting Neb. Rev. Stat. § 28-319(1) (Reissue 1979)). The *Willis* court’s statements about § 28-319 relied on this quoted language, which is no longer part of the statute. See *id.* In 1995, the Nebraska legislature substantially amended § 28-319. See 1995 Neb. Laws L.B. 371 § 4. In doing so, it deleted “overcome” and replaced the “force, threat of force, express or implied, coercion, or deception” language with “without consent.” *Id.* And it added the four-part definition of “without consent” now in effect, which lists deception separately from “force or threat of force or coercion.” *Id.* § 3; *State v. Koperski*, 254 Neb. 624, 578 N.W.2d 837, 842 (1998) (noting the addition of “without consent” to § 28-319(1)(a)). In short, *Willis* relied on now-repealed language from § 28-319 that has no counterpart in the current statute or the version in effect when Church was charged. The Government’s reliance on *Willis* is misplaced.

The Government’s reliance on *State v. Orosco* is misplaced for the same reason. No. A-98-299, 1999 WL 247119 (Neb. Ct. App. Apr. 6, 1999) (unpublished). The defendant there challenged the sufficiency of the evidence supporting his conviction for first-degree sexual assault, arguing “there was no evidence that he overcame [the victims] by force, threat of force, express *891 or implied coercion or deception.” *Id.* at *4 (internal quotation marks omitted). The Nebraska Court of Appeals rejected his argument, finding “there was force, threat of force, coercion, or deception sufficient to support the convictions.” *Id.* As these quotations make clear, the *Orosco*

court looked to the prior version of § 28-319 discussed in *Willis*, although it was repealed years before the defendant's 1997 assaults.

In response to Church's argument that § 2242 has no analogue to Nebraska's prohibition on consent obtained through deception, the Government argues the language of § 2242(2)(A), which prohibits sexual acts with persons who are "incapable of appraising the nature of the conduct," covers the same ground as the Nebraska statute on this point. ECF No. 34 at 6; *see* Neb. Rev. Stat. § 28-318(8)(iv) (defining "without consent" to include situations where consent is obtained through "the actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor"). In its sur-reply, the Government cites two cases for this argument. ECF No. 36 at 3–4. First, it cites *State v. Collins*, where the Nebraska Court of Appeals affirmed a defendant's conviction under § 28-319(1)(b), concluding: "We believe the evidence is ample to establish that [the defendant's] manipulation and deception of [the victim] rendered her incapable of resisting or appraising the real nature of the sexual penetration that he visited upon her during the relevant time period." 7 Neb.App. 187, 583 N.W.2d 341, 352 (1998). Second, it cites *United States v. Vallie*, where the Eighth Circuit reviewed a conviction under § 2242(2)(A) that involved sexual intercourse accomplished through deception. 284 F.3d 917, 919–20 (8th Cir. 2002).

Collins provides only marginal support for the Government's argument. Taken in isolation, the above language from *Collins* might seem to equate deception with incapacity. But *Collins* dealt only with subsection (b) of Nebraska's statute, involving incapacitation, and not the deception provision. 583 N.W.2d at 346; *compare* Neb. Rev. Stat. § 28-319(1)(b), *with* Neb. Rev. Stat. § 28-318(8)(iv). The court's use of the word "deception" was not a reference to the statute; instead, the court used the word to describe how the defendant—"a highly trained psychotherapist who specialized in treating sexually abused youth"—"used the tools and techniques of his trade to mold [two] young girls into his sexual robots." 583 N.W.2d at 352. This form of "manipulation and deception," the court held, rendered the teenage girls "incapable of resisting or appraising the real nature of the sexual penetration," as required by § 28-319(1)(b). *Id. Collins* does not discuss whether other forms of deception—*e.g.*, deceiving an unimpaired adult—equate to incapacity. And the existence of separate subsections for incapacity and deception in the Nebraska statute suggests they have independent meaning. *Compare* § 28-319(1)(b), *with* § 28-318(8)(iv).

Vallie provides even less support for the Government's argument. As the Government acknowledges, the *Vallie* court did not review the sufficiency of the evidence for the defendant's conviction under 18 U.S.C. § 2242(2)(A). *See* ECF No. 36 at 4. Thus, the Government cites *Vallie* simply to demonstrate that defendants have been convicted under § 2242(2)(A) for deceiving others into sexual intercourse. *Id.* But *Vallie* does not support even that proposition. The victim in *Vallie* was assaulted after going to bed at 4:00 a.m., following a party where alcohol was served. 284 F.3d at 919. Shortly after going to sleep, she was awakened by the defendant having sex with her. *Id.* Based on this factual record, the likely basis for the defendant's conviction under § 2242(2)(A) was that the victim was asleep, intoxicated, or both, at the time of *892 the assault. *Cf. United States v. Carter*, 410 F.3d 1017, 1027 (8th Cir. 2005) (holding victim was unable to appraise the nature of the defendant's conduct under § 2242(2)(A) because she had ingested marijuana and alcohol and felt "drowsy" and "very tired" at the time of the assault). And even if deception were the basis for the defendant's conviction, *Vallie* would still provide no support for the Government's argument because the Eighth Circuit did not address the sufficiency of the evidence, meaning it had no occasion to consider whether deception equates to incapacitation under § 2242(2)(A).

More generally, the Government's argument relies on a broad reading of the word "incapable," which lacks support in the case law. Courts have generally held that § 2242(2)(A) covers mental incapacitation—*i.e.*, situations where the victim is "mentally incapable of understanding what is happening." *James*, 810 F.3d at 676; *see United States v. Walker*, No. 17-CR-184-pp, 2018 WL 3325909, at *8 (E.D. Wis. July 6, 2018); *cf. Carter*, 410 F.3d at 1027. Deception is different than mental incapacitation; persons with full capacity can be deceived. Therefore, Nebraska's prohibition on deception-induced consent covers conduct that § 2242(2)(A) does not reach.

Finally, the Government argues that, even if the statutes are not identical, they are at least "comparable." ECF No. 34 at 6; ECF No. 36 at 4. If Nebraska's prohibition on deception-based consent were the only difference between the statutes, the Government's argument might carry the day. Although the deception provision of the Nebraska statute has no precise analogue in § 2242, deception is arguably comparable to taking advantage of someone because of their lack of capacity, or using threats or fear to induce compliance. But

Nebraska's prohibition on deception-based consent is not the only divergence between the statutes. The Nebraska statute also contains a general prohibition on sexual penetration "without consent." Neb. Rev. Stat. § 28-319(1)(a). And this subsection encompasses not only deception-based consent, but also a victim's refusal to consent expressed through words or conduct. Neb. Rev. Stat. § 28-318(8)(ii)–(iii). There is no similar provision in § 2242, which singles out discrete categories of inherently nonconsensual sex—those involving threats, fear, or victim incapacitation—without including a backstop prohibition on nonconsensual sexual acts. The Government fails to acknowledge this difference between the statutes, and therefore cannot establish this discrepancy as only a minimal variation between otherwise comparable statutes. Nebraska's "without consent" provision, which has no counterpart in § 2242, distinguishes this case from cases where courts have found statutes comparable despite slight variations. Cf. *Coleman*, 681 F. App'x at 417–18 (holding element of "sexual or aggressive intent" in a Minnesota statute was comparable to element of "intent to abuse ... or gratify the sexual desire of any person" under 18 U.S.C. § 2246(3), even though Minnesota statute may have covered a "slightly broader range of conduct"). Therefore, the Court is unable to conclude that Nebraska's first-degree sexual assault statute is "comparable" to § 2242.

2. The Nebraska statute is not comparable to aggravated sexual abuse under 18 U.S.C. § 2241.

[26] The parties only briefly discuss whether Nebraska's first-degree sexual assault statute is comparable to or more severe than aggravated sexual abuse under 18 U.S.C. § 2241. The Government concedes lack of consent is not an element of § 2241, but argues the statutes are still comparable because "lack of consent remains relevant" to the analysis under § 2241. ECF No. 34 at 5 n.2. Church *893 argues the Nebraska statute is "much broader" than § 2241 because it requires proof of an enumerated aggravating circumstance, while the Nebraska statute does not require any aggravating circumstances. ECF No. 35 at 3 n.1.

[27] [28] Nebraska's first-degree sexual assault statute is not comparable to or more severe than aggravated sexual abuse under § 2241. Aggravated sexual abuse covers sexual acts accomplished through force; threats of death, serious bodily injury, or kidnapping; inducing fear of death, serious bodily injury, or kidnapping; rendering a person unconscious; or drugging a person. 18 U.S.C. § 2241. Like § 2242,

§ 2241 requires more than lack of consent. See *United States v. Cobenais*, 868 F.3d 731, 740 (8th Cir. 2017). Instead, the statute proscribes only discrete categories of nonconsensual sex that involve aggravating circumstances. Absent one of these aggravating circumstances, it does not prohibit nonconsensual sex. See *id.* Nebraska's first-degree sexual assault statute, by contrast, covers all nonconsensual sexual penetration, whether or not aggravating circumstances are present.

The Government's argument that § 2241 is comparable to Nebraska's first-degree sexual assault statute because "lack of consent remains relevant" to the analysis under § 2241 is unpersuasive. ECF No. 34 at 5 n.2 (citing *Cobenais*, 868 F.3d at 740). To demonstrate that § 2241 is comparable to or more severe than Nebraska's first-degree sexual assault statute, the Government must explain why Nebraska's statute does not cover more ground than § 2241. It cannot merely point to certain general similarities between the two statutes while ignoring significant differences.

The Court finds no legal basis for reading §§ 2241 or 2242 as general prohibitions on nonconsensual sex, and therefore Nebraska's first-degree sexual assault statute is not comparable to or more severe than either federal crime. As discussed above, Nebraska expanded its first-degree sexual assault statute in 1995 to include a prohibition on sexual penetration done "without consent." See 1995 Neb. Laws L.B. 371 § 4. In doing so, Nebraska eliminated the requirement that a victim be "overcome" by threats, force, coercion, or deception. *Id.* Congress has not similarly amended the definitions of aggravated sexual abuse and sexual abuse contained in §§ 2241 and 2242 since it enacted them in 1986. Compare Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99–646, § 87, 100 Stat. 3592 (1986), with 18 U.S.C. §§ 2241, 2242. Both §§ 2241 and 2242 still require something beyond nonconsensual sex—such as the use of force, threats, coercion, or incapacitation. Around the time that Congress enacted §§ 2241 and 2242, some argued that the "force" required by rape and sexual assault laws should include the force inherent in nonconsensual sexual acts. See, e.g., Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1105–06 (1986). Some state courts later interpreted their states' sexual assault statutes in this manner. See, e.g., *State ex rel. M.T.S.*, 129 N.J. 422, 609 A.2d 1266, 1277 (1992). But the Government has not advanced this interpretation of § 2241, nor has it provided any other legal basis for concluding that all nonconsensual sex is covered by the circumstances listed in §§ 2241 or 2242.

V. CONCLUSION

Nebraska's first-degree sexual assault statute is not comparable to or more severe than aggravated sexual abuse or sexual abuse, as those crimes are defined in 18 U.S.C. §§ 2241 and 2242. Therefore, Church does not qualify as a tier III sex offender under SORNA. *See* 34 U.S.C. § 20911(4)(A) (i). Because Church is a tier I sex offender, his duty to register under SORNA lasted fifteen years. *Id.* § 20915(a)(1). Church was released from *894 prison on September 4, 2003. ECF No. 23. His alleged failure to register occurred between April

2019 and September 2019—more than fifteen years after he was released from prison. ECF No. 2. Because the indictment does not allege a criminal offense, it must be dismissed.

IT IS ORDERED that Defendant Scott Lowell Church's Motion to Dismiss, ECF No. 23, is **GRANTED**.

IT IS SO ORDERED.

All Citations

461 F.Supp.3d 875

Footnotes

- 1 In response to Church's motion to dismiss, the Government asserts, without citation, that "Defendant was accused of victimizing a mentally disabled twenty-year-old by fondling her genitals, forcing her to perform oral sex on the Defendant, and penetrating her vagina with his penis." ECF No. 34 at 1; *see also* Gov't's Sur-Reply Def.'s Mot. Dismiss Indictment 2–3, ECF No. 36. As discussed below, the categorical approach—not the modified categorical approach—applies in this case. Thus, the Court cannot consider the facts of Church's prior conviction, no matter how aggravating. *See Mathis v. United States*, — U.S. —, 136 S. Ct. 2243, 2248, 195 L.Ed.2d 604 (2016). Even if the modified categorical approach applied, the facts underlying Church's conviction could only be considered by the Court if they originated from a "limited class of documents." *See id.* at 2249; *cf. United States v. Hill*, 820 F.3d 1003, 1005 (8th Cir. 2016) (observing that a court applying the distinct circumstance-specific approach may look to "reliable evidence" of the circumstances giving rise to the defendant's conviction). The Government's factual assertions are not tethered to any such documents.
- 2 The first handwritten modification provides Church "[did] intentionally engage in conduct which would constitute the crime if the attendant circumstances were as he believed, to wit: attempt." ECF No. 23-2 at 5. This language quotes nearly verbatim one of the subsections of Nebraska's criminal attempt statute. *See* Neb. Rev. Stat. § 28-201(1)(a).
- 3 Nebraska's first-degree sexual assault statute provides: "The sentencing judge shall consider whether the actor caused serious personal injury to the victim in reaching a decision on the sentence." Neb. Rev. Stat. § 28-319(2). Serious personal injury is a sentencing consideration, not an element of the crime. *State v. Freeman*, 267 Neb. 737, 677 N.W.2d 164, 175 (2004).
- 4 Church argues in the alternative that SORNA is unconstitutional as applied to individuals with convictions that preceded its 2006 enactment. ECF No. 23-1 at 10–11. Church raises this argument for preservation purposes only; he concedes that Supreme Court precedent forecloses this Court from ruling in his favor on this basis. *Id.* at 11; ECF No. 35 ¶ 9.
- 5 Nebraska's first-degree sexual assault statute was amended in 2006. *See* L.B. 1199, 99th Leg., 2d Sess. (Neb. 2006). The only substantive change to the portion quoted above added that a victim under subsection (c) must be at least twelve years old. *See id.* Otherwise, the version of § 28-319 that Church was charged and convicted under mirrors the present version of the statute, including the definition of "without consent" in §

28-318(8). See *id.* Because the pre-and post-2006 versions of the statute are materially identical for present purposes, the Court generally cites to the current version of the Nebraska statute in this order.

- 6 In its response to Church's motion to dismiss, the Government argued the Nebraska statute was indivisible. ECF No. 34 at 3–5. The Government clarified its position in its sur-reply, arguing subsections (a), (b), and (c) are alternative elements, each of which defines a separate crime. ECF No. 36 at 1–2. The Government does not dispute that subsection (a)—which defines “without consent” in four alternative ways—is indivisible. *Id.*; see Neb. Rev. Stat. § 28-319(1)(a); Neb. Rev. Stat. § 28-318(8).
- 7 As noted above, Church pleaded guilty to attempted first-degree sexual assault. See ECF No. 23. Both SORNA and the federal statutes defining aggravated sexual abuse and sexual abuse include attempt in their definitions. 34 U.S.C. § 20911(4)(A)(i); 18 U.S.C. §§ 2241, 2242. The parties do not discuss the elements of attempt when comparing Church's offense of conviction with the crimes listed in 34 U.S.C. § 20911(4)(A)(i). Because the elements of Church's offense of conviction are not comparable to either §§ 2241 or 2242 without regard to the additional elements of attempt, the Court need not compare the elements of attempt under Nebraska law and federal law. More generally, and for the same reason, the Court does not consider whether there are differences or similarities between the statutes beyond those the parties identify.

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This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 5th Cir. Rules 28.7 and 47.5. United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee

v.

Joe COLEMAN, Defendant-Appellant

No. 16-10370

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Filed March 15, 2017

Synopsis

Background: Defendant pleaded guilty in the United States District Court for the Northern District of Texas, No. 5:15-CR-69-1, to failure to register as a sex offender, in violation of the Sex Offender Registration and Notification Act (SORNA). Defendant appealed.

Holdings: The Court of Appeals held that:

[1] defendant's appeal of his sentence was not rendered moot by his the expiration of his prison term, and

[2] defendant's prior Minnesota conviction for criminal sexual conduct in the second degree qualified defendant as a Tier III sexual offender, for sentencing purposes.

Affirmed.

West Headnotes (2)

[1] Criminal Law Grounds of dismissal in general

Defendant's appeal of his sentence for failure to register as a sex offender, in violation of the Sex Offender Registration and Notification Act (SORNA), was not rendered moot by his the expiration of his prison term; defendant's

appeal challenged district court's finding that his Minnesota conviction for criminal sexual conduct in the second degree qualified him as a Tier III sexual offender, rather than a Tier I offender, which made his base offense level 16 and not 12, and his classification as a Tier III sex offender carried with it collateral consequences, including that a Tier I offender must keep his registration current for 15 years, but a Tier III offender must do so for life and must appear for in-person verification more frequently than Tier I offenders. 18 U.S.C.A. § 2250(a); 42 U.S.C.A. §§ 16911, 16915(a)(1), 16915(a)(3), 16916; Minn. Stat. Ann. § 609.343(1)(a); U.S.S.G. § 2A3.5(a).

8 Cases that cite this headnote

[2]

Sentencing and Punishment Offense or adjudication in other jurisdiction

Elements of Minnesota statute under which defendant was previously convicted of criminal sexual conduct in the second degree were comparable to or more severe than the federal crime of abusive sexual contact, and thus Minnesota conviction qualified defendant as a Tier III sexual offender, which made his base offense level 16, for purposes of his sentence for failure to register as a sex offender in violation of Sex Offender Registration and Notification Act (SORNA); even if the Minnesota statute had been applied to a slightly broader range of conduct than the federal abusive sexual contact statute, intent to abuse in the federal statute was analogous to the aggressive intent required by the Minnesota statute. 18 U.S.C.A. §§ 2244, 2246(3), 2250(a); 42 U.S.C.A. § 16911(4)(A); Minn. Stat. Ann. §§ 609.341, 609.343(1)(a); U.S.S.G. § 2A3.5(a).

9 Cases that cite this headnote

***414** Appeal from the United States District Court for the Northern District of Texas, USDC No. 5:15-CR-69-1

Attorneys and Law Firms

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Before STEWART, Chief Judge, and JONES and OWEN, Circuit Judges.

Opinion

PER CURIAM: *

Joe Coleman entered into a plea agreement for failure to register as a sex offender, in violation of 18 U.S.C. § 2250(a). At sentencing, the district court found that Coleman's 2000 conviction for criminal sexual conduct in the second degree under Minnesota Statute section 609.343, subd. (1)(a), qualified him as a Tier III sexual offender. *See U.S.S.G. § 2A3.5(a).* Coleman appeals on the grounds that the Minnesota Statute criminalizes a broader range of conduct than the federal offense of abusive sexual contact and that the categorical approach applies to determine a defendant's tier under Guideline § 2A3.5. Because Coleman was released from prison on January 29, 2017, we first consider whether his appeal is moot. Finding that this court has jurisdiction, we AFFIRM Coleman's sentence.

I. FACTUAL AND PROCEDURAL HISTORY

On September 23, 2015, Coleman pleaded guilty to failure to register as a sex offender, as required under the Sex Offender Registration and Notification Act ("SORNA"). 18 U.S.C. § 2250(a). He did not waive his right to appeal in the plea agreement.

Coleman had to register pursuant to the SORNA because of his 2000 conviction for criminal sexual conduct in the second degree. *See Minn. Stat. § 609.343, subd. (1)(a).* That conviction stemmed from an incident in Anoka County, Minnesota. While staying with a family, Coleman entered a ten-year-old girl's room, "laid in her bed, and [] began rubbing her legs, back, and buttocks." The girl reported *415

Coleman's actions to her mother, and he subsequently pleaded guilty.

The Presentence Report ("PSR") in the instant case initially determined that Coleman was a Tier I sex offender, with a base offense level of twelve. *See 42 U.S.C. § 16911(1)-(4); U.S.S.G. § 2A3.5(a).* With a two-level reduction for acceptance of responsibility, *see U.S.S.G. § 3E1.1(a)*, his total offense level was ten. His criminal history category of II resulted in a guidelines range of eight to fourteen months' imprisonment.

The Government objected to the PSR's determination that Coleman was a Tier I offender, arguing instead that Coleman qualified as a Tier III offender. The probation officer agreed and modified the PSR. As a Tier III offender, Coleman's base offense level was sixteen, though he received an additional one point reduction for acceptance of responsibility. *Id. §§ 2A3.5(a), 3E1.1(b).* Under the modified PSR, Coleman's new guidelines range was fifteen to twenty-one months' imprisonment.

In response, Coleman urged that under the categorical approach, the elements of his Minnesota conviction were broader than the elements of the federal crime of abusive sexual contact. Therefore, his prior Minnesota conviction did not make him a Tier III offender.

The PSR answered Coleman's objections, stating that the two statutes were nearly identical. It also looked to the events underlying Coleman's Minnesota conviction and determined that his actions qualified him as a Tier III offender. The district court adopted as its findings the amended PSR, including its analysis of the Sentencing Guidelines. Coleman received a sentence of twenty-one months' imprisonment, which was to run consecutive to any sentence received in a pending Minnesota case. The district court also imposed a five-year term of supervised release. Coleman timely appealed.

While his appeal was pending before this court, Coleman's term in federal custody expired on January 29, 2017.

II. DISCUSSION

1. Mootness

[1] The Bureau of Prisons released Coleman from custody on January 29, 2017, subject to a five-year supervised release term. Because of his release from prison, we must first

determine whether his appeal is moot. We conclude that it is not.

Mootness is a jurisdictional question that the court has a duty to raise sua sponte. *United States v. Villanueva-Diaz*, 634 F.3d 844, 848 (5th Cir. 2011) (citing *United States v. Lares-Meraz*, 452 F.3d 352, 354–55 (5th Cir. 2006) (per curiam)). We review questions of jurisdiction de novo. *Id.* Both parties responded to our request for supplemental briefing on this issue.

Ordinarily, a defendant's “subjection to the terms of supervised release satisfy an ongoing consequence that is a sufficient legal interest to support [jurisdiction].” *Lares-Meraz*, 452 F.3d at 355. However, that general rule applies to non-mandatory terms of supervised release because the district court maintains discretion to terminate or modify the supervised release. See 18 U.S.C. § 3583(e); *Johnson v. Pettiford*, 442 F.3d 917, 918 (5th Cir. 2006) (per curiam). Coleman's conviction, in contrast, requires a mandatory five-year term of supervised release. 18 U.S.C. § 3583(k). We note a circuit split concerning whether a mandatory supervised release term may be modified or terminated under section 3583(e). Compare *United States v. Spinelle*, 41 F.3d 1056, 1057 (6th Cir. 1994) *416 (holding that a mandatory supervision term does not prohibit a court from later modifying release under section 3583(e)) with *United States v. Lafayette*, 585 F.3d 435, 440 (D.C. Cir. 2009) (holding that a mandatory term cannot be shortened).

If Coleman's mandatory term cannot be modified, then that could render his appeal moot. We need not wade into this circuit split, however, because Coleman's classification as a Tier III sex offender carries with it collateral consequences that keep alive his case or controversy. See *Villanueva-Diaz*, 634 F.3d at 848–49 (citing *Sibron v. New York*, 392 U.S. 40, 55, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968)). For instance, a Tier I offender must keep his registration current for fifteen years, while a Tier III offender must do so for life. Compare 42 U.S.C. § 16915(a)(1) with *id.* § 16915(a)(3). Additionally, Tier III offenders must appear for in-person verification more frequently than Tier I offenders. *Id.* § 16916.

Therefore, we hold that Coleman's appeal of his sentence is not moot.

2. Whether Minnesota's Statute is Comparable to the Federal Statute

[2] We next address whether Minnesota Statute section 609.343, subd. (1)(a), is “comparable to or more severe than” the federal offense of abusive sexual contact. See 42 U.S.C. § 16911(4)(A). If the Minnesota statute is comparable to the federal crime of abusive sexual contact, our analysis need not go any further because Coleman would qualify as a Tier III offender under either the categorical or circumstance-specific approach.

“For properly preserved claims, this court reviews the district court's interpretation and application of the Sentencing Guidelines *de novo*.” *United States v. Cedillo-Narvaez*, 761 F.3d 397, 401 (5th Cir. 2014).

SORNA, enacted in 2006, instituted a nationwide sex offender registry “to protect the public from sex offenders and offenders against children.” 42 U.S.C. § 16901. When passing SORNA, “Congress cast a wide net to ensnare as many offenses against children as possible.” *United States v. Gonzalez-Medina*, 757 F.3d 425, 431 (5th Cir. 2014) (quoting *United States v. Dodge*, 597 F.3d 1347, 1355 (11th Cir. 2010) (en banc)). The purpose of SORNA was generally “to strengthen and increase the effectiveness of sex offender registration and notification for the protection of the public, and to eliminate potential gaps and loopholes under the pre-existing standards by means of which sex offenders could attempt to evade registration requirements or the consequences of registration violations.” National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38030 (July 2, 2008). SORNA requires that a sex offender “register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.” 42 U.S.C. § 16913(a). The base offense level an offender receives if convicted for failing to comply depends on his sex offender tier, which is based on the severity of his sex offense. See *id.* § 16911(2)–(4); U.S.S.G. § 2A3.5(a) & cmt. 1.

Although we are limiting our analysis to a comparison of the elements of the two crimes, it is not necessary that the two crimes be identical. See 42. U.S.C. § 16911(4). The plain language of SORNA requires only that the offenses be “comparable.” *Id.* Courts have stated that, given SORNA's broad purpose, a comparable statute can be “slightly broader” than the federal crime. *United States v. Forster*, 549 Fed.Appx. 757, 769 (10th Cir. 2013); see also *417 *United States v. Morales*, 801 F.3d 1, 7–8 (1st Cir. 2015) (stating that the “comparable to” language may provide the court with “some flexibility when examining [] offenses”).

The district court concluded that Coleman's Minnesota conviction constituted a Tier III offense because it was "comparable to or more severe than ... abusive sexual contact (as described in section 2244 of title 18) against a minor who has not attained the age of 13 years." 42 U.S.C. § 16911(4)(A). Abusive sexual contact is knowing sexual contact, when certain other circumstances are present. 18 U.S.C. § 2244. In turn, the federal statute defines "sexual contact" as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." *Id.* § 2246(3).

Sexual conduct in the second degree under Minnesota law involves "sexual contact with another person" when "the complainant is under 13 years of age and the actor is more than 36 months older than the complainant." Minn. Stat. § 609.343, subd. (1)(a). Minnesota defines sexual contact as, *inter alia*, "the intentional touching by the actor of the complainant's intimate parts," when such an action is done "with sexual or aggressive intent." Minn. Stat. § 609.341, subd. (11)(a). Coleman's argument that the Minnesota statute is broader is limited to the intent element.

On their faces, the elements of the two statutes are nearly identical. Yet, Coleman insists that "sexual or aggressive intent" is materially broader than the "intent to abuse ... or gratify the sexual desire of any person." Compare 18 U.S.C. § 2246(3) with Minn. Stat. § 609.341. He cites to two Minnesota appellate court cases where the defendants acted only with aggressive, but not sexual intent. In *State v. Ahmed*, 782 N.W.2d 253, 257 (Minn. App. 2010), the court sustained a conviction under the statute when an individual had burned a three year old "on multiple parts of his body, including his face, back, shoulder, abdomen, and penis." The court looked to the plain text of the statute and concluded that the severe "abuse" that Ahmed committed satisfied the intent prong under the statute because he acted aggressively. *Id.* at 256, 262. In another case, the defendant pleaded guilty under the Minnesota statute for severely beating his three-year-old stepson with a belt, which resulted in lacerations to his penis and scrotum. *State v. Chandler*, 2013 WL 5612549, at *1 (Minn. App. Oct. 15, 2013). The *Chandler* court also held that "[b]ecause 'sexual' and 'aggressive' are stated as

alternatives, either is sufficient." *Id.* at *2 (quoting *State v. Austin*, 788 N.W.2d 788, 792 (Minn. App. 2010)). In comparison, the Government cannot point to any case in which an individual was punished under the federal statute for non-sexual conduct.

Still, after examining both statutes, we are convinced that they are, at a minimum, comparable. The intent to "abuse" in 18 U.S.C. § 2246(3) is analogous to the aggressive intent required by the Minnesota statute. Both courts that applied Minnesota Statute section 609.343 to non-sexual activity characterized the behavior as "abuse," and each involved horrific injuries to children's sexual organs. See *Ahmed*, 782 N.W.2d at 256; *Chandler*, 2013 WL 5612549 at *2. In the cases cited by Coleman, the courts found that the individuals had the specific intent to touch the children's genitals and cause harm to the child through that touching. See *Ahmed*, 782 N.W.2d at 262; *Chandler*, 2013 WL 5612549 at *3. Abuse is "physical or mental maltreatment, often resulting in mental emotional, sexual, or physical injury." *Abuse*, Black's Law Dictionary (10th ed. *418 2014). Although the Government has not pursued an individual for purely aggressive conduct under 18 U.S.C. § 2244, that is not dispositive to our analysis. See *Forster*, 549 Fed.Appx. at 769 (stating that a comparable statute may be "slightly broader" than the federal statute).

Accordingly, even if the Minnesota statute has been applied to a slightly broader range of conduct than the federal statute, we conclude that the elements of the Minnesota statute are "comparable or more severe than" the federal crime of criminal sexual abuse. See 42 U.S.C. § 16911(4)(A). The similarity between the elements in both statutes convinces us that the district court did not err when it concluded that the Minnesota statute fit 42 U.S.C. § 16911(4)(A)'s definition of a Tier III offense.

III. CONCLUSION

Having determined that the district court properly classified Coleman as a Tier III offender, we AFFIRM his sentence.

All Citations

681 Fed.Appx. 413

Footnotes

- * Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

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86 F.4th 1189

United States Court of Appeals, Eighth Circuit.

UNITED STATES of America, Plaintiff - Appellee

v.

Michael Ryan COULSON, Defendant - Appellant

No. 23-1690

|

Submitted: October 26, 2023

|

Filed: November 20, 2023

Synopsis

Background: Defendant pleaded guilty in the United States District Court for the Northern District of Iowa, Leonard T. Strand, Chief Judge, to violating the Sex Offender Registration and Notification Act (SORNA). Defendant appealed his sentence as Tier III offender.

Holdings: The Court of Appeals, Melloy, Circuit Judge, held that:

[1] defendant's underlying offense of forcible pandering under Uniform Code of Military Justice (UCMJ) amounted to forced prostitution under SORNA;

[2] de novo review applied to issue of whether defendant with underlying offense of forcible pandering under UCMJ was Tier III offender;

[3] on issue of first impression, categorical approach applied to SORNA's tier analysis; and

[4] application of categorical approach to defendant's underlying offense of forcible pandering under UCMJ resulted in his classification as Tier I offender.

Reversed and remanded.

Loken, Circuit Judge, dissented.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (10)

[1] **Mental Health** Offenses and prosecutions Defendant's underlying offense of forcible pandering under Uniform Code of Military Justice (UCMJ) amounted to forced prostitution for purpose of sentencing under Sex Offender Registration and Notification Act (SORNA) defined in material part as compelling another person to engage in "sexual abuse" or "sexual contact" for which anyone is paid. UCMJ, Art. 120c, 10 U.S.C.A. § 920c(b); 18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20901 et seq.; U.S.S.G. § 2A3.5(a).

[2] **Criminal Law** Review De Novo In general, Court of Appeals reviews de novo classification of prior offenses or convictions for sentencing purposes.

[3] **Mental Health** Offenses and prosecutions In sentencing, determination of proper framework for Sex Offender Registration and Notification Act's (SORNA) tier analysis, and application of that framework, were questions of law, and therefore de novo review applied to issue of whether defendant with underlying offense of forcible pandering under Uniform Code of Military Justice (UCMJ) was Tier III offender; even if classification of prior conviction required court to review limited materials under modified-categorical approach, such exercise involved interpretation of legal consequences flowing from prior judicial records, and it did not involve fact finding in traditional sense that might merit deference. UCMJ, Art. 120c, 10 U.S.C.A. § 920c(b); 18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20911(2–4); U.S.S.G. § 2A3.5(a).

[4] **Aliens, Immigration, and Citizenship** Crime and Related Grounds

Sentencing and Punishment Offenses

Usable for Enhancement

In general, as applied in several different criminal- and immigration-law contexts, the categorical approach for determining whether a prior offense is comparable to a listed offense under federal statute, for such purposes as immigration consequences or sentencing enhancement, does not permit a court to consider a defendant's actual underlying conduct.

- [5] **Aliens, Immigration, and Citizenship** Crime and Related Grounds
Sentencing and Punishment Offenses

Usable for Enhancement

The categorical approach, which is used to determine whether a prior offense is comparable to a listed offense under federal statute for such purposes as immigration consequences or sentencing enhancement, permits only an elements-to-elements comparison between a defendant's prior offense and either: (1) a general or traditional common law definition of a referenced offense, or (2) the elements of an offense as identified with express reference to a particular statutory provision.

- [6] **Aliens, Immigration, and Citizenship** Crime and Related Grounds
Sentencing and Punishment Offenses

Usable for Enhancement

Reference to a generic comparator "offense," to a specific statute, or to a "conviction"—all as contrasted with references to conduct or to specific acts that a defendant previously committed—strongly suggests courts must apply the categorical approach for determining whether an underlying offense is comparable to a listed offense, for such purposes as immigration consequences or sentencing enhancement.

- [7] **Mental Health** Proceedings
Under the hybrid approach for deciding whether a prior sex offense is comparable to a listed

offense under Sex Offender Registration and Notification Act (SORNA), courts use the categorical approach, which involves only an element-to-element comparison, generally in the tier analysis and employ a circumstance-specific approach only where Congress separately identified "conduct" or a victim's age as relevant to a SORNA determination. 34 U.S.C.A. § 20911(2), (3), (4), (7)(I).

Jury Particular cases in general**Mental Health** Offenses and prosecutions

Categorical approach focusing on whether the elements of the crime of conviction sufficiently matched the elements of the listed offense applied at sentencing to Sex Offender Registration and Notification Act's (SORNA) tier analysis; possible encroachment on defendant's Sixth Amendment jury rights was avoided by refusing to reach beyond elements of prior offense, categorical approach respected benefits of any earlier plea agreements or bargains that may have driven defendant's decision to waive or exercise jury rights, and inefficiency and unfairness or unreliability that might exist in factual review of prior offenses was avoided. U.S. Const. Amend. 6; 18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20911(2–4).

Criminal Law Effect in General**Criminal Law** Judgment in General

The fact of a conviction, whether by jury or plea, establishes nothing more than the least of the acts criminalized.

Mental Health Offenses and prosecutions

Under categorical approach focusing on whether the elements of the crime of conviction sufficiently matched elements of listed offense for purposes of deciding defendant's Sex Offender Registration and Notification Act (SORNA) tier, defendant's underlying offense of forcible pandering under Uniform Code of Military Justice (UCMJ) fell outside the scope of SORNA's Tier III comparator offenses, and thus

resulted in his classification as Tier I offender for purposes of his sentence for failure to register under SORNA; forcible pandering employed the defined term “prostitution,” which could be found based on “sexual contact,” “sexual contact” included over-the-clothes touching, and SORNA’s Tier III comparator offenses required a “sexual act” which did not include over-the-clothes touching. UCMJ, Art. 120c, 10 U.S.C.A. § 920c(b); 18 U.S.C.A. §§ 2241, 2242, 2246, 2250(a); 34 U.S.C.A. § 20911(2, 4); U.S.S.G. § 2A3.5(a).

1 Case that cites this headnote

***1191** Appeal from United States District Court for the Northern District of Iowa - Central

Attorneys and Law Firms

Counsel who presented argument on behalf of the appellant and appeared on the brief was Bradley Ryan Hansen, AFD, of Des Moines, IA.

Counsel who presented argument on behalf of the appellee and appeared on the brief was Ron Timmons, AUSA, of Sioux City, IA.

Before LOKEN, MELLOY, and KELLY, Circuit Judges.

Opinion

LOKEN, Circuit Judge, dissenting without opinion.

MELLOY, Circuit Judge.

Michael Ryan Coulson was convicted at a court martial for “forcible pandering” in violation of Article 120c(b) of the Uniform Code of Military Justice (UCMJ), codified at 10 U.S.C. § 920c(b) (2012). He later failed to register as a sex offender in Iowa and pleaded guilty to violating the Sex Offender Registration and Notification Act (SORNA). *See* 18 U.S.C. § 2250(a); *see also, generally*, 34 U.S.C. § 20901 *et seq.*

The sentence for a SORNA conviction depends in part on the severity of the defendant’s underlying sex offense as categorized by tier. Tier III is the most severe category and Tier I is the least severe, serving as a catchall when Tiers II

or III do not apply. Tiers II or III apply when the SORNA defendant’s underlying offense is “comparable to or more severe than” a listed offense. *See* 34 U.S.C. § 20911(2)–(4) (defining Tiers I–III); *see also* U.S.S.G. § 2A3.5(a) (setting base offense levels). Coulson argued below that he was a Tier I offender. The district court concluded he was a Tier III offender and sentenced him accordingly.

On appeal, Coulson argues the “categorical approach” applies to his SORNA tier analysis. He also argues that, pursuant to this approach, his prior statute of conviction is “overbroad” in relation to SORNA’s Tier III listed comparator offenses.¹ We now hold for the first time, in line with a consensus of authority from other circuits, that the categorical approach applies to SORNA’s tier analysis. Further, we agree with Coulson that application of the categorical approach results in his classification as a Tier I offender. Accordingly, we reverse and remand for resentencing.

I.

[1] Under the UCMJ, Coulson’s underlying offense of forcible pandering amounts to forced prostitution defined in material part as compelling another person ***1192** to engage in “sexual abuse” or “sexual contact” for which anyone is paid. 10 U.S.C. § 920c(b) (defining pandering through reference to prostitution); 10 U.S.C. § 920c(d)(1) (defining prostitution through reference to “sexual abuse” or “sexual contact” as further defined in 10 U.S.C. § 920(g)). For the present analysis, the critical distinction between these two statutory terms boils down to the fact that sexual contact may occur outside or over a victim’s clothing, whereas sexual abuse may not.²

At sentencing for the present SORNA conviction, the district court faced the question of whether the circumstance-specific approach, modified-categorical approach, categorical approach, or some other approach applied to determine if Coulson’s prior conviction was “comparable to or more severe than ... aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18).” 34 U.S.C. § 20911(4)(A)(i). The United States argued in its district court briefing and at the sentencing hearing that the term “comparable” as used in § 20911 provided an expansive degree of flexibility and allowed the court to move away from the rigid structure of the categorical or modified-categorical approach. In support, the United States relied on dicta from an unpublished Tenth Circuit opinion and argued, “[R]egardless

of which approach applies ... even if the prior conviction statute is slightly broader, this wider protective sweep is allowable under SORNA's tier regime." In the alternative, the United States argued that even if the word "comparable" did not provide an additional degree of flexibility, the modified-categorical approach should apply. And in advocating for the modified-categorical approach, the United States argued that permissibly viewable *Shepard* materials showed Coulson's underlying pandering conviction had involved sexual abuse—compelled intercourse involving an adult woman with money paid to Coulson—rather than mere "sexual contact."³

The district court appears to have partially adopted the United States's arguments. The district court stated that the categorical approach applied but held that the possibility of a pandering (prostitution) conviction arising from mere sexual contact over the clothing was so unlikely as to be speculative or hypothetical. As a result, the district court found the pandering conviction comparable to sexual abuse, 18 U.S.C. § 2242, resulting in a Tier III classification.

We interpret the district court's conclusion, articulated generally as the categorical approach but applied with some degree *1193 of flexibility, to reflect either: (1) the partial adoption of the United States's argument that the term "comparable" broadens SORNA's tier inquiry away from a traditional categorical or modified-categorical approach; or (2) an application of the "realistic probability" qualifier that courts sometimes apply to reject "fanciful" interpretations of unclear statutes under the categorical approach when analyzing prior convictions. *See, e.g., Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007) ("[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime."); *but see Gonzalez v. Wilkinson*, 990 F.3d 654, 660 (8th Cir. 2021) (refusing to apply the realistic probability test where the statute at issue was "clear on its face").

On appeal, Coulson renews his arguments, but the United States's position is somewhat unclear. The United States does not argue clearly against the categorical approach but continues to urge the adoption of some degree of flexibility based on the statutory term "comparable." 34 U.S.C. § 20911(4)(A)(i). However, in briefing and at oral argument, the government was unable to articulate standards or any guiding

principles as to how this "categorical light" approach would work in practice.

II.

[2] [3] In general, we review *de novo* the classification of prior offenses or convictions for sentencing purposes. *See United States v. Bragg*, 44 F.4th 1067, 1075 (8th Cir. 2022). *De novo* review applies to the questions before us because determination of the proper framework for SORNA's tier analysis, and application of that framework, are questions of law. This remains true even if classification of a prior conviction requires the court to review limited materials under the modified-categorical approach, as urged by the United States. *United States v. Myers*, 928 F.3d 763, 765–67 (8th Cir. 2019). Such an exercise involves interpretation of the legal consequences flowing from prior judicial records. It does not involve fact finding in a traditional sense that might merit deference.

Several years ago, a panel of our court identified, but was not required to resolve, the outstanding question of how to conduct SORNA's tier analysis. *See United States v. Mulverhill*, 833 F.3d 925, 930 (8th Cir. 2016) (applying plain error review and finding it unnecessary to "wade into the quagmire of which approach applies to the three tier classifications"). At that time, a few circuits had applied the categorical approach. *See, e.g., United States v. Berry*, 814 F.3d 192, 197 (4th Cir. 2016); *United States v. Morales*, 801 F.3d 1, 5–6 (1st Cir. 2015); *United States v. White*, 782 F.3d 1118, 1134–36 (10th Cir. 2015); *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1133 (9th Cir. 2014). Since then, a broad consensus has grown, with no circuits holding to the contrary. *See United States v. Walker*, 931 F.3d 576, 579 (7th Cir. 2019); *United States v. Barcus*, 892 F.3d 228, 231–32 (6th Cir. 2018); *United States v. Young*, 872 F.3d 742, 746 (5th Cir. 2017).⁴ We now join these other circuits.

*1194 [4] [5] In general, as applied in several different criminal- and immigration-law contexts, the categorical approach does not permit a court to consider a defendant's actual underlying conduct. *See, e.g., Moncrieffe v. Holder*, 569 U.S. 184, 190, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013) (directing courts to consider "not ... the facts of the particular prior case, but instead ... whether the ... statute defining the crime of conviction categorically fits within the generic federal definition" (internal citations omitted)). This approach permits only an elements-to-elements comparison between

a defendant's prior offense and either: (1) a general or traditional common law definition of a referenced offense, e.g., "burglary" as referenced in 18 U.S.C. § 924(e); or (2) the elements of an offense as identified with express reference to a particular statutory provision. SORNA's tier provisions involve the latter in that 34 U.S.C. § 20911(4)(A)(i) expressly references the definitions of "aggravated sexual abuse" and "sexual abuse" from 18 U.S.C. §§ 2241 and 2242.

[6] Like the circuits cited above, we find that textual support points almost exclusively toward the categorical approach. Reference to a generic comparator "offense," to a specific statute, or to a "conviction"—all as contrasted with references to conduct or to specific acts that a defendant previously committed—strongly suggests courts must apply the categorical approach. *See Nijhawan v. Holder*, 557 U.S. 29, 36–37, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009) (distinguishing a Congressional directive to review specific facts from language typically interpreted as permitting only the review of elements; stating that reference to a generic crime or a "particular section of the Federal Criminal Code" suggests application of the categorical approach); *see also United States v. White*, 782 F.3d 1118, 1132 (10th Cir. 2015).

In contrast, when courts have elected to focus on facts, acts, and conduct rather than statutory elements, courts typically have identified statutory language indicating a clear Congressional directive to consider such facts. In *Nijhawan*, for example, the Court addressed different aspects of a prior offense inquiry in the immigration context. There, the Court settled upon a hybrid approach using the categorical approach generally but calling for a broader evidentiary inquiry and a circumstance-specific approach where Congress had made immigration consequences dependent on specific facts apart from the fact of conviction. *See Nijhawan*, 557 U.S. at 38, 129 S.Ct. 2294 ("The upshot is that [8 U.S.C. § 1101(a)(43)(M)(i)] 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.").

[7] In fact, our court found clear Congressional language mandating a circumstance-specific approach under a different provision of SORNA itself. *See United States v. Hill*, 820 F.3d 1003, 1005 (8th Cir. 2016) (applying a factual analysis under 42 U.S.C. § 16911(7)(I) (now codified at 34 U.S.C. § 20911(7)(I)) where Congress specifically directed an examination of "conduct"). Several of the circuits cited above have done the same, essentially adopting a "hybrid" approach under SORNA depending upon the statutory

subsection being applied. Under this hybrid approach, courts use the categorical approach generally in the tier analysis and employ a circumstance-specific approach only where Congress separately identified "conduct" or a victim's age as relevant to a SORNA determination. *See, e.g., United States v. Berry*, 814 F.3d 192, 196–97 (4th Cir. 2016).

[8] [9] Apart from statutory language, we conclude that several prudential considerations *1195 support the categorical approach. First, by refusing to reach beyond the elements of a prior offense, we avoid possible encroachment on a defendant's Sixth Amendment jury rights. *Descamps v. United States*, 570 U.S. 254, 269–70, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). The fact of a conviction, whether by jury or plea, after all, establishes "nothing more than the least of the acts criminalized." *Gonzalez*, 990 F.3d at 658 (quoting *Moncrieffe*, 569 U.S. at 190–91, 133 S.Ct. 1678)). Cabining our analysis to the elements properly respects the limits of a previous jury's conclusions. Second, the categorical approach respects the benefits of any earlier plea agreements or bargains that may have driven a defendant's decision to waive or exercise jury rights.

Third, and finally, it is prudent to avoid the general inefficiency and the unfairness or unreliability that may exist in the factual review of prior offenses. *See Moncrieffe*, 569 U.S. at 200–01, 133 S.Ct. 1678 ("[T]he procedure the Government envisions would require precisely the sort of *post hoc* investigation into the facts of predicate offenses that we have long deemed undesirable. The categorical approach serves 'practical' purposes: It promotes judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact." (citation omitted)); *see also United States v. Vasquez-Garcia*, 449 F.3d 870, 873 (8th Cir. 2006) (discussing the modified categorical approach and stating, "The Court declined to adopt 'a more inclusive standard of competent evidence,' citing the 'practical difficulties and potential unfairness of a factual approach' and the 'respect for congressional intent and avoidance of collateral trials.'") (quoting *Shepard*, 544 U.S. at 20, 23, 125 S.Ct. 1254) (internal citations omitted)). Collateral inquiries into the details of potentially "aged" prior acts necessarily raise concerns regarding the availability and the quality or staleness of evidence. *Descamps*, 570 U.S. at 270, 133 S.Ct. 2276. Moreover, even where such evidence is available, it may be far afield and down separate paths from the investigation and prosecutorial efforts that support the later, separate prosecution.

The categorical approach largely resolves these concerns, thus protecting investigatory and judicial resources as well as Sixth Amendment rights. It does so without finesse in that sometimes-reliable evidence as to actual circumstances may make the earlier criminal act appear different than the elements alone might suggest. Like the several circuits cited above, however, we conclude this trade-off favoring efficiency and the protection of jury rights is the correct choice.

Finally, turning to application of the categorical approach, the present case leaves no room for the United States's suggested and generalized broadening of the analysis based on SORNA's use of the term "comparable." To broaden the inquiry beyond the elements would introduce a confusing double measure of subjectivity. Is flexibility to be found surrounding the elements of the prior offense or the elements of the SORNA comparators? How is comparability measured if not by the elements? And what does comparability mean if it is distinct from relative severity? Subjectivity and flexibility may come into play later in the imposition of a final sentence through the application of 18 U.S.C. § 3553(a), after tier determination and after application of the Sentencing Guidelines. They do not fit well into the tier analysis itself.

[10] Here, the offense of conviction is unambiguously broader in scope than the SORNA comparators. The offense of "forcible pandering" employs the defined term "prostitution," which may be found based on "sexual contact." 10 U.S.C. § 920c(b) (forcible pandering); 10 U.S.C. § 920c(d)(1) (prostitution). "Sexual contact" includes *1196 over-the-clothes touching. 10 U.S.C. § 920(g)(2). Such contact falls outside the scope of SORNA's Tier III comparator offenses as found in 18 U.S.C. §§ 2241 and 2242, both of which require a "sexual act" as defined in 18 U.S.C. § 2246 and which does not include over-the-clothes touching.

To the extent the government argues there is no "realistic probability" that prostitution would involve over-the-clothes touching, we find no lack of clarity in the statutes as required to open the door for application of the "realistic probability" exception. *Gonzalez*, 990 F.3d at 660.

We reverse Coulson's sentence and remand for further proceedings consistent with this opinion.

All Citations

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Footnotes

1 The parties present no arguments concerning Tier II.

2 10 U.S.C. § 920(g) provides:

Definitions.—In this section:

(1) Sexual act. —The term "sexual act" means—

(A) the penetration, however slight, of the penis into the vulva or anus or mouth;

(B) contact between the mouth and the penis, vulva, scrotum, or anus; or

(C) the penetration, however slight, of the vulva or penis or anus of another by any part of the body or any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

(2) Sexual contact. —The term "sexual contact" means touching, or causing another person to touch, *either directly or through the clothing*, the vulva, penis, scrotum, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, or degrade any person or to arouse

or gratify the sexual desire of any person. Touching may be accomplished by any part of the body or an object.

(Emphasis added).

- 3 *Shepard v. United States*, 544 U.S. 13, 20–21, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (permitting courts to review certain reliable judicial records to determine which subpart of a divisible statute a defendant had been convicted of violating).
- 4 The unpublished Tenth Circuit opinion cited by the United States below is not to the contrary because the key discussion referenced by the United States was mere dicta. See *United States v. Escalante*, 933 F.3d 395, 402 n.9 (5th Cir. 2019) (discussing *United States v. Forster*, 549 F. App'x 757 (10th Cir. 2013) (unpublished)).

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United States District Court, D. Idaho.

UNITED STATES of America, Plaintiff,
v.
Myron Wayne DANIEL, Defendant.

Case No. 1:20-cr-00112-DCN

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Signed 07/19/2021

Attorneys and Law Firms

David Gregory Robins, United States Attorney's Office, Boise, ID, for Plaintiff.

MEMORANDUM DECISION AND ORDER

David C. Nye, Chief U.S. District Court Judge

I. INTRODUCTION

*¹ Pending before the Court is Defendant Myron Wayne Daniel's Motion to Dismiss (Dkt. 27). Having reviewed the record and briefs, the Court finds the facts and legal arguments are adequately presented. Accordingly, in the interest of avoiding further delay, and because the Court finds that the decisional process would not be significantly aided by oral argument, the Court will decide the Motion without oral argument. Dist. Idaho Loc. Civ. R. 7.1(d)(1)(B). For the reasons outlined below, Daniel's Motion to Dismiss is GRANTED.

II. BACKGROUND

In 1988, Daniel pled guilty to Assault with the Intent to Commit Rape ("CAWICR") in violation of California Penal Code § 220. Upon his release from prison, Daniel was required to register as a sex offender under the Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 20901 *et seq.* Daniel moved to Idaho in early 2019, but did not register as a sex offender.¹ On June 10, 2020, Daniel was indicted by a grand jury for failing to register between April 2019 through June 2020, in violation of 18 U.S.C. § 2250(a).² Dkt. 1.

On April 30, 2021, Daniel moved to dismiss the Indictment because his duty to register under SORNA has purportedly expired. Dkt. 27. After briefing on Daniel's Motion to Dismiss closed, the Court requested supplemental briefing from the parties.³ Such briefing has been submitted, and the matter is ripe for the Court's review.

III. DISCUSSION

The length of time Daniel was required to register under SORNA depends upon his tier classification. SORNA classifies sex offenses as either Tier III, Tier II, or Tier I. 34 U.S.C. § 20911(2)–(4). While a Tier III offender must register for life, a Tier II offender must register for 25 years, and a Tier I offender must register for 15 years. 34 U.S.C. § 20915(a). The Government acknowledges that if Daniel is not a Tier III offender, he is no longer required to register under SORNA. Dkt. 34, at 2. The Court must accordingly evaluate whether Daniel's CAWICR conviction constitutes a Tier III offense. A Tier III sex offender is defined, in relevant part, as "a sex offender whose offense is punishable by imprisonment for more than 1 year and ... is comparable to or more severe than ... aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18)." 34 U.S.C. § 20911(4)(A)(i).

*² The Court follows the categorical approach to assess whether Daniel's CAWICR conviction is comparable to or more severe than federal aggravated sexual abuse and sexual abuse. *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1133 (9th Cir. 2014) (citations omitted). In following the categorical approach, it must be noted that the Court is required to compare California law—not Idaho law—to federal law because Daniel was convicted under California law.

A. Categorical Approach

Under the categorical approach, the Court compares the elements of CAWICR with the elements of aggravated sexual abuse under 18 U.S.C. § 2241(a)(1), and sexual abuse under 18 U.S.C. § 2242(1).⁴ *United States v. Descamps*, 570 U.S. 254, 260 (2013) (citing *Taylor v. United States*, 495 U.S. 575, 599–600 (1990)). Daniel's prior conviction may properly serve as a predicate for his classification as a Tier III sex offender if CAWICR is defined more narrowly than, or has the same elements as, the "generic" federal crimes.

Cabrera-Gutierrez, 756 F.3d at 1133. If, however, CAWICR “sweeps more broadly” than the federal crimes, Daniel’s prior conviction cannot serve as a statutory predicate for his Tier III classification. *Id.* (quoting *Descamps*, 570 U.S. at 261).

Under *Descamps*, the “key” to the categorical comparison is only the “statutory definitions—*i.e.*, the elements—of a defendant’s prior offense[]” and *not* “the particular facts underlying” the conviction. 570 U.S. at 260 (quoting *Taylor*, 495 U.S. at 600). The Court must presume that Daniel’s prior conviction “rested upon [nothing] more than the least of th[e] acts criminalized” by CAWICR. *United States v. Baldon*, 956 F.3d 1115, 1125 (9th Cir. 2020) (alterations in original) (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190–191 (2013)). Thus, the Court cannot consider the facts giving rise to Daniel’s CAWICR conviction, even if such facts establish that his conduct was equivalent to federal sexual abuse or aggravated sexual abuse. *Cabrera-Gutierrez*, 756 F.3d at 1133.

To establish CAWICR is not a categorical match with the cognate federal crimes, Daniel must show “a realistic probability, not a theoretical possibility” that California would apply CAWICR to conduct that falls outside the generic definition of federal sexual abuse or aggravated sexual abuse. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). This reasonable possibility can be demonstrated by showing that, “in at least one other case,” a California state court “in fact did apply” CAWICR to conduct that was less severe than crimes of sexual abuse or aggravated sexual abuse. *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010), overruled on other grounds by *Betansos v. Barr*, 928 F.3d 1133, 1141–42 (9th Cir. 2019).

B. CAWICR

CAWICR is a form of attempted rape. *People v. Rupp*, 260 P.2d 1, 7 (Cal. 1953); *People v. Leal*, 103 Cal. Rptr. 3d 351, 358 (Cal. Ct. App. 2009). The elements of CAWICR are: (1) an assault (2) with a specific intent to commit rape. *People v. Puckett*, 118 Cal. Rptr. 884, 888 n. 3 (Cal. Ct. App. 1975). The parties agree that the assault element of CAWICR matches that of federal attempt law. Dkt. 34, at 5, 11; Dkt. 35, at 3. That is, a person who commits California assault also, categorically, commits a federal act of attempt. *Id.*; see also Dkt. 37, at 4 (“The force required for an assault in California is equivalent to a federal attempt.”); Dkt. 38, at 2.

*3 The parties also agree that the ultimate question for the Court is whether the force required for the substantive state

offense (rape) is broader than that required for a conviction of aggravated sexual abuse or sexual abuse under federal law.⁵ See, e.g., Dkt. 34, at 6; Dkt. 35, at 9–10 n. 3. Said another way, if California’s rape statute criminalizes conduct that would not constitute federal aggravated sexual abuse or sexual abuse, then Daniel’s prior state conviction cannot serve as a predicate for his classification as a Tier III sex offender and the Indictment must be dismissed. On the other hand, if California’s rape statute criminalizes conduct that is more severe than, or equivalent to, federal aggravated sexual abuse or sexual abuse, then Daniel is a Tier III offender and his Motion to Dismiss must be denied.

C. Aggravated Sexual Abuse

In California, rape is defined by statute, in relevant part, as “an act of sexual intercourse … accomplished against a person’s will by means of *force*, violence, or fear of immediate and unlawful bodily injury on the person or another.” California Penal Code § 261(a)(2) (1988) (emphasis added).⁶ Similarly, aggravated sexual abuse is defined, in relevant part, as a person who “knowingly causes another person to engage in a sexual act⁷ by using *force* against that other person[.]” 18 U.S.C. 2241(a)(1)⁸ (emphasis added). The parties dispute whether the “force” required under California Penal Code § 261(a)(2) is equivalent to the “force” required under § 2241(a)(1).

1. Force under California Penal Code § 261(a)(2) and 18 U.S.C. § 2241(a)(1)

Daniel argues force is broader under California Penal Code § 261(a)(2) than under § 2241(a)(1) because, in California, rape can be committed with only the force inherent to sexual penetration, while aggravated sexual abuse requires additional force. The Government counters that the force required for both California rape and aggravated sexual abuse is force sufficient to overcome the will of the victim. As such, the Government contends the force elements of California’s rape statute and federal aggravated sexual abuse are coterminous.

In California, the “term ‘force’ as used in the rape statute is not specifically defined.” *People v. Griffin*, 94 P.3d 1089, 1093 (Cal. 2004). In *Griffin*, the California Supreme Court held there was nothing in the express statutory language of California Penal Code § 261 to suggest “force in a forcible

rape prosecution actually means force *substantially* different from or *substantially* greater than the physical force normally inherent in an act of consensual sexual intercourse.” *Id.* at 1094 (emphasis in original) (cleaned up). The *Griffin* court explained:

The Legislature has never sought to circumscribe the nature or type of forcible conduct that will support a conviction of forcible rape, and indeed, the rape case law suggests that even conduct which might normally attend sexual intercourse, when engaged in with force sufficient to overcome the victim's will, can support a forcible rape conviction.

*⁴ *Id.* at 1096–97. Because “the fundamental wrong is the violation of a woman's will and sexuality, the law of rape does not require that ‘force’ cause physical harm.” *Id.* at 1095 (citation omitted). Rather, the “law of rape primarily guards the integrity of a woman's will and the privacy of her sexuality from an act of intercourse undertaken without her consent.” *Id.* Under *Griffin*, the force element turns upon a lack of consent rather than on a particular degree of actual force. *Id.* at 1097.

Following *Griffin*, the California Court of Appeals held a forcible rape conviction could be sustained with no more force than that “inherent in the act of penetration” in *In Re Jose P.*, 31 Cal. Rptr. 3d 430, 435 (Cal. Ct. App. 2005). In *Jose P.*, the minor victim voluntarily engaged in sexual foreplay with the minor defendant. During such, the defendant attempted penetration but failed. *Id.* at 431. After the failed attempt, the victim told the defendant she was not willing to have sex, but continued to voluntarily engage in foreplay. *Id.* Later, the defendant achieved penetration against the victim's will but without the exertion of any force other than that inherently involved in the act of penetration itself. *Id.* at 434.

The victim in *Jose P.* acknowledged that the defendant never threatened her or attempted to stop her from leaving his room, and the court also determined there was no evidence the defendant used his weight as a means to hold the victim down. *Id.* at 434. The court nonetheless held “the force inherently involved in the penetration itself was sufficient” to support

the defendant's conviction of forcible rape. *Id.* In so holding, the court explained:

We do not hold that, in all cases, the force inherent in the act of penetration is sufficient to show forcible rape; indeed, we think as a general matter it is not.... What we do hold is that there is substantial evidence in this case to show that, against the victim's will, appellant forced his penis inside her vagina and thus committed a violation of [California Penal Code § 261(a)(2)].

Id. at 435 (citations omitted).

Although the *Jose P.* court held the act of penetration is not, as a general matter, sufficient to show forcible rape, it nonetheless held such force *was* sufficient to support the defendant's conviction for forcible rape where the victim made it clear to the defendant “repeatedly and prior to penetration” that she was unwilling to have sex. *Id.* As Daniel notes, the categorical approach does not consider the typical way a state offense is committed. Dkt. 35, at 5. Instead, “to satisfy the categorical test, even the least egregious conduct the [state] statute covers must qualify” as federal aggravated sexual abuse. *United States v. Lopez-Solis*, 447 F.3d 1201, 1206 (9th Cir. 2006). The existence of even a single unpublished decision is sufficient to establish, for purposes of the categorical analysis, that a state statute is overbroad. *Nunez*, 594 F.3d at 1137 n. 10. *Jose P.* illustrates the least egregious amount of force necessary to sustain a conviction under California's rape statute is the force “inherent in the act of penetration” if such penetration is against the victim's will. *Jose P.*, 31 Cal. Rptr. 3d at 435.

By contrast, the Ninth Circuit has held § 2241(a)(1) “requires a showing of actual force.” *United States v. H.B.*, 695 F.3d 931, 936 (9th Cir. 2012) (quoting *United States v. Fulton*, 987 F.2d 631, 633 (9th Cir. 1993)). “While the statute does not define ‘force’ or specify how much force is necessary to amount to a violation,” Congress has stated that the requirement of force may be satisfied by a showing of “the use of such physical force as is sufficient to overcome, restrain, or injure a person[.]” *Id.* (citation omitted); *see also United States v. Archdale*, 229 F.3d 861, 868 (9th Cir. 2000) (same); *Fulton*, 987 F.2d at 633 (same); *United States v. Fire*

Thunder, 908 F.2d 272, 274 (8th Cir. 1990) (“Section 2241(a)(1) envisions actual force.”).

*5 The Government interprets “overcome,” as referenced in the aforementioned cases, as force sufficient “to overcome the victim’s will.” Dkt. 34, at 8. However, this is not what the federal cases state. Instead, “overcome” appears to mean to physically overcome the victim—and not just to overcome the victim’s will—because the cases say aggravated sexual abuse requires “physical force” sufficient to “overcome … a person” and not force sufficient to overcome *a person’s will*. *H.B.*, 695 F.3d at 936 (emphasis added). Moreover, the federal cases each explain the “force requirement is met when the ‘sexual contact resulted from a restraint upon the other person that was sufficient that the other person could not escape the sexual contact.’” *Fulton*, 987 F.2d at 633 (emphasis added) (quoting *Fire Thunder*, 908 F.2d at 274); *Archdale*, 229 F.3d at 868; *H.B.*, 695 F.3d at 936 (“In our few judicial decisions interpreting the term ‘force,’ we have held that, ‘the force requirement is met when the sexual contact resulted from a restraint upon the other person that was sufficient that the other person could not escape the sexual contact.’” (quoting *Fulton*, 987 F.2d at 633)); *United States v. Lucas*, 157 F.3d 998, 1002 (5th Cir. 1998) (“[T]he disparity in power between a jail warden and an inmate, *combined with physical restraint*, is sufficient to satisfy the force requirement of § 2241.”) (emphasis added).

As *Jose P.* illustrates, a conviction for rape under California Penal Code § 261(a)(2) does not require that the victim was physically overcome, restrained, or prevented from escaping the sexual contact. 31 Cal. Rptr. 3d at 432, 434 (explaining there was no evidence the defendant used his weight to hold the victim down, and noting, “[o]n both direct and cross examination, [the victim] acknowledged that [the defendant] had never threatened her or attempted to stop her from leaving the room.”). The California Supreme Court has also specifically held the force required for a conviction under California’s rape statute does not require that the victim was physically unable to escape sexual contact. *Griffin*, 94 P. 3d at 1096 (“[I]n a forcible rape prosecution the jury determines whether the use of force served to overcome the will of the victim to thwart or resist the attack, *not* whether the use of such force physically facilitated sexual penetration or prevented the victim from physically resisting her attacker.”) (emphasis in original).

Because, in its broadest application, California Penal Code § 261(a)(2) requires only the force inherent in the act of

penetration itself, if such penetration is against an express manifestation of the victim’s will, it is not a categorical match with aggravated sexual abuse, which requires force sufficient to physically overcome, restrain, or injure *the victim*.

The Government suggests *United States v. Bordeaux*, 997 F.2d 419, 420 (8th Cir. 1993) illustrates a disparity in size—without actual force—is sufficient force for a conviction of aggravated sexual abuse. The *Bordeaux* court stated the “apparent disparity in size between Mr. Bordeaux and the victim [200 pounds versus a 10-year old child] … might be enough, in itself, to establish” a restraint amounting to force. *Id.* at 421 (emphasis added). As Daniel highlights, the Government reasons that *Bordeaux* means federal aggravated sexual abuse can be committed through atmospheric “force”—such as a size or power difference between the defendant and the victim—and with no more force than that inherent to penetration. See Dkt. 35, at 7 (citing Dkt. 34, at 10–11). However, the Eighth Circuit has more recently held “size difference alone *cannot* establish use of force” and “status evidence, i.e., a large adult and a small child” alone is insufficient to establish “force as an affirmative matter,” as required under § 2241(a)(1). *United States v. Blue*, 255 F.3d 609, 613 (8th Cir. 2001) (emphasis added).⁹ Rather, a difference in size is relevant only where there is evidence that “the defendant affirmatively used his size advantage to effect the crime,” such as by “immobiliz[ing] the victim by his weight.” *United States v. Sharpfish*, 408 F.3d 507, 510–511 (8th Cir. 2005). Yet, as discussed above, the court in *Jose P.* upheld a conviction for forcible rape after explicitly finding there was no evidence the defendant used his size to physically overcome or restrain his victim. 31 Cal. Rptr. 3d at 434.

*6 Other federal cases demonstrate that federal aggravated sexual abuse requires proof the defendant did not simply overcome the will of the victim, but instead used physical force to accomplish the sex act. For instance, in *Cates v. United States*, 882 F.3d 731 (7th Cir. 2018), the Seventh Circuit considered whether a jury instruction on aggravated sexual abuse was in error. At Cates’s trial, the judge instructed the jury that “force” under § 2241(a)(1) did not mean the government was required to demonstrate that the “defendant used actual violence,” and that “force” included “not just physical force but also psychological coercion and [could] even be inferred from a disparity in size between the defendant and victim.” *Id.* at 733, 737. The Seventh Circuit found this instruction was “badly flawed,” explaining “[w]e long ago held that the term ‘force’ in § 2241(a)(1) means

physical force." *Id.* at 737 (emphasis in original) (citing *United States v. Boyles*, 57 F.3d 535, 544 (7th Cir. 1995)).

The Seventh Circuit further instructed:

By defining ‘force’ in this expansive way the jury instruction flatly contradicted the text of § 2241(a)(1) The instruction plainly misstated the law by wrongly suggesting that force does *not* mean *physical* force. The jury was told that threats and other nonphysical forms of coercion—including a mere disparity in coercive power or size—could suffice to establish force. That erroneously conflated the distinction between ‘force’ [as required for aggravated sexual abuse] and ‘fear’ [as required for non-aggravated sexual abuse], relaxing the government’s burden.

Cates, 882 F.3d at 737 (emphasis in original). *Cates* illustrates force sufficient to overcome the will of the victim, without physical force, is insufficient to constitute aggravated sexual abuse under § 2241(a)(1).

Further, in *United States v. Montgomery*, 966 F.3d 335 (5th Cir. 2020), the Fifth Circuit specifically held the force element of § 2241(a)(1) requires physical force in addition to that inherent to sexual penetration. The defendant in *Montgomery* appealed his conviction for failure to register under SORNA. Like Daniel, the defendant argued his registration requirement had expired because his underlying state conviction was not a Tier III offense. *Id.* at 337. The Fifth Circuit applied the categorical approach to determine whether the defendant’s conviction for second degree sexual assault under New Jersey law was comparable to, or more severe than, federal aggravated sexual abuse. *Id.* at 338.

At the time the defendant in *Montgomery* was convicted of his state crime, New Jersey’s sexual assault statute required, in relevant part, an “act of sexual penetration” using “physical force or coercion.” *Id.* (citing 1992 N.J. Stat. § 2C:14–2(c) (1)). The Fifth Circuit held the “force” required under the New Jersey statute was broader than “force” required under § 2241(a)(1) because, like California Court of Appeals in *Jose*

P., New Jersey courts had held “physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful ... [r]ather, the act of penetration itself, if engaged in by the defendant without the affirmative and freely-given permission of the victim ... satisfies the physical force or coercion element of sexual assault.” *Id.* at 338–39 (cleaned up). The *Montgomery* court explained § 2241(a)(1) instead requires “restraint sufficient to prevent the victim from escaping.”¹⁰ *Id.* at 338 (citations omitted). Since the New Jersey predicate statute criminalized conduct that fell outside of the definition of aggravated sexual abuse, the *Montgomery* Court held the defendant was not required to register as a Tier III offender and vacated his conviction for failure to register under SORNA. *Id.* at 339.

*7 Because § 2241(a)(1) requires force sufficient to *physically* overcome, restrain, or injure the victim, while forcible rape in California—in its broadest form—requires force sufficient to overcome the victim’s will, Daniel’s prior offense is not a categorical match with § 2241(a)(1). The Court must next consider whether Daniel’s prior offense is a categorical match with federal sexual abuse.

D. Sexual Abuse

As noted, California defines rape as “an act of sexual intercourse” ... “accomplished against a person’s will by means of force, violence, or fear of immediate and unlawful bodily injury on the person or another.” California Penal Code § 261(a)(2) (1988). Under 18 U.S.C. § 2242(1), a person commits sexual abuse if they knowingly cause “another person to engage in a sexual act by threatening or placing that other person in fear[.]”¹¹ While, in its broadest application, forcible rape in California includes an act of sexual intercourse against the victim’s will, *Griffin*, 94 P.3d at 1094, the Ninth Circuit has interpreted the phrase “threatening or placing that other person in fear” in § 2242(1) to require *more* than merely a lack of consent. *Cabrera-Gutierrez*, 756 F.3d at 1133–34 (holding an Oregon sexual abuse statute penalizing penetration without consent was broader than § 2242); *see also Montgomery*, 966 F.3d at 339 (finding New Jersey statute, which criminalized non-consensual intercourse through the use of physical force or coercion, was broader than § 2242); *United States v. Iu*, 917 F.3d 1026, 1031 (8th Cir. 2019) (holding defendant’s history of physically assaulting and threatening to kill the victim, coupled with the victim’s fear of being hit again and a physical struggle when the defendant attempted to remove the victim’s underwear, satisfied the fear requirement of § 2242); *United States*

v. Betone, 636 F.3d 384, 388 (8th Cir. 2011) (relying on statements such as “[y]ou don't want to do that, because it's the worst thing you can do for yourself right here and right now,” and fact that defendant blocked the exit and prevented the victim from leaving to establish sexual abuse through the use of threats or fear under § 2242).

In California, the “gravamen of the crime of forcible rape is sexual penetration *accomplished against the victim's will[.]*” Griffin, 94 P.3d at 1097 (emphasis added). Thus, “even conduct which might normally attend sexual intercourse, when engaged in with force sufficient to overcome the victim's will, can support a forcible rape conviction.” *Id.* at 1089. Significantly, in *Jose P.*, the California Court of Appeals held nonconsensual intercourse that did not involve the use of threats or fear nonetheless violated California's forcible rape statute. 31 Cal. Rptr. 3d at 433–34. The prosecutor in *Jose P.* conceded that any fear felt by the victim “was just based on her simple inexperience” and was not due to any conduct by the defendant. *Id.* at 433 n. 4. As noted, the victim also acknowledged that the defendant never threatened her. *Id.* at 432. Thus, while nonconsensual intercourse without the use of threats or fear would not violate § 2242(1), *Jose P.* illustrates nonconsensual intercourse without the use of threats or fear can constitute a violation of California Penal Code § 261(a)(2). *Id.* at 433. California's rape statute thus penalizes a broader class of behavior than § 2242(1) and Daniel's prior offense is also not a categorical match with federal sexual abuse.

IV. CONCLUSION

***8** In short, Daniel's conviction does not qualify as a Tier III offense, and his duty to register under SORNA has expired. As such, the Indictment must be dismissed. The Court does not make this decision lightly. Like many other federal courts, this Court is skeptical of the categorical approach because it is “difficult to apply and can yield dramatically different sentences depending on where a [crime] occurred.” *Quarles v. United States*, 139 S. Ct. 1872, 1881 (2019) (Thomas, J., concurring); *see also United States v. Escalante*,

933 F.3d 395, 406 (5th Cir. 2019) (“In the nearly three decades since its inception, the categorical approach has developed a reputation for crushing common sense in any area of the law in which its tentacles find an inroad.”); *United States v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017) (observing that the categorical approach carries judges “down the rabbit hole ... to a realm where we must close our eyes as judges ... It is a pretend place in which a crime the defendant committed violently is transformed into a non-violent one.... Curiouser and curioser it has all become[.]”); *United States v. Doctor*, 842 F.3d 306, 313–15 (4th Cir. 2016) (Wilkinson, J., concurring) (stating that the categorical approach has caused judges to “swap[] factual inquiries for an endless gauntlet of abstract legal questions[.]”).

Although the specific acts underlying Daniel's conviction fit within SORNA's Tier III definition, the Court is compelled by the categorical approach to find Daniel is not a Tier III offender because the crime of rape in California is broader than the crimes of federal aggravated sexual abuse and sexual abuse. *See, e.g.*, Dkt. 34-1. Nevertheless, the Court is bound to follow the categorical approach, and this outcome is required, “by faithful adherence to precedent.” *Escalante*, 933 F.3d at 406.

V. ORDER

Now, therefore, IT IS HEREBY ORDERED:

1. Daniel's Motion to Dismiss (Dkt. 27) is **GRANTED** and the Indictment (Dkt. 1) is **DISMISSED**.

All Citations

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Footnotes

- 1 SORNA requires qualifying offenders to “register, and keep the registration current, in each jurisdiction where the offender” resides, works, or goes to school. 34 U.S.C. § 20913(a) (formerly cited as 42 U.S.C. § 16913(a)). SORNA defines “sex offender” to “mean[] an individual who was convicted of a sex offense.” 34 U.S.C. § 20911(1). The term “sex offense” is defined in § 20911(5)(A)(i) to include: “a criminal offense that has an element involving a sexual act or sexual contact with another.” While Daniel argues he is not a Tier III offender, he does not dispute he was a sex offender.
- 2 Section 2250 is the penalty provision of SORNA. 18 U.S.C. § 2250. Although Congress enacted SORNA in 2006, SORNA became retroactive, and applicable to pre-Act offenders, on August 1, 2008. *United States v. Mattix*, 694 F.3d 1082, 1083–84 (9th Cir. 2012) (citing *United States v. Valverde*, 628 F.3d 1159, 1169 (9th Cir. 2010)).
- 3 Specifically, the Court requested simultaneous briefs on the applicability of *People v. Cook*, 213 Cal. Rptr. 3d 497 (Cal. Ct. App. 2017) to Daniel's SORNA registration requirement. Dkt. 36.
- 4 A violation of either 18 U.S.C. § 2241(a)(1) or § 2242(1) would render Daniel a Tier III sex offender pursuant to 34 U.S.C. § 20911(4)(A)(i). Because 34 U.S.C. § 20911(4)(A) defines Tier III offenses to include any “attempt” to commit an offense comparable to aggravated sexual abuse or sexual abuse, the Court references the pertinent federal crimes without using the term “attempted.”
- 5 Daniel does not dispute that it is appropriate to apply the modified categorical approach to narrow the focus to the specific crime of assault with intent to commit rape under California Penal Code § 220, and, specifically, rape by force or fear under California Penal Code § 261(a)(2). Dkt. 27, at 5 n. 2 (citing *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016)).
- 6 California Penal Code § 261 was amended in 1990 to add duress and menace as means of accomplishing sexual intercourse against a person's will.
- 7 The definition of a “sexual act” for purposes of § 2241 includes “contact between the penis and the vulva,” which “occurs upon penetration, however slight.” 18 U.S.C. § 2246(2)(A).
- 8 Daniel maintains, and the Government does not contest, that the other subsections of § 2241 are not a match with a violation of CAWICR by force. Dkt. 27, at 7 n. 3.
- 9 Several of the cases referenced in this Memorandum Decision and Order, including *Blue* and *Bordeaux*, involved appeals of sentencing enhancements applied by the trial court for using force contemporaneous with aggravated sexual abuse. Section 2A3.1(b)(1) of the United States Sentencing Guidelines provides: “If the offense was committed by the means set forth in 18 U.S.C. § 2241(a) or (b), increase by 4 levels.” In *Blue*, the Eighth Circuit affirmed the defendant's conviction for sexual abuse, but vacated his sentence and remanded to the trial court for resentencing without the four-level enhancement for use of force because 2A3.1(b)(1), and, by implication, § 2241(a)(1), require more force than simply a difference in size between the victim and the perpetrator. 255 F.3d at 613.
- 10 The Government suggests *Montgomery* is inapposite because it was not an attempt case. This is irrelevant given the Government's agreement that the ultimate question is whether the force required for rape under California law is broader than that required for a conviction of aggravated sexual abuse. Dkt. 34, at 7. The Government also contends the “New Jersey predicate law is not like California rape law in the case at bar which requires force.” *Id.* at 12. While the amended N.J. Stat. § 2C:14–2(c)(1) requires only “an act of penetration” using “coercion or without the victim's affirmative and freely-given permission,” the 1992 version of the statute, which was the relevant statute for purpose of the *Montgomery* court's categorical analysis, did require an act of penetration through “the use of physical force or coercion.” 966 F.3d at 338.

11 The other provisions of § 2242 are not at issue in this case.

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UNITED STATES of America

v.

Kenneth James FLINT

CRIMINAL ACTION NO. 17-00140-01

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Signed 01/18/2018

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MEMORANDUM RULING

ELIZABETH ERNY FOOTE, UNITED STATES DISTRICT
JUDGE

*1 Before the Court is a Motion to Dismiss Indictment by Defendant Kenneth James Flint. [Record Document 20]. The Government has filed an opposition. [Record Document 28]. Because Defendant's prior conviction is properly classified as a Tier I conviction requiring registration as a sex offender for a period of fifteen years, the motion is **GRANTED**.

I. Background

On August 13, 1991, Defendant pleaded guilty in the Tenth Judicial Circuit Court of Illinois to Aggravated Criminal Sexual Abuse, 720 Ill. Comp. Stat. Ann. 5/11-1.60 (West 2017). [Record Document 20-2]. He was sentenced to four years probation. [Record Document 20-3]. The Sex Offender Registration and Notification Act ("SORNA") requires that a sex offender register in every jurisdiction where he or she resides, is employed, or is a student. 34 U.S.C. § 20913(a) (formerly 42 U.S.C. § 16913(a) (2012)). Sex offenses are classified into tiers. *Id.* § 20911(2)-(4). A Tier III sex offender is one whose predicate offense is "comparable to or more severe than" the federal offenses of Aggravated Sexual Abuse, Sexual Abuse, or Abusive Sexual Contact against a minor under thirteen or whose predicate offense involved child kidnapping. *Id.* § 20911(4). The predicate convictions for Tier II offenders must either

be "comparable to or more severe than" the federal offenses of Sex Trafficking, Coercion and Enticement, Transportation with Intent to Engage in Criminal Sexual Activity, or Abusive Sexual Contact, or involve the use of a minor in a sexual performance, solicitation of a minor to practice prostitution, or production or distribution of child pornography. *Id.* § 20911(3). Any other sex offender is a Tier I offender. *Id.* § 20911(2). Tier I sex offenders must register for fifteen years, Tier II offenders for twenty-five years, and Tier III offenders for life. *Id.* § 20915(a). Failure to register or to update a registration is a federal offense. 18 U.S.C.A. § 2250(a) (2017).

The indictment alleges that on unknown dates between June 2016 and November 2, 2016, Defendant knowingly failed to register as a sex offender. [Record Document 1]. Defendant argues that the indictment fails as a matter of law because his Illinois conviction is properly classified as a Tier I conviction rather than a Tier III conviction. [Record Document 20 at 1]. Because more than fifteen years have elapsed since his sentencing, Defendant argues that he did not commit a crime by failing to register. [*Id.*]. The Government maintains that the Illinois offense of Aggravated Criminal Sexual Abuse is a Tier III offense because it is comparable to the federal offense of Abusive Sexual Contact against a minor under thirteen. [Record Document 28 at 5-12]. Thus, the propriety of the indictment turns on the proper classification of Defendant's predicate conviction.

II. Law and Analysis

Rule 12 of the Federal Rules of Criminal Procedure authorizes a motion to dismiss an indictment. Although a pretrial motion should not be used to resolve factual disputes, "[i]f a question of law is involved, then consideration of the motion is generally proper." *United States v. Flores*, 404 F.3d 320, 324 (5th Cir. 2005) (quoting *United States v. Korn*, 557 F.2d 1089, 1090 (5th Cir. 1977)), abrogated on other grounds by *United States v. Garcia*, No. 16-40475, 2017 WL 3978448 (5th Cir. Sept. 8, 2017). Because Defendant attacks the applicability of the crime of indictment based on a purely legal question—the appropriate tier classification of his predicate state offense—the Court may consider his motion to dismiss.

A. Classifying Offenses by Tier

*2 To determine into which SORNA tier a particular state conviction falls, the Fifth Circuit has instructed courts to employ the categorical approach. *United States v. Young*, 872 F.3d 742, 746 (5th Cir. 2017). Under this approach, a court must "refer only to the statutory definition of the

crime for which the [defendant] was convicted” and not to the specific circumstances underlying the conviction. *United States v. Castillo-Rivera*, 853 F.3d 218, 221–22 (5th Cir. 2017) (en banc) (quoting *Larin-Ulloa v. Gonzales*, 462 F.3d 456, 463 (5th Cir. 2006)), cert. denied, No. 17-5054, 2017 WL 2855255 (U.S. Dec. 4, 2017). However, if a state statute is divisible, that is, consists of alternative ways to commit the offense only some of which fall within a particular tier, then a modified categorical approach is appropriate. See *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). The modified categorical approach allows courts to “consult[] the trial record—including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms” in order to determine which particular statutory provision was used to convict the defendant. *Johnson v. United States*, 559 U.S. 122, 144 (2010) (citing *Chambers v. United States*, 555 U.S. 122, 126 (2009), abrogated on other grounds by *Johnson v. United States*, 135 S. Ct. 2551 (2015); *Shepard v. United States*, 544 U.S. 13, 26 (2005) (plurality opinion); *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

Once the relevant federal and state statutory provisions have been identified, a court must determine whether the offense of conviction as defined by the state legislature is “comparable to or more severe than” the federal offense. 34 U.S.C. § 20911(3)–(4); see *Young*, 872 F.3d at 745–47. To meet this test under the categorical approach, the elements of a state offense must be such that a conviction for the state offense would necessarily satisfy the elements of the federal offense. See *Descamps*, 133 S. Ct. at 2283 (citing *Taylor*, 495 U.S. at 599); *Castillo-Rivera*, 853 F.3d at 221–22 (noting that the categorical approach inquiry “ask[s] whether th[e] legislatively-defined offense necessarily fits within” the offense as defined by Congress). Although the comparison focuses only on the elements of each offense, for SORNA purposes “it is not necessary that the two crimes be identical,” and the state offense may be “slightly broader” than the federal offense. *United States v. Coleman*, 681 Fed.Appx. 413, 416 (5th Cir. 2017) (per curiam) (quoting *United States v. Forster*, 549 Fed.Appx. 757, 769 (10th Cir. 2013)). A defendant challenging the comparability of the two statutes must “show a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of the crime.” *Young*, 872 F.3d at 746 (quoting *Castillo-Rivera*, 853 F.3d at 222). To do so, a defendant must demonstrate that the state courts, either in his own case or in other cases, have applied the state statute to criminalize conduct that would not satisfy the elements of

the federal statute. *Castillo-Rivera*, 853 F.3d at 222 (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

B. Classifying Defendant's Illinois Conviction

The Illinois offense of Aggravated Criminal Sexual Abuse can be committed in several distinct ways. 720 Ill. Comp. Stat. Ann. 5/11-1.60. Because the statute “sets out one or more elements of the offense in the alternative,” *Descamps*, 133 S. Ct. at 2281, the statute is divisible. As one district court has noted when interpreting this statute, “[s]ome of the proscribed conduct may qualify the offender as a Tier III offender ... but not all of it.” *Cary v. United States*, No. 12-CV-1469, 2013 WL 530575, at *4 (C.D. Ill. Feb. 12, 2013). As a result, the Court must employ the modified categorical approach to determine under which statutory provision Defendant was convicted. See *Descamps*, 133 S. Ct. at 2285. To do so, the Court may look to a limited selection of state court documents. See *Johnson*, 559 U.S. at 144. At present, only two state court documents are before the Court: the order accepting the plea agreement and the sentencing order. [Record Documents 20-2 and 20-3]. Although both documents indicate that Defendant pleaded guilty to Aggravated Criminal Sexual Abuse, neither indicate which of the divisible subsections of the statute Defendant actually violated. [Id.]. Under these circumstances, the Court lacks sufficient information to apply the modified categorical approach. Because the statute can be violated in ways that do not require a Tier III classification, *Cary*, 2013 WL 530575, at *4, the Court cannot conclude that Defendant is a Tier III offender based on the fact of his prior conviction alone.

*3 However, acceptable state court documents may exist that provide facts sufficient to determine which provision Defendant violated. In fact, the parties appear to agree that Defendant violated section 5/11-1.60(c)(1)(i): “A person commits aggravated criminal sexual abuse if ... that person is 17 years of age or over and ... commits an act of sexual conduct with a victim who is under 13 years of age....” [Record Documents 20-1 at 1 and 28 at 11]. Therefore, the Court will proceed with an analysis applying the categorical approach to this subsection. Under Illinois law, “sexual conduct” is “any knowing touching or fondling by the victim or the accused, either directly or through clothing, of ... any part of the body of a child under 13 years of age ... for the purpose of sexual gratification or arousal of the victim or the accused.” 720 Ill. Comp. Stat. Ann. 5/11-0.1 (West 2017). Therefore, the state crime to which Defendant pleaded guilty had four elements: (1) knowing touching; (2) sexual intent;

(3) a victim less than thirteen years old; and (4) an offender at least seventeen years old.

The parties also agree that the comparable federal offense is Abusive Sexual Contact. [Record Documents 20-1 at 3 and 28 at 1–2]. This offense is, in relevant part, “knowingly engag[ing] in or caus[ing] sexual contact with or by another person” where the other person “has not attained the age of 12 years.” 18 U.S.C. §§ 2241(c), 2244(a)(5) (2012). Sexual contact is the “intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” *Id.* § 2246(3).¹ Therefore, the elements of the federal offense are: (1) knowingly touching a specifically-identified sexual body part; (2) a sexual or harassing intent; and (3) a victim less than twelve years old.

As an initial matter, the federal offense includes a wider variety of *mentes reae* than does the Illinois statute. *Compare* 18 U.S.C. § 2246(3) (“intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person”) with 720 Ill. Comp. Stat. Ann. 5/11-0.1 (“for the purpose of sexual gratification or arousal of the victim or the accused”). However, when a state statute is drawn more narrowly than the generic federal offense, the state statute is necessarily comparable. *Descamps*, 133 S. Ct. at 2283 (citing *Taylor*, 495 U.S. at 599). Therefore, the fact that a non-sexual but abusive intent would support a conviction for Abusive Sexual Contact does not render the two statutes non-comparable because any conviction for Aggravated Criminal Sexual Abuse necessarily satisfies the more inclusive intent requirement of the federal statute. For the same reasons, the fact that an offender must be at least seventeen years old to commit Aggravated Criminal Sexual Abuse, while the federal statute imposes no minimum age for the offender, does not prevent a finding of comparability.

***4** Second, the Illinois statute appears to sweep more broadly than the federal statute because the Illinois statute protects minors under thirteen, while the federal statute protects minors under twelve. There is some debate among the circuits whether a small difference in the age range of the victim between the state and federal statutes is fatal to a finding that the state statute is comparable to or more severe than the federal offense. *Compare United States v. Forster*, 549 Fed.Appx. 757, 769 (10th Cir. 2013) (suggesting that the requirement of comparability may be expansive enough to allow a statute protecting minors under thirteen

to be comparable to one protecting minors under twelve) with *United States v. Morales*, 801 F.3d 1, 9 (1st Cir. 2015) (holding that a two-year difference in the upper age limit of the protected age groups rendered the state statute not comparable to the federal statute). However, SORNA itself obviates this distinction by indicating that Tier III applies to abusive sexual contact “against a minor who has not attained the age of 13 years.” 34 U.S.C. § 20911(4)(A)(ii). As a result, for SORNA purposes the age provisions in the Illinois statute (which criminalizes sexual contact with minors under thirteen) and the federal statute (which, for SORNA purposes, also applies to sexual contact with minors under thirteen) are comparable. *See Forster*, 549 Fed.Appx. at 769.²

Third, the Illinois offense criminalizes all touching of a minor under thirteen with sexual intent whereas the federal statute only criminalizes intentional touching of one or more specific body parts. *Compare* 720 Ill. Comp. Stat. Ann. 5/11-0.1 (“any part of the body”) with 18 U.S.C. § 2246(3) (“the genitalia, anus, groin, breast, inner thigh, or buttocks”). To prevail on his argument that this renders the Illinois statute too broad to be comparable to the federal statute, Defendant must show that an Illinois court would apply the statute to the touching of body parts other than those listed in the federal statute. *See Young*, 872 F.3d at 746–47 (citing *Castillo-Rivera*, 853 F.3d at 222). Under Illinois law, “[e]vidence that defendant touched any part of ... [the victim's] body for purposes of his sexual gratification or arousal would have been sufficient to support his conviction.” *People v. Priola*, 561 N.E.2d 82, 90 (Ill. App. Ct. 1990) (emphasis added) (citing *People v. Thingvold*, 384 N.E.2d 489 (Ill. App. Ct. 1978)).³ Thus, Illinois courts have upheld a conviction for Aggravated Criminal Sexual Abuse where a defendant touched a child’s leg and kissed her, *People v. Laremont*, 528 N.E.2d 249, 251 (Ill. App. Ct. 1988), as well as when a defendant placed his arms around a child and kissed her with his tongue, *People v. Calusinski*, 733 N.E.2d 420, 425 (Ill. App. Ct. 2000). The fact of convictions where a defendant did not touch any of the body parts listed in the federal statute conclusively demonstrates that Illinois courts do, on occasion, apply the statute to touching that would not be criminalized under the federal statute.

***5** The Government correctly notes that Illinois courts typically require evidence of more than mere touching of non-sexual body parts before convicting a defendant of Aggravated Criminal Sexual Abuse, [Record Document 28 at 8], but the Government misconstrues the import of these additional facts. Rather than evidence of “touching,” these facts are evidence of a defendant’s intent. *See People v.*

Ostrowski, 914 N.E.2d 558, 567 (Ill. App. Ct. 2009) (citing *People v. Kolton*, 806 N.E.2d 1175 (Ill. App. Ct. 2004)) (“Intent to arouse or satisfy sexual desires may be established by circumstantial evidence, which the trier of fact may consider by inferring defendant’s intent from his conduct.”). For instance, in *People v. Calusinski*, the victim testified that the defendant “placed his hands on her, kissed her, and put his tongue in her mouth.” 733 N.E.2d at 425. No evidence was presented that the defendant touched any of the body parts delineated in the federal statute. Therefore, the degree of contact necessary to satisfy the “touching” element of the Illinois statute was provided in *Calusinski* by a form of contact that would not satisfy the parallel element of the federal statute. The *Calusinski* court’s discussion of whether and what sort of kissing was necessary to trigger the statute was directed towards establishing whether evidence of the touching that did occur indicated that its purpose was sexual arousal or gratification. *Id.* at 425–26. (“Based on the circumstances, we believe that the trial court could reasonably infer that the defendant intentionally placed his tongue in the victim’s mouth for purposes of his own sexual arousal.”).

Similarly, in *People v. Laremont*, the defendant “slid his hand up [the victim’s] leg and kissed her with his tongue in her mouth;” he then kissed her two more times. 528 N.E.2d at 250. Some months later, the defendant touched the victim’s buttocks, bit her ear, tried to lay on top of her, and touched her stomach with his penis. *Id.* The defendant was charged with two counts of Aggravated Criminal Sexual Assault, one for each incident. *Id.* at 251. The Court affirmed the defendant’s conviction on the first count. *Id.* By noting the legislative choice to “declare [that] the intentional touching of a child under 13 years of age by a person age 17 or over for the purpose of sexual gratification or arousal constitutes felonious conduct,” the court effectively held that touching a leg while kissing is “sexual conduct” within the meaning of the statute when the victim is under thirteen. *Id.* at 251–52. The additional conduct established a second count of the offense and was not used by the Illinois court to establish the elements of the first count. *Id.* at 250.

The Government also relies heavily upon *People v. Ostrowski* for the proposition that kissing alone does not violate the Illinois statute and that “other factors such as ‘tongue-kissing, fondling, groping, or rubbing’ done for purposes of sexual gratification or arousal are required.” [Record Document 28 at 8]. However, “[t]he question on appeal [in *Ostrowski*] was] whether the State met its burden of proving that defendant kissed [the victim] for the purpose of sexual gratification or

arousal.” *Ostrowski*, 914 N.E.2d at 566 (emphasis added). Thus, the additional factors that the Government insists must be present are factors that the Illinois court believed allowed an inference of sexual intent. *See id.* at 568–69. In *Ostrowski*, it was the absence of these factors and the presence of others such as a public place, numerous witnesses, and a victim who always kissed relatives on the lips that prevented a finding of sexual intent from evidence of mere kissing. *Id.* at 571. As discussed above, the intent element in the Illinois statute is more narrowly drawn than the parallel element in the federal statute; hence, this element satisfies the categorical test by virtue of the statutory language. In consequence, facts that serve to prove intent are irrelevant to a determination of whether a different element of the statute (i.e., “touching”) has been satisfied. Because *Calusinski* and *Laremont* reveal that Illinois courts have found that kissing while touching a non-sexual body part satisfies the “touching” element of Aggravated Criminal Sexual Abuse, the Court concludes that the Illinois statute is applied by the state courts to circumstances that exceed those criminalized in the federal offense of Abusive Sexual Contact.

This Court’s determination that the Illinois statute is applied more broadly than the federal statute does not end the inquiry because the Fifth Circuit has made it clear that a state statute may be “slightly broader” than the federal statute and yet be comparable. *Coleman*, 681 Fed.Appx. at 416 (quoting *Forster*, 549 Fed.Appx. at 769). In *Coleman*, the Court of Appeals concluded that a Minnesota statute is “comparable to or more severe than” the federal crime of Abusive Sexual Contact “even if the Minnesota statute has been applied to a slightly broader range of conduct.” *Id.* at 418. Although this statement might imply that the Fifth Circuit has directed district courts to find a state statute comparable to a federal statute where the state statute has been applied to factual circumstances that are close to but still outside the ambit of the federal statute, the actual analysis in *Coleman* does not extend so far. The Minnesota courts had applied the statute at issue to burning or lacerating a child’s penis in the absence of sexual intent. *Id.* at 417 (citing *State v. Ahmed*, 782 N.W.2d 253, 257 (Minn. Ct. App. 2010); *State v. Chandler*, No. A12-2142, 2013 WL 5612549, at *1 (Minn. Ct. App. Oct. 15, 2013)). However, the Fifth Circuit held that “the intent to ‘abuse’ in 18 U.S.C. § 2246(3) is analogous to the aggressive intent required by the Minnesota statute.” *Id.* Although the court noted that there were no “case[s] in which an individual was punished under the federal statute for non-sexual conduct,” *id.*, the court did not fully reach the question before this Court —whether state court application of a state statute to facts that

exceed the language of the relevant federal statute prevents a finding of comparability.

*6 In the one occasion in which it has interpreted *Coleman*, the Fifth Circuit determined that a Mississippi statute criminalizing contact with any body part of a child under sixteen when an offender possesses an intent to seek sexual gratification is comparable to the federal offense of Abusive Sexual Contact. *Young*, 872 F.3d at 746.⁴ The court held that the mere possibility that a state statute would be applied to body parts outside of the list in the federal statute was insufficient to defeat comparability because the defendant had located no Mississippi case applying the statute to the touching of body parts other than those listed in the federal statute. *Id.* In the present case, however, Illinois courts have applied the state statute to touching that would not expose a person to criminal liability under the federal statute. *Calusinski*, 733 N.E.2d at 425; *Laremont*, 528 N.E.2d at 251. Therefore, while *Coleman* and *Young* clearly direct this Court to apply the categorical approach, neither case directly addresses whether the Fifth Circuit's embrace of a standard that allows for "some flexibility" or that allows a state statute to be "slightly broader" applies not only to the statutory text but also to its application by state courts. *Coleman*, 681 Fed.Appx. at 416–17 (first quoting *Forster*, 549 Fed.Appx. at 769; then quoting *Morales*, 801 F.3d at 7–8).

The "central feature" of the categorical approach is "a focus on the elements, rather than the facts, of a crime;" its "basic method" is to "compar[e] those elements with the generic offense's." *Descamps*, 133 S. Ct. at 2285. Therefore, when comparing the elements of a state statute whose language is "slightly broader" than the federal statute, a court can only find the statutes "comparable" for SORNA purposes if the state court refrains from applying the statute in a way that is "inconsistent with the ... federal statute." *Young*, 872 F.3d at 746. By applying slightly broader statutory language consistently with narrower language in the federal statute, courts give the state statute the "same elements" as the federal statute. See *Descamps*, 133 S. Ct. at 2283. From this, it follows that if state court interpretations of the state statute are inconsistent with the federal statute, then the two statutes do not have the "same elements." Therefore, this Court concludes that the Fifth Circuit intends to allow a finding of comparability where the language of a state statute, but not the interpretation of that statute, is "slightly broader" than the language of the federal statute. See *Young*, 872 F.3d at 747. Because Defendant has provided cases that demonstrate that the elements of Aggravated Criminal Sexual Abuse, as

explicated by the Illinois courts, may be satisfied by facts that do not satisfy the elements of the federal offense of Abusive Sexual Contact, the Illinois statute is not "comparable to or more severe than" the federal statute. As a result, Defendant's Illinois conviction does not render him a Tier III offender.

Defendant is also not a Tier II offender. Given his state charge, Defendant can be a Tier II offender only if the state charge were comparable to or more severe than Abusive Sexual Contact committed against a victim of any age. See 34 U.S.C. § 20911(3)(A)(iv). As discussed above, the range of conduct criminalized by the Illinois offense of Aggravated Criminal Sexual Abuse is broader than that forbidden by the federal offense of Abusive Sexual Contact. Hence, Defendant is not a Tier II offender. Because, a sex offense that is neither a Tier II nor a Tier III offense is merely a Tier I offense, *id.* § 20911(2), Defendant is a Tier I offender.

A Tier I offender need only register for 15 years. *Id.* § 20915(a)(1). For offenders who are not sentenced to imprisonment, the requirement to register commences three business days following the imposition of sentence. *Id.* § 20913(b)(1). Defendant's sentence of probation was imposed on October 18, 1991. [Record Document 20-3 at 1]. Therefore, Defendant was no longer required to register as a sex offender after October 23, 2006.⁵ Because the indictment alleges a failure to register between June and November 2016, [Record Document 1 at 1], the indictment does not allege a federal offense.

III. Conclusion

*7 Under the categorical approach, Defendant's conviction for Aggravated Criminal Sexual Abuse is not "comparable to or more severe than" Abusive Sexual Contact. As a result, Defendant is neither a Tier II nor a Tier III offender and instead is merely a Tier I offender. Because a Tier I offender would not be required to register at the time that the indictment alleges that Defendant failed to do so, the motion to dismiss the indictment [Record Document 28] is **GRANTED**. The indictment is **DISMISSED WITH PREJUDICE**.

THUS DONE AND SIGNED in Shreveport, Louisiana, this 18th day of January, 2018.

All Citations

Not Reported in Fed. Supp., 2018 WL 473427

Footnotes

- 1 The Government contends that an everyday understanding of what constitutes a “sexual contact” may be used to define the term for purposes of determining the tier into which an offense falls rather than relying upon the definition of “sexual contact” in 18 U.S.C. § 2246. [Record Document 28 at 6]. However, neither of the cases that the Government cites in support interpreted the precise question at issue here—whether the definition of “sexual contact” in 18 U.S.C. § 2246(3) must be used to determine the meaning of “abusive sexual contact” in 34 U.S.C. § 20911(4)(A)(ii). In fact, both cases interpreted statutory language that, unlike the language in this SORNA provision, does not reference a specific federal criminal statute. See *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1569–70 (2017) (interpreting the phrase “sexual abuse of a minor” when used without reference to any particular criminal statute); *United States v. Sinerius*, 504 F.3d 737, 742–43 (9th Cir. 2007) (interpreting the phrase “sexual abuse” when used without reference to any particular criminal statute). Moreover, the Government’s suggestion ignores the Fifth Circuit’s methodology in *Young* in which the court determined whether a Mississippi statute was comparable to the federal offense of Abusive Sexual Contact by reference to the “sexual contact” definition in 18 U.S.C. § 2246(3). See 872 F. 3d at 746.
- 2 It is also possible that the categorical approach does not apply to the question of the victim’s age. The alternative approach, the circumstances-specific approach, examines whether the criminal conduct that formed the basis of the predicate conviction would allow conviction under the generic federal statute. See *United States v. White*, 782 F.3d 1118, 1131 (10th Cir. 2015). The Fifth Circuit has yet to determine whether the categorical approach or the circumstances-specific approach applies to the question of the victim’s age. *Young*, 872 F.3d at 747–48. As the victim in Defendant’s predicate conviction was five years old, [Record Document 28 at 2], under the circumstances-specific approach, Defendant’s conduct would render the element of the state offense relating to the victim’s age comparable to the parallel element of the federal crime of Abusive Sexual Contact.
- 3 Although the Government correctly notes that the defendant in *Priola* did touch the victim’s vaginal area, [Record Document 28 at 7–8], the operative rule of law in *Priola* is that proof that the defendant touched a sexual body part is not necessary to establish a violation because, for a victim under thirteen, any touching of the victim’s body for purposes of sexual gratification is sufficient. *Priola*, 561 N.E.2d at 90. The court made this point when rejecting the defendant’s argument that the evidence was insufficient to show that he touched the victim’s vaginal area. *Id.*
- 4 The Fifth Circuit declined to address whether the fact that the Mississippi statute included children under sixteen while the federal statute protected children under twelve destroyed comparability because the defendant had waived this argument in the district court. *Young*, 872 F.3d at 747–48.
- 5 October 18, 1991 was a Friday; therefore, Defendant’s registration obligations would not have commenced until October 24, 1991.

2024 WL 3360514

Only the Westlaw citation is currently available.
United States District Court, D. Kansas.

UNITED STATES of America, Plaintiff,
v.
Donyell FLIPPINS, aka Dunyell P. Flippins,
aka Jocory L. Hamilton, Defendant.

Case No. 6:23-cr-10084-EFM

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Signed July 9, 2024
|
Filed July 10, 2024

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MEMORANDUM AND ORDER

ERIC F. MELGREN, CHIEF UNITED STATES DISTRICT JUDGE

*1 Before the Court is Defendant Donyell Flippins, aka Dunyell P. Flippins, aka Jocory L. Hamilton's objection to his classification as a Tier III sex offender under United States Sentencing Guideline ("U.S.S.G.") § 2A3.5. Defendant claims that the Kentucky statute under which he was convicted as a sex offender in 2006 categorically covers a wider range of conduct than the federal statute relevant to a Tier III classification. The Court agrees and sustains Defendant's objection.

I. Factual and Procedural Background

On December 21, 2023, Defendant pleaded guilty to violating the Sex Offender Registration and Notification Act ("SORNA"), 18 U.S.C. § 2250(a). Defendant had been convicted in 2006 under Kentucky statute, K.R.S. § 510.110(b),¹ for sexual abuse in the first degree of a four-year-old girl. As prepared by the U.S. Probation Office, Defendant's Presentence Investigation Report ("PSI") labeled

him as a Tier III sex offender under U.S.S.G. § 2A3.5, which meant his base offense level was 16.

Defendant objected to his classification as a Tier III sex offender. Applying the categorical approach to comparing federal and state crimes, Defendant argued that the Kentucky statute under which he was convicted allowed criminalized conduct falling outside the federal statute's parameters. After a hearing on the issue and supplemental briefing by the parties, the Court is prepared to rule on Defendant's objection.

II. Legal Standard

Under the United States Sentencing Guidelines, "a defendant's sentencing range is determined by a number of factors, including his offense level and criminal history."² When a defendant is sentenced for failure to register as a sex offender under SORNA, court musts determine the base offense level, which scrutinizes the severity of the defendant's underlying crime.³ SORNA divides prior sexual offenses into three categories, or tiers, with the higher tier providing for a greater base offense level.⁴

To determine which tier the defendant's previous offense falls under, courts must "compar[e] the defendant's prior sex offense to statutory criteria."⁵ In comparing state and federal crimes, courts usually must abide by the categorical approach.⁶ The categorical approach "compare[s] the elements of the statute forming the basis of the defendant's conviction with the elements of the [predicate] crime."⁷ The purpose of the categorical approach is "to see whether the state statute shares the nature of the federal offense that serves as a point of comparison."⁸ Thus, when applying the categorical approach, courts look not to the facts of the defendant's prior offense but to the elements viewed in the abstract.⁹ A notable exception under SORNA is that when a crime involves a minor, courts may "also consider the actual age of the victim by looking to the specific circumstances of the defendant's crime."¹⁰ Still, "the use of a circumstance-specific methodology should be limited to the determination of the victim's age."¹¹

*2 However, when a statute lists disjunctive elements, courts must apply the "modified categorical approach."¹² This approach helps when "a divisible statute, listing potential

offense elements in the alternative, renders opaque which element played a part in the defendant's conviction.”¹³ Essentially, statutes listing alternative elements “cover several different crimes.”¹⁴ When applying the modified categorical approach, “a sentencing court looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of.”¹⁵ The sentencing court must then categorically compare the elements of that crime with the generic offense.¹⁶

Nevertheless, statutes may simply list “alternative methods of committing one offense, so that a jury need not agree” on which was involved.¹⁷ In that case, the listed means do not change the breadth of the statute, nor do they constitute alternate elements.¹⁸ The Supreme Court gave by way of example:

To use a hypothetical adapted from two of our prior decisions, suppose a statute requires use of a “deadly weapon” as an element of a crime and further provides that the use of a “knife, gun, bat, or similar weapon” would all qualify. Because that kind of list merely specifies diverse means of satisfying a single element of a single crime—or otherwise said, spells out various factual ways of committing some component of the offense—a jury need not find (or a defendant admit) any particular item: A jury could convict even if some jurors concluded that the defendant used a knife while others concluded he used a gun, so long as all agreed that the defendant used a “deadly weapon.”¹⁹

Thus, where a statute applies “a single, indivisible set of elements,” court must apply the strictly categorical approach—not the modified categorical approach.²⁰ In other words, if a state law defines a crime “not alternatively, but only more broadly than the generic offense,” the categorical approach still applies.²¹ In that case, a statute might list alternative “means” of committing an offense without listing separate elements.²² Thus, the “threshold inquiry” is whether the disjunctive terms in a statute are “elements or means[.]”²³

Normally, when interpreting state criminal statutes, courts must “giv[e] a word its commonly understood meaning when the statute itself leaves the term undefined.”²⁴ “A statute that mirrors the generic definition of an offense but makes minor variations in terminology will suffice if it ‘corresponds

in substance to the generic meaning.’ ”²⁵ As stated by the Supreme Court,

to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.²⁶

*3 The defendant bears the burden to show that undefined elements may be interpreted broader than the generic definition suggests and may do so in two ways.²⁷ First, the defendant “may show that the statute was so applied in his own case.”²⁸ Second, he may point to “other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.”²⁹

III. Analysis

Defendant objects to his PSI in this case which labels him as a Tier III sex offender, resulting in a base offense level of 16. He argues that the Kentucky statute under which he was convicted in 2006 categorically prohibits a wider range of conduct than required to categorize a defendant as a Tier III sex offender. In contrast, the Government argues that the Kentucky statute is equivalent to 18 U.S.C. § 2244, which qualifies as a Tier III sexual offense.

A. The statutory backdrop of Defendant's objection.

Here, Defendant was convicted for sexual abuse in the first degree under K.R.S. § 510.110.

At the time of Defendant's offense in 2006, the statute stated in full:

- (1) A person is guilty of sexual abuse in the first degree when:

- (a) He or she subjects another person to sexual contact by forcible compulsion; or
- (b) He or she subjects another person to sexual contact who is incapable of consent because he or she:
 - 1. Is physically helpless;
 - 2. Is less than twelve (12) years old; or
 - 3. Is mentally incapacitated.

Because K.R.S. § 510.110 lists at least two sets of alternative elements—sexual contact by forcible compulsion *or* sexual contact with a person incapable of consent in one of three ways—the Court must apply the modified categorical approach to determine which elements the Kentucky court applied to Defendant's case. Here, the record establishes that Defendant's offense was against a minor who was 4 years old at the time of the offense. There does not appear to be any indication that Defendant was charged under K.R.S. § 510.110(1)(a) or that the minor was physically helpless or mentally incapacitated during the offense. The parties agree that K.R.S. § 510.110(1)(b)(2) is the section under which Defendant pleaded guilty. Therefore, the Court will analyze K.R.S. § 510.110(1)(b)(2) when determining whether Defendant's past offense equates to a Tier III crime.

K.R.S. § 510.110(1)(b)(2) lacks a definition for “sexual contact.” By reference, K.R.S. § 510.010(7) provides the definition, which in 2006 defined “sexual contact” as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party.”³⁰

Turning to the equivalent federal crime, 34 U.S.C. § 20911 describes a “Tier III sex offender” as one whose offense is comparable to “abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years.”³¹ The definition for Tier II offenders uses the same criteria for “abusive sexual contact” as Tier III, the difference being the contact must have been with a minor 13 years old or older.³² Finally, Tier I “means a sex offender other than a tier II or tier III sex offender.”³³

^{*4} For its part, 18 U.S.C. § 2244 references 18 U.S.C. § 2241, effectively substituting “sexual contact” for “sexual act.” Relevant here, § 2241(c) criminalizes “knowingly engag[ing] in a sexual act [or sexual contact] with another

person who has not attained the age of 12 years.” “Sexual contact” is then defined by 18 U.S.C. § 2246(3) as “the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”

B. Based on his prior conviction, Defendant qualifies as a Tier I sex offender.

Despite the labyrinthine statutory review needed to even approach the question in this case, the question itself is relatively simple: is the Kentucky definition of “sexual contact” broader than its federal counterpart? In other words, the Court must determine whether the definition of “sexual contact” under 18 U.S.C. § 2246(3) categorically matches the definition of “sexual contact” under K.R.S. § 510.010(7). The other elements of the statutes are not at issue. Thus, if by its definition of “sexual contact” K.R.S. § 510.010(7) allows for conviction under K.R.S. § 510.110(1)(b)(2) for conduct that would not result in conviction under 18 U.S.C. § 2244 (by way of 18 U.S.C. § 2241(c)), then Defendant is not a Tier III offender.

As an initial matter, it is clear that the definitional statute —K.R.S. § 510.010(7) describes a single indivisible element —sexual contact—not divisible elements that would trigger the use of the modified categorical approach. And as agreed by the parties, “other intimate parts” in K.R.S. § 510.010(7) refers not to a separate crime but rather to the means of committing the same crime. Thus, the Court will apply the categorical approach in interpreting K.R.S. § 510.010(7).

Here, the Kentucky statute on its face appears to be little more than a slight variation on the generic definition of “sexual contact.” Nevertheless, Defendant interprets the phrase “other intimate parts” to cover a broader swath of conduct than the very specified list of body parts necessary for “sexual contact” under 18 U.S.C. § 2246(3). Accordingly, Defendant bears the burden to show that Kentucky courts would interpret “other intimate parts” to apply to facts beyond the scope of 18 U.S.C. § 2246(3)’s definition.

Defendant successfully meets his burden in this case. He points to Kentucky caselaw, *Bills v. Kentucky*,³⁴ where the Kentucky Supreme Court interpreted K.R.S. § 510.010(7)—using the same language as when Defendant was convicted under the statute in 2006—broadly to include touching of the “legs” and “thigh.”³⁵ Although 18 U.S.C. § 2246(3) includes

touching of the inner thigh within “sexual contact,” legs and simply “the thigh” are beyond its scope. Therefore, Defendant has successfully shown that K.R.S. § 510.010(7) allows a defendant to have been convicted under K.R.S. § 510.110(1)(b) for conduct that does not fall under 18 U.S.C. § 2244. Therefore, categorically speaking, K.R.S. § 510.110(1)(b) is not equivalent to 18 U.S.C. § 2244.

Accordingly, Defendant's classification as a Tier III offender under 34 U.S.C. § 20911 is improper. Similarly, because the definition for Tier II offenders also utilizes the federal definition of “abusive sexual contact,” K.R.S. § 510.110(1)(b) is also not equivalent to a Tier II classification. Therefore,

Defendant must be classified as a Tier I offender. As a Tier I offender, Defendant's base offense level under U.S.S.G. § 2A3.5 is 12 instead of 16.

***5 IT IS THEREFORE ORDERED** that Defendant's Sentencing Objection 2 is **SUSTAINED**.

IT IS SO ORDERED.

All Citations

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Footnotes

1 In analyzing this statute, the Court will apply the statute's language as it existed at the time of Defendant's conviction. See, e.g., *United States v. Harbin*, 56 F.4th 843, 847 (10th Cir. 2022), cert. denied, 144 S. Ct. 106 (2023) (favorably discussing the Supreme Court's reasoning in *McNeill v. United States*, 563 U.S. 816, 820 (2011) that courts must look to “the law that applied at the time of that conviction”).

2 *United States v. White*, 782 F.3d 1118, 1129 (10th Cir. 2015).

3 See U.S.S.G. § 2A3.5(a).

4 34 U.S.C. § 20911.

5 *White*, 782 F.3d at 1130.

6 *Id.* at 1130–31.

7 *Id.* at 1131 (quoting *Descamps v. United States*, 570 U.S. 254, 257 (2013)). Although the Supreme Court in *Descamps* used the term “generic crime,” the Tenth Circuit in *White* applied the categorical approach to compare the elements of a federal statute with the elements of a state statute.

8 *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013).

9 *White*, 782 F.3d at 1135.

10 *Id.*

11 *Id.*

12 *Mathis v. United States*, 579 U.S. 500, 505 (2016).

13 *Descamps*, 570 U.S. at 260.

14 *Mathis*, 579 U.S. at 515.

15 *Id.* at 505–06.

16 *Id.* at 506.

17 *Id.* (cleaned up) (further citation omitted).

18 See *id.* at 516 (“[N]othing material changes if Iowa’s law further notes (much as it does) that a ‘premises’ may include ‘a house, a building, a car, or a boat.’ ”).

19 *Id.* at 506 (further citations, quotations, and brackets omitted).

20 *Descamps*, 570 U.S. at 260.

21 *Id.*

22 *Mathis*, 579 U.S. at 506.

23 *Id.* at 517.

24 *United States v. Mendez*, 924 F.3d 1122, 1125 (10th Cir. 2019).

25 *Id.* (quoting *Taylor v. United States*, 495 U.S. 575, 599 (1990)).

26 *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

27 *Id.*

28 *Id.*

29 *Id.*

30 Both statutes also require that the touching be done for the “purpose of sexual arousal or gratification of either party,” K.R.S. § 510.010(7), or “with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(3). But that is not at issue in this case.

31 34 U.S.C. § 20911(4)(A)(ii).

32 *Id.* § 20911(3)(A)(vi).

33 *Id.* § 20911(2).

34 851 S.W.2d 466 (Ky. 1993).

35 *Id.* at 472.

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United States District Court, M.D. Pennsylvania.

UNITED STATES of America

v.

Walter GILCHRIST, Defendant

CRIMINAL NO. 3:19-147

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Signed 03/03/2021

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MEMORANDUM

[MALACHY E. MANNION](#), United States District Judge

*1 Presently before the court is the January 15, 2021 motion *in limine* filed by the government in which it requests that the court find evidence of the predicate sex offense conviction alleged in the Indictment to be admissible and self-authenticating, and that the court instruct the jury, as a matter of law, that the defendant's prior New York conviction for Rape in the First Degree, if proved, qualifies as a sex offense under the Sex Offender Registration Notification Act (SORNA). (Doc. 45). Defendant, through his counsel, opposes the motion. For the reasons set forth below, the government's motion will be **GRANTED**.

I. BACKGROUND

On May 7, 2019, a federal grand jury charged the defendant, Walter Gilchrist, a/k/a Walter Gilcrest, with failure to register as a sex offender, in violation of [18 U.S.C. § 2250\(a\)](#). (Doc. 1). Specifically, the Indictment contained one Count and charged:

Beginning November 2009 and continuing up to the date of this Indictment, in the Middle District

of Pennsylvania and elsewhere, the defendant, Walter Gilchrist, a/k/a Walter Gilcrest, a person required to register under the Sex Offender Registration and Notification Act, and a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reasons of a Rape conviction in the first degree under the laws of the State of New York, and having traveled in interstate commerce, did knowingly fail to register and update registration information, as required by the Sex Offender Registration and Notification Act.

The charge under [§ 2250\(a\)](#) is predicated on Gilchrist's prior New York conviction for Rape in the First Degree, in violation of [New York Penal Law § 130.35\(1\)](#).

The government's motion *in limine* has been briefed and an Exhibit have been submitted. (Docs. 45, 45-1 & 48). The matter is now ripe for this court's review. The court granted defendant's motion to continue the trial, and the trial in this case is scheduled to commence on April 26, 2021.

II. STANDARD

"The purpose of a motion *in limine* is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence." [United States v. Tartaglione](#), 228 F.Supp.3d 402, 406 (E.D. Pa. 2017). On a motion *in limine*, evidence should only be excluded "when the evidence is clearly inadmissible on all potential grounds." *Id.* Evidentiary rulings on motions *in limine* are subject to the trial judge's discretion and are therefore reviewed for an abuse of discretion. [Abrams v. Lightolier, Inc.](#), 50 F.3d 1204, 1213 (3d Cir. 1995); [Bernardsville Bd. of Educ. v. J.H.](#), 42 F.3d 149, 161 (3d Cir. 1994). "The Court is vested with broad inherent authority to manage its cases, which carries with it the discretion and authority to rule on motions *in limine* prior to trial." [Ridolfi v. State Farm Mutual Auto. Ins. Co.](#), 2017 WL 3198006, *2 (M.D. Pa. July 27, 2017). Further, "[c]ourts may exercise this discretion in order to ensure that juries are not exposed to unfairly prejudicial, confusing or irrelevant evidence." *Id.*

*2 “A trial court considering a motion *in limine* may reserve judgment until trial in order to place the motion in the appropriate factual context.” [United States v. Tartaglione](#), 228 F.Supp.3d 402, 406 (E.D. Pa. 2017). “Further, a trial court’s ruling on a motion *in limine* is ‘subject to change when the case unfolds, particularly if actual testimony differs from what was contained in the movant’s proffer.’ ” *Id.* (quoting [Luce v. United States](#), 469 U.S. 38, 41, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984)).

III. DISCUSSION

The government contends that the defendant’s certified record regarding his December 1991 New York State conviction for Rape in the First Degree, (*see* Doc. 45-1), is admissible and self-authenticating, and that the court should instruct the jury, as a matter of law, that if it proves the defendant’s conviction, the conviction qualifies as a “sex offense” under the Sexual Offender Registration and Notification Act (“SORNA”), pursuant to [Federal Rules of Evidence 902\(1\)](#) and [803\(22\)](#).

“Congress enacted SORNA ‘to protect the public from sex offenders and offenders against children’ by ‘establish[ing] a comprehensive national system for the registration of [sex] offenders.’ ” [U.S. v. Cooper](#), 750 F.3d 263, 264 (3d Cir. 2014) (citing 42 U.S.C. § 16901). In relevant part, SORNA requires that “all sex offenders ‘shall register, and keep the registration current,’ in each state where the offender lives, works, or attends school.” *Id.* at 265 (citing 42 U.S.C. § 16913(a)). “SORNA makes it a federal crime for any person who is required to register, and who travels in interstate or foreign commerce, to knowingly fail to register or to update registration.” *Id.* (citing 18 U.S.C. § 2250(a)). Further, if a sex offender is required to register under SORNA, “that offender can be convicted under § 2250 if he thereafter engages in interstate or foreign travel and then fails to register.” *Id.* (citation omitted).

Specifically, § 2250(a) provides:

Whoever (1) is required to register under [SORNA]; (2)(A) is a sex offender as defined for the purposes of [SORNA] by reason of a conviction under Federal law ..., or the law of any territory or possession of the United States; or (B) travels in interstate or foreign commerce, ...; and (3)

knowingly fails to register or update a registration as required by [SORNA]; shall be fined under this title or imprisoned not more than 10 years, or both.

Here, the government seeks to introduce at trial a certified copy of Gilchrist’s December 11, 1991 conviction (sentenced on January 13, 1992) in the Supreme Court of the State of New York, New York County, for Rape in the First Degree, in violation of [New York Penal Law § 130.35\(1\)](#). (*See* Doc. 45-1).

Initially, the court must consider whether the certified copy of Gilchrist’s December 11, 1991 conviction in New York for Rape in the First Degree, (Doc. 45-1), is self-authenticating under [FRE 902\(1\)](#) as a domestic public document under seal, and whether it is admissible as a hearsay exception and as a final judgment of previous conviction under [FRE 803\(22\)](#).

Gilchrist concedes that [Rule 902](#) permits public documents to be self-authenticated by a sealed signature, and that the government’s Exhibit, Doc. 45-1, has a seal and a court clerk’s signature, but he argues that the New York “Certificate of Disposition” proffered by the government is not admissible at trial under [FRE 803\(22\)](#) to prove that he was in fact convicted of the rape offense alleged. He relies upon [U.S. v. Hernandez](#), 218 F.3d 272 (3d Cir. 2000), for support and its holding that certificates of disposition are not the judgments of conviction. The court finds no merit to Gilchrist’s contention. The government’s Exhibit is evidence of a final judgment of conviction under [Rule 803\(22\)](#) as it plainly meets the requisite elements. *See U.S. v. Drapeau*, 73 F.Supp.3d 1086, 1091 (D.S.D. 2014) (“Rule 803(22) does not preclude the admission of the conviction to prove the defendant had the conviction, as the conviction is not used to prove the defendant was in fact guilty of the underlying offense, but that there was a conviction.”) (citation omitted). Also, [Hernandez](#) is distinguishable from this case since it dealt with the determination of predicate offenses for purposes of sentencing. Further, Gilchrist does not address the government’s additional contention that its Exhibit is self-authenticating and is admissible under [FRE 902\(1\)](#) as a domestic public document under seal. The court finds that the certificate of disposition signed by the court clerk for New York Supreme Court, New York County, bearing a seal of the court and, includes a notarized affidavit from the Office Assistant of the Sex Offender Registry for the New York

State Division of Criminal Justice Services, qualifies as a self-authenticating public document under seal pursuant to FRE 902(1). See U.S. v. Vance, 215 Fed.Appx. 360 (4th Cir. 2007). Therefore, the government's Exhibit is admissible.

*3 The court must now consider whether Gilchrist's New York rape conviction qualifies as a sex offense for purposes of SORNA. No doubt that Gilchrist's sex offense conviction was prior to SORNA's effective date of July 27, 2006, and that SORNA requires individuals convicted of sex offenses after its enactment date to register or face criminal penalties. However, SORNA also applies to Gilchrist based on his 1991 New York State conviction. See Pavulak v. U.S., 248 F.Supp.3d 546, 568-69 (D. De. 2017) (holding that "it would appear that the earliest possible effective date of SORNA for pre-enactment sex offenders in the Third Circuit is the date on which the SMART Guidelines became effective: August 1, 2008."); U.S. v. Crosby, 568 Fed.Appx. 118 (3d Cir. 2014) (Third Circuit held that although defendant's 2002 New York State conviction for attempted rape in the first degree preceded the enactment of SORNA in 2006, the "later administrative rules promulgated by the Attorney General applied SORNA's requirements to individuals, such as [defendant], whose qualifying sex-offense convictions predated the statute."). Thus, if it qualifies, Gilchrist's sex offense in 1991 in the New York Supreme Court "required him to register under SORNA as of August 1, 2008, thereby satisfying the first element of § 2250(a)." Pavulak, 248 F.Supp.3d at 569. See also U.S. v. Stacey, 570 Fed.Appx. 213 (3d Cir. 2014). Additionally, "[o]nce a person becomes subject to SORNA's registration requirements ... that person can be convicted under § 2250 if he thereafter travels and then fails to register." United States v. Pendleton, 636 F.3d 78, 83 (3d Cir. 2011) (citation omitted).

"SORNA also contains separate requirements applicable to sex offenders", and "SORNA requires a 'sex offender' to 'register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.' " Thomas v. Blocker, 2018 WL 8578007, *6 (M.D. Pa. Nov. 26, 2018) (citing 34 U.S.C. § 20913), adopted by 2019 WL 1275076 (March 20, 2019), affirmed 799 Fed.Appx. 131 (3d Cir. 2020), cert. denied — U.S. —, 141 S.Ct. 164, 207 L.Ed.2d 1099 (2020). Also, SORNA "defines 'sex offender' broadly to include any 'individual who was convicted of a sex offense.' " *Id.* (citing Reynolds, 565 U.S. at 442, 132 S.Ct. 975 (quoting 42 U.S.C. § 16911(1) (now codified at 34 U.S.C. § 20911)). Further, "[SORNA] broadly defines 'sex offense'

to include 'a criminal offense that has an element involving a sexual act or sexual contact with another.' " *Id.* (citing 34 U.S.C. § 20911(5)(A)(i)).

The government asserts that Gilchrist's 1991 New York State first degree rape by forcible compulsion conviction, in violation of New York Penal Law § 130.35(1), qualifies as a sexual offense as contemplated by SORNA, since "the Rape conviction is a criminal offense which includes an element involving a sexual act or sexual contact with another person." (Doc. 45 at 4).

"SORNA defines 'sex offender' to mean 'an individual who [has been] convicted of a sex offense' ", and "SORNA defines 'sex offense' to include: (i) a criminal offense that has an element involving a sexual act or sexual contact with another." U.S. v. Vineyard, 945 F.3d 1164, 1168 (11th Cir. 2019) (citing 34 USC § 20911(1) and § 20911(5)(A)(i)). Therefore, the court must decide whether Gilchrist's New York rape conviction " 'has an element involving ... sexual contact with another' and thus qualifies as a sex offense under SORNA." *Id.* at 1169.

Gilchrist maintains that if the government's instant motion is granted, then he should be classified as a sex offender under Tier I. He states that when comparing the broadest definition of rape under New York law in 1991 to the relevant federal counterparts of aggravated sexual abuse or sexual abuse, under 18 U.S.C. sections 2241 and 2242, "New York's definition does not contain a mens rea" that the counterparts contain, and " 'physical injury' " [in New York's law] is broader than the federal definition for 'serious bodily injury.' " He also states that the "federal exclusion from 'fear' is specifically included in the state definition." As such, Gilchrist concludes that "[t]he New York statute is indivisible as the definition for forcible compulsion are means", and "[t]he scope of first degree rape in New York is broader than the federal counterpart." However, he concedes that his New York rape offense "would still qualify as Tier I offense."

*4 "Under [SORNA], sex offenders are required to register (and keep their registration current) for a period of time after their conviction. 34 U.S.C. § 20913(c)." U.S. v. Marrero, 2020 WL 6637584, *1 (E.D. N.Y. Nov. 12, 2020). "The amount of time a sex offender must register varies according to the offense of conviction." *Id.* "A 'tier I' offender must register for fifteen years, a 'tier II' offender must register for twenty-five years, and a 'tier III' offender must register for life." *Id.* (citing 34 U.S.C. § 20915(a)).

In determining whether Gilchrist's New York rape conviction is a sex offense under SORNA, courts in other circuits use the categorical approach, namely, 1st Circuit, 5th Circuit, 7th Circuit, 9th Circuit, 10th Circuit, 11th Circuit. *See Vineyard*, 945 F.3d at 1169. *See also U.S. v. George*, 223 F.Supp.3d 159, 162 (S.D. N.Y. 2016) ("The Court concludes that case law requires the use of a 'categorical approach' in interpreting SORNA's application to an individual's predicate sex offense."); *Marrero*, 2020 WL 6637584, *2 ("Although the Second Circuit [and Third Circuit] ha[ve] not yet addressed this question, every Court of Appeals to do so has held that the categorical approach applies to determine a sex offender's 'tier,' given SORNA's instruction to compare the relevant 'offenses.'") (string citations from the First, Fourth, Fifth, Sixth, Seventh, Ninth, and Tenth Circuits omitted).

The Third Circuit has not yet decided whether courts should apply the categorical approach to determine whether a state conviction qualifies as a sex offense under SORNA. Nonetheless, the court finds the holdings in the above listed Circuits persuasive and shall apply the categorical approach. *See Vineyard*, 945 F.3d at 1170 ("based on SORNA's plain language, we hold that a categorical approach must be applied to determine whether [Gilchrist's] [rape] conviction 'has an element involving ... sexual contact with another' such that it qualifies as a SORNA sex offense.") (string citations of other Circuits omitted). As such, the court can only consider the fact of Gilchrist's conviction and the elements of New York's rape statute "to determine whether [his] conviction qualifies as a sex offense under SORNA's sexual contact provision." *Vineyard*, 945 F.3d at 1170 ("The statutory focus on an individual having been convicted of an offense with a specified element makes it clear that 'Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.' " "That is, Congress intended courts to apply a categorical approach to determine whether a conviction qualifies as a sex offense under the sexual contact provision of SORNA.") (internal citations omitted). Further, since the New York rape law is indivisible, the court does not use the hybrid or modified categorical approach.

As the Court in *Vineyard*, 945 F.3d at 1170-71, explained, "[u]nder the categorical approach, [Gilchrist's New York] conviction will only qualify as a sex offense under SORNA if the [New York rape] statute under which he was convicted covers the same conduct as—or a narrower range of conduct

than—SORNA." (citing, in part, *Welch v. United States*, — U.S. —, 136 S. Ct. 1257, 1262, 194 L.Ed.2d 387 (2016)) ("Under the categorical approach, a court assesses whether a crime qualifies as a [predicate offense] in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion."). Thus, "[Gilchrist's] conviction will only qualify as a sex offense under SORNA if the sexual contact required by [New York's] [rape] statute is materially the same as—or less encompassing than—the definition of the term sexual contact as used in SORNA. *Id.* 'If [New York's] definition of sexual contact 'sweeps more broadly' than SORNA's, "[Gilchrist's rape] conviction cannot qualify as a sex offense under the sexual contact provision of SORNA regardless of [his] actual conduct in committing the offense.' *Id.* (citation omitted).

*5 In its motion, the government, (Doc. 45 at 4-5), contends:

New York Penal Law § 130.35(1) provides that "[a] person is guilty of rape in the first degree when he or she engages in sexual intercourse with another person" in one of three separate ways, including "(1) by forcible compulsion." *Id.* "Sexual intercourse" under New York Penal Law is defined as: "Sexual intercourse" has its ordinary meaning and occurs upon any penetration, however slight." *New York Penal Law* § 130.00(1) (definitions). "Sexual contact" means sexual intercourse, oral sexual conduct, anal sexual conduct, aggravated sexual contact, or sexual contact. *Id.* 130.00.10. The crime thus necessarily "involves a sexual act or sexual contact with another, and accordingly is a 'sex offense'" under SORNA. *See United States v. Crosby*, 568 F.App'x 118 (3d Cir. 2014) (affirming SORNA conviction where qualifying sex offense was New York attempted rape in the first degree).

In 1991, New York Penal Law § 130.35 provided:

A male is guilty of rape in the first degree when he engages in sexual intercourse with a female:

1. By forcible compulsion; or
2. Who is incapable of consent by reason of being physically helpless; or
3. Who is less than eleven years old.

" 'Forcible compulsion' [regarding a first-degree rape in violation of New York Penal Law § 130.35(1)] means to compel by either use of physical force or 'a threat, express or

implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped.’” [Blond v. Graham](#), 2014 WL 2558932, *21 (N.D. N.Y. June 6, 2014) (citing N.Y. Penal Law § 130.00(8)).

“Physical injury” under the New York law meant “impairment of physical condition or substantial pain.” “Serious physical injury” was defined as: “physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ.”

Moreover, rape in the first degree under New York law is a class B felony, *see N.Y. Penal Law § 130.35*, and a defendant can face up to 25 years’ imprisonment if convicted of a class B felony, *see N.Y. Penal Law § 70.00(2)(b)*.

SORNA “specifies the conduct that qualifies as a ‘sexual act’ or ‘sexual contact’, and “[a] ‘sexual act’ involves contact with or penetration of the penis, vulva, anus, or genital opening”, ‘[s]exual contact’ [as used in 18 U.S.C. § 2244], is ‘the intentional touching, either directly or through the clothing of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.’” [U.S. v. George](#), 223 F.Supp.3d 159, 161 (S.D. N.Y. 2016) (citing 18 U.S.C. § 2246(3)).

As mentioned, Gilchrist contends that the definition of rape under New York law must be compared to the relevant federal counterparts of aggravated sexual abuse or sexual abuse to determine if his rape conviction qualifies under Tier III. Gilchrist also relies upon the definition of the term “seriously bodily injury” as defined by § 2246. In its motion, the government fails to address under what Tier Gilchrist would fall if his rape conviction qualifies as a predicate offense under SORNA.

*6 Thus, the court must decide whether Gilchrist’s rape qualifies him as a sex offender under SORNA and, if so, whether he should be classified as a Tier I sex offender, as he suggests, or a Tier III sex offender.

The definition of a Tier III sex offender includes “a sex offender whose offense is punishable by imprisonment for more than 1 year and (A) is comparable to or more severe than ... (i) aggravated sexual abuse or sexual abuse (as

described in sections 2241 and 2242 of Title 18).” 34 U.S.C. § 20911(4). “Thus, if a state statute is comparable to or more severe than the federal offenses of aggravated sexual abuse, sexual abuse, or abusive sexual contact, a defendant with a prior conviction under that state statute will be subject to the Tier III base offense level.” [U.S. v. Young](#), 872 F.3d 742, 745 (5th Cir. 2017). As indicated, the categorical approach should be used in determining a sex offender’s tier and in determining if the New York rape statute is “comparable to or more severe than” the federal offenses of aggravated sexual abuse or abusive sexual contact. *Id.*

“A defendant [such as Gilchrist] challenging the comparability of the two statutes must ‘show a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of the crime.’” [U.S. v. Flint](#), 2018 WL 473427, *2 (W.D. La. Jan. 18, 2018) (citations omitted). “To do so, a defendant must demonstrate that the state courts, either in his own case or in other cases, have applied the state statute to criminalize conduct that would not satisfy the elements of the federal statute.” *Id.* (citations omitted).

The pertinent provision of SORNA in this case requires an offense to have “an element involving ... sexual contact with another” to qualify as a sex offense, *see § 20911(5)(A)(i)*, and the court finds that New York’s rape statute does have such an element and that the statute “categorically requires sexual contact as that term is commonly understood”, and thus qualifies as a sex offense under SORNA. *See Vineyard*, 945 F.3d at 1172. The court finds that the New York rape statute is comparable to the stated generic federal counterparts. The court also finds that New York would not have applied its rape statute in 1991 to conduct outside of the federal counterparts. Even though the New York rape law did not require a defendant to knowingly cause another person to engage in a sexual act, it did require a male to engage in sexual intercourse with a female by the use of “forcible compulsion”, i.e., the use of physical force or a threat, express or implied, which places a person in fear of immediate death or physical injury (i.e., impairment of physical condition or substantial pain) to herself. The federal offense of aggravated sexual abuse includes causing another person to engage in a sexual act by using force against the other person or by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury. The court finds that the terms “engages in sexual intercourse with a female”, as used in the New York statute, and “knowingly causes another person to engage in a sexual act”, in the federal counterpart,

do not alone establish that the State statute criminalized a broader category of conduct since they both additionally required the comparable elements of threatening or placing the other person in fear of “physical injury”, as used in the New York statute, and “serious bodily injury”, as used in the federal law. *See People v. Scaife*, 133 Misc.2d 460, 507 N.Y.S.2d 141, 143 (S.C. N.Y. 1986) (holding New York Penal Law section 130.35 “requires the [] elements of the use of physical force or threats, express or implied, which places the victim in fear of immediate death or physical injury to herself.”). Also, both statutes have a similar “fear” element. Under the categorical approach, the court must consider all of the requirements of the two statutes. Since the New York statute criminalized a subset of the conduct criminalized by the federal counterpart for aggravated sexual abuse under to § 2241(a), they are comparable. *See U.S. v. Coleman*, 681 Fed.Appx. 413, 416-17 (5th Cir. 2017) (“The plain language of SORNA requires only that the offenses be ‘comparable.’ ”) (citing, in part, *United States v. Morales*, 801 F.3d 1, 7-8 (1st Cir. 2015) (stating that the “comparable to” language may provide the court with “some flexibility when examining [] offenses”)). *See also Flint*, 2018 WL 473427, *2 (“Although the comparison focuses only on the elements of each offense, for SORNA purposes ‘it is not necessary that the two crimes be identical,’ and the state offense may be ‘slightly broader’ than the federal offense.”) (citations omitted).

*7 Based on the above discussions, the court finds that Gilchrist's New York rape conviction is comparable to the generic federal offense of aggravated sexual abuse under 18 U.S.C. § 2241. Gilchrist has not met his burden to show that the New York state courts applied the rape statute to criminalize conduct that would not satisfy the elements of the federal statute. He therefore qualifies as a Tier III sex offender since the “sexual contact” element of his rape conviction was for conduct prohibited by the federal law, and he has committed a sex offense as defined by §§ 16911(5)(A)(i) and 2246(3) of SORNA. *See U.S. v. Gudger*, 624 Fed.Appx. 394, 397 (6th Cir. 2015) (“SORNA extends to a person convicted of a crime that involves a sexual act or sexual contact with another, no matter the jurisdiction in which the conviction was entered.”).

Thus, the court classifies Gilchrist as a Tier III offender. *See 42 U.S.C. § 16911(4)* (a “tier III sex offender” is a “sex offender whose offense is punishable by imprisonment for more than 1 year and ... is comparable to or more severe than” the federal crimes of aggravated sexual abuse or sexual abuse). *See also Bell v. PA Board of Probation and Parole*,

2019 WL 5692768, *5 (M.D. Pa. Nov. 4, 2019) (“SORNA provides that an individual convicted of the crime of Rape shall be registered for life as a Tier III sex offender, to appear in person quarterly at an approved registration site to verify the information provided to the Pennsylvania State Police, and to be photographed.”) (citing 42 Pa.C.S. §§ 9799.14(d)(2) (relating to rape), (d)(10) 18 U.S.C. § 2241 (relating to aggravated sexual abuse), and (d)(11) 18 U.S.C. § 2242 (relating to sexual abuse)).

Next, the court considers whether it can instruct the jury that Gilchrist's first degree New York rape conviction qualifies as a sex offense under SORNA.

As indicated above, the government must prove that Gilchrist was required to register under SORNA and, that he traveled in interstate commerce and knowingly failed to register and update his registration information. The government is relying upon Gilchrist's first degree New York rape conviction to show that he had to register under SORNA. The government states that while “[t]he question whether the conviction occurred and the identity of the defendant who received the conviction is a factual question for the jury”, “[i]t is a purely legal question, ..., whether [Gilchrist's] New York conviction for Rape in the First Degree is a crime that includes an element involving a sexual act or sexual contact” and that “no factual determination [is] required.” (Doc. 45 at 6). Thus, the government contends that since “the determination is based solely on an examination of the elements of the statute of conviction”, “[it is] proper for the Court to instruct the jury that [Gilchrist's] [rape] offense constitute[s] a sex offense as a matter of law.” (*Id.*).

It is “a pure question of law” regarding the court's determination as to “which approach to statutory interpretation should be used to evaluate a predicate offense under SORNA, and, using the correct approach, decide whether [defendant's] predicate offense is covered by SORNA.” *U.S. v. George*, 223 F.Supp.3d 159, 163 (S.D. N.Y. 2016).

In this case, the jury will have to decide if Gilchrist was in fact convicted of rape in New York and if he failed to register under SORNA. However, the court can instruct the jury that a conviction for Rape in the First Degree under New York law qualifies as a “sex offense” under SORNA, as a matter of law. As indicated above, it is clear that such a determination involves a legal analysis, rather than factual questions for the jury. *See George*, 223 F.Supp.3d at 167 (court held that it was a

“purely legal question of whether the [state] statute is written such in a way that violating it constitutes a predicate offense under SORNA § 16911(5)(A)(i)”; [U.S. v. Walker, 2018 WL 3325909, *5 \(E.D. Wi. July 6, 2018\)](#) (court found that “while the question of whether the defendant was required to register under SORNA normally would be a question for a jury to determine, the court must make the legal determination of whether the defendant’s tier classification required him to register on the dates in the indictment.”).

***8** Thus, the government will be allowed to admit into evidence at trial the certificate of disposition regarding Gilchrist’s 1991 New York rape conviction. (*See Doc. 45-1*). Therefore, the court will grant the government’s motion *in limine*.

Accordingly, the court will give the jury the following instruction proposed by the government:

You have heard evidence that the defendant, Walter Gilchrist, was convicted of Rape in the First Degree in the State of New York. It is for you to determine whether you

believe this evidence and, if you do believe it, whether you accept it.

You are instructed, however, as a matter of law, that if you find that the defendant, Walter Gilchrist, was convicted of this offense, then he would be classified as a “sex offender” under federal law because the offense qualifies as a “sex offense” as defined by the Sex Offender Registration Notification Act (SORNA).

IV. CONCLUSION

Accordingly, the government’s motion *in limine*, ([Doc. 45](#)), is **GRANTED** with regard to the admission of Gilchrist’s New York rape conviction and for an instruction from the court that this conviction qualifies as a sex offense under SORNA. An appropriate order shall issue.

All Citations

Slip Copy, 2021 WL 808753

218 F.Supp.3d 111
United States District Court, D. Maine.

UNITED STATES of America

v.

Robert GOGUEN

1:11-cr-00003-JAW

|

Signed November 2, 2016

Synopsis

Background: Government filed petition to revoke the supervised release of a defendant who had been convicted of failing to register as a sex offender, in violation of the Sex Offender Registration and Notification Act's (SORNA).

Holdings: The District Court, John A. Woodcock, Jr., J., held that:

[1] defendant was required to register as a sex offender under SORNA, even though he was no longer obligated to register under state law;

[2] defendant was a Tier III offender required to register as a sex offender for life;

[3] a court is required to impose a five-year term of supervised for release for failing to register as a sex offender under SORNA;

[4] requirement that a defendant be informed of the maximum penalty when pleading guilty did not bar Court from imposing a sentence of five years imprisonment or more on defendant's violation of terms of supervised release; and

[5] in light of principles of fundamental fairness, the Court would cap defendant's potential term of imprisonment to two years.

So ordered.

West Headnotes (9)

[1] **Mental Health** ↗ Persons and offenses included

Defendant was required to register as a sex offender for life under the Sex Offender Registration and Notification Act (SORNA), even though defendant's obligation to register as a sex offender under the Maine Sex Offender Registration and Notification Act (MSORNA), which triggered defendant's registration under the federal SORNA, had been terminated by the Superior Court of Maine, as defendant's federal obligation to register was independent of his duties to register under state law. 42 U.S.C.A. § 16913(a); 34-A Me. Rev. Stat. § 11202.

2 Cases that cite this headnote

[2] **Mental Health** ↗ Persons and offenses included

The Sex Offender Registration and Notification Act's (SORNA) registration requirements apply regardless of whether an offender's predicate sexual offense occurred before or after SORNA came into effect. 42 U.S.C.A. § 16913(a).

1 Case that cites this headnote

[3] **Federal Courts** ↗ Criminal Justice

Federal jurisprudence, not state jurisprudence, governs the resolution of ex post facto challenges in federal criminal cases. U.S. Const. art. 1, § 9, cl. 3.

[4] **Mental Health** ↗ Scores and risk levels

Defendant's prior Connecticut conviction for sexual assault in the second degree statute was comparable to the federal sexual abuse statute listed in the Sex Offender Registration and Notification Act's (SORNA) definition for Tier III offenses, and thus defendant was a Tier III offender required to register as a sex offender for life under SORNA, where the Connecticut and federal statutes shared the scienter requirement

of knowingly, shared similar definitions of covered sex acts, and required some aspect of physical helplessness or inability to consent. 18 U.S.C.A. § 2242; 42 U.S.C.A. §§ 16911(4)(A) (i), 16915(a); Conn. Gen. Stat. Ann. § 53a-71(a) (3).

[5] Mental Health Proceedings

To determine a defendant's tier classification as a sex offender, courts compare the defendant's prior sex offense conviction with the offenses listed in the Sex Offender Registration and Notification Act's (SORNA) tier definitions. 42 U.S.C.A. § 16911.

[6] Mental Health Persons and offenses included

Under the categorical approach, to determine whether a state offense is comparable to or more severe than a federal offense listed in the Sex Offender Registration and Notification Act (SORNA), a court compares the statutory elements of the prior state offense with the elements of the specified federal statute: the prior state conviction is comparable to or more severe than the federal offense if it is defined more narrowly than, or has the same elements as the federal statute, but by contrast, if the elements of the state offense sweep more broadly than those of the federal statute, the two statutes are not comparable, and the prior state offense cannot serve as a predicate. 42 U.S.C.A. § 16911.

[7] Mental Health Offenses and prosecutions

A court is required to impose a five-year term of supervised release for failing to register as a sex offender under the Sex Offender Registration and Notification Act's (SORNA), and does not have discretion to impose a lesser term of supervised release. 18 U.S.C.A. §§ 2250, 3583(k).

3 Cases that cite this headnote

[8] Sentencing and Punishment Failure to properly announce or memorialize

District Court's prior misinformation to defendant when defendant pled guilty to failing to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA) that he only faced a potential sentence of up to two years if defendant violated the terms of his supervised release, when defendant was actually subject to a minimum of five years imprisonment under certain circumstances if he violated the terms of supervised release, did not bar a District Court from imposing a term of five or more years imprisonment when defendant subsequently violated the terms of his supervised release by the requirement that a defendant be informed of the maximum penalty when pleading guilty, where the penalty for violating the terms of supervised release was not meant to punish the original offense, and thus was a collateral consequence of defendant's guilty plea. 18 U.S.C.A. §§ 2250, 3583(e)(3), 3583(k); Fed. R. Crim. P. 11(b)(1)(H).

1 Case that cites this headnote

[9] Mental Health Offenses and prosecutions

In light of principles of fundamental fairness, the District Court would cap the potential term of imprisonment for defendant's violation of the conditions of supervised release, by possessing child pornography on his laptop computer, to two years imprisonment, below the five year minimum sentence prescribed for such a violation, where a sentence of two years imprisonment was consistent with the information mistakenly provided to defendant when defendant earlier pled guilty to failure to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA). 18 U.S.C.A. §§ 2250, 3583(k).

Attorneys and Law Firms

***113** Gail Fisk Malone, Office of the U.S. Attorney District of Maine, Bangor, ME, for United States of America.

ORDER ON MEMORANDUM IN OPPOSITION TO THE GOVERNMENT'S REQUEST TO APPLY THE PENALTY RANGES UNDER 18 U.S.C. § 3583(k)

JOHN A. WOODCOCK, JR., UNITED STATES DISTRICT JUDGE

On July 14, 2011, a convicted sex offender pleaded guilty to failing to register in the state of Maine in violation of 18 U.S.C. § 2250. The term of supervised release for a violation of § 2250 is “any term of years not less than 5, or life.” 18 U.S.C. § 3583(k). In addition, a defendant convicted of violating § 2250 may be subject to a special penalty of “not less than 5 years” of imprisonment if he commits one of a number of sex-related crimes while on supervised release. *Id.* For this provision to apply, while on supervised release, the defendant must meet a number of conditions: (1) he must be required to register under the Sex Offender Registration and Notification Act (SORNA), (2) he must commit another sex-related crime, and (3) the potential term of imprisonment for the new crime must be longer than one year. *Id.* If all these conditions are met, the statute requires the court to revoke the defendant's supervised release and to impose a sentence of at least five years' imprisonment on the supervised release violation. *Id.* The potential term of incarceration is life. *Id.*

When this Defendant pleaded guilty to violating 18 U.S.C. § 2250, the Court, for reasons that are obscure, did not inform him of the correct term of supervised release or about the special penalty provision for a violation of supervised release. Instead, the Court misinformed the Defendant that he faced a maximum term of supervised release of three years under 18 U.S.C. § 3583(b)(2) and that the maximum term of imprisonment for a violation of a term of supervised release was two years pursuant to 18 U.S.C. § 3583(e)(3). When the Court sentenced the Defendant, it improperly imposed a three-year term of supervised release under § 3583(b)(2).¹

Unfortunately, having served his term of incarceration and while on supervised release, the Probation Office filed a petition for revocation of supervised release alleging that the Defendant committed what amounts to new criminal conduct that would trigger the five-year mandatory and up to life term

of incarceration under § 3583(k). On November 13, 2015, the Probation Office filed a petition for revocation on the ground that the Defendant possessed child pornography on his laptop computer.

The Government asserts that § 3583(k) requires the Court to revoke the Defendant's term of supervised release and sentence ***114** him to at least five years in prison even though the Court incorrectly advised the Defendant that he faced a maximum of two years of imprisonment under §§ 3583(b)(2) and 3583(e)(3). The Defendant opposes the application of § 3583(k)'s penalty provision based on the erroneous information at the Rule 11 hearing.

Given the unique circumstances of this case, the Court will limit the potential term of imprisonment for violation of supervised release to a maximum of two years consistent with what the Court told the Defendant at the Rule 11 hearing.

I. BACKGROUND

A. Initial Violation of 18 U.S.C. § 2250

On July 14, 2011, Robert Goguen pleaded guilty in the District of Maine to one count of failing to register as a sex offender in violation of 18 U.S.C. § 2250. *Def.'s Mem. in Opp'n to Gov't's Req. to Apply the Penalty Ranges under 18 U.S.C. § 3583(k)* at 2 (ECF No. 163) (*Def.'s Mem.*). Mr. Goguen's obligation to register as a sex offender stemmed from a 1996 Connecticut conviction of Sexual Assault in the Second Degree under Connecticut General Statute § 53a-71(a)(3). *Def.'s Mem.* Attach 1, *Order on Def.'s Mot. to Dismiss* at 1 (ECF No. 163). Mr. Goguen was released from custody for the 1996 conviction on April 1, 2000. *Prosecution Version* at 1 (ECF No. 42) (*Pros. Version*).

On August 31, 2009, Mr. Goguen applied for and obtained a driver's license from the Maine Bureau of Motor Vehicles. *Pros. Version* at 2–3. On July 29, 2010, Mr. Goguen met with police officers and informed them that he had lived in Maine for the previous 16 months. *Pros. Version* at 3. Mr. Goguen failed to register as a sex offender in Maine during that time. *Id.* Accordingly, on January 12, 2011, a grand jury issued an indictment charging Mr. Goguen with one count of failing to register in violation of § 2250. *Indictment* (ECF No. 1).

Mr. Goguen pleaded guilty on July 14, 2011. *Minute Entry* (ECF No. 43). At the time of the plea, the Government's Synopsis indicated that, in addition to imprisonment and a fine, Mr. Goguen faced a term of supervised release of

not more than three years under 18 U.S.C. § 3583(b)(2). *Synopsis* at 1 (ECF No. 2). The Synopsis also indicated that if Mr. Goguen violated his supervised release, he could be imprisoned for not more than two years pursuant to 18 U.S.C. § 3583(e)(3). *Id.* At Mr. Goguen's Rule 11 hearing, consistent with the Synopsis, the Court informed Mr. Goguen:

Now, by pleading guilty to this crime, you're subject to the following maximum ranges of penalties. You're subject to being placed in jail for a period not to exceed ten years. You're subject to a fine not to exceed \$250,000, and it can be both prison and a fine. Following any term of imprisonment, you're subject to a period of supervised release not to exceed three years. If you were to violate a term of supervised release, you could go back to jail for a period not to exceed two years. And, finally, you're subject to a special assessment of \$100.00.

Tr. of Proceedings at 8:16–9:2 (ECF No. 11). Mr. Goguen stated that he understood the maximum penalties and still wished to plead guilty. *Id.* at 9:3, 16:13–16. There was no plea agreement between the Government and Mr. Goguen. *Id.* 14:4–6.

Following the Rule 11 hearing, the Probation Office filed a Revised Presentence Investigation Report (PSR) that also indicated that Mr. Goguen faced a term of supervised release not to exceed three years under § 3583(b)(2). *Def.'s Mem.* at 2; *Gov't's Resp. to Def.'s Mem. in Opp'n to Gov't's Req. to Apply the Penalty Ranges under 18 U.S.C. § 3583(k)* at 1–2 (ECF *115 No. 164) (*Gov't's Resp.*). Neither party objected to this part of the PSR. On January 31, 2013, the Court sentenced Mr. Goguen to 37 months of imprisonment, three years of supervised release, and a \$100.00 special assessment. *Am. J.* (ECF No. 90).

B. Mr. Goguen's Supervised Release

Mr. Goguen's term of supervised release commenced on May 11, 2013. *Pet. for Warrant or Summons for Offender under Supervision* at 1 (ECF No. 96). On September 23, 2013, Mr.

Goguen admitted violating the term of his supervised release that required him to participate in sex offender treatment. *Id.* at 1–2; *Minute Entry* (ECF No. 112). The Court sentenced Mr. Goguen to five months of imprisonment and 31 months of supervised release. *Minute Entry* (ECF No. 112).

Mr. Goguen's supervised release recommenced on January 15, 2014. *Pet. for Warrant or Summons for Offender under Supervision* (ECF No. 114). On November 13, 2015, the Probation Office moved the Court to issue a warrant for Mr. Goguen's arrest, alleging that on November 10, 2015, Mr. Goguen possessed a laptop computer containing child pornography in violation of his supervised release and 18 U.S.C. § 2252A(a)(5). *Id.* at 1–2. In the motion, the Probation Office indicated that Mr. Goguen faced a term of imprisonment of up to two years for his supervised release violation pursuant to § 3583(e)(3). *Id.* at 4. The Court authorized the issuance of the arrest warrant, and Mr. Goguen was arrested on November 13, 2015. *Minute Entry* (ECF No. 148).

C. The Dispute

Following his arrest, the Government realized that the Court imposed an incorrect term of supervised release when it initially sentenced Mr. Goguen for failing to register as a sex offender. The Government pointed out that because Mr. Goguen violated § 2250, the Court should have imposed a term of supervised release between five years and life under 18 U.S.C. § 3583(k), rather than no more than three years under § 3583(b)(2). The distinction carries notable implications. If a defendant violates a term of release imposed under § 3583(b)(2), the maximum term of imprisonment is two years pursuant to § 3583(e)(3). However, if a defendant violates a term of release imposed under § 3583(k) having violated the special conditions set forth in that section, the Court must impose a five-year term of incarceration.

The Government argued that because the Court should have imposed a term of supervised release under § 3583(k), the Court should now impose the penalty associated with § 3583(k), namely, at least five years' imprisonment. On January 21, 2016, Mr. Goguen filed a memorandum in opposition to the Government's request to apply the penalty ranges under § 3583(k). *Def.'s Mem.* In the memorandum, Mr. Goguen raises a number of interrelated issues. First, Mr. Goguen argues that he was not required to register under SORNA at the time he violated the term of supervised release, so the penalty provision of § 3583(k) does not apply. Next, he argues that imposing a term of supervised release under

§ 3583(k) is optional and that the Court properly used its discretion to impose a term of supervised release under § 3583(b)(2) rather than § 3583(k). Accordingly, he contends the corresponding penalty provisions of § 3583(e)(3) apply, limiting the term of imprisonment to a maximum of two years for violation of his supervised release. Finally, he argues that because the Court informed Mr. Goguen that he only faced a maximum term of imprisonment of two years for a supervised release violation, fairness prohibits the Court from now sentencing Mr. Goguen *116 to a minimum of five years under § 3583(k).

II. DISCUSSION

The Court will first discuss Mr. Goguen's arguments that he was not required to register under SORNA at the time of his alleged violation of supervised release. Next, the Court will analyze whether the terms of § 3583(k) are mandatory when they apply to a defendant, or whether the Court can choose to impose a term of supervised release under § 3583(b) instead. The Court will then discuss whether it can impose a term of imprisonment between five years and life for a supervised release violation under § 3583(k) even though the Court informed the defendant at the Rule 11 hearing that he would only face a maximum of two years pursuant to §§ 3583(b)(2) and 3583(e)(3).

A. SORNA Registration Requirement

Mr. Goguen contends that the penalty provisions of § 3583(k) do not apply because he was not required to register under SORNA at the time of the alleged violation of supervised release in 2015. *Def.'s Mem.* at 10. Mr. Goguen alleges that he was not required to register because (1) the Maine Superior Court ruled that his obligation to register as a sex offender ended in 2010, *id.*, and (2) he is not a Tier III offender under SORNA, and thus his obligation to register ended in 2010 before his alleged supervised release violation. *Def.'s Reply* at 11–14. The Court rejects both arguments and concludes that Mr. Goguen was required to register under SORNA at the time of the alleged violation.

1. The Maine Superior Court Decision

Mr. Goguen points out that the Maine Superior Court recently held that his obligation to register as a sex offender ended on April 1, 2010. *Def.'s Mem.* at 10 (citing *State v. Goguen*, No. CR-14-2979, *Order on Def.'s Mot. to Dismiss* (Me. Super. Ct. Dec. 10, 2015)) (*State Goguen Order*). Because the alleged

violation of his supervised release occurred on November 10, 2015—over five years after his obligation to register ended—Mr. Goguen argues that the penalty provisions of § 3583(k) are inapplicable. *Id.*

The Government asserts that Mr. Goguen's reliance on the Maine Superior Court decision is misplaced. *Gov't's Resp.* at 8. First, the Government argues that Mr. Goguen's federal obligation to register as a sex offender under SORNA is independent of any state obligations. *Id.* at 8–10. Additionally, the Government emphasizes that the Superior Court reached its decision by determining that the statute requiring Mr. Goguen to register as a sex offender for life violated the Ex Post Facto Clauses of the Maine and United States Constitutions. *Id.* at 8, 10. However, the Government explains, federal caselaw “has consistently rejected the position” that SORNA's registration requirements violate the Ex Post Facto Clause of the United States Constitution. *Id.* at 10–11 (collecting cases). Accordingly, the Government urges the Court to find that Mr. Goguen was required to register as a sex offender and that the penalty provisions of § 3583(k) do apply.

In reply, Mr. Goguen highlights that the Superior Court decision relied on *State v. Letalien*, 2009 ME 130, 985 A.2d 4, a Maine Supreme Judicial Court ruling that cited federal precedent to determine that the retroactive application of Maine's sex offender and registration and notification law violated the Ex Post Facto Clause of the United States Constitution. *Def.'s Reply* at 15. As such, Mr. Goguen submits that the Superior Court decision “applies with equal force” to this Court's analysis. *Id.* at 14.

*117 The Superior Court's December 10, 2015 opinion in *State v. Goguen* addressed Mr. Goguen's motion to dismiss a criminal complaint pending against him in the Maine Superior Court for failing to register under 34-A M.R.S. § 11202, the Maine Sex Offender Registration and Notification Act (MSORNA). *State Goguen Order* at 2. The Court noted that on September 6, 1996, Mr. Goguen had been convicted in the state of Connecticut of Sexual Assault in the Second Degree, a violation of Connecticut General Statute § 53a–71(a)(3). *Id.* at 1. As of the date of his conviction, Mr. Goguen was required to register as a sex offender for ten years after the date of his release from prison. *Id.* However, while he was in prison, the state of Connecticut enacted a law that required people who were released into the community on or after October 1, 1998, and who had been convicted of a sexually violent crime, including Sexual Assault in the Second Degree, to register as

a sex offender for life. *Id.* Mr. Goguen was released into the community on April 1, 2000. *Id.*

Mr. Goguen moved to the state of Maine in 2000. *Id.* at 2. MSORNA distinguishes between ten-year and lifetime registrants. 34-A M.R.S. § 11203(5), (8). Among other things, a lifetime registrant is a person who has been convicted of a “sexually violent offense.” 34-A M.R.S. § 11203(8) (A). MSORNA defines “sexually violent offense” by listing those crimes that qualify under Maine criminal law and by including a conviction in another jurisdiction “that includes the essential elements of an offense” so listed. 34-A M.R.S. § 11203(7)(A), (B). Consistent with this provision, the Superior Court Justice compared the elements of Sexual Assault in the Second Degree in Connecticut with the elements of Gross Sexual Assault in Maine and concluded that the Connecticut crime “appears to satisfy all of the essential elements of Maine’s Gross Sexual Assault.” *State Goguen Opinion* at 7 (citing 17-A M.R.S. § 253(2)(D)). Thus, the Superior Court concluded that Mr. Goguen would be required to register under MSORNA, if MSORNA could constitutionally be applied to him. *Id.* at 2, 7.

The Superior Court then analyzed the caselaw emanating from the Maine Supreme Judicial Court, specifically *State v. Letalien; Doe I v. Williams*, 2013 ME 24, 61 A.3d 718; and *Doe XLVI v. Anderson*, 2015 ME 3, 108 A.3d 378. Applying this caselaw, the Superior Court Justice concluded that “because Defendant’s obligation to register in Maine stems from his obligation to register in Connecticut, and that obligation was effectively part of his sentencing in Connecticut, the application of [MSORNA] in these circumstances is so punitive in its effect that it violates the Ex Post Facto Clauses of the Maine and U.S. Constitutions.” *Id.* at 7–8. The Superior Court granted Mr. Goguen’s motion to dismiss the criminal complaint. *Id.* at 8.

[1] [2] Despite the Superior Court’s conclusion, this Court concludes that SORNA requires Mr. Goguen to register as a sex offender for life, and thus the penalty provisions of § 3583(k) are applicable. Congress enacted SORNA in July 2006 to create “a comprehensive national system for the registration of [sex] offenders.” 42 U.S.C. § 16901. SORNA requires sex offenders to “register, and keep the registration current, in each jurisdiction where the offender resides...” 42 U.S.C. § 16913(a). SORNA’s registration requirements apply regardless of whether an offender’s predicate sexual offense occurred before or after SORNA came into effect in July 2006. *See United States v. Parks*, 698 F.3d 1 (1st Cir. 2012).

Mr. Goguen’s invocation of state authority is unavailing for several reasons. First, the Superior Court decision dealt with Mr. Goguen’s registration obligations under Maine’s sex offender and registration law. *118 Yet Mr. Goguen’s federal registration obligations are independent of his duties to register under Maine law. *See United States v. Thompson*, 431 Fed.Appx. 2 (1st Cir. 2011). In *Thompson*, the defendant was convicted of failing to register as a sex offender in Maine under SORNA. *Id.* at 3. The defendant argued that he could not have registered federally under SORNA because Maine had not yet enacted statutes or promulgated regulations implementing SORNA. *Id.* However, the First Circuit upheld the defendant’s conviction because, under SORNA, “the [federal] registration requirements for sex offenders are neither conditioned on nor harnessed to state implementation of SORNA’s state-directed mandates.” *Id.*

Thompson makes clear that an offender’s obligation to register under the federal SORNA statute is separate from the offender’s duty to register under state law. Thus, even though Mr. Goguen was not required to register under Maine’s sex offender registry law, he still needed to register federally under SORNA. *See also United States v. Billiot*, 785 F.3d 1266, 1269 (8th Cir. 2015) (“Although SORNA requires states to maintain a jurisdiction-wide sex offender registry, SORNA imposes an independent *federal* obligation for sex offenders to register that does not depend on, or incorporate, a state-law registration requirement”) (emphasis in original) (internal quotation marks omitted).

[3] Additionally, the Maine state courts’ ex post facto rulings are not binding on this Court. “Federal jurisprudence, not state jurisprudence, governs the resolution of ex post facto challenges in federal criminal cases.” *Thompson*, 431 Fed.Appx. at 4 (citing *United States v. Rodriguez*, 630 F.3d 39, 41–42 (1st Cir. 2010)). Federal jurisprudence, including binding First Circuit precedent, is clear that SORNA does not violate the Ex Post Facto Clause of the United States Constitution. *See Parks*, 698 F.3d at 6 (1st Cir. 2012) (joining “every circuit to consider the issue” in rejecting an ex post facto challenge to SORNA). In fact, the First Circuit specifically rejected a defendant’s reference to *State v. Letalien* to argue that SORNA violated the Ex Post Facto Clause:

In an effort to blunt the force of this reasoning, the defendant

repeatedly invokes the decision of the Supreme Judicial Court of Maine in [*Let alien*]...*Let alien* is of no consequence here. Federal jurisprudence, not state jurisprudence, governs the resolution of ex post facto challenges in federal criminal cases.

Thompson, 431 Fed.Appx. at 4.

Because binding First Circuit precedent contradicts the Maine state courts' non-binding ex post facto holdings, and because the state courts' rulings do not affect Mr. Goguen's federal registration obligations under SORNA anyway, the Court concludes that Mr. Goguen is required to register under the federal SORNA statute, and the penalty provisions of § 3583(k) apply.

2. Mr. Goguen's SORNA Tier Classification

SORNA classifies offenders into three tiers with each category corresponding to specific types of offenses. 42 U.S.C. § 16911. A Tier III sex offender means a defendant whose offense was punishable by more than one year of imprisonment and whose offense is "comparable to or more severe than" a number of listed sex offenses, including sexual abuse as described in 18 U.S.C. § 2242. 42 U.S.C. § 16911(4)(A)(i). Section 2242 criminalizes a person's engaging in a sexual act with another person if that person is either "incapable of appraising the nature of the conduct" or "physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act[.]" 18 U.S.C. § 2242(2)(A)–(B). Tier II has a *119 rather complicated definition, but in general it captures defendants who committed a sexual offense punishable by more than one year in prison, whose offense is "comparable to or more severe than" certain listed offenses, and whose conviction involved the misuse of a minor in specific ways or occurred after the defendant became a Tier I offender. 42 U.S.C. § 16911(3)(A)–(C). Tier I includes those offenders who are neither Tier II nor Tier III offenders. 42 U.S.C. § 16911(2). A Tier III offender must register as a sex offender for the rest of his life; a Tier II offender for 25 years, and a Tier I for 15 years.² 42 U.S.C. § 16915(a)(1)–(3).

[4] Mr. Goguen argues that he was not required to register under SORNA at the time of his alleged violation of

supervised release because his predicate sexual offense did not qualify him as a Tier III offender. *Def.'s Reply* at 11–14. If Mr. Goguen were a Tier I offender, his obligation to register would have ended on April 1, 2015, seven months before the alleged violation of supervised release on November 10, 2015.³ The Government, on the other hand, believes that Mr. Goguen's predicate sexual offense qualifies Mr. Goguen as a Tier III offender; therefore, he must register under SORNA for life.⁴ *Gov't's Resp.* at 3.

*120 [5] "To determine a defendant's tier classification, courts compare the defendant's prior sex offense conviction with the offenses listed in SORNA's tier definitions." *United States v. Berry*, 814 F.3d 192, 195 (4th Cir. 2016). Of the listed offenses in Tier III, only sexual abuse as described in 18 U.S.C. § 2242 is relevant to Mr. Goguen. Therefore, the Court must determine whether Mr. Goguen's prior state offense under C.G.S. § 53a–71(a)(3) is "comparable to or more severe than" sexual assault as described in 18 U.S.C. § 2242.

[6] In *US v. Morales*, 801 F.3d 1 (1st Cir. 2015), the First Circuit identified the proper analytical path. To determine whether a state offense is "comparable to or more severe than" a federal offense listed in SORNA, the First Circuit instructs courts to employ the "categorical approach" established in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), and *Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). *Morales*, 801 F.3d at 4–6. Under this approach, a court compares the statutory elements of the prior state offense with the elements of the specified federal statute. *Id.* at 5. The prior state conviction is "comparable to or more severe than" the federal offense if it is "defined more narrowly than, or has the same elements as" the federal statute. *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1133 (9th Cir.) (citing *Descamps*, 113 S.Ct. at 2283). By contrast, if the elements of the state offense "sweep[] more broadly" than those of the federal statute, the two statutes are not comparable, and the prior state offense cannot serve as a predicate. *Id.* (quoting *Descamps*, 113 S.Ct. at 2283).

The Connecticut sexual assault statute provides:

(a) A person is guilty of sexual assault in the second degree when such a person engages in sexual intercourse

with another person and:...⁽³⁾ such other person is physically helpless.

C.G.S. § 53a–71(a). A person is “physically helpless” if:

[the] person is (A) unconscious, or (B) for any other reason, is physically unable to resist an act of sexual intercourse or sexual contact or to communicate unwillingness to an act of sexual intercourse or sexual contact.

C.G.S. § 53a–65.

The federal sexual assault statute listed in Tier III states:

Whoever...knowingly—

(2) engages in a sexual act with another person if that other person is—

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

18 U.S.C. § 2242.

The Government argues that the elements of the two statutes parallel one another. *Gov't's Resp.* at 6. Accordingly, the Government contends that Mr. Goguen's predicate offense of Sexual Assault in the Second Degree is “comparable to or more severe than” sexual abuse as defined in 18 U.S.C. § 2242. *Id.*

Mr. Goguen disagrees. He argues that the elements of the Connecticut sexual assault statute sweep more broadly than the elements of the federal sexual abuse statute because the Connecticut statute has no *mens rea* requirement whereas the federal statute contains a *mens rea* requirement of “knowingly.” *Def.'s Reply* at 13–14. He cites Connecticut state court decisions holding that Sexual Assault in the Second Degree is a “general intent” offense to *121 prove that “for the Connecticut offense[,] the act itself is all that

matters and no mental state is required.” *Id.* (collecting cases). According to Mr. Goguen, because Connecticut's statute is a general intent offense with no *mens rea* requirement, it penalizes more behavior than the federal offense, which requires a specific *mens rea* of “knowingly.” *Id.* Thus, under the categorical approach, the Connecticut offense should not serve as a predicate offense, and the Court should classify Mr. Goguen as a Tier I offender. *Id.* at 11–12.

Mr. Goguen's argument is unpersuasive. In fact, Connecticut caselaw interpreting C.G.S. § 53a–71(a) directly contradicts his position. Mr. Goguen is correct that Connecticut courts have described Sexual Assault in the Second Degree as a “general intent” offense. However, this does not mean, as Mr. Goguen suggests, that the offense has no *mens rea* requirement. Indeed, the Connecticut Supreme Court has held that to prove Sexual Assault in the Second Degree, the government must show that the defendant “*knowingly* engaged in sexual intercourse[.]” *State v. Sorabella*, 277 Conn. 155, 169, 891 A.2d 897 (2006) (emphasis added).

Although *Sorabella* concerned a different subsection of Connecticut's Sexual Assault in the Second Degree statute, its reasoning applies with equal force to the present case. In *Sorabella*, a jury found the defendant guilty of, among other things, two counts of attempted Sexual Assault in the Second Degree, in violation of C.G.S. § 53a–71(a)(1). *Id.* at 160, 891 A.2d 897. Section 53a–71(a)(1) states:

(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and: (1) Such other person is thirteen years of age or older but under sixteen years of age and the actor is more than three years older than such other person[.]

C.G.S. § 53a–71(a)(1). The defendant argued that C.G.S. § 53a–71 is a strict liability crime—that is, a crime for which no intent is necessary. *Sorabella*, 277 Conn. at 168, 891 A.2d 897. Accordingly, the defendant contended that attempted sexual assault was not a cognizable offense because it is impossible to attempt a strict liability offense. *Id.*

The Connecticut Supreme Court disagreed. The Court reasoned that C.G.S. § 53a–71 is a general intent offense,

meaning that the crime only requires the actor to possess “a general intent to perform the acts that constitute the elements of the offense.” *Id.* at 169, 891 A.2d 897. In the context of C.G.S. § 53a–71(a)(1), this meant that the state was not required to establish that the defendant knew that the person with whom he had sexual intercourse was under the age of sixteen. *Id.* Rather, the state only needed to prove “that the accused knowingly engaged in sexual intercourse with a person who, in fact, had not attained the age of sixteen.” *Id.* That is, the state needed to establish “that the accused had the general intent to have sexual intercourse with the victim.” *Id.* at 170, 891 A.2d 897.

Sorabella makes clear that when the Connecticut courts refer to C.G.S. § 53a–71(a) as a “general intent” offense, they do not mean that “the act itself is all that matters and [that] no mental state is required.” *See Def.’s Reply* at 14. On the contrary, the state must prove that the defendant “knowingly engaged” in sexual intercourse. *Sorabella*, 277 Conn. at 169, 891 A.2d 897. It is simply that the state does not need to establish that the defendant was aware of the further attendant circumstances related to the sexual intercourse.

The same logic applies to the present case. Here, Mr. Goguen was convicted of violating C.G.S. § 53a–71(a)(3). An individual *122 violates C.G.S. § 53a–71(a)(3) when “such person engages in sexual intercourse with another person and:... (3) such other person is physically helpless.” Applying *Sorabella*, the Connecticut prosecutors did not need to prove that Mr. Goguen knew that the victim was physically helpless. The prosecutors simply needed to prove that Mr. Goguen knowingly had sexual intercourse with another person who, in fact, was physically helpless.

With this understanding, the Court inspects the elements of each statute in accordance with the categorical approach. A person violates the Connecticut Sexual Assault in the Second Degree statute if the person (1) knowingly engages in (2) sexual intercourse with another person who is, in fact, (3) physically helpless, meaning that the person was either unconscious or, for any other reason, physically unable to resist the act of sexual intercourse or to communicate unwillingness to an act of sexual intercourse. C.G.S. § 53a–71(a)(3); C.G.S. § 53a–65. A person is guilty of the federal offense of sexual abuse when the person (1) knowingly engages in (2) a sexual act with another person who is (3) incapable of declining participation in, or communicating unwillingness to engage in, the sexual act. 18 U.S.C. § 2242.

The elements of each statute, although not precisely identical, are strikingly similar. Only element (2) contains a difference of potential significance. The Connecticut statute prohibits “sexual intercourse” while the federal statute describes a “sexual act.” At first blush, “sexual intercourse” appears to incorporate a narrower band of conduct than a “sexual act.” A closer inspection of the relevant definitions reveals that a “sexual act” and “sexual intercourse” include roughly the same conduct. Connecticut defines “sexual intercourse” as:

vaginal intercourse, anal intercourse, fellatio or cunnilingus between persons regardless of sex. Its meaning is limited to persons not married to each other. Penetration, however slight, is sufficient to complete vaginal intercourse, anal intercourse or fellatio and does not require emission of semen. Penetration may be committed by an object manipulated by the actor into the genital or anal opening of the victim’s body.

C.G.S. § 53a–65(2). Connecticut caselaw clarifies that digital penetration constitutes sexual intercourse by “an object manipulated by an actor” within the statutory definition of sexual intercourse. *See State v. Grant*, 33 Conn.App. 133, 139 n.8, 634 A.2d 1181 (1993). Federal law defines a “sexual act” for purposes of 18 U.S.C. § 2242 as:

- (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
- (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; [or]
- (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person[.]

18 U.S.C. § 2246(2).

The only notable difference between the definitions is that using an object or finger to penetrate an anal or genital opening only constitutes a “sexual act” under the federal

definition if there was “an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” Connecticut’s definition of “sexual intercourse” requires no such intent. However, this distinction does not necessarily mean that the statutes are not “comparable” for purposes of SORNA’s tier classification. “SORNA’s tier regime only demands ***123** that the statutes be “comparable,” not that they be identical.” *United States v. Forster*, 549 Fed.Appx. 757, 769 (10th Cir. 2013); *see also Morales*, 801 F.3d at 7–8 (“‘comparable to’...provide[s] us some flexibility in examining the offenses”).

Most importantly, the distinction does not appear to be essential to SORNA’s tier framework. *See Morales*, 801 F.3d at 7–8 (holding that the explicit reference to an age cut-off in the text of SORNA was “so essential to the [tier] framework that the congressional cut-off must be strictly construed”). Here, the additional intent requirement in the federal statute only applies to a single sub-component of the definition of one element in an offense listed in Tier III. There are no explicit references to the additional intent requirement in SORNA’s description of Tier III, nor does the additional intent requirement apply to other conduct that comprises a “sexual act.” Accordingly, the Court concludes that this distinction is not so essential that it precludes Mr. Goguen from qualifying as a Tier III offender under SORNA.⁵

To summarize, in applying the categorical approach, the Court concludes that Connecticut’s Sexual Assault in the Second Degree statute is “comparable to” the federal sexual abuse statute listed in Tier III of SORNA.⁶ Therefore, Mr. Goguen is a Tier III offender and must register as an offender for life. Consequently, at the time of his alleged violation of supervised release, Mr. Goguen was required to register under SORNA, and thus § 3583(k) is applicable.

B. Mandatory Application of § 3583(k)

Mr. Goguen argues that even if § 3583(k) could apply to him, § 3583(k) is not mandatory. *Def.’s Mem.* at 3–5. Mr. Goguen’s logic proceeds as follows: § 3583(k) merely mentions an “authorized term of supervised release.” He views the plain language of the statute as indicating that it is not mandatory. Hence, he asserts, the Court lawfully used its discretion to impose a three-year term of supervised release under § 3583(b)(2). Because the Court imposed a term of supervised release under § 3583(b), Mr. Goguen faces a maximum period of incarceration of two years for his violation of supervised

release pursuant to § 3583(e)(3), rather than a five-year minimum pursuant to § 3583(k). *Id.*

***124** The Government responds that § 3583(k) is mandatory, citing *United States v. Brown*, 586 F.3d 1342 (11th Cir. 2009). *Gov’t’s Resp.* at 11–12. Moreover, because Mr. Goguen was required to register under SORNA and because he committed a criminal offense under chapter 110 for which imprisonment for a term longer than one year could be imposed, the Government argues that § 3583(k) mandates a specific penalty. *Id.* at 11. In particular, § 3583(k) states that “the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection [18 U.S.C. § 3583](e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.” 18 U.S.C. § 3583(k).

Mr. Goguen agrees with the Government that the penalty for violating a term of supervised release under § 3583(k) is mandatory. *Def.’s Reply* at 3. However, he argues that this penalty provision does not apply because the Court did not impose a term of supervised release under § 3583(k); rather, the Court used its lawful discretion to impose a term of supervised release under § 3583(b)(2). *Id.* at 3–4.

Mr. Goguen pleaded guilty to 18 U.S.C. § 2250 in 2011. Thus, § 3583(k), by its terms, applies to Mr. Goguen. The question reduces to whether a court must impose a term of supervised release under § 3583(k) when that section applies to a defendant. The Court holds that when it applies, § 3583(k) is mandatory. First, the Court views the plain language of § 3583(k) as phrased in mandatory terms.⁷ § 3583(k). The statutory language states that, notwithstanding other provisions in § 3583 relating to supervised release, if an individual is convicted of certain offenses, including 18 U.S.C. § 2250, then “the authorized term of supervised release ... is any term of years not less than 5, or life.” § 3583(k). Mr. Goguen highlights the word “authorized,” but “authorized” in this context relates to a court’s discretion to impose a term of supervised release anywhere within the mandatory range of five years to life. It does not mean that a court has discretion to sentence a qualifying offender to less than five years.

Moreover, caselaw overwhelmingly indicates that § 3583(k) is mandatory. *See United States v. Medina*, 779 F.3d 55, 58 (1st Cir. 2015) (indicating that the range of supervised release for a sex offense listed under § 3583(k) spans from five years to life); *United States v. Cedillo*, 536 Fed.Appx. 866, 868

(11th Cir. 2013) (providing that a violation of 18 U.S.C. § 2250 has a five-year mandatory minimum term of supervised release and a maximum term of life); *United States v. Kuchler*, 285 Fed.Appx. 866, 868 (3d Cir. 2008); *United States v. Acklin*, 557 Fed.Appx. 237, 240 (4th Cir. 2014); *United States v. Brown*, 826 F.3d 835, 839 (5th Cir. 2016); *United States v. Widmer*, 511 Fed.Appx. 506, 508 (6th Cir. 2013); *United States v. Lewis*, 823 F.3d 1075, 1083 (7th Cir. 2016); *United States v. Garcia*, 604 F.3d 575, 577 (8th Cir. 2010); *United States v. Jackman*, 512 Fed.Appx. 750, 752 (10th Cir. 2013).

[7] As such, the plain language of the statute and the overwhelming weight of authority make clear that § 3583(k) requires the Court to impose a term of supervised release between five years and life. Contrary to Mr. Goguen's assertions, the Court did not have discretion to impose *125 a term under § 3583(b)(2). Thus, § 3583(k) applies to Mr. Goguen, and, as both parties admit, the penalty provision of § 3583(k) is mandatory.

C. Propriety of Imposing a Term of Imprisonment Under § 3583(k)

[8] Mr. Goguen asserts that the Court "is required to inform a defendant of a mandatory minimum sentence" under Rule 11 so that the "defendant knows the actual consequences of his plea." *Def.'s Mem.* at 6 (citing FED. R. CRIM. PROC. R. 11(b)(1)(H)). According to Mr. Goguen, "[t]he fairness and integrity of the judicial proceedings" requires that the Court impose a penalty consistent with what the Court told Mr. Goguen at the time of his Rule 11 hearing. *Id.* Because the Court told Mr. Goguen that he was subject to a maximum term of imprisonment of two years following a violation of supervised release under § 3583(e)(3), he insists that the Court may not now impose a more severe penalty based on § 3583(k). *Id.*

Mr. Goguen points to caselaw holding that courts must inform a defendant of the maximum term of supervised release, "including the possibility that he may have to serve a number of years in prison for a violation." *Id.* at 7 (collecting cases). He also cites *United States v. Rivera-Maldonado*, 560 F.3d 16 (1st Cir. 2009), in which the First Circuit held that the District Court committed plain error when it sentenced the defendant to a lifetime of supervised release after mistakenly informing him during the Rule 11 hearing that the maximum period of supervised release was only three years. The First Circuit stated that "[t]here is a huge difference between expecting a three year term of supervised release and expecting one will

be subject to such supervision for the rest of one's life." *Id.* at 8 (quoting *Rivera-Maldonado*, 560 F.3d at 8).

Analogizing to the present case, Mr. Goguen argues that there is also a "huge difference" between expecting a two-year term of imprisonment for a violation of supervised release and a term of imprisonment ranging from five years to life. *Id.* Thus, he urges the Court to sentence him in accordance with the penalties that the Court announced in the Rule 11 hearing. *Id.* at 9.

In response, the Government claims that, despite misinforming Mr. Goguen about the potential term of imprisonment following a violation of supervised release, the Court nevertheless satisfied the requirements of a Rule 11 hearing because the Court is not required to advise a defendant of the collateral consequences of pleading guilty. *Gov't's Resp.* at 14. The Government disputes Mr. Goguen's assertion that courts must apprise defendants of the possible consequences of violating supervised release. *Id.* at 16. The Government explains that a term of imprisonment following a supervised release violation is a collateral consequence of pleading guilty, and that caselaw is clear that courts do not need to inform defendants of collateral consequences during a Rule 11 hearing. *Id.* at 13–16. Rather, a court must simply apprise a defendant of the direct consequences of pleading guilty, such as the maximum prison term, fine, and term of supervised release associated with the defendant's conviction. *Id.* at 16.

The Government insists that the caselaw that Mr. Goguen cites, including *Rivera-Maldonado*, does not contradict its position. According to the Government, "[t]hese cases merely stand for the proposition that courts must advise defendants of the potential period of supervised release because that is a direct consequence of a guilty plea." *Id.* Therefore, because the Court did not even need to inform Mr. Goguen about a term of imprisonment following *126 a violation of supervised release, the Government argues that the Court may impose the correct penalty provision under § 3583(k).

In reply, Mr. Goguen reasserts that Rule 11 required the Court to inform Mr. Goguen of the potential term of imprisonment because it relates to the "maximum possible penalty" that he faced at the time of his guilty plea. *Id.* at 5. Moreover, Mr. Goguen claims that, contrary to the Government's position, at least two circuits require a trial court to inform a defendant of the maximum penalty for violating supervised release at the Rule 11 hearing. *Id.* at 6 (citing *United States v.*

Tuangmaneeratmun, 925 F.2d 797 (5th Cir. 1991); *United States v. Good*, 25 F.3d 218 (4th Cir. 1994)).

Additionally, Mr. Goguen argues that even if the Government is correct, and the Court did not need to inform Mr. Goguen of the potential term of imprisonment following a supervised release violation, this case is different because the Court actually misinformed Mr. Goguen of the consequences of violating supervised release. *Id.* at 6. He points out that the Government does not cite any caselaw holding that “the Court can incorrectly advise a defendant of a lesser maximum penalty and then impose a significantly higher penalty.” *Id.* at 7 n.3. Mr. Goguen emphasizes that the Government did not object at the sentencing hearing when the Court imposed a term of supervised release with a maximum penalty of two years for a violation. *Id.* at 9. Thus, according to Mr. Goguen, the Government cannot now come before the Court and ask it to impose the penalty provisions of § 3583(k). *Id.*

The Court concludes that Rule 11 did not require the Court to inform Mr. Goguen at his plea colloquy that he could face a term of imprisonment if he violated the terms of his supervised release. Rule 11 states that “[b]efore the court accepts a plea of guilty...the court must inform the defendant of...(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release[.]” FED. R. CRIM. P. 11(b)(1)(H). The Rule includes a list of penalties that the Court must discuss during the plea colloquy. The list does not include a potential term of imprisonment following a supervised release violation. This omission is unsurprising. The penalties listed in Rule 11—imprisonment, fines, and terms of supervised release—all directly punish the offense of conviction. However, a term of imprisonment following a supervised release violation is not meant to punish the original offense. Rather, it serves to punish the violation of the supervised release. *See Parry v. Rosemeyer*, 64 F.3d 110 (3rd Cir. 1995) (“[T]he sentence of imprisonment upon revocation of probation is not generated by the plea but by the defendant's own unwillingness or inability to conform to the restrictions imposed as part of probation”). As such, it is not part of the “maximum possible penalty” for the original offense.

There exists a practical element as well. The Court is able to discuss the original term of imprisonment, fine, and terms of supervised release at the Rule 11 hearing because the Court is aware of the conduct surrounding the original offense, and that conduct forms the basis of the punishment. However, “[t]here is no way for a court presiding over a Rule 11 hearing to know whether, or in what manner, or how many

times, a defendant will violate supervised release.” *United States v. Lewis*, 504 F.Supp.2d 708, 713 (W.D. Mo. 2007). In most cases, the Court is unable to rehearse the maximum possible term of imprisonment following a supervised release violation because it is impossible to predict the circumstances, timing, or number of the violations. Therefore, the Court agrees that “Rule 11 does not require a detailed analysis and explanation of the possible *127 consequences for violating supervised release—nor could it.” *Id.*

Caselaw reinforces the Court's position. The First Circuit instructs that “a defendant need not be informed of all the collateral consequences of a guilty plea” during the Rule 11 hearing. *United States v. Ocasio-Cancel*, 727 F.3d 85, 89 (1st Cir. 2013) (citing *Steele v. Murphy*, 365 F.3d 14, 17 (1st Cir. 2004)). However, the Court must inform the defendant of the direct consequences of his plea. *Id.* (citing *Brady v. United States*, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970)). “[T]he distinction between a direct consequence and a collateral consequence ‘turns on whether the consequence represents a definite, immediate, and largely automatic effect on the range of a defendant's punishment.’ ” *Id.* (quoting *Steele*, 365 F.3d at 14).

At the time of the Rule 11 hearing, the fact that Mr. Goguen might serve a term of imprisonment for violating a term of supervised release constituted a collateral consequence of his guilty plea. His additional term of incarceration was not “a definite, immediate, and largely automatic effect” flowing from his guilty plea. Rather, the application of the five-year term of imprisonment under § 3583(k) depended on the happening of a series of contingent events:

- (1) If Mr. Goguen were required to register as a sex offender under SORNA; and
- (2) If he committed a new criminal offense; and,
- (3) If the new criminal offense was an offense for which a term of imprisonment of greater than one year could be imposed; and
- (4) If the new criminal offense fell within the criminal offenses set forth in Chapter 109A, 110, or 117 or sections 1201 or 1591;
- (5) Then, the mandatory five-year and potential lifetime imprisonment provision of § 3583(k) would apply.

18 U.S.C. § 3583(k).

Moreover, revocation “may or may not occur sometime in the future, and whether it occurs is dependent on the actions of the defendant.” *Parry*, 64 F.3d at 114. Thus, Rule 11 did not require the Court to inform Mr. Goguen about the potential term of imprisonment following a violation of supervised release. *See Parry*, 64 F.3d 110, 114–15 (holding that the District Court did not need to advise defendant of a sentence of imprisonment upon a revocation of probation because the sentence was a collateral consequence of the guilty plea); *United States v. Powers*, 29 F.3d 636 at *1 (9th Cir. 1994) (“[A] probation violation is similar to other types of events which have been termed ‘collateral consequences’ of a guilty plea. The district court is not required to inform the defendant of the collateral consequences of pleading guilty”); *see also Ocasio–Cancel*, 727 F.3d at 90 (holding that the imposition of a consecutive sentence is a collateral consequence of pleading guilty); *Steele*, 365 F.3d at 17 (holding that the possibility of commitment for life as a sexually dangerous person is a collateral consequence of pleading guilty).

Mr. Goguen asserts that “[a]t least two Circuits require the Court to inform a defendant of the maximum penalty for a supervised release violation at the Rule 11 hearing,” citing *United States v. Tuangmaneeratmun*, 925 F.2d 797 (5th Cir. 1991), and *United States v. Good*, 25 F.3d 218 (4th Cir. 1994). However, these cases involved an earlier version of Rule 11 that required courts to inform defendants of “the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law, including the effect of any special parole or *128 supervised release term.” *Tuangmaneeratmun*, 925 F.2d at 802; *Good*, 25 F.3d at 219. By contrast, the current Rule 11 simply requires courts to inform defendants of “the maximum possible penalty, including imprisonment, fine, and term of supervised release[.]” FED. R. CRIM. P. 11(b)(1)(H). Mr. Goguen does not identify—nor can the Court locate—any cases that require courts to inform defendants of the maximum penalties for supervised release violations under the current statutory language.

[9] That the Court was not required to inform Mr. Goguen of a potential term of imprisonment following a supervised release violation does not end the inquiry in this case. Here, the Court actually misinformed Mr. Goguen about the penalties he faced if he violated the terms of his supervised release. The Court informed him that he faced a maximum additional imprisonment term of two years, when he in fact faced a minimum of five years and a maximum of life

under § 3583(k). Given the unique circumstances of this case, fundamental fairness compels the Court to sentence Mr. Goguen in accordance with the penalties the Court described during Mr. Goguen’s plea colloquy.

To add to this point, the Court is highly conscious of Mr. Goguen’s past and recent history. Mr. Goguen has had a demonstrably difficult time obeying society’s laws and judicially-imposed supervised release conditions. The Court has discussed Mr. Goguen’s 1996 sexual assault in Connecticut, when at the age of 20, he sexually assaulted an intoxicated sixteen-year-old victim who was passed out. This crime was one of eight crimes Mr. Goguen committed from age 18 through age 32. *PSR ¶¶ 23–30*. One of those convictions was in 2006 in the commonwealth of Massachusetts for failure to register as a sex offender. *Id. ¶ 28*.

On January 12, 2011, Mr. Goguen was indicted federally for his failure to register as a sex offender when he came to Maine, and on September 14, 2012, he was sentenced to 37 months of incarceration with three years of supervised release to follow. *J.* (ECF No. 80); *Am. J.* (ECF No. 90). Before the federal charge was initiated, Mr. Goguen had been arrested on July 29, 2010, on a state charge of unlawful sexual contact with a minor. *PSR ¶ 42*. In calculating Mr. Goguen’s guideline sentence range, the Court imposed an eight-level enhancement under U.S.S.G. § 2A3.5(b)(1)(C) because Mr. Goguen had committed a sex offense against a minor while he was in failure-to-register status. *Statement of Reasons Attach. 1, Findings Affecting Sentencing ¶ 3* (ECF No. 81). The state charge was dismissed on July 10, 2012. *PSR ¶ 42*.

Mr. Goguen was initially released from incarceration on May 11, 2013. On May 23, 2013, the Probation Office filed a consented-to modification of the terms of his supervised release because Mr. Goguen was found in possession of a computer with numerous pornographic images and videos. *Req. for Modifying the Conditions or Term of Supervision with Consent of the Offender* (ECF No. 93). On May 28, 2013, the Court modified the terms of supervised release to require Mr. Goguen to comply with the requirements of the District’s computer and internet monitoring program. *Order Granting Pet. to Modify Supervised Release* (ECF No. 95).

On August 16, 2013, the Probation Office filed a petition for warrant for offender under supervision. *Pet. for Warrant or Summons for Offender under Supervision* (ECF No. 96). This time the Probation Office alleged that Mr. Goguen accessed pornography on the law library computers at the Penobscot

County Judicial Center. *Id.* at 1–2. On September 23, 2013, Mr. Goguen admitted the violation, and the Court imposed a five-month sentence. *129 *Minute Entry* (ECF No. 112); *Revocation J.* (ECF No. 113).

On January 17, 2014, Mr. Goguen was released from incarceration and began his most recent term of supervised release. *Revocation Report* at 6. On November 13, 2015, the Probation Office brought another petition to revoke Mr. Goguen's supervised release. *Pet. for Warrant or Summons for Offender under Supervision* (ECF No. 144) (*Pending Pet.*). This time, the Probation Office alleged that Mr. Goguen had committed the offense of possession of child pornography and had possessed other types of pornography in violation of the terms of his sex offender treatment program. *Id.* at 2. It is this petition that is currently pending before the Court.

For many defendants, a judicial recitation of contingencies at the Rule 11 hearing that describes a possible mandatory minimum punishment of five years and up to life for the commission of a future sex offense while on supervised release is not especially significant because they do not intend to commit another sex offense. But for Mr. Goguen, given his inability to conform his actions to the conditions of supervised release, this additional information may have given him pause. At the very least, the Court's statement that he faced only a maximum of two years' incarceration for a violation of the conditions of supervised release could have misled Mr. Goguen about the true consequences of his guilty plea and the likely penalty he faced if he violated a condition of supervised release.

The Court takes its lead from the principles set forth in *DeWitt v. Ventetuolo*, 6 F.3d 32 (1st Cir. 1993). In *DeWitt*, the Rhode Island Superior Court mistakenly suspended all but 15 years of a convicted defendant's life sentence. Six years later, the Superior Court corrected its mistake and reimposed the original sentence. *Id.* at 33. The First Circuit wrote that there is "no general rule that prohibits a court from increasing an earlier sentence where the court finds that it was erroneous and that a higher sentence was required by law." *Id.* at 34. Stated another way, "[a] convicted defendant does not automatically acquire a vested interest in a mistakenly low sentence." *Id.* at 35. However, the First Circuit recognized that notions of fundamental fairness "must impose some outer limit on the power to revise sentences upward after the fact." *Id.* at 34. "[T]here is no single touchstone for making this judgment," but in certain extreme cases, "a court can properly say that the later upward revision of a sentence, made to

correct an earlier mistake, is so unfair that it must be deemed inconsistent with fundamental notions of fairness[.]" *Id.* at 35. The First Circuit ultimately held that the Superior Court's reimposition of a higher sentence was fundamentally unfair because the Government did not seek judicial correction for over six years, the defendant did not know that the Court made a mistake, and that the defendant was actually released on probation before the Court reimposed his life sentence. *Id.* at 35–6.

Although the facts of the present case differ somewhat from *DeWitt*, the principles of fairness remain the same. At the plea colloquy, the Court mistakenly informed Mr. Goguen that he faced no more than three years of supervised release under § 3583(b)(2) and no more than two years of imprisonment for a violation of that supervised release under § 3583(e)(3). The Court sentenced Mr. Goguen to, among other things, three years of supervised release without remedying the earlier error. The Court, the Probation Office, and the parties failed to correct the mistake. Now, following a violation of the supervised release, the Government asks the Court for the first time to correct the error and impose the penalties associated *130 with § 3583(k). Yet, as mentioned before, the penalties of § 3583(k) dramatically escalate the term of incarceration facing Mr. Goguen, from a maximum of two years to a minimum of five years and a maximum of life. Given the drastic increase in punishment facing Mr. Goguen, the time that has elapsed since the original mistake, and the fact that the error escaped the notice of all parties until now, the Court concludes that this is one such "extreme case" in which a subsequent upward revision, made to correct an earlier mistake, is so unfair that it must be deemed inconsistent with fundamental notions of fairness. See *DeWitt*, 6 F.3d at 36. Accordingly, the Court will cap the potential term of imprisonment for a supervised release violation in this case to two years in accordance with the Court's description of the penalties at the plea colloquy.

Finally, the context of this decision is solely the pending petition for revocation of supervised release. The allegation in the petition is that Mr. Goguen committed a new federal crime, namely possession of child pornography. *Pending Pet.* at 2 ("Beginning on an unknown date and continuing until November 10, 2015, the defendant committed the offense of Possession of Child Pornography, in violation of federal law"). This decision neither prevents the Government from initiating a new criminal charge against Mr. Goguen for this new conduct nor encourages the Government to do so. If the Government does, the restrictions on the imposed penalties

described in this opinion would not apply, but unlike the more probable than not standard for a violation of supervised release, the Government would be compelled to prove his new criminal conduct beyond a reasonable doubt.

III. CONCLUSION

Mr. Goguen violated 18 U.S.C. § 2250, and thus the Court was required to impose a term of supervised release between five years and life under 18 U.S.C. § 3583(k). Because the Court misinformed Mr. Goguen at the Rule 11 hearing that the

maximum term of incarceration for a violation of the terms of supervised release was two years, the Court will limit Mr. Goguen's potential term of imprisonment to a maximum of two years.

SO ORDERED.

All Citations

218 F.Supp.3d 111

Footnotes

- 1 Although it makes no difference for purposes of the resolution of this issue why the Court erred, the error remains inexplicable. The error began with the Synopsis the Government filed on January 13, 2011. *Synopsis* (ECF No. 2) (stating that the maximum term of supervised release was three years under 18 U.S.C. § 3583(b)(2) and that the maximum term of imprisonment for violation of supervised release was not more than two years under § 3583(e)(3)). Although it is true that the Defendant would have little incentive to raise the possibility that his period of supervised release should be more severe, defense counsel did not notify the Court of the error. The Probation Office adopted a portion of the erroneous synopsis in the Revised Presentence Investigation Report. *PSR* ¶ 59 ("If a term of imprisonment is imposed, the Court may impose a term of supervised release of not more than three years, pursuant to 18 U.S.C. § 3583(b)(2)"). The Court is baffled that the error was not caught during the entire process from indictment through the guilty plea, continuing with the presentence proceedings through sentencing to judgment.
- 2 SORNA allows a Tier I and Tier III defendant to reduce the term of registration if he maintains a "clean record." 42 U.S.C. § 16915(b). Mr. Goguen makes no argument that he would be entitled to a clean record reduction, and it appears from his subsequent conduct that he would not be eligible.
- 3 The Court sentenced Mr. Goguen to five months of imprisonment for an earlier violation of supervised release in 2013. The text of SORNA requires the Court to toll Mr. Goguen's registration period while he is in custody. See 42 U.S.C. § 16915(a) ("excluding any time the sex offender is in custody"). Even if the Court does not credit these five months toward Mr. Goguen's registration period, his registration period as a Tier I offender would still end before the alleged violation of supervised release on November 10, 2015.
- 4 Neither party mentioned it, but the PSR classified Mr. Goguen as a Title II offender. *PSR* ¶ 12. This classification had significant sentencing consequences for Mr. Goguen. His base offense level was deemed to be 14. *Id.* If he had been a Tier III offender, his base offense level would have been 16. U.S.S.G. § 2A3.5(a) (1). If he had been a Tier I offender, it would have been 12. *Id.* § 2A3.5(a)(3). Applying other guideline factors and using the base offense level of 14, Mr. Goguen's total offense level was 19. *PSR* ¶ 21. Applying the same calculations, as a Tier III and Tier I offender, his total offense level would have been 21 and 17, respectively. His criminal history category was III. *Id.* ¶ 31. Again using the base offense level of 14, Mr. Goguen's guideline range was 37 to 46, and he was sentenced to 37 months, the low end. *Statement of Reasons*, Attach. 1, *Findings Affecting Sentencing* at 2 (ECF No. 81). If he had been Tier III, he would have faced a guideline sentence range of 46 to 57 months and if Tier I, 33 to 41 months.

At the time of his original sentencing, neither the Government nor Mr. Goguen objected to the Tier II classification that drove the guideline range. The Court has qualms about whether, if Mr. Goguen had not raised the question of his proper Tier classification, the Court could revisit an issue that could have (and perhaps should have) been objected to during the original sentencing process and that became the starting point for the Court's original sentencing analysis.

As a practical matter, if the Court were to hold Mr. Goguen and the Government to the Tier II classification in the original PSR, he would be required to register under SORNA for 25 years, 42 U.S.C. § 16915(a)(2), and therefore he would have committed the November 10, 2015 violation of his term of supervised release well within the 25-year registration period. At the same time, Mr. Goguen raised the issue of his proper classification and, whatever else might be in dispute, it seems incontrovertible that the Tier II classification in the original PSR was in error. In this opinion, the Court does not reach whether its conclusion that Mr. Goguen is a Tier III offender is binding on the parties for the purposes of future proceedings.

- 5 This Court's conclusion is consistent with the Maine Superior Court Justice's conclusion that the Connecticut crime of Sexual Assault in the Second Degree "appears to satisfy all of the *essential elements* of Maine's Gross Sexual Assault" statute. *State Goguen Order* at 7 (citing 17-A M.R.S. § 253(2)(D)) (emphasis added).
- 6 The Court has rested its decision on a comparison of the elements of the state and federal statutes in accordance with *Morales*. If the Court engaged in the modified categorical approach and examined documents in accordance with *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), to the extent the Court could consider the unobjected-to contents of the PSR, it is noteworthy that the First Circuit has affirmed the application of 18 U.S.C. § 2242(2)(C) in circumstances similar to Mr. Goguen's 1996 Connecticut conviction for Sexual Assault in the Second Degree. See PSR ¶ 26 (intoxicated sixteen-year-old female passed out and woke up to discover the Defendant sexually assaulting her). In *United States v. Jahagirdar*, 466 F.3d 149 (1st Cir. 2006), a female passenger in a flight from Dallas to Boston awoke from a nap to find the defendant's hand inside her underpants. *Id.* at 150. See *United States v. Schoenborn*, 793 F.3d 964 (8th Cir. 2015) (victim passed out from drinking too much alcohol and defendant engaged in sexual intercourse with her); *United States v. Papakee*, 573 F.3d 569 (8th Cir. 2009) (while victim was intoxicated, defendant sexually abused her); *United States v. Armstrong*, 166 Fed.Appx. 949 (9th Cir. 2006) (victim passed out and awoke to an act of anal penetration).
- 7 This interpretation is consistent with the remainder of § 3583(k), which is couched in mandatory language. § 3583(k) ("[T]he court *shall* revoke the term of supervised release and *require* the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term *shall* be not less than 5 years") (emphasis supplied).

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United States District Court, M.D.
Tennessee, Nashville Division.

UNITED STATES of America
v.
Lemar Jordan GREENE
No. 3:16-00075-1
I
Filed 01/30/2017

Attorneys and Law Firms

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MEMORANDUM

KEVIN H. SHARP, UNITED STATES DISTRICT JUDGE

*1 Defendant Lemar Greene has filed objections to the Presentence Report (“PSR”), arguing that he should be deemed a Tier I offender under the Sex Offender Registration and Notification Act (“SORNA”). In response, the Government asserts that the PSR is correct, and that Defendant’s prior convictions in Oregon properly qualify him as a Tier III offender. Having considered the arguments raised by the parties (Docket Nos. 34–38 & 40), the Court finds that Defendant is a Tier I offender and he will be sentenced as such.

I. Background

On April 6, 2016, a federal grand jury returned an Indictment against Defendant charging him with failing to update his sex offender registration upon moving to Tennessee. The basis for the Indictment stems from the fact that, on September 9, 2008, Defendant pled guilty in Washington County, Oregon to two counts of Attempted Sexual Abuse in the First Degree in violation of Oregon Revised Statute (“ORS”) § 163.427.

In the underlying state court Indictment, defendant was charged with six crimes, including touching the vaginal area and buttocks of a female victim under the age of 14. He was also charged with causing a female victim under the age of 14 to touch his penis.

Upon acceptance of his pleas of guilt, Defendant was sentenced to 36 months of imprisonment to be followed by 5 years of supervision. Additionally, Defendant was required by the state court judgment to register in Oregon as a sex offender for the rest of his life.

According to the PSR, Defendant last registered in Oregon on July 30, 2014. In December 2014, he moved to Nashville, Tennessee, but did not register as a sex offender in this state at that time. In fact, Defendant did not register as a sex offender in Tennessee until February 16, 2016, and only after being instructed to do so by law enforcement authorities.

II. Legal Discussion

SORNA makes it a federal crime for a sex offender who meets certain requirements to “knowingly fai[.] to register or update a registration as required[.]” 18 U.S.C. § 2250(a)(3). Among those requirements is that a sex offender register “in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.” 42 U.S.C. § 16913(a). It also requires that an offender keep his registration current by reporting any change in residence within 3 days. *Id.* § 16913 (c).

“SORNA sweeps broadly, but its broad sweep discriminates among three sex offender tiers ‘depending on the seriousness of [the defendant’s] underlying sex offense.’ ” *United States v. Gudger*, 624 Fed.Appx. 394, 397 (6th Cir. 2015) (quoting *United States v. White*, 782 F.3d 1118, 1129 (10th Cir. 2015)). The three offender tiers are specified by statute.

At the high end is a Tier III offender, and, so far as relevant, “means a sex offender whose offense is punishable by imprisonment for more than 1 year” and is “comparable to or more severe than ... aggravated sexual abuse or sexual abuse (as described in Sections 2241 and 2242 of Title 18)” or an attempt to commit such an act. 42 U.S.C. § 19611(4). In the middle is a Tier II offender, which includes “a sex offender other than a tier III sex offender whose offense is punishable by imprisonment of more than 1 year” where the offense (or attempt) is “comparable to or more severe” than “coercion

and enticement (as described in section 2422(b) of Title 18); or “abusive sexual contact as described in section 2244 of Title 18.” *Id.* § 16911(2). At the low end is a Tier I offender and “means a sex offender other than at tier II or tier III sex offender.” “*Id.* § 16911(2). A Tier I sex offender is required to keep his registration current for 15 years; a Tier II for 25 years; and a Tier III for life. *Id.* § 16915(b)(2).

*2 The three different categories of offenders are incorporated into the United States Sentencing Guidelines (“U.S.S.G.”) for determination of a defendant’s base offense level. A Tier III offender has a base offense level of 16, the level for a Tier II offender is 14, and the level for a Tier I offender is 12. U.S.S.G. § 2A3.5(a).

Because both Tier II and Tier III statuses require that a sex offense be “comparable to or more severe” than specified federal offenses and Tier I only applies by default, the critical issue in this case is how to make the comparison given Defendant’s convictions for crimes under state law. “Courts have embraced two analytical frameworks for such inquiries: 1) the ‘categorical approach’ and its derivative, the ‘modified categorical approach,’ and 2) the ‘circumstance-specific approach’ (also known as the ‘noncategorical approach’).” *United States v. Berry*, 814 F.3d 192, 195 (8th Cir. 2016).

In *Descamps v. United States*, 133 S. Ct. 2276 (2013) the Supreme Court addressed the categorical approach, albeit in the context of the Armed Career Criminal Act. The Court explained that this approach “compare[s] the elements of the statute forming the basis of the defendant’s conviction with the elements of the ‘generic’ crime—i.e., the offense as commonly understood,” with “[t]he key” being “elements, not facts.” *Id.* at 2281, 83. “[A] variant of this method —labeled (not very inventively) the ‘modified categorical approach’ ” is used for divisible statutes and “permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant’s prior conviction.” *Id.* at 2283.¹ The circumstance-specific approach “is a different species of analysis altogether,” and “focuses on the facts—not the elements—relating to the prior conviction.” *United States v. Price*, 777 F.3d 700, 705 (4th Cir. 2015). This “broader framework applies when the federal statute refers ‘to the specific way in which an offender committed the crime on a specific occasion,’ rather than to the generic crime.” *Id.*

Here, the Government asserts that the Court “must employ the circumstance-specific approach when assessing whether the defendant’s 2008 conviction for first degree sexual abuse is a proper predicate for a Tier III offender classification.” (Docket No. 33 at 5). Defendant argues that the “Court should apply the modified categorical approach, and it should do so without using [an] age exception.” *Id.* at 3.

To date, the Sixth Circuit has not definitively identified which of the categories should be used in determining a Tier level for purposes of SORNA. In fact, in *United States v. Stock*, 685 F.3d 621, 628 (6th Cir. 2012), the court “decline[d] to decide whether it would have been appropriate for the district court to inquire into the specific factual circumstances of [defendant’s state] violations, rather than to limit itself to the fact of [defendant’s] convictions.” See also, *United States v. Gudger*, 624 Fed.Appx. 394, 397 n.1 (6th Cir. Aug. 26, 2015) (declining to “decide whether the district court should have applied the categorical approach when placing [defendant] in a SORNA tier”). Worse yet, its “sister circuits[’] [have] admitted difficulty in answering this question.” *United States v. Mulverhill*, 833 F.3d 925, 929 (8th Cir. 2016); see also, *Stock*, (“Admittedly, there was (and remains) some doubt about the extent to which Guidelines § 2A3.5(a) directs district courts to look beyond the mere fact of a prior sex-offense conviction and into the specific factual circumstances of that offense.”).

*3 In *United States v. Byun*, 539 F.3d 982, 990 (9th Cir. 2008), the Ninth Circuit acknowledged that “courts usually apply a categorical, or modified categorical, approach to determine whether the crime of which the defendant was convicted … provides the basis for a sentencing enhancement, rather than allowing examination of the underlying facts of an individual’s crime.” However, the court went on opine that the “best reading of the statutory structure and language is that Congress contemplated a non-categorical approach as to the age of the victim in determining whether a particular conviction is for a ‘specified offense against a minor,’ ” and that SORNA’s legislative history “fully supports this conclusion.” *Id.* at 992. Even so, that court expressed “no conclusion as to whether a non-categorical approach is permitted with regard to any facts other than the age of the victim.” *Id.* at 994 n. 15.

Byun was followed by the Eleventh Circuit’s opinion in *United States v. Dodge*, 597 F.3d 1347 (11th Cir. 2010). Noting that it, too, “generally applies a categorical or modified categorical approach to statutory construction in

the context of ... enhancement of criminal sentences," the Eleventh Circuit found "the Ninth Circuit's reasoning ... persuasive and instructive for our construction of SORNA," and "its approach supports our conclusion that SORNA permits examination of the defendant's underlying conduct—and not just the elements of the conviction statute—in determining what constitutes a 'specified offense against a minor.'" *Id.* at 1353–54. After then examining the statutory language, the court in *Dodge* concluded that "[a]ll signs point to only one reasonable conclusion—we may look beyond [defendant's] conviction statute to the underlying facts of his offense to determine whether his offense qualifies as a "sex offense against a minor." *Id.* at 1354.

Similarly, the Tenth Circuit in *United States v. White*, 782 F.3d 1118, 1135 (10th Cir. 2015) held that courts "should apply a categorical approach to sex offender tier classifications designated by reference to a specific federal statute, but ... employ a circumstance-specific comparison for the limited purpose of determining the victim's age." This conclusion was based on "the text of the statute, its legislative history, and ... equitable and practical considerations." *Id.*

More recently, both the Eighth and the Fourth Circuits weighed in on the issue. In *United States v. Berry*, 814 F.3d 192, 197 (4th Cir. 2016), the Fourth Circuit "agree[d]" with the Tenth Circuit's decision in *White* and stated that "Congress's decision to reference in SORNA a victim 'who has not attained the age of 13 years,' 42 U.S.C. § 16911(4)(A)(ii), must therefore be read as an instruction to courts to consider the specific circumstances of a victim's age, rather than simply applying the categorical approach." In *United States v. Hill*, 820 F.3d 925 (8th Cir. 2016), the Eighth Circuit agreed with the "[t]hree other circuits [to] have considered how courts should determine if a prior offense constitutes 'conduct that by its nature is a sex offense against a minor under SORNA,'" and their conclusion that "[c]ourts should employ a circumstance-specific approach." *Id.* at 1005 (citing *Price*, 777 F.3d at 708); *Dodge*, 597 F.3d 1347, 1356 (11th Cir. 2010); *Byun*, 539 F.3d at 991–92).

It has been recently observed that "which approach applies to the three tier classifications set forth in §§ 16911(2), (3), and (4)" is a "quagmire[.]" *United States v. Mulverhill*, 833 F.3d 925, 930 (8th Cir. 2016). Nevertheless, the Court reads the foregoing decisions as generally endorsing the categorical approach for SORNA violations, except for purposes of determining the victim's age. As for the age of the victim only, the court can look to the specific circumstances to determine

if the conduct is a sex offense against a minor. Given that understanding, and in the absence of controlling authority from the Sixth Circuit, that is the approach the Court will use in this case.

*4 The actual age of the minor victim is relevant because, for purposes of Tier III (but not Tier I) status, the sex offender must have committed, so far as relevant, either "aggravated sexual abuse or sexual abuse (as described in section 2241 and 2242 of Title 18)" or "abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not obtained the age of 13 years." 42 U.S.C. § 16911(4)(A)(ii). Here, Defendant fits the latter mold because, while the statute merely identified the victims as being under 14 years old in keeping with the language of the Oregon statute, the specific circumstances of his offense show that one victim was 9 to 10 years old at the time of the offenses charged in counts 1 through 3 of the indictment, while the second victim was 12 to 13 years old at the time of the offenses charged in counts 4 through 6 of the indictment. Defendant does not argue otherwise.

What he does argue, however, is that the Oregon statute is broader than the federal statutes. The Court agrees.

As indicated previously, the relevant counts of Defendant's convictions were for violations of ORS § 167.427. That statute provides:

- (1) A person commits the crime of sexual abuse in the first degree when that person:
 - (a) Subjects another person to sexual contact and:
 - (A) The victim is less than 14 years of age;
 - (B) The victim is subjected to forcible compulsion by the actor; or
 - (C) The victim is incapable of consent by reason of being mentally defective, mentally incapacitated or physically helpless; or
 - (b) Intentionally causes a person under 18 years of age to touch or contact the mouth, anus or sex organs of an animal for the purpose of arousing or gratifying the sexual desire of a person.
- (2) Sexual abuse in the first degree is a Class B felony.

Or. Rev. S. § 163.427.

The Oregon statute is divisible if for no other reason than it proscribes sexual contact with both humans and animals and requires the Court to utilize the modified categorical approach to determine which subsection serves as the basis for Defendant's counts of convictions. See United States v. Rocha-Alvarado, 843 F.3d 802, 807 (9th Cir. 2016) ("As the Oregon statute of conviction is overinclusive of the federal crime with regard to the bestiality component and as (1)(a) is divisible from (1)(b), we apply the modified categorical approach here."). From the underlying state court indictment,² it is clear that Defendant was convicted of violating Section 1(a)(A), to wit, subjecting a victim under the age of 14 to sexual contact.

On its face, Section 1(a)(1) is extremely broad; it does not classify offenses based on the mental state of the victim, the reason the victim was subjected to the sexual contact, or the events leading up to the contact. The pivotal question, therefore, is whether that statute is broader than all of the federal statutes which denote Tier III status. In other words, for Defendant to qualify as a Tier III sex offender under SORNA, the Oregon statute must be "comparable to or more severe than" one of the following offenses: 18 U.S.C. § 2241 (aggravated sexual abuse), § 2242 (sexual abuse), or § 2244 (abusive sexual contact) against a minor who has not attained the age of 13 years. It is not.

The Oregon statute is broader than the aggravated sexual abuse statute because it does not require force (or the threat of force), unconsciousness or intoxication, or interstate travel while 18 U.S.C. § 2241 does. Likewise, the Oregon statute is broader than 18 U.S.C. § 2242 because it does not require a threat, placement in fear, incapacity to appraise the nature of the conduct, or physical incapability to decline participation. And, although the analysis is a bit more complicated, the Oregon statute is also broader than abusive sexual contact described in 18 U.S.C. § 2244.

*5 So far as relevant, Section 2244 replaces the term "sexual act" with "sexual contact" for certain provisions of Sections 2241, 2242 and 2243, including Section 2243(a)'s provision which, as modified by Section 2244, criminalizes knowingly engaging in sexual contact with another person who is at least 12 years of age but not 16. "Sexual contact," in turn, is defined as "the intentional touching either directly or through the clothing of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse any person[.]" 18 U.S.C. § 2246(3).

The Government argues that the "plain reading of the statutes clearly illustrates that the federal definition of sexual contact is broader than Oregon's definition." (Docket No. 37 at 3). It posits that "under the federal definition of sexual contact, the grabbing of a woman's genitalia would also be criminal if it were done with the intent to abuse, humiliate, harass, or degrade," but "if a defendant grabbed a woman's genitalia with the intent to humiliate or degrade, the defendant's touching would not be criminal under Oregon's definition of sexual contact." (Id.). Similarly, the Government suggests that "touching the male breasts may or may not be a crime under Oregon law depending on whether the person being touched subjectively considers the male breasts to be an intimate area," but "[u]nder the federal definition, regardless of subjective beliefs, the touching of the male breasts would be criminal if done with the intent to abuse, humiliate, harass, degrade, or for arousal or sexual gratification." (Id. at 3–4).

Assuming the Government's hypotheticals correctly state the law, its argument based on those hypotheticals is immaterial. The issue is not whether federal law is broader, but rather whether Oregon law is broader. This is because the analysis focuses on whether, looking solely at the elements of the two offenses, one can know as a fact a defendant committed the federal offense when he or she committed the state offense. Descamps, 133 S. Ct. at 2283 ("But if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate"); Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013) ("[A] state offense is a categorical match with a generic federal offense only if a conviction of the state offense necessarily involved facts equating to the generic federal offense.").

While the federal definition of sexual contact contains a list of specific body parts, the Oregon definition does not. Rather, sexual contact under Oregon law includes "any touching of the sexual or other intimate parts of a person or causing such person to touch the sexual or other intimate parts of the actor for the purpose of arousing or gratifying the sexual desire of either party," ORS § 163.305(6), with "intimate parts" potentially being extremely broad. This is because the Oregon Supreme Court has held that "intimate parts of a person" include subjectively intimate body parts, State v. Woodley, 760 P.2d 884, 887 (Or. 1988), and may go so far as to encompass a neck, hips or legs, State v. Miles, 357 P.3d 522, 528–30 (Or. App. Ct. 2015) depending on the subjective beliefs of the victim and what defendant knew or should have known.

The recent decision of the United States Court of Appeals for the Ninth Circuit in United States v. Rocha-Alvarado, 843 F.3d 802 (9th Cir. 2016) does not alter this Court's conclusion. While the Ninth Circuit discussed ORS § 163.427 in the context of sentencing, its concern was with Application Note (B)(iii) to U.S.S.G. § 2L1.2, which, as it pointed out, is generic, broader than Section 2243, and includes all statutes that "criminalize conduct that (1) is sexual, (2) involves a minor, and (3) is abusive." *Id.* at 808. Simply put, "§ 2243 does not fully define the universe of sexual offenses contemplated by U.S.S.G. § 2L1.2's term sexual abuse of a minor." *Id.* (citing, United States v. Medina-Villa, 567 F.3d 507, 514–16 (9th Cir. 2009)).

III. Conclusion

***6** Based upon the foregoing, the Court finds that Or. Rev. S. § 163.427 is not comparable to and sweeps broader than the predicate federal offenses for Tier III status under SORNA. Accordingly, Defendant will be sentenced as a Tier I offender.

An appropriate Order will enter.

All Citations

Not Reported in Fed. Supp., 2017 WL 395053

Footnotes

- 1 These types of documents are commonly referred to as "Shepard materials" or "Shepard-approved documents" within the meaning of Shepard v. United States, 544 U.S. 13 (2005)
- 2 Under the modified categorical approach which "calls for looking beyond the mere fact of conviction," an indictment is a Shepard-approved document.. United States v. Prater, 766 F.3d 501, 511 (6th Cir. 2014).

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Only the Westlaw citation is currently available.
United States District Court, D. Nebraska.

UNITED STATES of America, Plaintiff,
v.
Christopher Lee KARSTEN, Defendant.

4:23-CR-3063
|
Signed April 19, 2024

Attorneys and Law Firms

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Toni M. Leija-Wilson, Public Defender, Federal Public Defender's Office, Lincoln, NE, for Defendant.

MEMORANDUM AND ORDER

John M. Gerrard, Senior United States District Judge

*1 The defendant is charged with one count of failing to register as a sex offender in violation of 18 U.S.C. § 2250(a), for failing to register as required by the Sex Offender Registration and Notification Act (SORNA), 34 U.S.C. § 20901 et seq. Filing 1. His federal obligation to register, as charged in the indictment, was allegedly premised on an underlying 2001 Nebraska conviction for first degree sexual assault. Filing 1. The defendant pled guilty to the federal charge in this case pursuant to a plea agreement. Filing 20; filing 21; filing 25.

Now, however, he moves to withdraw his plea, after his counsel discovered while preparing for sentencing that the defendant is factually innocent of the crime charged. Filing 32. Specifically, he alleges that contrary to what the parties had believed, his Nebraska conviction for first degree sexual assault only required him, under federal law, to register for 15 years, not 25—meaning that his obligation to register ended before the current offense was allegedly committed. *See* filing 32. The Court agrees and will grant the defendant's motion to withdraw his plea.

DISCUSSION

WITHDRAWAL OF GUILTY PLEA

A defendant may withdraw a plea after the Court accepts it, but before imposing sentence, if the defendant can show a fair and just reason for requesting the withdrawal. Fed. R. Crim. P. 11(d)(2)(B); *see United States v. Osei*, 679 F.3d 742, 746 (8th Cir. 2012). The defendant bears the burden of showing a fair and just reason for withdrawal. *Id.*

And even if the defendant shows a fair and just reason for withdrawal, the Court must consider other factors before granting the motion, such as whether the defendant asserts his innocence of the charge, the length of time between the plea and the motion to withdraw it, and whether the government will be prejudiced if the Court grants the motion. United States v. McHenry, 849 F.3d 699, 705 (8th Cir. 2017). But there is no absolute right to withdraw a plea before sentencing. United States v. Prior, 107 F.3d 654, 657 (8th Cir. 1997); *see Osei*, 679 F.3d at 746. Rule 11 proceedings are not an exercise in futility, and a plea is a solemn act not to be disregarded because of belated misgivings. *See Osei*, 679 F.3d at 746-47.

The defendant contends that while preparing for sentencing, his counsel discovered that as a matter of law, he's not guilty of the crime charged—which, the defendant says, goes both to the factual basis for the plea and calls into question the effectiveness of counsel. Filing 33 at 2-4. The Court agrees that the lack of a factual basis for the plea (which will be discussed below) is a fair and just reason to permit its withdrawal. *See United States v. Heid*, 651 F.3d 850, 856 (8th Cir. 2011).¹

*2 Considering the other factors, the defendant also asserts his actual innocence, which weighs strongly in favor of his motion. *See United States v. Barnett*, 426 F. Supp. 2d 898, 913-14 (N.D. Iowa 2006). The Court credits the defendant's claim that the motion was promptly filed because its basis was only discovered while preparing for sentencing—which makes sense, given how the base offense level for this charge is determined. *See U.S.S.G. § 2A3.5(a)*. And while the government is undoubtedly prejudiced, the Court finds that being unable to prosecute a factually innocent defendant isn't the sort of prejudice that weighs against granting the motion. *See Barnett*, 426 F. Supp. 2d at 914.

SORNA

Turning to the merits of the defendant's argument: Under SORNA, the length of a sex offender's registration requirement is determined by the severity of the underlying sex offense, categorized by "tiers." *See 34 U.S.C. § 20915(a).* Tier III is the most severe category and Tier I is the least severe, serving as a catchall when Tiers II or III do not apply. *United States v. Coulson*, 86 F.4th 1189, 1191 (8th Cir. 2023)

As relevant here a "Tier I" sex offender is required to register for 15 years, while a "Tier II" sex offender must register for 25 years. *§ 20915(a).* That period runs from the date the offender is released from any imprisonment, *see id.*, which the Court understands for the defendant was May 10, 2005. So, if the defendant's underlying conviction was for a Tier I offense, his registration obligation ended in 2020. But if it was a Tier II offense, his registration obligation runs until 2030. And he's charged with knowingly failing to register between October 10 and November 1, 2022. Filing 1.

Tier II applies when the SORNA defendant's underlying state offense is "comparable to or more severe than" one of the listed federal Tier II offenses. *See 34 U.S.C. § 20911; see also Coulson*, 86 F.4th at 1191. The relevant federal offense here is at the end of a winding stream of citations. One of the listed Tier II offenses is "abusive sexual contact," which is defined "as described in Section 2244 of Title 18." *§ 20911(3)(A)(iv).* That section, in turn, contains a cross-reference to "subsection (a) of section 2243 of this title." *18 U.S.C. § 2244(a)(3).* And that section, finally, proscribes knowingly engaging in a sexual act, or attempting to do so, with a person who is between the ages of 12 and 16 and is at least four years younger than the person so engaging. *18 U.S.C. § 2243(a).* That federal offense is, according to the government, comparable to the defendant's Nebraska state conviction for attempted first degree sexual assault in violation of *Neb. Rev. Stat. § 28-319(1).* Filing 45 at 3-4.

THE CATEGORICAL APPROACH

SORNA's tier analysis requires the Court to engage in the so-called "categorical approach" to comparing state and federal offenses. *Coulson*, 86 F.4th at 1193. Under that approach, the Court compares the elements of the prior state offense with the federal definition of a Tier II offense, to determine whether the state offense sweeps more broadly. *See United States v.*

Brown, 73 F.4th 1011, 1014 (8th Cir. 2023). But if the state statute covers more conduct than the federal definition of a Tier II offense, and lists alternative methods of committing the crime, then the Court must determine whether the listed alternatives are elements or means. *See Brown*, 73 F.4th at 1014.

If the statutory alternatives are multiple means of committing a single offense, the statute is indivisible, and the pure categorical approach applies. *Id.* If, however, the statute sets forth alternative elements that define multiple offenses, the statute is divisible, and the Court must apply the "modified categorical approach" to determine which alternative was the offense of conviction. *Id.*

*3 In this case, the version of the statute in effect at the time,² *§ 28-319(1)* (Reissue 1995), provided:

Any person who subjects another person to sexual penetration (a) without consent of the victim, (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or (c) when the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree.

The question, in other words, is whether the Court should regard the defendant as having been convicted of "sexual assault in the first degree" in violation of the entirety of *§ 28-319(1)*, or whether the Court should regard the defendant as having been convicted of "first degree sexual assault of a child," solely in violation of *§ 28-319(1)(c)*.

As the Court understands the parties' arguments, that question is dispositive. The defendant argues that all of those alternatives—(a), (b), and (c)—are different ways of committing the crime of first degree sexual assault. Filing 33 at 5-7 (citing *United States v. Church*, 461 F. Supp. 3d 875, 882 (S.D. Iowa, 2020)). And, as a result, the defendant concludes that the statute sweeps more broadly than Tier II. Filing 33 at 6. The government, on the other hand, wants the Court to focus on subsection (c), arguing that it's functionally a separate crime—and, as a result, squarely comparable to a

Tier II offense. Filing 45 at 7-9. But the defendant doesn't argue that § 28-319(1)(c), if allowed to stand alone, isn't a Tier II offense. *See* filing 33. And the government doesn't dispute that § 28-319(1), if considered in its entirety, is overinclusive. *See* filing 45. In other words, the question of divisibility determines the outcome here.

DIVISIBILITY

The Supreme Court explained in *Mathis v. United States*, 579 U.S. 500, 517 (2016), that:

The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means. If they are elements, the court should do what we have previously approved: review the record materials to discover which of the enumerated alternatives played a part in the defendant's prior conviction, and then compare that element (along with all others) to those of the generic crime. But if instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution.

(Citation omitted). In that instance, “the court may ask only whether the *elements* of the state crime and generic offense make the requisite match.” *Id.*

To make this means-or-elements determination, the Court must look to the statute's text and structure, authoritative state court decisions, and the record of the defendant's prior conviction, to determine which words or phrases in the statute are elements of the crime, as opposed to the means, or specific facts, of satisfying these elements. *United States v. McConnell*, 65 F.4th 398, 403 (8th Cir. 2023); *see Mathis*, 579 U.S. at 517-19.

*⁴ Other courts have reached sharply varying conclusions about whether similar statutes from other jurisdictions are indivisible or divisible—some support the government's position that different ways of committing sexual abuse are,

in fact, functionally difference crimes, subject to the modified categorical approach. *See Debique v. Garland*, 58 F.4th 676, 682 n.5 (2d Cir. 2023); *Johnson v. United States*, 24 F.4th 1110, 1117-19 (7th Cir. 2022); *Valdez v. Garland*, 28 F.4th 72, 78 (9th Cir. 2022); *United States v. Alfaro*, 835 F.3d 470, 473 (4th Cir. 2016); *United States v. Davis*, 875 F.3d 592, 598 (11th Cir. 2017); *United States v. Armes*, 953 F.3d 875, 879 (6th Cir. 2020). Others, however, support the defendant's position that the statute is indivisible because the relevant element of the offense is a lack of valid consent, and the statute simply provides different means of satisfying that element. *United States v. Al-Muwakkil*, 983 F.3d 748, 757 (4th Cir. 2020); *United States v. Degeare*, 884 F.3d 1241, 1249 (10th Cir. 2018).³

It is, however, Nebraska caselaw that dictates the specific outcome here. One of the few things that is reasonably clear about determining divisibility under *Mathis* is that when a state court decision indicates that the statutory alternatives are merely different ways of committing a single crime, and that the jury need not agree on any particular one of those alternatives to convict, then the statutory alternatives are means, rather than elements. *Degeare*, 884 F.3d at 1249; *see Mathis*, 579 U.S. at 506, 517; *see also United States v. McMillan*, 863 F.3d 1053, 1057 (8th Cir. 2017); *cf. Rincon v. Garland*, 70 F.4th 1080, 1084-85 (8th Cir. 2023) (holding that a drug possession statute's alternatives were elements because separate convictions were permitted for simultaneous possession of each alternative).

And with respect to § 28-319(1), the Nebraska Supreme Court has said, repeatedly, that:

There are three distinct ways in which a perpetrator can commit the offense of first degree sexual assault under § 28-319(1). In addition to compelled or coerced sexual penetration pursuant to § 28-319(1)(a), a perpetrator 19 years or older may commit first degree sexual assault by subjecting a victim that is less than 16 years of age to sexual penetration. See § 28-319(1)(c). Furthermore, Nebraska's first degree sexual assault law prohibits, without qualification, a perpetrator from sexually penetrating a victim that the attacker knows or should have known is “mentally or physically incapable of resisting or appraising the nature of his or her conduct.” § 28-319(1)(b).

State v. Rossbach, 650 N.W.2d 242, 249 (Neb. 2002); *see State v. McCurdy*, 918 N.W.2d 292, 298-99 (Neb. 2018) (“[t]he first degree sexual assault statute ... sets forth three

ways in which one could be found guilty of the offense"). And moreover, the Nebraska Supreme Court has plainly stated that subsections (a) and (b) of § 28-319(1) are "distinct ways of committing the same offense" and that "where there is evidence of both, a juror may determine guilt based on either." *State v. Npimnee*, 2 N.W.3d 620, 627 (Neb. 2024). Accordingly, the Court concluded in *Npimnee* that the jury had been instructed correctly when the jurors were told that they need not agree unanimously on whether the offense was committed "without consent" or the victim was "mentally or physically incapable," so long as they agreed unanimously that the prosecution had proved one element or the other. *Id.* at 626-27; *see also McMillan*, 863 F.3d at 1057. And "*Mathis* makes jury unanimity the touchstone of the means-or-elements inquiry." *Degear*, 884 F.3d at 1251.

*5 In other words, the Nebraska Supreme Court's interpretation of § 28-319(1) supports the defendant's construction: That the crime of first degree sexual assault has two elements, (1) sexual penetration and (2) lack of valid consent, and subsections (a), (b), and (c) are alternative means of establishing lack of valid consent. Subsection (a) states the lack of consent expressly, while subsections (b) and (c) define particular circumstances in which the victim is legally incapable of consenting. *See In re Int. of K.M.*, 910 N.W.2d 82, 88 (Neb. 2018) (explaining that "the law of sexual assault has traditionally recognized certain circumstances under which an individual lacks the capacity to consent to sexual conduct and where sexual contact with that person thus constitutes sexual assault"); *see also Al-Muwakkil*, 983 F.3d at 757.

It's based on that reasoning that the U.S. District Court for the Northern District of Iowa likewise concluded, in *Church*, that § 28-319(1) was indivisible. 461 F. Supp. 3d at 886. But the government takes a different tack in trying to get around all that authority. The government notes that *Church* was focused, like other cases, on subdivisions (a) and (b)—so, the government contends it's just subsection (c) that's divisible. Filing 45 at 7.

That stretches statutory interpretation past the breaking point. The inquiry under *Mathis* is whether the alternatives listed in a statute are elements or means—*Mathis* talks about the structure of the entire statute, not individual pieces of it. It's absolutely clear under *Mathis*, given Nebraska caselaw, that subsections (a) and (b) are means. The government cites no authority, nor is the Court aware of any, for the proposition that *some* of a statute's listed alternatives can be means while other alternatives *in the same list* can somehow be elements.

Nor is this Court inclined to make applying the "categorial approach" even more convoluted than it already is.

Nothing in § 28-319(1)'s "text and structure," *see McConnell*, 65 F.4th at 403, provides any support for a conclusion that the statute begins by listing alternative means for committing an offense and then pivots, mid-sentence, into listing one element of a different offense—and *then* pivots back to conclude that any one of the alternatives makes the actor "guilty of sexual assault in the first degree." And the Court has little doubt that, were an offender to be convicted of two counts of first degree sexual assault based on a single incident of sexual penetration of an unconscious 15-year-old, the Nebraska Supreme Court would conclude that the duplicitous convictions were barred by the Double Jeopardy Clause. *Compare Rincon*, 70 F.4th at 1084-85.

The Court notes, for the sake of completeness, that the records of the defendant's prior conviction—so-called *Shepard* documents, *see Mathis*, 579 U.S. at 519 (citing *Shepard v. United States*, 544 U.S. 13, 21 (2005))—provide some support, albeit weak, for the divisibility of the statute. *See filing 43*. They do admittedly charge the defendant solely under § 319(1)(c), *see filing 43-1* at 5, which is at least consistent with a theory of divisibility, *see id.* at 518-19.

But as the Supreme Court recognized, "such record materials will not in every case speak plainly." *Mathis*, 579 U.S. at 519. They do not speak plainly here. While the underlying factual details of the case are unavailable, it's not hard to imagine circumstances (such as sexual contact with a willing but underage victim) that would readily explain why a charging instrument might specify only subsection (c). In any event, the *Shepard* documents are only persuasive if "state law fails to provide clear answers," *id.* at 518—and Nebraska law provides a clear answer here.

*6 That answer is neither intuitive nor satisfying: Everyone knows that the defendant violated § 28-319(1)(c), and that's a Tier II offense—yet the Court is precluded from saying so. But as the Third Circuit has lamented,

The categorical approach mandates our accedence to [the defendant's] demand that we ignore what [he] actually did and focus instead on what someone else, in a hypothetical world, could have done. That's the analytical

box the categorical approach puts us in. Thus, even though it is indisputable on this record—and, in fact, no one does dispute—that [the defendant] repeatedly had sex with a minor, when we assess [his] conviction alongside the pertinent federal statutes, the categorical approach blinds us to the facts and compels us to hold that the crime of which [he] was convicted does not amount to the aggravated felony of “sexual abuse of a minor.” It is a surpassingly strange result but required by controlling law.

Cabeda v. Att'y Gen. of United States, 971 F.3d 165, 167 (3d Cir. 2020). Adherence to controlling authority requires the same result here.

CONCLUSION

The Court is aware of the implications its reasoning has for the ultimate disposition of this case. But we're not there yet. Whether this case should be dismissed in its entirety is a question the Court will answer when it's asked.

But the Court notes that the defendant has been in custody since his June 8, 2023 arrest. The Court doesn't intend to discourage the government from preserving its arguments and pursuing any appellate review it might be entitled to, should it

choose. If the defendant is eventually to be released, however, the parties are encouraged not to unnecessarily prolong his captivity.

That said, the Court also notes that according to the presentence report, the defendant was apparently living rough when arrested.⁴ The parties, the probation office, and the Magistrate Judge are encouraged to carefully consider—particularly given the defendant's history of homelessness, substance abuse, and anger mismanagement—whether there are arrangements that can be made while this case is still pending (consistent with the laws concerning pretrial release, which still govern) that might improve the defendant's chance for successful reentry into the community.

IT IS ORDERED:

1. The defendant's motion to withdraw his plea (filing 32) is granted.
2. The defendant's plea of guilty is withdrawn.
3. This case is returned to the Court's trial calendar.
4. Counsel are directed to promptly contact the Magistrate Judge's chambers to discuss case progression—including a new pretrial motions deadline—and the defendant's continued custody.

All Citations

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Footnotes

- ¹ Ineffective assistance of counsel may also be a fair and just reason for withdrawing a plea. See *United States v. Marcos-Quiroga*, 478 F. Supp. 2d 1114, 1130 (N.D. Iowa 2007). But the Court notes, for the record, its view that the defendant's capable counsel was *not* ineffective for failing to recognize this complicated issue before the defendant's plea was entered—and should, in fact, be credited for spotting it and raising it now.
- ² The statute has been amended since the defendant's 2001 conviction: New crimes for sexually assaulting a child under the age of 12 were created, so § 28-319(1)(c) was amended to specify a victim between the ages of 12 and 16. See L.B. 1199, 99th Leg., 2d Sess. (Neb. 2006). The amendment doesn't affect the Court's interpretation of the statute.

- 3 The reasoning in these cases is often hard to reconcile, and provides some basis to sympathize with repeated criticism of the entire legal framework for deciding these issues. See, e.g., *Valdez*, 28 F.4th at 85-86 (Graber, J., concurring in part).
- 4 Which poses a question of how the defendant was expected to maintain his registration as a sex offender when his actual residence was “a tent in an area near 48th Street,” but that’s beside the point.

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United States District Court, N.D. Iowa, Central Division.

UNITED STATES of America, Plaintiff,

v.

Scott Wayne LANEY, Defendant.

No. CR20-3053-LTS

|

Signed 05/06/2021

Attorneys and Law Firms

Ronald C. Timmons, US Attorney's Office, Sioux City, IA, for Plaintiff.

ORDER ON REPORT AND RECOMMENDATION

Leonard T. Strand, Chief Judge

*1 This matter is before me on a Report and Recommendation (R&R) in which the Honorable Kelly K.E. Mahoney, Chief United States Magistrate Judge, recommends that I grant defendant's motion (Doc. 28) to dismiss the indictment. The Government has filed objections (Doc. 51) and Laney has filed a response (Doc. 52).

I. BACKGROUND

On December 8, 2020, the grand jury returned an indictment (Doc. 2) against Laney alleging one count of failure to register as a sex offender in violation of 18 U.S.C. § 2250(a). On January 13, 2021, Laney filed a motion (Doc. 28) to dismiss the indictment. On January 27, 2021, the Government filed a response (Doc. 32) and a superseding indictment (Doc. 36) clarifying the underlying Minnesota statute that allegedly obligated Laney to register as a sex offender pursuant to the Sex Offender Registration and Notification Act (SORNA). Laney then filed a reply (Doc. 45) to the Government's response. Judge Mahoney issued her R&R (Doc. 46) on March 26, 2021. Trial is scheduled for June 7, 2021.

II. APPLICABLE STANDARDS

A district judge must review a magistrate judge's R&R under the following standards:

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

28 U.S.C. § 636(b)(1); *see also* Fed. R. Crim. P. 59(b). Thus, when a party objects to any portion of an R&R, the district judge must undertake a de novo review of that portion.

Any portions of an R&R to which no objections have been made must be reviewed under at least a "clearly erroneous" standard. *See, e.g., Grinder v. Gammon*, 73 F.3d 793, 795 (8th Cir. 1996) (noting that when no objections are filed "[the district court judge] would only have to review the findings of the magistrate judge for clear error"). As the Supreme Court has explained, "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)). However, a district judge may elect to review an R&R under a more-exacting standard even if no objections are filed:

Any party that desires plenary consideration by the Article III judge of any issue need only ask. Moreover, while the statute does not require the judge to review an issue *de novo* if no objections are filed, it does not

preclude further review by the district judge, *sua sponte* or at the request of a party, under a *de novo* or any other standard.

*² *Thomas v. Arn*, 474 U.S. 140, 150 (1985).

III. THE R&R

Judge Mahoney began by describing Laney's underlying criminal conviction. He was convicted of first degree criminal sexual conduct in violation of Minnesota Statute section 609.342(1)(g). His offense conduct involved inserting his finger into his 11-month-old daughter's vagina while giving her a bath. Laney pleaded guilty to subsection (g), which criminalized "sexual penetration with another person, or ... sexual contact with a person under 13 years of age" when "the actor has a significant relationship to the complainant and the complainant was under 16 years of age at the time of the sexual penetration." Minn. Stat. § 609.342(1)(g) (1998). This conviction required Laney to register as a sex offender under SORNA upon his release from prison on June 6, 2005. Doc. 46 at 2. The parties dispute whether Laney is a tier I offender, required to register for 15 years, or a tier III offender, required to register for life. The indictment and superseding indictment allege that Laney failed to register from June 21, 2020, to October 16, 2020. *Id.* at 3 (citing Docs. 2, 36).

Judge Mahoney concluded Laney is a tier I offender. She explained that courts determine whether a defendant is a tier II or tier III offender by comparing the defendant's prior conviction to certain enumerated federal crimes. If the conviction does not fit an enumerated federal crime, it falls under the catch-all provision of tier I. *See id.* at 3-4. In comparing the prior conviction to federal crimes, courts use either the categorical approach or the circumstance-specific approach. The categorical approach requires comparing elements of the prior offense with elements of a listed offense. The circumstance-specific approach requires examining the circumstances of the prior offense. Judge Mahoney explained that defendant would be considered a tier III offender if his prior conviction "is comparable to or more severe than ... abusive sexual contact (as described in [18 U.S.C. § 2241]) against a minor who has not attained the age of 13 years." *Id.* (quoting 34 U.S.C. § 20911(4)(A)(ii)). Subsection (c) of 18 U.S.C. § 2241 prohibits "knowingly engag[ing] in a sexual [contact] with another person who has not attained

the age of 12 years." *Id.* (quoting 18 U.S.C. § 2244(a)(5); 18 U.S.C. § 2241(c)).¹ Laney argues that because his prior conviction required proof of sexual contact with another person "under 16 years of age" and the federal statute requires proof of sexual contact with a person under 12 years old, the elements do not match under the categorical approach. The Government argues there is a match under the circumstance-specific approach because the victim was only 11 months old.

Judge Mahoney explained the Eighth Circuit has not determined when to apply the categorical approach or the circumstance-specific approach to tier determinations. *Id.* at 5-6 (noting that neither *United States v. Hall*, 772 F. App'x 375 (8th Cir. 2019), nor *United States v. Lowry*, 595 F.3d 863 (8th Cir. 2010), directly addressed the issue). Judge Mahoney examined cases in which courts considered the two approaches with regard to other aspects of SORNA – such as determining whether a defendant's prior conviction involves conduct that meets the definition of "sex offender" and requires a defendant to register under SORNA. She noted that the definitions identify the applicable approach. For example, under 34 U.S.C. § 20911(7)(I), a "specified offense against a minor"² includes "[a]ny conduct that by its nature is a sex offense against a minor." This statutory language (referencing conduct) demonstrates that Congress intended a circumstance-specific approach.

*³ Under 34 U.S.C. § 20911(5)(A)(i), a person meets the definition of a sex offender if convicted of "a criminal offense that has an element involving a sexual act or sexual contact with another." This statutory language (referencing elements) demonstrates Congress intended a categorical approach. *Id.* at 7. Judge Mahoney noted that courts have also applied the circumstance-specific approach when determining whether the exception to the definition of "sex offender" under 34 U.S.C. § 20911(5)(C) applies. The exception states: "[a]n offense involving consensual sexual conduct is not a sex offense for purposes of [SORNA] if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim." 34 U.S.C. § 20911(5)(C). Courts have reasoned that the phrase "involving ... conduct" signals a circumstance-specific approach. *Id.* at 7-8 (citing cases).

With regard to the tier definitions, Judge Mahoney observed that other circuit courts of appeal have held that the categorical approach applies when determining whether a prior conviction is "comparable to or more severe than" one

of the enumerated federal offenses listed in sections 20911(3)(A) and 20911(4)(A), but have held that the circumstance-specific approach applies when determining whether an offense was “committed against a minor” for purposes of section 20911(3)(A) or “against a minor who has not attained the age of 13 years” for purposes of section 20911(4)(A)(ii). *Id.* at 9 (citing cases). Judge Mahoney also noted courts have recognized that the Supreme Court has held that when a statute lists several of its “offenses” in language that refers to generic crimes, including sections that refer specifically to an “offense described in” a particular section, this invokes a categorical approach. *Id.* at 10 (citing *United States v. White*, 782 F.3d 1118, 1132-33 (10th Cir. 2015)). However, a statute that uses the term “committed” rather than “convicted” suggests Congress intended a circumstance-specific approach. *Id.* She also noted that the Fifth Circuit has reasoned that the phrase “when committed against a minor” is “conditional language” that modifies the listed offenses and also suggests a circumstance-specific approach in determining whether the “minor” qualifier was met before using the categorical approach. *Id.* at 10-11 (citing *United States v. Escalante*, 933 F.3d 395, 402-04 (5th Cir. 2019)).

Turning to the specific statutory language at issue here, a tier III offense is “comparable to or more severe than the following offenses.... abusive sexual contact (as described in [18 U.S.C. § 2244]) against a minor who has not attained the age of 13 years.” 34 U.S.C. § 20911. Judge Mahoney found that this language supports a circumstance-specific approach to the age qualifier because no subsection of abusive sexual contact includes an element of a victim age 12 or under. *Id.* at 11 (citing 18 U.S.C. §§ 2241-2244). She reasoned that to give the age qualifier any meaning, the court must use a circumstance-specific approach. Otherwise, “only one subsection of abusive sexual contact would ever be a categorical match to the age qualifier, and no conviction of abusive sexual contact involving a 12-year-old victim would be a categorical match.” *Id.* at 11 (citing *United States v. Walker*, 931 F.3d 576, 580 (7th Cir. 2019)).

In addition to the statutory language, Judge Mahoney noted that courts also rely on practical considerations and legislative history. For instance, the Tenth Circuit observed that applying the categorical approach “gives the defendant most of the benefits of a plea bargain, strictly confines the need to consult documents from a prior proceeding, and avoids the inequity of relying on allegations of the indictment where the defendant may have had no reason to challenge those assertions.” *Id.* (quoting *White*, 782 F.3d at 1135). In contrast, the Tenth

Circuit noted that the victim's age is “a single fact that is easy to prove and, in an ordinary case, [is] not easily disputed.” *Id.* at 12 (quoting *White*, 782 F.3d at 1135). Judge Mahoney noted that circuit courts have also recognized that SORNA’s legislative history reveals that “Congress intended to punish defendants who committed sex offenses against children more severely than other sex offenders.” *Id.* (quoting *White*, 782 F.3d at 1134). She recommends “following the decisions of every circuit court to address this issue and holding that as a general rule, the categorical approach applies when comparing the defendant’s prior conviction to the enumerated federal offenses in tier II and tier III.” *Id.* She further recommends holding, again in line with every circuit court to address the issue, “that a circumstance-specific approach applies to victim age when determining whether an offense was ‘against a minor’ or ‘against a minor who has not attained the age of 13 years’ (the age qualifiers).” *Id.*

*4 Judge Mahoney next considered whether the categorical or circumstance-specific approach should apply when evaluating the victim's age as an element in an enumerated tier II or tier III offense. She first considered a modified categorical approach as advocated by the Government. *Id.* at 12-13. She found the Government's proposal was prohibited by *Descamps v. United States*, 570 U.S. 254 (2013), and *Mathis v. United States*, 136 S. Ct. 2243 (2016). Specifically, she noted the Government was not arguing that Laney was convicted of one version of the statute over another, but that the court should consider the underlying facts supporting Laney's conviction. *Id.* at 13. Judge Mahoney reasoned the modified categorical approach does not allow the court to consider facts (such as the victim's age) that did not have to be proved to sustain a defendant's conviction. *Id.* Because the parties agreed on the elements of the prior conviction, she found the modified categorical approach inapplicable and concluded the Government's argument was better understood as advocating for a circumstance-specific approach limited solely to determining victim age.

Next, Judge Mahoney considered whether Laney could be considered a tier III offender, noting that his prior conviction must be “comparable to or more severe than ... abusive sexual contact (as described in [18 U.S.C. § 2244]) against a minor who has not attained the age of 13 years.” *Id.* at 14 (quoting 34 U.S.C. § 20911(4)(A)(ii)). She applied the circumstance-specific approach to the under-13 qualifier and found that it was met, as Laney's victim was less than a year old. She then considered the Government's argument that the circumstance-specific approach should continue to apply to the victim's age,

even when comparing Laney's prior offense to the elements of abusive sexual contact (the enumerated federal offense). Subsection (a)(5) of this offense (through reference to 18 U.S.C. § 2241(c)) prohibits knowingly engaging in sexual contact "with another person who has not attained the age of 12 years." 18 U.S.C. §§ 2244(a)(5), 2241(c). The Government argues that Laney's prior conviction is a categorical match to subsection (a)(5) of abusive sexual contact (except with respect to the victim's age) and argues that the court should continue to take a fact-based approach to victim age in deciding whether the prior conviction is "comparable" to subsection (a)(5). Doc. 46 at 14.

Judge Mahoney noted that the circuit court decisions cited by the Government did not address whether a circumstance-specific approach to the victim's age continues to apply when comparing the elements of the defendant's prior offense to the elements of the enumerated federal offenses (when the categorical approach usually applies). *Id.* at 15. However, she noted the Seventh Circuit has addressed this precise issue and determined that the court "must first consider whether [the prior] conviction is a categorical match to 'abusive sexual contact'" and if it is, only "*then* consider the age of the victim to complete the tier-classification determination." *Id.* at 16 (quoting *Walker*, 931 F.3d 581). In *Walker*, there was no categorical match because the predicate offense under Colorado law required, as an element, that the child be "less than fifteen years of age," *see* Colo. Rev. Stat. § 18-3-405(1), while the applicable parts of the federal statutes required the child "has attained the age of 12 years but has not attained the age of 16 years," *see* 18 U.S.C. § 2243(a), or "has not attained the age of 12 years." 18 U.S.C. § 2241(c). *See id.* § 2244(a)(2), (3), & (5). The court reasoned that the Colorado statute was broader than § 2243(a) because it covered sexual contact against victims under 12 while § 2243(a) did not. The Colorado statute was also broader than § 2241(c) because it covered some victims between the ages of 12 and 15 while § 2241(c) did not. The court concluded "a conviction under the Colorado statute doesn't necessarily satisfy the elements of either federal offense and so fails the categorical analysis." *Walker*, 931 F.3d at 582. Therefore, age did not factor into the analysis.

*5 Applying *Walker*, Judge Mahoney explained the age qualifiers "do not create an exception to applying the categorical approach; rather they are an independent addition to meeting the tier II or tier III requirements." Doc. 46 at 19. She agreed with *Walker* that a person is a tier III offender "only if his prior offense matches [abusive sexual contact]

and was committed 'against a minor who has not attained the age of 13 years.' " *Id.* (quoting *Walker*, 931 F.3d at 580). Judge Mahoney concluded the statutory language supports employing the categorical approach without exception, even for victim age. She recommends following the Seventh Circuit (the only circuit court to address this precise issue) and holding "that when determining the defendant's tier classification, the categorical approach applies when comparing the defendant's prior sex offense to abusive sexual contact and other enumerated federal offenses – including to victim age." *Id.* at 20.

Turning to Laney's prior sex offense, Judge Mahoney noted that Minnesota statute required, as an element, a victim under 16 years old. *See* Minn. Stat. § 609.342(1)(g) (1998). Judge Mahoney compared that offense to 18 U.S.C. § 2244(a)(5), which requires, through reference to § 2241(c), a victim under 12 years old. She reasoned the state offense is categorically broader than the federal offense because, unlike the federal offense, it applies to conduct against victims aged 12, 13, 14 and 15. Doc. 46 at 20 (citing *Walker*, 931 F.3d at 582). Judge Mahoney rejected the Government's arguments that the categorical approach does not apply as stringently to SORNA as it does in other contexts. *Id.* at 21. She also noted the Government did not contend that Laney's prior offense was comparable to any other tier II or tier III offense and no other tier II or tier III offense appears to be applicable. She recommends finding that Laney's conviction for first degree criminal sexual conduct, in violation of Minnesota Statute section 609.342(1)(g), renders him a tier I sex offender. Because he was not required to register under SORNA at the time alleged in the indictment, Judge Mahoney recommends that his motion to dismiss the indictment be granted. *Id.* at 23.

IV. ANALYSIS

The Government objects to the R&R arguing that the circumstance-specific approach should be applied to the age element (rather than being treated as an additional requirement after a categorical analysis of the age element). Doc. 51 at 8. Specifically, the Government cites to the following language found in *White*:

- "the language of [SORNA] subsection [(4)(A)(ii)] suggests Congress intended courts to look to the actual age of the defendant's victim, but to *otherwise* employ a generic approach to the section of the criminal code listed." *White*, 782 F.3d at 1133 (emphasis added).

- “[e]xamination of the language used to define a tier II sex offender also suggests that Congress intended courts to use a categorical approach to determine the sex offender tier, with the *exception* that the court should consider the specific circumstances to determine the victim's age.” *Id.* (emphasis added).
- “subsection 3(A) evidences an intent to apply a categorical approach for purposes of comparing the defendant's prior sex offense with the listed section of the criminal code, *combined with* a circumstance-specific approach with respect to the victim's age.” *Id.* at 1134 (emphasis added) (citing *Nijhawan v. Holder*, 557 U.S. 29, 37-38 (2009)).
- “even when the tier classifications refer to generic crimes that invoke a categorical approach, Congress intended the courts to *also* consider the actual age of the victim by looking to the specific circumstances of the defendant's crime.” *Id.* at 1134-35 (emphasis added) (citing *United States v. Byun*, 539 F.3d 982, 992-93 (9th Cir. 2008)).

The Government argues that language such as “otherwise,” “except” and “exception” supports a circumstance-specific approach to the age element rather than treating age as an additional requirement after a categorical analysis of the age element. Doc. 51 at 8. The Government contends that *Byun*, *White*, and *Berry*³ are collectively more persuasive than *Walker*.

*⁶ Judge Mahoney addressed *Byun*.⁴ In that case, the defendant was convicted under federal law of smuggling aliens for prostitution. 539 F.3d at 983-84. The victim was 17 years old but the offense did not include an element requiring a victim of a certain age. *Id.* at 984. The sentencing court determined that defendant was a tier II sex offender. Judge Mahoney noted the defendant appealed the determination that she was a sex offender for purposes of SORNA but did not challenge the tier determination. Doc. 46 at 17. Nonetheless, the Ninth Circuit considered the tier determination, observing that elements of tier II offenses were similar to the defendant's crime with the exception of the requirement that the victim be a minor. *Byun*, 539 F.3d at 989. The court also concluded that the defendant's offense met the definition of being a “specified offense against a minor.” *Id.* at 990. It acknowledged that its determination that defendant “‘committed a specified offense against a minor’ as well as that her offense is a tier II sex offense” “depend[ed] on an examination of the underlying facts of Byun's crime, which reveal[ed] that one of Byun's

victims was only 17 years old.” *Id.* The court found that the statutory language pointed strongly toward utilizing a non-categorical approach for victim age. *Id.* at 991 (an individual is a tier II sex offender when his or her crime is “comparable to or more severe than” a violation of § 2423(a) “when committed against a minor”) (emphasis in original). The court found the statutory language was more ambiguous regarding whether to apply the categorical approach to all elements of a “specified offense against a minor” but reasoned that the “close connection between ‘specified offense[s] against a minor’ and tier II offenses, as well as the history of the statute” supported application of the non-categorical approach to victim age. *Id.*

Judge Mahoney found *Byun* less persuasive than *Walker* for the following reasons:

First, the court in *Byun* analyzed SORNA as a “civil statute creating registration requirements,” specifically noting that Sixth Amendment concerns might dictate a different outcome “[w]here [it] interpreting a criminal statute” (noting such concerns in the sentencing context). [*Byun*, 539 F.3d at] 993 n.14. Second, as noted, the defendant did not challenge the district court's tier II determination. Finally, and most importantly, the court in *Byun* did not separately analyze whether a circumstance-specific approach should apply to the tier II minor qualifier (“when committed against a minor”) and to comparing the defendant's crime to the enumerated federal offenses, instead lumping the analysis together.

Doc. 46 at 18-19. This third reason is what the *Walker* court referred to as a “double dip.”

The government argues that a circumstance-specific inquiry into victim age resolves this case because knowing the actual ages of Walker's victims (four and six) not only satisfies SORNA's Tier III victim-age requirement, but also places his offense within the scope of “abusive sexual contact (as described in section 2244 of title 18).” See 34 U.S.C. § 20911(4)(A)(ii); see also 18 U.S.C. § 2244(a)(5) (sexual contact with a person who has not attained the age of 12 years constitutes abusive sexual contact). In other words, the government wants to double dip: it asks us to apply SORNA's age requirement as both an independent addition to the categorical analysis and an exception within the categorical analysis, thereby collapsing the two-part inquiry outlined above.

Walker, 931 F.3d at 581. This is precisely what the Government requests here. *See* Doc. 32 at 11 (“Clearly, a sexual assault against an 11-month-old is more severe than one against a 13-year-old.”). I agree with Judge Mahoney that *Walker* is more on point than *Byun*, *Berry* and *White* and is more persuasive based on the issues in this case. As such, I will consider whether the Minnesota statute is “comparable to or more severe than” ... “abusive sexual contact (as described in [18 U.S.C. § 2244]) against a minor who has not attained the age of 13 years,” 34 U.S.C. § 20911(4)(A)(ii), using the categorical approach for all elements, including victim age. *See Walker*, 931 F.3d at 581.

As Judge Mahoney explained, the categorical approach requires comparing the elements of a prior offense with the elements of the listed offense. *See Mathis*, 136 S. Ct. at 2248. The facts or circumstances of the crime are immaterial under the categorical approach. *Id.* To apply the categorical approach, I must compare the elements of Laney's Minnesota conviction to those of abusive sexual contact (as described in 18 U.S.C. § 2244). A state crime is not a categorical match if its elements are broader than those of a listed generic offense. *See Mathis*, 136 S. Ct. at 2251. Abusive sexual contact under 18 U.S.C. § 2244(a)(5) requires a person to “knowingly engage in or cause sexual contact with or by another person, if to do so would violate – subsection (c) of section 2241 of this title, had the sexual contact been a sexual act.” The relevant part of section 2241(c) makes it a crime to “knowingly engage[] in a sexual act with another person who has not attained the age of 12 years.” Laney's Minnesota conviction required the following elements: (1) sexual penetration or contact, (2) with an individual under 16 years for penetration or 13 years for contact (3) with whom the defendant has a significant relationship.

*7 I agree with Judge Mahoney that the Minnesota statute is categorically broader than the federal statute and is therefore not comparable to or more severe than abusive sexual contact, as described in 18 U.S.C. § 2244. Subdivision 1(g) of the

Minnesota statute extends to individuals under 16 years old (for sexual penetration) and under 13 years old (for sexual contact), while the federal statute requires, as an element, that the person be under 12 years old. 18 U.S.C. § 2241(c). As noted above, the Government does not contend that Laney's prior offense is comparable to any other tier II or tier III offense and I agree with Judge Mahoney that it does not, in fact, appear to be comparable to any other offense listed under those tiers.

Because the Minnesota statute is not comparable to or more severe than abusive sexual contact under 18 U.S.C. § 2244, *see* 34 § 20911(4)(A)(ii), Laney is properly classified as a tier I sex offender under SORNA and was required to register for 15 years beginning June 6, 2005. *See* 34 U.S.C. § 20915(a) (1). This registration requirement therefore expired before the time period alleged in both the indictment (Doc. 2) and the superseding indictment (Doc. 36), which is June 21, 2020 to October 16, 2020. As such, Laney is entitled to dismissal of the indictment and superseding indictment.

V. CONCLUSION

For the reasons stated herein:

1. The Government's objections (Doc. 51) to the R&R (Doc. 46) are **overruled**;
2. I accept the R&R (Doc. 46) without modification, *see* 28 U.S.C. § 636(b)(1);
3. Pursuant to Judge Mahoney's recommendation, Laney's motion (Doc. 28) to dismiss the indictment is **granted**.

IT IS SO ORDERED.

All Citations

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Footnotes

1 The Government does not contend that Laney's prior offense is comparable to any other tier II or tier III offenses.

- 2 A “sex offense” includes “a criminal offense that is a specified offense against a minor.” 34 U.S.C. § 20911(5)(ii).
- 3 *United States v. Berry*, 814 F.3d 192, 197 (4th Cir. 2016).
- 4 Out these cases, *Byun* is the most applicable. *White* and *Berry* involved statutes that were not categorical matches based on elements other than age. See *White*, 782 F.3d at 1137 (noting that federal crimes each required physical contact as an element while state crime did not); *Berry*, 814 F.3d at 200 (same).

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UNITED STATES of America, Plaintiff,
v.
Early LIVESTOCK, Defendant.

Case No. 19-CR-182-GKF

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Signed 04/28/2020

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OPINION AND ORDER

GREGORY K. FRIZZELL, UNITED STATES DISTRICT JUDGE

*1 This matter comes before the court on the Motion For Leave of Court to Withdraw Guilty Plea and for Dismissal of Indictment [Doc. 35] of defendant Early Livestock. For the reasons discussed below, the motion is granted.

I. Background and Procedural History

The Indictment charges Livestock with one count of failure to register as a sex offender pursuant to 18 U.S.C. § 2250. [Doc. 14]. On January 8, 2020, Livestock pled guilty to the charge, and the court set his sentencing for April 8, 2020. [Doc. 32]. However, on March 16, 2020, Livestock filed his Motion for Leave of Court to Withdraw Guilty Plea and for Dismissal of Indictment. [Doc. 35]. Based on Livestock's motion, the court struck the April 8 sentencing to be reset upon resolution of the Motion to Dismiss. [Doc. 36]. The government responded in opposition to the motion to dismiss on April 14, 2020 [Doc. 39], and Livestock filed a reply on April 16, 2020. [Doc. 40].

II. Standards

Pursuant to Fed. R. Crim. P. 11, a defendant may withdraw a guilty plea, "after the court accepts the plea, but before it imposes sentence if ... the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d) (2) (formatting altered). The defendant bears the burden of demonstrating a "fair and just reason" for withdrawal. *United*

States v. Hamilton, 510 F.3d 1209, 1214 (10th Cir. 2007). To determine whether a defendant meets his or her burden, the court considers the following factors: "(1) whether the defendant has asserted his innocence, (2) prejudice to the government, (3) delay in filing defendant's motion, (4) inconvenience to the court, (5) defendant's assistance of counsel, (6) whether the plea is knowing and voluntary, and (7) waste of judicial resources." *Id.* (quoting *United States v. Gordon*, 4 F.3d 1567, 1572 (10th Cir. 1993)).

"Rule 12 permits pretrial resolution of a motion to dismiss the indictment only when 'trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense.'" *United States v. Pope*, 613 F.3d 1255, 1259 (10th Cir. 2010) (quoting *United States v. Covington*, 395 U.S. 57, 60 (1969)). Thus, a court may determine a motion to dismiss that "require[s] it to answer only pure questions of law." *Id.* at 1260.

Livestock asserts he is innocent because he was not required to register as a sex offender at the time charged in the Indictment and therefore requests dismissal of the Indictment and to withdraw his guilty plea. [Doc. 35, p. 4]. The government's response is entirely directed to Livestock's motion to dismiss and therefore the court understands the government's position to be that Livestock's motion to withdraw guilty plea should be granted if the court determines the motion to dismiss in Livestock's favor. *See generally* [Doc. 39]. Thus, the court focuses its analysis on the motion to dismiss.

III. Motion to Dismiss Analysis

The Sex Offender Registration and Notification Act ("SORNA"), 34 U.S.C. § 20901 *et seq.*, dictates the registry requirements for sex offenders. SORNA classifies sex offenders into tiers. "Tier III sex offenders" are, in relevant part, those offenders whose offense is punishable by imprisonment for more than 1 year and—

*2 (A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

- (i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or
- (ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years[.]

34 U.S.C. § 20911(4). A “Tier I sex offender” means “a sex offender other than a tier II or tier III sex offender.”¹ *Id.* § 20911(2). The duration of a sex offender’s required registration period depends upon the offender’s “tier” classification. 34 U.S.C. § 20915. Section 20915 of SORNA provides a fifteen (15) year registration period for Tier I offenders, and a lifetime registration period for Tier III offenders. *Id.* § 20915(a).

In May of 1989, Livestock was charged and later convicted of first degree sexual assault pursuant to Wis. Stat. Ann. § 940.225(1)(d). The government contends this prior conviction is comparable to abusive sexual contact (as described in 18 U.S.C. § 2244) against a minor who has not attained the age of 13 years. To determine a defendant’s SORNA tier classification, the Tenth Circuit applies “a categorical approach to sex offender tier classifications designated by reference to a specific federal criminal statute.” *United States v. White*, 782 F.3d 1118, 1135 (10th Cir. 2015).² Pursuant to the categorial approach, the court must “focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the predicate crime], while ignoring the particular facts of the case.” *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). If the elements of the statute of conviction are the same as the Tier III offense, or are defined more narrowly, then the conviction requires a Tier III classification. *See Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). However, if the elements of the statute of conviction “sweep[] more broadly” than, or cover more conduct than, the referenced federal offense, then the statute of conviction cannot serve as a Tier III predicate offense. *Id.*; *see also Mathis*, 136 S. Ct. at 2248.

Looking to the Wisconsin statute, at the time of the relevant conduct and criminal complaint, Wis. Stat. Ann. § 940.225(1)(d) provided “[w]hoever does any of the following is guilty of a Class B felony ... [h]as sexual contact or sexual intercourse with a person 12 years of age or younger.” *State v. Hirsch*, 410 N.W.2d 638, 640 (Wis. Ct. App. 1987) (formatting altered from original) (quoting Wis. Stat. Ann. § 940.225(1)(d)).³

The statute defined “sexual contact” as:

any intentional touching by the complainant or defendant, either directly or through clothing by the use of any body part or object, of the complainant’s or defendant’s intimate

parts if that intentional touching is either for the purpose of sexually degrading; or for the purpose of sexually humiliating the complainant or sexually arousing or gratifying the defendant or if the touching contains the elements of actual or attempted battery under s. 940.19(1).

*³ *Id.* (quoting Wis. Stat. Ann. § 940.225(5)(a)). “Intimate parts” meant “the breast, buttock, anus, groin, scrotum, penis, vagina or pubic mound of a human being.” *Id.* (quoting Wis. Stat. Ann. § 939.22(19)).

Turning to SORNA, the relevant Tier III offense is “abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years.” 34 U.S.C. § 20911(4)(A)(ii). Section 2244, in relevant part, prohibits knowingly engaging in or causing sexual contact with or by another person, if so to do would violate ... “subsection (c) of section 2241 of this title had the sexual contact been a sexual act[.]” 18 U.S.C. § 2244(a)(5). Section 2241(c), in turn, makes it a crime to “knowingly engage[] in a sexual act with another person who has not attained the age of 12 years ... or attempts to do so.” 18 U.S.C. § 2241(c). “Sexual contact” means “the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(3).

Comparing the elements of Wis. Stat. Ann. § 940.225(d)(1) with the elements of the referenced federal offense, the Wisconsin statute sweeps more broadly than abusive sexual contact against a minor pursuant to 18 U.S.C. § 2244. The Wisconsin statute prohibited sexual contact with a person *12 years of age or younger*, whereas the federal statute prohibits sexual contact with a minor *who has not attained the age of 12 years*. Thus, a discrepancy exists in the age element, and the Wisconsin statute is broader than the federal offense because it prohibits sexual contact during a minor’s twelfth year.

The government urges the court to adopt the reasoning of an unpublished Tenth Circuit decision, *United States v. Forster*, 549 F. App’x 757, 769 (10th Cir. 2013), and conclude that the Wisconsin statute and referenced federal offense are “comparable.” In *Forster*, a Tenth Circuit panel considered whether a conviction for “gross sexual imposition” under

Ohio Rev. Code Ann. § 2907.05(A)(4), qualified as an offense “comparable to or more severe than … abusive sexual contact (as described in [18 U.S.C. § 2244]) against a minor who has not attained the age of 13 years” and therefore a Tier III SORNA offense. *Id.* at 767-68. The Ohio statute prohibits “sexually-oriented touching—whether directly or through the clothing—of an erogenous zone of a minor less than thirteen years of age,” whereas 18 U.S.C. § 2244 prohibits sexual contact with minors under the age of twelve. *Id.* at 768. Applying the categorical approach, the panel stated:

To be sure, on its face, the protective sweep of the Ohio statute would appear to be slightly broader, protecting minors under thirteen—instead of just those under twelve—from unlawful sexual contact. However, SORNA’s tier regime only demands that the statutes be “comparable,” not that they be identical. 42 U.S.C. § 16911(3)(A). And, more importantly, SORNA effectively negates this temporal point of distinction because it expressly defines the scope of § 2244’s substantive provisions, for purposes of the tier regime, to apply to only “a minor who has not attained the age of 13 years.” *Id.* § 16911(4)(A)(ii). In other words, viewed through the lens of SORNA, the Ohio statute and § 2244—by cross-reference to § 2241(c)—protect the same age group of minors from unlawful sexual contact.

*4 *Id.* at 769. It is well-established that, in the Tenth Circuit, “[u]npublished decisions are not precedential, but may be cited for their persuasive value.” 10th Cir. R. 32.1(A). Thus, the court is not bound by *Forster*. More importantly, *Forster* is not persuasive in this instance because it was decided prior to *Mathis*.

In *Mathis*, the U.S. Supreme Court reiterated its prior holdings that, in applying the categorical approach, a court must consider “only the *elements of the offense*.” *Mathis*, 136 S. Ct. at 2252 (formatting altered from original) (emphasis in original) (citing *Sykes v. United States*, 564 U.S. 1, 7 (2011)). The Court stated “in no uncertain terms” that a state crime cannot qualify as a predicate offense if its elements are broader than those of the listed federal offense. *Id.* at 2251 (citing *Taylor v. United States*, 495 U.S. 575 (1990)). “[I]f the crime of conviction covers *any more* conduct than the [referenced] offense,” it cannot be a Tier III offense, regardless of whether defendant’s conduct actually falls within the scope of the federal statute. *Id.* at 2248 (emphasis added).

In light of *Mathis*’s clear mandate, this court concludes that an identity of elements, at the very least, is required for a

state statute to be “comparable” to a Tier III offense.⁴ A state statute that is “slightly broader” is not comparable. *See United States v. Barcus*, 892 F.3d 228, 233 (6th Cir. 2018) (concluding that *Mathis* “shuts the door” on any argument that a state statute that is “slightly broader” than the federal counterpart is “comparable” to a Tier III offense); *see also United States v. Escalante*, 933 F.3d 395, 402-03 n.9 (5th Cir. 2019) (expressing skepticism “that courts applying the categorical approach have leeway to hold that a broader offense can still be a predicate when it is deemed only ‘slightly broader,’ ” and noting lack of Supreme Court precedent in support).

Nor is the age requirement effectively negated by SORNA, which defines the Tier III offense as one “comparable to or more severe than … abusive sexual contact (as described in [18 U.S.C. § 2244]) against a minor *who has not attained the age of 13 years*.” 34 U.S.C. § 20911(4)(A)(ii) (emphasis added). The section’s condition that the contact be against “a minor who has not attained the age of 13 years” permits a court to look to the underlying facts but only “for the limited purpose of determining the victim’s age.” *White*, 782 F.3d at 1135. The condition is not an exception to the categorical approach. Rather, the court must first apply the categorical approach to determine whether defendant’s Wisconsin conviction is a categorical match to “abusive sexual contact (as described in section 2244 of title 18),” and only *then* may the court look to the victim’s age “to complete the tier-classification determination.” *United States v. Walker*, 931 F.3d 576, 581 (7th Cir. 2019); *see also White*, 782 F.3d at 1133; *Escalante*, 933 F.3d at 402.

Here, Wis. Stat. Ann. § 940.225(1)(d) prohibits a broader range of conduct than the referenced federal statute, 18 U.S.C. § 2244, because the victim under the Wisconsin statute can be twelve years old, whereas the federal statute caps the victim’s age at eleven. Thus, under the categorial approach, the state statute is not “comparable” to the federal offense. Livestock’s 1989 conviction therefore cannot qualify as a “Tier III” predicate offense, and Livestock is a Tier I offender. As such, his sex offender registration period ended in 2009. Because Livestock was not required to register as a sex offender at the time of the charged conduct, the Indictment must be dismissed. Further, Livestock’s actual innocence of the crime charged constitutes a “fair and just reason” for withdrawal of his guilty plea.

IV. Conclusion

*5 WHEREFORE, the Motion for Leave of Court to Withdraw Guilty Plea and for Dismissal of Indictment [Doc. 35] is granted.

[All Citations](#)

Not Reported in Fed. Supp., 2020 WL 2044728

IT IS SO ORDERED this 28th day of April, 2020.

Footnotes

- 1 Neither the government nor Livestock contends that Livestock is a “Tier II” sex offender.
- 2 Neither the government nor Livestock argues that the statute is divisible and a modified categorical approach applies.
- 3 Section 940.225(1)(d) was repealed by sec. 30, 1987 Wis. Act 332, effective July 1, 1989. The section was “recreated” as section 948.02(1), which governs crimes against children. *State v. Saucedo*, 472 N.W.2d 798, 800 n.1, 810 (Wis. Ct. App. 1991).
- 4 A state statute of conviction may also qualify as a Tier III predicate offense if the statute covers a narrower range of conduct than the referenced federal offense. *Descamps*, 570 U.S. at 261.

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District Court of the Virgin Islands, Division of St. Croix.

UNITED STATES of America

v.

Joe Dale LOOMIS, Defendant.

Criminal Action No. 2014-0052

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Signed 03/14/2017

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MEMORANDUM OPINION

WILMA A. LEWIS, Chief Judge

***1** THIS MATTER comes before the Court on Defendant's "Motion to Dismiss Allegations of Supervised Release Violations and Vacate Conviction and Memorandum of Authorities in Support," filed on October 27, 2016 (Dkt. No. 126); the "Government's Response to Defendant's Motion to Dismiss Revocation Proceedings and to Vacate Conviction," filed on November 4, 2016 (Dkt. No. 130); and Defendant's "Reply to Government's Opposition to Motion to Dismiss Allegations of Supervised Release Violations and Vacate Conviction," filed on November 14, 2016 (Dkt. No. 131). Pursuant to an Order entered by the Court November 22, 2016 (Dkt. No. 132), the Government filed its "Sur-reply to Defendant's Reply to Government's Opposition to Motion to Dismiss" on December 5, 2016 (Dkt. No. 135), and Defendant filed his "Response to Government's Sur-reply to Motion to Dismiss Allegations of Supervised Release Violations and Vacate Conviction" on December 12, 2016 (Dkt. No. 137). For the reasons set forth below, the Court will deny Defendant's Motion.

I. BACKGROUND AND EVIDENCE

On August 19, 2014, the Grand Jury returned an indictment charging that "[b]etween on or about October 22, 2013 to on

or about August 19, 2014 ... [Defendant] fail[ed] to register and to update a registration as required by the federal Sex Offender Registration and Notification Act" ("SORNA"). (Dkt. No. 22). Defendant was allegedly subject to SORNA's federal registration requirements due to his earlier conviction under Oregon law on one count of Sodomy in the First Degree and one count of Attempted Sodomy in the First Degree in violation of [Or. Rev. Stat. Ann. § 163.405](#) (*see* Dkt. Nos. 135-1, 136-1), for which he was sentenced on December 27, 1991, in the Circuit Court of Oregon. On April 9, 2015, this Court accepted Defendant's plea of guilty for failing to register as a sex offender in violation of SORNA. (Dkt. No. 73). He was sentenced to 21 months in prison and five years of supervised release. Defendant is currently serving his five-year term of supervised release. (Dkt. No. 78).

In the instant Motion, Defendant asserts that the alleged violation of SORNA for failing to register—to which he pleaded guilty in this Court and for which he is currently serving a term of supervised release—never occurred. Defendant argues that (1) he does not qualify as a sex offender under SORNA or (2) even if he does qualify, he is only a tier I sex offender. (*See* Dkt. No. 126 at 3). Defendant asserts that under either scenario, when he allegedly violated SORNA on St. Croix for failing to register, he was actually under no requirement to register as a sex offender. (*Id.*). The crux of Defendant's argument is that Defendant's prior Oregon conviction is not a sex offense under SORNA. (*See id.* at 7-11). Accordingly, Defendant urges that "the Court must find that there is no jurisdiction.... [and] dismiss the pending alleged violation of supervised release, release him from detention and vacate his conviction in this matter." (*Id.* at 13).

***2** In its Sur-reply, the Government attacks the merits of Defendant's Motion by arguing that he is either a tier II or a tier III sex offender and, therefore, is subject to SORNA's registration requirements. (Dkt. No. 135 at 6).¹ The Government further asserts that Defendant's prior conviction does not fall within SORNA's exception for consensual sexual conduct. (*Id.* at 10). Accordingly, the Government argues that the relief that Defendant seeks should be denied.

II. APPLICABLE LEGAL STANDARDS

In order to violate the registration requirement of [18 U.S.C. § 2250](#), one must be "a sex offender as defined for the

purposes of [SORNA].” [18 U.S.C. § 2250\(a\)\(2\)\(A\)](#). “[A]n individual who was convicted of a sex offense” is a sex offender. [42 U.S.C. § 16911\(1\)](#). Subject to certain exceptions, SORNA defines “sex offense” in pertinent part as “(i) a criminal offense that has an element involving a sexual act or sexual contact with another; [or] (ii) a criminal offense that is a specified offense against a minor.” [§ 16911\(5\)\(A\)](#). While SORNA contains a relatively broad definition of “sex offense,” it also contains the following exception for certain types of consensual sexual conduct:

An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

[§ 16911\(5\)\(C\).](#)²

A sex offender's requirement to register under SORNA lasts for varying amounts of time depending on whether the sex offender is categorized as tier I, tier II, or tier III. [42 U.S.C. § 16915\(a\)](#). Specifically, a tier I sex offender's registration period is 15 years, a tier II sex offender's registration period is 25 years, and a tier III sex offender's registration period is for life. *Id.* Thus, to determine when a sex offender's registration requirement is completed, courts must first identify the sex offender's proper tier classification. Under SORNA, a sex offender's tier classification is determined by comparing the offender's sex offense to statutory criteria set forth in [§ 16911\(2\), \(3\), and \(4\)](#). For example, a sex offender whose offense is punishable by imprisonment for more than one year and “is comparable to or more severe than ... (i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or (ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years” is a tier III sex offender. [§ 16911\(4\)\(A\).](#)³ A tier II classification is triggered, for example, when a sex offender's offense is punishable by imprisonment for more than one year and:

*3 (A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor: (i) sex trafficking (as described in section 1591 of Title 18); (ii) coercion and enticement (as described in section 2422(b) of Title 18); (iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a) of Title 18; (iv) abusive sexual contact (as described in section 2244 of Title 18); [or] (B) involves (i) use of a minor in a sexual performance; (ii) solicitation of a minor to practice prostitution; or (iii) production or distribution of child pornography.

[§ 16911\(3\).](#)⁴ Finally, the tier I classification is triggered for any “sex offender other than a tier II or tier III sex offender.” [§ 16911\(2\).](#)

Thus, whether an individual's prior conviction constitutes a “sex offense” under SORNA—and, if so, the tier classification that the prior conviction triggers—is determined by comparing the individual's prior conviction and certain federal statutory criteria. To make such comparisons, courts employ the categorical approach, the modified categorical approach, or the circumstance-specific approach. *See, e.g., United States v. White*, [782 F.3d 1118, 1130 \(10th Cir. 2015\)](#); *United States v. Bango*, [386 Fed.Appx. 50, 53-54 \(3d Cir. 2010\)](#).

Courts employ the categorical approach where the relevant provision in SORNA requires a comparison between SORNA's statutory criteria and the prior conviction's statutory elements. *See White*, [782 F.3d at 1131](#). If the statute underlying the prior conviction “sweeps more broadly” than SORNA's statutory criteria, the prior conviction cannot be a predicate for a sex offense under SORNA or any related tier classification. This is so even if the individual's actual conduct giving rise to the prior conviction would satisfy SORNA's statutory criteria. *See United States v. Brown*, [765 F.3d 185, 189 \(3d Cir. 2014\)](#) (discussing the categorical approach in

the context of whether a particular crime constitutes a “crime of violence” for purpose of the career offender sentencing enhancement) (citing *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013)). This is because under the categorical approach, courts look only to the elements of the statute of conviction and not the facts underlying the conviction. *See id.*

Where the statute underlying the prior conviction is “divisible,” in that it “comprises multiple, alternative versions of the crime,” courts may look to a limited class of documents such as the charging paper “to determine which version of the offense was the basis of conviction.” *Id.* (quoting *Descamps*, 133 S. Ct. at 2284) (quotations omitted). This is known as the modified categorical approach. The modified categorical approach “retains the categorical approach’s central feature: a focus on the elements, rather than the facts, of a crime.” *United States v. Henderson*, 841 F.3d 623, 627 (3d Cir. 2016) (quoting *Descamps*, 133 S. Ct. at 2285) (quotations omitted).

Courts employ the circumstance-specific approach where the relevant provision in SORNA requires a comparison between SORNA’s statutory criteria and the individual’s specific conduct that gave rise to the prior conviction. *White*, 782 F.3d at 1130. Unlike the categorical approach or modified categorical approach, “courts using a circumstance-specific approach may look beyond the elements of the prior offense and consider ‘the facts and circumstances underlying an offender’s conviction.’ ” *Id.* at 1131 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009)). For example, while the categorical approach would require a court to analyze the elements of a state’s rape statute, the circumstance-specific approach would require the court to analyze the specific acts the offender committed that gave rise to the prior rape conviction. *See generally Nijhawan*, 557 U.S. at 34 (comparing the categorical approach and the circumstance-specific approach when determining whether a prior conviction constitutes an aggravated felony and, therefore, is a deportable offense).

III. DISCUSSION

*4 As noted above, Defendant argues (1) that he is not a sex offender for purposes of SORNA and (2) even if he is a sex offender, he is only a tier I sex offender. The Court will examine each argument in turn.

A. Sex Offender Status

Defendant argues that under the categorical approach, his prior conviction cannot constitute a “sex offense” under SORNA because O.R.S. § 163.405 (the Oregon statute underlying his conviction of sodomy in the first degree) sweeps more broadly than SORNA’s definition of “sex offense.” (Dkt. No. 126 at 10-11). In particular, Defendant asserts that O.R.S. § 163.405 criminalizes conduct that falls within SORNA’s exception for consensual sexual conduct. (*Id.*) The Court does not agree that the categorical approach applies under the circumstances here.

The Oregon statute underlying Defendant’s prior conviction states in pertinent part:

- (1) A person who engages in deviate sexual intercourse with another person or causes another to engage in deviate sexual intercourse commits the crime of sodomy in the first degree if:
 - (a) The victim is subjected to forcible compulsion by the actor;
 - (b) The victim is under 12 years of age;
 - (c) The victim is under 16 years of age and is the actor’s brother or sister, of the whole or half blood, the son or daughter of the actor or the son or daughter of the actor’s spouse; or
 - (d) The victim is incapable of consent by reason of mental defect, mental incapacitation or physical helplessness.

O.R.S. § 163.405. In pertinent part, SORNA excepts from the definition of “sex offense” “consensual sexual conduct ... if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.” § 16911(5)(C). At bottom, Defendant’s argument is that because O.R.S. § 163.405(1)(c) (which generally prohibits deviant sexual conduct between a victim who is younger than 16 and his or her immediate family members) criminalizes conduct that does not constitute a sex offense under SORNA, a conviction under O.R.S. § 163.405 cannot constitute a sex offense under the categorical approach. Specifically, Defendant maintains that “[b]ecause a 13, 14 or 15 year old could [legally] consent to ‘deviant sexual conduct’ with a half sibling who was less than 4 years older than her under the SORNA definition but such conduct would be criminalized under the Oregon sodomy statute, [Defendant] is not a ‘sex offender’ who must register subject to SORNA.” (Dkt. No. 126 at 11). However, because the Court concludes that the categorical approach

does not apply to the consensual sexual conduct exception in SORNA, Defendant's argument lacks merit and will be rejected.

1. The circumstance-specific approach

Defendant's argument is that his prior conviction does not constitute a sex offense under SORNA because certain portions of the statute underlying his prior conviction prohibit conduct that falls within SORNA's consensual sexual conduct exception. This argument is unavailing because—as set forth below—the Court concludes that the circumstance-specific approach, rather than the categorical approach, applies to SORNA's consensual sexual conduct exception.

Neither party has cited any Third Circuit decisions on the issue of whether the categorical approach is applicable to SORNA's consensual sexual conduct exception. While the Court has not found any Third Circuit decision expressly analyzing this issue, the Court finds the case of *United States v. Brown*, 740 F.3d 145 (3d Cir. 2014) to be instructive.

*5 In *Brown*, the Third Circuit analyzed the meaning of the phrase “not more than 4 years older than the victim” in SORNA's consensual sexual conduct exception. *Id.* at 149. The defendant in *Brown* was charged in 2011 for failing to register under SORNA based on a 2003 conviction. *Id.* at 147. The district court dismissed the 2011 indictment because it found that the defendant's prior conviction fell within SORNA's consensual sexual conduct exception, notwithstanding that the defendant was technically four years and four months older than the victim. *Id.* at 147-48. The district court reasoned that the consensual sexual conduct exception applied because, at the time of the offense, the victim was 13 years old, the defendant was 17 years old, and the conduct was consensual. *Id.* On appeal, the Third Circuit held that the defendant's prior conviction did not fall within the consensual sexual conduct exception and vacated the district court's ruling. *Id.* at 151. The Third Circuit reasoned that four years meant 48 months and, therefore, the exception was inapplicable since the defendant was 52 months older than the victim. *Id.* at 149-50.

Although never expressly identifying whether the categorical, modified categorical, or circumstance-specific approach applied, the Third Circuit's analysis in *Brown* is consistent with a circumstance-specific approach. Notably, the Third Circuit never analyzes—or even identifies—the statutory

elements of the defendant's prior conviction. Rather, the analysis turns on the specific factual circumstances that gave rise to the prior conviction—specifically, the exact age of the defendant and the exact age of the victim. *Id.* at 151. The Third Circuit's analysis suggests that when determining whether the consensual sexual conduct exception applies, courts should employ a circumstance-specific approach.

This reading of *Brown* is consistent with decisions from two other Circuits that have expressly analyzed and held that the circumstance-specific approach governs in determining the applicability of the consensual sexual conduct exception. In the first case, *United States v. Gonzalez-Medina*, 757 F.3d 425 (5th Cir. 2014), the Fifth Circuit rejected the defendant's contention that courts must apply a categorical approach to determining whether the “not more than 4 years” age differential in the consensual sexual conduct exception applies. *Id.* at 432. In so holding, the Fifth Circuit found that “the language, structure, and broad purpose of SORNA all indicate that Congress intended a non-categorical approach to the age-differential determination in [the consensual sexual conduct exception].” *Id.* As to SORNA's language, the Fifth Circuit noted that while the base definitions of “sex offense,” calls for a categorical approach because it is defined as “a criminal offense that has an *element* involving a sexual act or sexual contact with another,” the consensual sexual conduct exception in § 16911(5)(C) contains no reference to the “elements” of the prior conviction but instead “define[s] the exception in terms of the ‘conduct’ ‘involved’ in the ‘offense.’” *Id.* at 430. The Fifth Circuit reasoned that the “reference to conduct, rather than elements, is consistent with a circumstance-specific analysis.” *Id.*

Regarding SORNA's structure, the Fifth Circuit observed that another exception to the term “sex offense” found at § 16911(5)(B) involving foreign convictions “requires an inquiry into facts outside of the statute of conviction and into the circumstances of the country in which the conviction took place.” *Id.* According to the Fifth Circuit: “that Congress intended courts to look beyond the statute of conviction for the (5)(B) exception is evidence that Congress may have intended courts to look beyond the statute of conviction for the (5)(C) age-differential exception as well.” *Id.* at 430-31. Finally, the Fifth Circuit stated that “SORNA's language confirms ‘that Congress cast a wide net to ensnare as many offenses against children as possible.’” *Id.* at 431 (quoting *United States v. Dodge*, 597 F.3d 1347, 1355 (11th Cir. 2010) (en banc)). “Application of the categorical approach to the [consensual sexual conduct exception] age-

differential determination would frustrate SORNA's broad purpose and restrict SORNA's reach." *Id.* Accordingly, the Fifth Circuit held that a circumstance-specific approach was the proper method for analyzing the applicability of SORNA's consensual sexual conduct exception. *Id.* at 432.

*6 In the second case, *United States v. Rogers*, 804 F.3d 1233 (7th Cir. 2015), the Seventh Circuit also rejected the defendant's argument that the categorical approach applies to the consensual sexual conduct exception. *Id.* at 1236-37. The Seventh Circuit cited the Fifth Circuit's analysis in *Gonzalez-Medina* with approval and analyzed § 16911(5)(C) as follows:

The exception [in § 16911(5)(C)] uses fact-specific language, strongly suggesting that a conduct-based inquiry applies. First, the exception applies to an "offense involving consensual sexual conduct." § 16911(5)(C) (emphasis added). The word "involving" implies a noncategorical, fact-based inquiry. Second, and even more tellingly, the exception contains a string of fact-based qualifiers: "if the victim was an adult," "unless the adult was under the custodial authority of the offender at the time of the offense," "if the victim was at least 13 years old and the offender was not more than 4 years older than the victim." *Id.* (emphases added). This language doesn't refer to elements of the offense; it refers to specific facts of the offense. The categorical approach does not apply to the exception.

Id. at 1237.

Based on the Third Circuit decision in *Brown*, and the reasoning of the Fifth and Seventh Circuits as set forth in *Gonzalez-Medina* and *Rogers*, the Court concludes that, although the definition of "sex offense" in § 16911(5)(A)(i) requires a categorical approach, a circumstance-specific approach should be employed for the consensual sexual conduct exception in § 16911(5)(C). The Court therefore rejects Defendant's arguments to the contrary.⁵

Applying the circumstance-specific approach to the current facts, Defendant's argument that his prior conviction falls within SORNA's consensual sexual conduct exception fails.⁶ The exception is applicable only if the victim was an adult, or "if the victim was at least 13 years old and the offender was not more than 4 years older than the victim." § 16911(5)(C). As noted by the Government in its Sur-reply, the Presentence Investigation Report prepared in connection with the 2014 Indictment reports that the victim in Defendant's prior offense

was six years old at the time of the offense. (Dkt. No. 135 at 10). Moreover, in connection with its Sur-reply, the Government filed the 1991 Oregon Indictment underlying Defendant's prior conviction. (Dkt. No. 136-1). In relevant part, the 1991 Oregon Indictment charges that "defendant ... did unlawfully and knowingly engage in deviate sexual intercourse with [John Doe], a child under the age of twelve years." (*Id.* at 1). Defendant makes no attempt to contest the Government's factual assertions. Accordingly, the Court finds that the victim in Defendant's prior offense was younger than 13 years old. Thus, under the circumstance-specific approach, Defendant's prior conviction does not fall within SORNA's consensual sexual conduct exception, and Defendant's prior conviction constitutes a sex offense under SORNA.

2. The modified categorical approach

*7 Even if the Court were to apply a categorical approach to SORNA's consensual sexual conduct exception, the exception is still inapplicable and Defendant would still be a sex offender under SORNA.

As explained above, under the categorical approach, if the statute underlying the prior conviction is "divisible," then courts apply the modified categorical approach. *Brown*, 765 F.3d at 189. Under the modified categorical approach, courts may look to a limited class of documents such as the charging paper "to determine which version of the offense was the basis of conviction." *Id.* "[A] statute is 'divisible' when it 'list[s] potential offense elements in the alternative.'" *Id.* at 190 (quoting *Descamps*, 133 S. Ct. at 2283).

Here, the Court concludes that the Oregon statute underlying Defendant's conviction for sodomy in the first degree is divisible. The first element of sodomy in the first degree is that a person engages in or causes another to engage in deviate sexual intercourse. O.R.S. § 163.405(1). The remaining elements are found in four alternative versions (O.R.S. § 163.405(1)(a) through O.R.S. § 163.405(1)(d)), which are listed disjunctively. For example, O.R.S. § 163.405 is violated if one engages in deviate sexual intercourse with another person and "[t]he victim is subjected to forcible compulsion by the actor." O.R.S. § 163.405(1)(a). Alternatively, the statute is also violated if one engages in deviate sexual intercourse with another person and "[t]he victim is under 12 years of age." O.R.S. § 163.405(1)(b). Thus, "forcible compulsion" is an element of O.R.S. § 163.405(1)(a), but a victim under the age of 12 is not. See *Henderson*, 841 F.3d

at 628 (“[e]lements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction”) (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016)) (quotations omitted). Conversely, a victim under the age of 12 is an element of O.R.S. § 163.405(1)(b), but forcible compulsion is not. Because O.R.S. § 163.405 “list[s] multiple, alternative elements” that must be proven to secure a conviction for violating the statute,” the Court concludes that it is divisible. *Id.* at 627 (quoting *Descamps*, 133 S. Ct. at 2285).⁷

*8 Since O.R.S. § 163.405 is divisible into multiple different versions, the Court must “determine which version of the offense was the basis of conviction.” *Brown*, 765 F.3d at 189. Count I of the 1991 Oregon Indictment charges the following: “The defendant, between December 1, 1990 and May 31, 1991, in the County of Lincoln and State of Oregon, did unlawfully and knowingly engage in deviate sexual intercourse with [John Doe], a child under the age of twelve years.” (Dkt. No. 136-1 at 1). From the Oregon Indictment, the Court finds that Defendant's prior conviction was premised on O.R.S. § 163.405(1)(b), which is violated if one engages in deviate sexual intercourse with another person and “[t]he victim is under 12 years of age.” O.R.S. § 163.405(1)(b). There is no indication that Count I is based on any of the other subsections of O.R.S. § 163.405, which alternatively require that the victim be subject to forcible compulsion, O.R.S. § 163.405(1)(a); that the victim is under 16 years of age and the actor is a family member, O.R.S. § 163.405(1)(c); or that the victim is mentally or physically incapable of consent, O.R.S. § 163.405(1)(d).

Under the modified categorical approach, the Court concludes that O.R.S. § 163.405(1)(b) does not sweep more broadly than SORNA's definition of sex offense, including the consensual sexual conduct exception. For this exception to be applicable, the victim must be an adult or “at least 13 years old.” § 16911(5)(C). However, the elements of O.R.S. § 163.405(1)(b) cannot be met if the victim is 12 years of age or older. Thus, any violation of O.R.S. § 163.405(1)(b) categorically will fall outside of SORNA's consensual sexual conduct exception. Accordingly, under the modified categorical approach, Defendant's prior conviction for sodomy in the first degree constitutes a sex offense under SORNA.

B. Tier Classification

Defendant argues in the alternative that, even if he is a sex offender under SORNA, he is only a tier I sex offender whose registration requirement expired before he arrived on St. Croix. Defendant asserts that “[w]hile he was found to be a tier II offender [in the Presentence Investigation Report,]” under a categorical approach he is actually a tier I offender and his registration requirement under SORNA terminated after July 16, 2009. (Dkt. No. 126 at 12-13).

As discussed above, a sex offender's tier classification is determined by comparing the sex offense to the statutory criteria set forth in § 16911(2), (3), and (4). Focusing on the statutory criteria for tier II offenders (§ 16911(3)), Defendant asserts that his prior offense does not meet the criteria in § 16911(3)(A)(iv) (*i.e.* “abusive sexual contact (as described in section 2244 of Title 18)”) because the Oregon statute underlying his prior conviction “encompasses sexual conduct between 13, 14, and 15 year old siblings.” (*Id.* at 12). Defendant further asserts that the rest of the criteria in § 16911(3) is similarly not comparable to his prior conviction and therefore does not trigger a tier II classification. (*Id.*).

The Government does not contest Defendant's assertion that the categorical approach is used to determine a sex offender's tier classification. (Dkt. No. 135 at 11). However, the Government argues that, because the statute underlying Defendant's prior conviction is divisible, the Court must use the modified categorical approach. (*Id.* at 12). Under this approach, the Government asserts, Defendant is either a tier II or tier III sex offender. (*Id.* at 12-13).

The parties agree that the Court should employ the categorical approach. (*See* Dkt. No. 126 at 11; Dkt. No. 135 at 11).⁸ For the reasons discussed above, the Court finds that the statute underlying Defendant's prior conviction is divisible and that O.R.S. § 163.405(1)(b) is the basis of Defendant's prior offense. A violation of O.R.S. § 163.405(1)(b) requires, *inter alia*, that the victim of deviate sexual intercourse be under 12 years of age. Under the modified categorical approach, the Court finds that a violation of O.R.S. § 163.405(1)(b) constitutes at least a tier II sex offense.

*9 A tier II classification is triggered, *inter alia*, when a sex offense is punishable by imprisonment for more than one year and “is comparable to or more severe than ... abusive sexual contact (as described in section 2244 of Title 18).” § 16911(3)(A)(iv). In relevant part, “abusive sexual contact” occurs when one “knowingly engages in a sexual act with another person who has not attained the age of 12 years.”¹⁸

U.S.C. §§ 2241(c), 2244(a)(5). The term “sexual act” in this context means, *inter alia*, “(A) contact between the penis and the vulva or the penis and the anus … (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object … (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years....” 18 U.S.C. § 2246(2).

Defendant's prior conviction of O.R.S. § 163.405(1)(b) triggers a tier II classification because it is a sex offense punishable by imprisonment for more than one year and is “comparable to or more severe than” the federal crime of abusive sexual contact. § 16911(3)(A)(iv).⁹ A violation of O.R.S. § 163.405(1)(b), requires that one engage in or cause another to engage in “deviate sexual intercourse” and that the victim is under 12 years of age. The term “deviate sexual intercourse” means “sexual conduct between persons consisting of contact between the sex organs of one person and the mouth or anus of another.” O.R.S. § 163.305. Thus, a violation of O.R.S. § 163.405(1)(b) is comparable to or more severe than abusive sexual contact, which is committed when one knowingly engages in a “sexual act” with one who is under 12 years of age where “sexual act” includes contact between the penis and anus, penis and mouth, or vulva and mouth. 18 U.S.C. §§ 2244(a)(5), 2241(c), 2246(2).¹⁰

In reaching this conclusion, the Court finds the reasoning in *United States v. Forster*, 549 Fed.Appx. 757 (10th Cir. 2013) to be persuasive. In *Forster*, the Tenth Circuit in an unpublished decision rejected the defendant's argument that his prior sex offense was improperly categorized as a tier III offense. *Id.* at 766-67. The Ohio statute underlying the defendant's prior sex offense “provides in pertinent part that ‘[n]o person shall have sexual contact with another … when … [t]he other person … is less than thirteen years of age....’” *Id.* at 768 (quoting Ohio Rev. Code Ann. § 2907.05(A)(4)). In the context of the Ohio statute, “sexual contact” is “any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is female, a breast, for the purpose of sexually arousing or gratifying either person.” *Id.* (quoting Ohio Rev. Code Ann. § 2907.01(B)) (emphasis removed; quotations omitted). Applying the categorical approach, the Tenth Circuit compared the elements of the Ohio statute to those of abusive sexual contact as described in 18 U.S.C. § 2244 and determined that the Ohio statute was comparable

to or more severe than the federal offense of abusive sexual contact:

For purposes of the comparability analysis, it is especially noteworthy that (by cross-reference) § 2244 proscribes “knowingly engag[ing]” in sexual contact “with another person who has not attained the age of 12 years,” *id.* § 2241(c). Just viewing this provision alone, one might reasonably conclude that the Ohio statute at issue—which forbids a person from having “sexual contact with another … when … [t]he other person … is less than thirteen years of age,” Ohio Rev. Code Ann. § 2907.05(A)(4)—is comparable to § 2244.

*10 *Id.* at 769. In holding that the defendant's prior offense triggered a tier III classification, the Tenth Circuit noted that “SORNA's tier regime only demands that the statutes be ‘comparable,’ not that they be identical.” *Id.*

Here, the Oregon statute of sodomy in the first degree is “more severe” than the Ohio statute that the Tenth Circuit in *Forster* found to be a tier III sex offense. Whereas the Ohio statute prohibits sexual contact with one younger than 13, Ohio Rev. Code Ann. § 2907.05(A)(4), the Oregon statute prohibits “deviate sexual intercourse” with one younger than 12, O.R.S. § 163.405(1)(b). Similar to the Tenth Circuit's determination in *Forster*, the Court finds that under the modified categorical approach, Defendant's prior conviction of O.R.S. § 163.405(1)(b) is comparable to or more severe than the crime of abusive sexual contact as described in 18 U.S.C. § 2244. Thus, Defendant is at least a tier II sex offender, and Defendant's argument that he was under no requirement to register under SORNA during the period charged in the 2014 Indictment fails. See 18 U.S.C. § 16911(3)(A)(iv).¹¹ Defendant concedes in his Motion that “[i]f he is a tier II offender, the period [that he must register under SORNA] expires on July 16, 2019.” (Dkt. No. 126 at 12).¹²

IV. CONCLUSION

For the foregoing reasons, the Court rejects Defendant's argument that he is not a sex offender under SORNA or that he is only a tier I sex offender. Accordingly, the Court will deny in its entirety Defendant's “Motion to Dismiss Allegations of Supervised Release Violations and Vacate Conviction and Memorandum of Authorities in Support,” including his

request for a hearing regarding the same. (Dkt. No. 126). An appropriate Order accompanies this Memorandum Opinion.

[All Citations](#)

Not Reported in Fed. Supp., 2017 WL 987447

Footnotes

- 1 The Government also attacks Defendant's Motion on procedural grounds. Specifically, in its "Response to Defendant's Motion to Dismiss Revocation Proceedings and to Vacate Conviction," the Government argues that Defendant's Motion is "a camouflaged [28 U.S.C. §] 2255 motion," and is subject to the one-year statute of limitations set forth in § 2555(f). (Dkt. No. 130 at 5, 9). The Government asserts that this one-year period expired on July 28, 2016—approximately three months before Defendant filed the instant Motion. (*Id.* at 6). Because the Court determines that Defendant's Motion fails on the merits, it declines to reach the Government's argument that the Motion is procedurally barred.
- 2 Under SORNA, certain foreign convictions are also not included in the definition of "sex offense." § 16911(5)(B). Defendant does not assert that this exception is applicable here.
- 3 This is not an exhaustive list of the statutory criteria that triggers a tier III classification.
- 4 The tier II classification is also triggered if the sex offense "occurs after the offender becomes a tier I sex offender." § 16911(3)(C).
- 5 In both his Motion and his Response to the Government's Sur-reply, Defendant offers no analysis of either the text of § 16911(5)(C) or the structure or purpose of SORNA in support of his argument that courts must apply the categorical approach to the consensual sexual conduct exception. The only case Defendant cites in support of his position is *United States v. Alexander*, 802 F.3d 1134 (10th Cir. 2015). In *Alexander*, the Tenth Circuit rejected the defendant's argument that the statute underlying his prior conviction criminalized consensual sexual conduct and thus was broader than the exception in § 16911(5)(C). *Id.* at 1139, 1141. In affirming the district court, the Tenth Circuit—without discussion—applied the categorical approach, but nonetheless held that the defendant's argument failed because the statute underlying his prior conviction did not criminalize consensual sexual activity for the purposes of SORNA. *Id.* at 1138-39. Because the Tenth Circuit in *Alexander* did not analyze whether the categorical approach was required for § 16911(5)(C), any persuasive value Defendant can derive from *Alexander* is easily outweighed by *Brown*, *Gonzalez-Medina*, and *Rogers*.
- 6 Except for the consensual sexual conduct exception, Defendant raises no argument that his prior offense does not fall within SORNA's base definition of "sex offense." Indeed, any such argument would be futile as even under the categorical approach Defendant's prior offense of sodomy in the first degree constitutes a sex offense under SORNA. As noted above, the base definition of sex offense includes, *inter alia*, "a criminal offense that has an element involving a sexual act or sexual contact with another." § 16911(5)(A)(i). One of the elements of sodomy in the first degree, which is a Class A felony in Oregon, is to engage in or cause another to engage in "deviate sexual intercourse." O.R.S. § 163.405. The term "deviate sexual intercourse" means "sexual conduct between persons consisting of contact between the sex organs of one person and the mouth or anus of another." O.R.S. § 163.305. Thus, under SORNA's base definition, sodomy in the first degree is categorically a sex offense because it is a criminal offense that has an element involving a sexual act or sexual contact with another.

7 The Supreme Court in *Mathis* reiterated that courts may use the modified categorical approach where “[a] single statute ... list[s] elements in the alternative, and thereby define[s] multiple crimes” but may not use the modified categorical approach where the statute simply “enumerates various factual means of committing a single element.” 136 S. Ct. at 2249. The Supreme Court gave the example of a robbery statute that prohibits “‘the lawful entry or the unlawful entry’ of a premises with intent to steal” as an example of a divisible statute that lists elements in the alternative and for which, therefore, the modified categorical approach is appropriate. *Id.* Conversely, “a statute that requires use of a ‘deadly weapon’ as an element of a crime and further provides that the use of a ‘knife, gun, bat, or similar weapon’ would all qualify” does not list alternative elements but, rather, lists alternative factual means of accomplishing an element. *Id.* Accordingly, the modified categorical approach would not be appropriate for such a statute. As summarized by the Third Circuit in *Henderson*, the Supreme Court in *Mathis* outlined the following three methods for determining whether a statute lists multiple elements or simply multiple means of accomplishing an element: “First, the sentencing court should ascertain whether ‘a state court decision definitively answers the question....’ Second, the District Judge may look to ‘the statute on its face,’ which ‘may resolve the issue.’ Finally, explained the [Supreme] Court, ‘if state law fails to provide clear answers,’ sentencing courts may look to ‘the record of a prior conviction itself.’ ” 841 F.3d at 628 (quoting *Mathis*, 136 S. Ct. at 2256) (internal citations omitted).

As detailed above, the Court concludes here that the face of the Oregon statute underlying Defendant's conviction for sodomy makes clear that it contains multiple elements as opposed to multiple means of accomplishing an element.

- 8 The propriety of applying the categorical approach to determine a sex offender's tier classification is well supported by case law. See, e.g., *United States v. Berry*, 814 F.3d 192, 197 (4th Cir. 2016) (“Congress intended courts to apply a categorical approach to sex offender tier classifications” (quoting *White*, 782 F.3d at 1135)) (quotations omitted); *White*, 782 F.3d at 1135 (same); *Bango*, 386 Fed.Appx. at 53-54 (applying the categorical approach to determine the defendant's tier classification under SORNA for sentencing purposes).
- 9 Sodomy in the first degree is a Class A felony, which is punishable by a maximum term of imprisonment of 20 years. O.R.S. §§ 161.605(1), 163.405(2).
- 10 Because O.R.S. § 163.405(1)(b)—as opposed to O.R.S. § 163.405(1)(c)—does not prohibit “consensual sexual conduct between 13, 14, and 15 year old siblings,” the Court rejects Defendant's argument that the statute underlying his offense of conviction is not comparable to the federal offense of “abusive sexual contact” for purposes of categorizing Defendant's sex offender tier. (Dkt. No. 126 at 12).
- 11 For the purposes of denying Defendant's instant Motion, the Court finds that Defendant is at least a tier II sex offender because his prior conviction of sodomy in the first degree “is comparable to or more severe than ... abusive sexual contact (as described in section 2244 of Title 18).” 18 U.S.C. § 16911(3)(A)(iv). However, for the same reasons recounted above, Defendant's prior conviction likely constitutes a tier III sex offense in that it is comparable to or more severe than “abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years.” § 16911(4)(A)(ii).
- 12 Defendant also asserts that the Court lacks jurisdiction to determine whether Defendant violated the conditions of his supervised release. (Dkt. No. 137 at 4-5). Defendant argues that “[t]his Court has no jurisdiction to revoke [Defendant's] supervised release term when the alleged supervised release violation occurred during an illegal period of supervision.” (*Id.* at 4). Defendant's argument that the Court lacks jurisdiction is premised on his assertion that he is not a sex offender or is only a tier I sex offender. Because the Court has found otherwise, the Court rejects Defendant's jurisdictional challenge.

2024 WL 1253643

Only the Westlaw citation is currently available.
United States Court of Appeals, Second Circuit.

UNITED STATES of America, Appellee,

v.

Christopher MARRERO, Defendant-Appellant.

22-2030

|

March 25, 2024

Appeal from a judgment of the United States District Court for the Eastern District of New York (Edward R. Korman, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment entered on September 12, 2022, is **REVERSED**.

Attorneys and Law Firms

FOR DEFENDANT-APPELLANT: Allegra Glashausser, Assistant Federal Defender, Federal Defenders of New York, Inc., New York, NY.

FOR APPELLEE: Andrew D. Wang (Nicholas J. Moscow, on the brief), Assistant United States Attorneys, for Breon Peace, United States Attorney for the Eastern District of New York, New York, NY.

PRESENT: BARRINGTON D. PARKER, GERARD E. LYNCH, MARIA ARAÚJO KAHN, Circuit Judges.

SUMMARY ORDER

***1** Defendant-Appellant Christopher Marrero (“Marrero”) appeals from the district court’s September 12, 2022, judgment, rendered following a guilty plea, convicting him of one count of failure to register as a sex offender in violation of 18 U.S.C. § 2250(a). The district court sentenced Marrero to time served and five years’ supervised release.

On appeal, Marrero argues that the district court erred in denying his motion to dismiss the indictment based on its conclusion that he had a continuing registration obligation under the Sex Offender Registration and Notification Act (“SORNA”). We agree. We assume the parties’ familiarity with the underlying facts, the procedural history, and the

issues on appeal, to which we refer only as necessary to explain our decision.

BACKGROUND

In March 2001, Marrero was convicted of attempted rape in the second degree in violation of New York Penal Law § 130.30. Thereafter, he moved to Florida. In May 2018, Marrero moved from Florida back to New York, but did not update his sex offender registration. Marrero was subsequently indicted for his failure to register in December 2019.

Prior to pleading guilty to the failure to register charge, Marrero moved to dismiss the indictment for failure to state an offense. In that motion, he argued that his prior state law conviction renders him a Tier I sex offender under SORNA, subjecting him to a 15-year federal registration obligation that expired prior to his instant failure to register.¹ The district court disagreed and concluded that Marrero qualified as a Tier II sex offender, requiring 25 years of registration.

DISCUSSION

Marrero contends that the district court erred in failing to dismiss the indictment, and that his judgment of conviction should therefore be vacated. “In considering his challenge on appeal, we review *de novo* any questions of law arising from the District Court’s judgment” *United States v. Peeples*, 962 F.3d 677, 683 (2d Cir. 2020).

SORNA sets forth three registration tiers: Tier I, II, and III, which depend on the nature of the sex offense for which the offender was previously convicted. *See* 34 U.S.C. § 20911(2)–(4). A person qualifies as a Tier II sex offender if they were convicted of a felony offense against a minor that is “comparable to or more severe than” an enumerated list of offenses that includes “abusive sexual contact (as described in section 2244 of title 18).” *Id.* § 20911(3)(A)(iv). As relevant here, abusive sexual contact under 18 U.S.C. § 2244 includes “knowingly engag[ing] in a sexual act with” a minor who (1) is between the ages of 12 and 16 and (2) is at least four years younger than the perpetrator. 18 U.S.C. §§ 2243(a), 2244(a) (3). On the other hand, a person is a Tier I “sex offender” if their offense does not meet the Tier II or III criteria.² *See* 34 U.S.C. § 20911(2).

*2 For purposes of this appeal, we employ the categorical approach to determine the SORNA tier classification of Marrero's prior conviction.³ The categorical approach calls for courts to "identify the minimum criminal conduct necessary for conviction under a particular statute" by "looking only to the statutory definitions—i.e., the elements —of the offense, and not to the particular underlying facts." *Hylton v. Sessions*, 897 F.3d 57, 60 (2d Cir. 2018) (quoting *United States v. Hill*, 890 F.3d 51, 55 (2d Cir. 2018)). "Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

Our analysis of the elements of second-degree attempted rape is complicated by a change in New York law after Marrero's arrest but before his guilty plea. At the time of Marrero's 2000 arrest, New York Penal Law § 130.30 prohibited a person 18 years or older from engaging in sexual intercourse with a person under the age of 14. See N.Y. PENAL LAW § 130.30 (McKinney 2000) (the "2000 Statute"). However, on February 1, 2001, prior to Marrero's guilty plea, a new version of the statute went into effect. The new version expanded the scope of criminal conduct by criminalizing sexual intercourse between a person 18 years or older and a person under the age of 15. See N.Y. PENAL LAW § 130.30 (McKinney 2022) (the "2001 Statute").

As discussed above, the relevant Tier II SORNA offense requires an age difference of at least four years between the victim and perpetrator. See 18 U.S.C. § 2243(a), 2244(a)(3). The 2001 Statute is therefore not a categorical match, as it can be violated by sexual intercourse between a person who is 18 years old and another person between the ages of 14 and 15, which is an age difference of less than four years. See, e.g., *United States v. Escalante*, 933 F.3d 395, 402 (5th Cir. 2019) ("Looking solely at the elements then, the Utah offense criminalizes consensual sexual contact between an 18-year-old and a 15-year-old, whereas the federal statute does not. Thus, under the categorical approach, the Utah offense sweeps more broadly than the comparable federal offense and cannot serve as a proper predicate for a SORNA tier II sex offender designation." (internal quotation marks omitted)). Meanwhile, the 2000 Statute prohibited sexual intercourse by a person 18 years or older with a person under

the age of 14, requiring a minimum age difference of four years. See N.Y. PENAL LAW § 130.30 (McKinney 2000). Therefore, the 2000 Statute is a categorical match to a Tier II SORNA offense. Thus, Marrero's tier classification turns on whether he was convicted under the original or amended version of the statute.

In applying the categorical approach in other contexts, we have recognized that "federal courts are bound by the highest state court's interpretations of state law." *Matthews v. Barr*, 927 F.3d 606, 622 n.11 (2d Cir. 2019); see also *Johnson*, 559 U.S. at 138 (determining that the highest state court's determination of the elements of an offense are binding on a federal court). The New York Court of Appeals has long recognized the "general rule" that nonprocedural statutes "are not to be applied retroactively absent a plainly manifested legislative intent to that effect." *People v. Oliver*, 1 N.Y.2d 152, 157 (1956); see also *People v. Ndaula*, 179 N.Y.S. 3d 612, 613 (2d Dep't 2023) (same). Here, the legislature did not explicitly state that the amendment to New York Penal Law § 130.30 should apply retroactively. See Sexual Assault Reform Act, 2000 N.Y. Sess. Laws Ch. 1, § 33 (effective Feb. 1, 2001). Thus, in applying the categorical approach, "we focus on the law as it applied to [the defendant] when he committed the offense," rather than at the time the defendant was convicted. *United States v. Titties*, 852 F.3d 1257, 1262 n.2 (10th Cir. 2017).

*3 For the first time at oral argument,⁴ Marrero contended that, despite the "general rule" in New York, the 2001 Statute is the operative statute for applying the categorical approach because there is no evidence in the record that the court can consider that identifies the date of Marrero's offense or that establishes that his guilty plea was based on the conduct for which he was arrested on November 12, 2000. Specifically, he argued that, in determining which statute to evaluate under the categorical approach, the court is limited to considering sources identified by the United States Supreme Court in *United States v. Shepard*, 544 U.S. 13 (2005). Such documents include "the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Id.* at 26.

In the case at bar, the only *Shepard* document in the record is Marrero's certificate of disposition, which states that he was arrested on November 12, 2000, and convicted of attempted rape in the second degree on March 12, 2001. See *United*

States v. Green, 480 F.3d 627, 632 (2d Cir. 2007) (identifying a certificate of disposition as “a judicial record of the offense of which a defendant has been convicted”). The minimal information contained in that document—without reference to impermissible, non-Shepard evidence—leaves the court to speculate as to when the offense to which he pleaded guilty occurred. His conviction could have been based on conduct that occurred after Marrero’s November 2000 arrest and the February 2001 statutory change, alleged in a superseding charging document. Or it could have occurred before his November 2000 arrest, meaning that he pleaded guilty to violating the prior version of New York Penal Law § 130.30, as the government asserts. Without an offense date listed in the *Shepard* documents, we cannot conclude with certainty that the conviction was based on conduct that occurred before the change in the law. *Pereida v. Wilkinson*, 592 U.S. 224, 238 (2021) (“[A]ny lingering ambiguity about the [Shepard documents] can mean the government will fail to carry its burden of proof in a criminal case.”). Accordingly, because Marrero could have been convicted under either the 2000 or 2001 Statute, the “minimum criminal conduct necessary for

[Marrero’s] conviction” is that under the 2001 Statute, which is not a categorical match for a Tier II offense. *Sessions*, 897 F.3d at 60.

Thus, we conclude that Marrero is a Tier I sex offender whose obligation to report under SORNA expired before the failure to update his registration charged in the instant indictment. Accordingly, the district court erred in denying the motion to dismiss the indictment for failure to state an offense.⁵

*4

* * *

We have reviewed the parties’ remaining arguments and find them to be unavailing. For the reasons set forth above, we reverse Marrero’s conviction and direct that the indictment be dismissed.

All Citations

Not Reported in Fed. Rptr., 2024 WL 1253643

Footnotes

- 1 At oral argument, Marrero’s counsel represented that her client’s registration is currently up to date and that, irrespective of any federal obligations, he is subject to a lifetime registration requirement under New York law.
- 2 A person qualifies as a Tier III sex offender if they were convicted of a felony offense that is “comparable to or more severe than” an enumerated list of aggravated offenses. 34 U.S.C. § 20911(4). The government does not contend that Marrero’s prior conviction is a Tier III offense.
- 3 The district court applied the categorical approach, in accordance with every Court of Appeals that has considered the issue. Although the Second Circuit has not yet addressed this issue, we need not do so here as the government does not challenge the district court’s conclusion that the categorical approach applies to evaluating offense tiers under SORNA. See Appellee’s Br. 9 n.2. Thus, we assume without deciding that the categorical approach applies.
- 4 Ordinarily, arguments not raised in a principal brief—let alone not raised even in the reply—are considered waived. See, e.g., *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) (“We begin by observing that arguments not made in an appellant’s opening brief are waived even if the appellant pursued these arguments in the district court or raised them in a reply brief.”). Marrero also did not raise this argument below, perhaps because appended to his motion to dismiss was his signed 2001 sex offender registration form, which lists the date of his offense as September 20, 2000. However, this court has discretion to excuse Marrero’s waiver “where manifest injustice would otherwise result.” *JP Morgan Chase Bank*, 412 F.3d at 428. Because ignoring this argument would lead to affirmance of his conviction for failure to register, we conclude that the manifest injustice standard is met here.

5 We note that the experienced district judge cannot be faulted for failing to identify a defense that was not clearly called to his attention, and his decision on the issue as framed below appears to have been correct. However, an error is “plain” when it is apparent to the appellate court. *Henderson v. United States*, 568 U.S. 266, 279 (2013) (“[I]t is enough that an error be plain at the time of appellate consideration.” (internal quotation marks omitted)). We also note that the record refers to a police report suggesting that Marrero was originally arrested for statutory rape as defined under the 2000 Statute, but that evidence may not be considered for purposes of the categorical approach, and, in any event, it still does not definitively establish that he pleaded guilty to the offense charged at the time of his arrest.

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844 Fed.Appx. 859 (Mem)

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 6th Cir. Rule 32.1.

United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Robert J. MCGOUGH, Defendant-Appellant.

No. 20-5576

|

FILED April 20, 2021

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

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Dumaka Shabazz, Michael C. Holley, Federal Public Defender's Office, Nashville, TN, for Defendant-Appellant

BEFORE: KETHLEDGE, STRANCH, and NALBANDIAN, Circuit Judges.

OPINION

JANE B. STRANCH, Circuit Judge.

***860** Robert McGough appeals his 37-month sentence imposed after he pleaded guilty to failing to register as a sex offender as required by the Sex Offender Registration and Notification Act (SORNA). During sentencing, the district court classified McGough as a Tier II sex offender with a Guidelines range of 30-37 months. McGough contends—and the Government agrees—that the district court should have classified him as a Tier I sex offender, which carries a Guidelines range of 24-30 months. We VACATE McGough's sentence and REMAND to the district court for resentencing.

I. BACKGROUND

A. Factual Background

In 1998, Robert J. McGough—then 22 years-old—was convicted of corruption of a minor in Ohio, after engaging in sexual intercourse with a 13-year-old girl. This conviction required McGough to register as a sex offender under SORNA, 18 U.S.C. § 2250(a). Since his 1998 conviction, McGough has failed to register as a sex offender on several occasions. While still on supervised release in Alabama for his last conviction for failure to register, McGough abandoned his residence and moved to Tennessee. McGough did not update his registration with the Tennessee Bureau of Investigation as required by SORNA and was indicted for failure to register as a sex offender in the Middle District of Tennessee.

B. Procedural Background

McGough pleaded guilty to failing to register as a sex offender. The Presentence Investigation Report (PSR) classified McGough as a Tier II sex offender. A Tier II classification corresponds to a U.S. Sentencing Guidelines base level of 14, a higher offense level than a Tier I sex offender. With a criminal history category of VI, McGough's Guidelines range was 30-37 months. Neither party objected to the PSR's calculation, and the district court sentenced McGough to 37 months' imprisonment. McGough appealed.

II. ANALYSIS

The Government honestly and helpfully concedes that McGough was incorrectly classified as a Tier II sex offender. Both parties acknowledge that “[i]ncorrectly classifying a defendant as a Tier II[] sex offender is plain error.” *United States v. Barcus*, 892 F.3d 228, 231 (6th Cir. 2018) (citing *United States v. Stock*, 685 F.3d 621, 629 (6th Cir. 2012)).

“A defendant may be classified as a Tier II[] sex offender under SORNA if the defendant has a state-law conviction that is the same as or comparable to a specified federal offense.” *Id.* Here, the relevant Ohio statute, corruption of a minor, is broader than the most closely associated federal offense, abusive sexual conduct. *Compare* Ohio Rev. Code Ann. § 2907.04(A) (1998), with 18 U.S.C. § 2244 and 18 U.S.C. § 2246(3). The Ohio statute is a strict liability offense. *See State v. Jackson*, 2010 WL 2635062, ¶ 38 (Ohio Ct. App. 2010) (“Ohio courts have repeatedly recognized that no mens rea is necessary for the element of engaging in sexual conduct under R.C. 2907.04(A); it is a strict liability element.”); *see also State v. McGinnis*, 2008 WL 4831450, ¶¶ 27-30 (Ohio

Ct. App. 2008) (recognizing that engaging *861 in unlawful sexual conduct with a minor is a strict liability offense). In contrast, the federal offense requires specific intent “to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” *Barcus*, 892 F.3d at 232 (quoting 18 U.S.C. § 2246(3)). Applying the categorical approach, the state offense is broader as it criminalizes conduct that may not be unlawful under federal law. McGough therefore should have been classified as a Tier I offender.

An incorrect Guidelines calculation is rarely a harmless error. *United States v. Anderson*, 526 F.3d 319, 330 (6th Cir. 2008). Although the district court stated that it “would have imposed the same sentence under Section 3553(a),” this “boiler-plate language” is not enough to “thwart a deserved resentencing.” *United States v. Montgomery*, 969 F.3d 582, 583 (6th Cir. 2020). Because McGough’s Guidelines range was not disputed at sentencing and we cannot be “absolutely certain that the district court would have announced the same sentence had it not erred”, *id.*, we remand for resentencing.

Here, remand requires more than a “technical revision,” so resentencing should be open-ended and in McGough’s presence. *United States v. Woodside*, 895 F.3d 894, 904 (6th Cir. 2018) (Stranch, J., concurring) (quoting *United States v. Bryant*, 643 F.3d 28, 32 (1st Cir. 2011)).

In light of “COVID-19 and the present difficulties in transportation,” however, McGough has expressed his desire not to return to the district court for a new sentencing hearing.¹ Instead, McGough requests modified resentencing proceedings that will allow both parties to file resentencing memoranda, rehabilitation documentation, and post-sentencing developments, but do not require him to participate in person. Due to the COVID-19 outbreak, sentencings scheduled before a district judge in the Middle District of Tennessee may be conducted in person or by video or telephone conferencing. See M.D. Tenn. A.O. No. 209-11, 5 (Feb 25, 2021). We grant the modified resentencing procedures requested by McGough and entrust the practical details to the district court.

III. CONCLUSION

For the reasons discussed above, we **VACATE** McGough’s sentence and **REMAND** his case to the district court for resentencing in accordance with this opinion.

All Citations

844 Fed.Appx. 859 (Mem)

Footnotes

¹ Fed. R. Crim. P. 43 affords a defendant the opportunity to be present at resentencing. *United States v. Garcia-Robles*, 640 F.3d 159, 164–65 (6th Cir. 2011). However, this right may be waived. *Id.* at 165 n.2 (citing *United States v. Calderon*, 388 F.3d 197, 199 (6th Cir.2004)) (“It is well settled that a defendant in a criminal case may waive any right, even a constitutional right[.]”).

966 F.3d 335

United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff-Appellee

v.

Robert MONTGOMERY, Defendant-Appellant

No. 19-20448

|

FILED July 15, 2020

Synopsis

Background: Defendant was convicted in the United States District Court for the Southern District of Texas, David Hittner, Senior District Judge, of failing to register as a sex offender in violation of the Sex Offender Registration and Notification Act (SORNA). Defendant appealed.

[Holding:] The Court of Appeals, Higginson, Circuit Judge, held that defendant's underlying New Jersey conviction for second degree sexual assault was tier I sex offense, and so he only had to register for 15 years after release from custody.

Conviction vacated.

Elrod, Circuit Judge, filed concurring opinion in which Jones, Circuit Judge, and Higginson, Circuit Judge, joined.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

West Headnotes (8)

[1] Criminal Law 🔑 Necessity of Objections in General

To show plain error, defendant must demonstrate a clear or obvious error that has not been intentionally abandoned and has affected his substantial rights.

[2] Criminal Law 🔑 Necessity of Objections in General

If defendant makes the showing of a clear or obvious error that has not been intentionally abandoned and has affected his substantial rights, then the Court of Appeals should exercise its discretion to correct the error, under plain error review, if it seriously affects the fairness, integrity or public reputation of judicial proceedings.

[3] Mental Health 📈 Scores and risk levels

The court determines an offender's Sex Offender Registration and Notification Act (SORNA) tier, which determines how many years a sex offender must register, by comparing the offense for which they were convicted with SORNA's tier definitions using the "categorical approach," under which courts look only to the statutory definitions—i.e., the elements—of an offense, and not to the particular facts underlying those convictions. 34 U.S.C.A. § 20911.

3 Cases that cite this headnote

[4] Mental Health 📈 Scores and risk levels

If the defendant's offense sweeps more broadly than the Sex Offender Registration and Notification Act (SORNA) tier definition, then the offense cannot qualify as a predicate offense for that SORNA tier regardless of the manner in which the defendant actually committed the crime. 34 U.S.C.A. § 20911.

[5] Mental Health 📈 Scores and risk levels

Mental Health 📈 Proceedings

Under the categorical approach for determining a defendant's Sex Offender Registration and Notification Act (SORNA) tier, which determines how many years a sex offender must register, a defendant must show a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of the crime, in order for the offense not to qualify as a predicate offense for that SORNA tier; merely pointing to plausible interpretations of the statutory text in a vacuum is not enough. 34 U.S.C.A. § 20911.

1 Case that cites this headnote

[6] **Mental Health** Scores and risk levels

Mental Health Proceedings

Under the categorical approach for determining a defendant's Sex Offender Registration and Notification Act (SORNA) tier, which determines how many years a sex offender must register, a defendant must point to case law from the relevant state courts actually applying the law in a manner that is broader than the federal definition, in order for the offense not to qualify as a predicate offense for that SORNA tier. 34 U.S.C.A. § 20911.

3 Cases that cite this headnote

[7] **Mental Health** Scores and risk levels

Defendant's underlying New Jersey conviction for second degree sexual assault was a Sex Offender Registration and Notification Act (SORNA) tier I sex offense, rather than a tier III sex offense, meaning that he was required to register as a sex offender under SORNA for only 15 years after his release from custody and not for life; New Jersey courts interpreted the state crime of sexual assault in the second degree to cover any touching that occurred without permission, as well as non-consensual intercourse in the absence of threats or fear, and such conduct was broader than, and so fell outside of the federal offenses of aggravated sexual abuse and sexual abuse. 18 U.S.C.A. §§ 2241, 2242; 34 U.S.C.A. § 20911; N.J. Stat. Ann. § 2C:14-2(c)(1).

1 Case that cites this headnote

[8] **Sex Offenses** Threats, fear, and intimidation

Federal courts interpret the threat or fear language in sexual abuse statute to require more than merely a lack of consent. 18 U.S.C.A. § 2242.

1 Case that cites this headnote

*336 Appeal from the United States District Court for the Southern District of Texas, David Hittner, U.S. District Judge

Attorneys and Law Firms

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Marjorie A. Meyers, Federal Public Defender, Evan Gray Howze, Assistant Federal Public Defender, Kathryn Shephard, Federal Public Defender's Office, Southern District of Texas, Houston, TX, for Defendant-Appellant

Before JONES, ELROD, and HIGGINSON, Circuit Judges.

Opinion

STEPHEN A. HIGGINSON, Circuit Judge:

Robert Montgomery appeals his conviction for failure to register as a sex offender *337 in violation of the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250(a). Because Montgomery should have been classified as a tier I offender under SORNA, meaning that he was not required to register in 2018, we vacate the conviction.

Robert Montgomery was convicted of sexual assault in the second degree in New Jersey state court on October 22, 1992. He was sentenced to eight years in prison and released on parole on March 21, 1995. Twenty-three years later, around April 2, 2018, Montgomery took up residence in Texas. Although Montgomery had registered as a sex offender at previous addresses, he did not register as a sex offender at this residence.

On November 7, 2018, the government charged Montgomery in a one-count indictment with failure to register as a sex offender in violation of 18 U.S.C. § 2250(a). After a largely stipulated trial, the district court adjudged Montgomery guilty. In preparation for sentencing, the probation officer prepared a presentence investigation report (PSR) that recommended assigning Montgomery a base offense level of 16 as a tier III SORNA offender. Montgomery objected to the PSR, arguing that he should be classified as a tier I offender under SORNA because his New Jersey conviction for second degree sexual assault was not comparable to the federal SORNA definitions of sexual abuse and aggravated sexual

abuse associated with tier III status. The court overruled the objection and sentenced Montgomery to 41 months in custody with five years of supervised release.

Montgomery timely appealed the judgment. He now argues that his New Jersey conviction for second degree sexual assault is a SORNA tier I offense, meaning that he was required to register for only 15 years after his release from custody in 1995 and had no obligation to register as a sex offender when he was charged with failing to do so in 2018.

[1] [2] Because Montgomery failed to present his sufficiency of the indictment argument in a motion to dismiss, and instead raised it for the first time in his objections to the PSR, our review is for plain error.¹ *United States v. Fuchs*, 467 F.3d 889, 900 (5th Cir. 2006). To show plain error, Montgomery must demonstrate a clear or obvious error that has not been intentionally abandoned and has affected his substantial rights. *Rosales-Mireles v. United States*, — U.S. —, 138 S. Ct. 1897, 1904, 201 L.Ed.2d 376 (2018). If he makes that showing, then the court should exercise its discretion to correct the error, if it “seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Id.* at 1905 (citation omitted).

SORNA, 34 U.S.C. §§ 20901–20962, is a federal law establishing “a comprehensive national system for the registration” of sex offenders. *Id.* § 20901. It requires qualifying offenders to register and update their registration upon a change in residence, with criminal penalties for knowingly failing to comply. *Id.* § 20913; 18 U.S.C. § 2250. SORNA classifies offenders into three tiers. 34 U.S.C. § 20911. A tier I offender must register for 15 years, a tier II offender must register for 25 years, and *338 a tier III offender must register for life. *Id.* § 20915(a).

[3] [4] Our court and others determine an offender's SORNA tier by comparing the offense for which they were convicted with SORNA's tier definitions using the categorical approach. *See United States v. Escalante*, 933 F.3d 395, 398 (5th Cir. 2019). To apply the categorical approach, courts “‘look only to the statutory definitions’—*i.e.*, the elements—of [an offense], and *not* ‘to the particular facts underlying those convictions.’” *Descamps v. United States*, 570 U.S. 254, 261, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013) (quoting *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990)). If the offense “sweeps more broadly” than the SORNA tier definition, then the offense cannot qualify as a predicate offense for that SORNA tier regardless of the

manner in which the defendant actually committed the crime. *Id.*; *United States v. Young*, 872 F.3d 742, 745 (5th Cir. 2017).

[5] [6] A defendant must show “a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of the crime.” *United States v. Castillo-Rivera*, 853 F.3d 218, 222 (5th Cir. 2017) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007)). Merely pointing to plausible interpretations of the statutory text in a vacuum is not enough. *Id.* A defendant must point to case law from the relevant state courts actually applying the law in a manner that is broader than the federal definition. *Id.*

[7] Thus, to be a tier III sex offender under SORNA, Montgomery's New Jersey conviction must be “comparable to or more severe than … aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18).”² 34 U.S.C. § 20911(4); *see also Young*, 872 F.3d at 745 (quoting *United States v. Coleman*, 681 F. App'x 413, 416–17 (5th Cir. 2017)). Because the New Jersey Supreme Court has interpreted the state crime of sexual assault in the second degree to cover conduct outside of the federal definitions given in 18 U.S.C. §§ 2241 and 2242, Montgomery does not qualify as a tier III offender.

Aggravated sexual abuse, as defined in § 2241, requires “knowingly caus[ing] another person to engage in a sexual act” using force or “by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempt[ing] to do so.” 18 U.S.C. § 2241(a). We have held that the force element required under this definition is “restraint sufficient to prevent the victim from escaping.” *United States v. Lucas*, 157 F.3d 998, 1002 (5th Cir. 1998); *see also United States v. Carey*, 589 F.3d 187, 195 (5th Cir. 2009). Conversely, the New Jersey Supreme Court has held that, although 1992 N.J. Stat. § 2C:14-2(c)(1) requires “physical force or coercion,” a defendant may be convicted under the statute upon a showing of “any touching that occurs without permission.” *State in the Interest of M.T.S.*, 129 N.J. 422, 446, 609 A.2d 1266 (1992); *see also Jecrois v. Sojak*, 736 F. App'x 343, 347 (3d Cir. 2018) (“Under New Jersey law, ‘physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful’ … [r]ather, the act of penetration itself, if ‘engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration,’ satisfies the *339 physical force or coercion element of sexual assault.” (quoting *State*

in the Interest of M.T.S., 129 N.J. at 444, 609 A.2d 1266); *United States v. Johnson*, 743 F.3d 196, 201 (7th Cir. 2014) (noting that New Jersey has taken the position that “‘force’ was present ... because some force was inherently needed to perform the sexual act”). Indeed, the defendant in *State in the Interest of M.T.S.* was convicted upon a showing of nonconsensual conduct without an additional showing of force. 129 N.J. at 449–50, 609 A.2d 1266. Therefore, New Jersey courts have, in practice, applied 1992 N.J. Stat. § 2C:14-2(c)(1) to conduct that falls outside of the SORNA definition of aggravated sexual abuse.

[8] Similarly, a person commits sexual abuse under 18 U.S.C. § 2242 when he knowingly “causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping)” or engaging in a sexual act with someone who is mentally or physically incompetent. 18 U.S.C. § 2242. Federal courts interpret this threat or fear language to require more than merely a lack of consent. See, e.g., *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1133–34 (9th Cir. 2014) (holding that an Oregon sexual abuse statute penalizing penetration with a lack of consent was broader than § 2242); *United States v. Iu*, 917 F.3d 1026, 1031 (8th Cir. 2019) (pointing to behavior “aimed at frightening [the victim] to the point that she acquiesced to sexual activity with him” to satisfy the fear requirement of § 2242); *United States v. Betone*, 636 F.3d 384, 388 (8th Cir. 2011) (relying on statements such as “[y]ou don’t want to do that, because it’s the worst thing you can do for yourself right here and right now,” and the victim’s testimony that he was afraid to resist or leave to establish fear). Courts also distinguish § 2242’s threats and fear from § 2241’s force element. *United States v. Boyles*, 57 F.3d 535, 544 (7th Cir. 1995) (“‘Fear’ and ‘threats’ are different from ‘force.’”). These interpretations render New Jersey sexual assault, which criminalizes non-consensual intercourse in the absence of threats or fear, broader than the federal definition given in 18 U.S.C. § 2242 as well.

Because Montgomery does not meet the definition of a tier III offender, he must be classified as a tier I offender.³ 34 U.S.C. § 20911(2). As a tier I offender, he was required to register for only 15 years after his release in 1995. § 20915(a). Because this error is clear under current law and resulted in Montgomery serving additional time in prison, Montgomery has shown plain error. *Rosales-Mireles*, 138 S. Ct. at 1905–08.

Accordingly, Montgomery’s conviction for failure to register as a sex offender is VACATED.

JENNIFER WALKER ELROD, Circuit Judge, joined by JONES and HIGGINSON, Circuit Judges, concurring:

I fully concur in the panel opinion. “This outcome is required by faithful adherence to precedent.” *United States v. Escalante*, 933 F.3d 395, 406 (5th Cir. 2019). However, I write separately because this case illustrates yet another troubling application of the expanded and “byzantine-like” categorical approach. *Id.* “[A]dherence to the categorical approach leads to a result in this case that is almost certainly contrary to any plain reading of the statute.” *Id.*

Here, Mr. Montgomery was convicted of sexual assault in the second degree in 1992. The *340 1992 New Jersey statute defining sexual assault in the second degree provides that, “[a]n actor is guilty of sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances ... [including, as relevant here,] [t]he actor uses physical force or coercion, but the victim does not sustain severe personal injury.” N.J. Stat. § 2C:14-2(c) (1) (1992). Mr. Montgomery’s crime involved threatening an adult woman with a box cutter while he fondled her and put his fingers and mouth on her vagina.

Despite the specific acts of Mr. Montgomery’s underlying conviction squarely fitting SORNA’s Tier III definition, we are compelled by the categorical approach to instead look only to the elements of the crime enumerated by the New Jersey statute: (1) an act of sexual penetration; (2) using force or coercion. See *State v. R.P.*, 223 N.J. 521, 126 A.3d 1226, 1230 (N.J. 2015). In doing so, Mr. Montgomery cannot be classified as a Tier III offender; he must be classified as a Tier I offender and relieved of his obligation to register as a sex offender under SORNA. This does not comport with the statute’s text.

Skepticism of the categorical approach is not new, but time has magnified the unworkability of this approach. *Quarles v. United States*, — U.S. —, 139 S. Ct. 1872, 1881, 204 L.Ed.2d 200 (2019) (Thomas, J., concurring) (suggesting that the Supreme Court reconsider this approach and noting that “the categorical approach employed today is difficult to apply and can yield dramatically different sentences depending on where a [crime] occurred”); *Sessions v. Dimaya*, — U.S. —, 138 S. Ct. 1204, 1252, 200 L.Ed.2d 549 (2018) (Thomas, J., dissenting); *Mathis v. United States*, — U.S.

—, 136 S. Ct. 2243, 2259, 195 L.Ed.2d 604 (2016) (Thomas, J., concurring).¹

“In the nearly three decades since its inception, the categorical approach has developed a reputation for crushing common sense in any area of the law in which its tentacles find an inroad.” *Escalante*, 933 F.3d at 406. “Perhaps one day the Supreme Court will consider revisiting the categorical

approach and setting the federal judiciary down a doctrinal path that is easier to navigate and more likely to arrive at the jurisprudential destinations that a plain reading of our criminal statutes would suggest.” *Id.* at 407.

All Citations

966 F.3d 335

Footnotes

- 1 Montgomery instead moved to dismiss because he argued that SORNA was unconstitutional as applied to him due to SORNA’s provision authorizing the United States Attorney General to decide the applicability of the Act’s registration requirements to offenders convicted before its enactment, which he argued violated the nondelegation doctrine. This issue was pending at the time before the Supreme Court in *Gundy v. United States*, but the Supreme Court subsequently held that the provision did not violate the nondelegation doctrine. — U.S. —, 139 S. Ct. 2116, 204 L.Ed.2d 522 (2019).
- 2 New Jersey sexual assault does not involve kidnapping a minor or a crime that occurs after the offender becomes a tier II offender, which are the other definitions of a tier III offender. See 34 U.S.C. § 20911(4).
- 3 The government does not argue that Montgomery meets the definition of a tier II sex offender, and the crimes described in that section are inapplicable to Montgomery’s conviction. See 34 U.S.C. § 20911(3).
- 1 See also, e.g., *United States v. Lewis*, 720 F. App’x 111, 120 (3d Cir. 2018) (Roth, J., concurring in the judgment) (describing the categorical approach as “willful blindness—which may allow violent offenders to evade accountability”); *United States v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017) (observing that the categorical approach carries judges “down the rabbit hole … to a realm where we must close our eyes as judges.... It is a pretend place in which a crime that the defendant committed violently is transformed into a non-violent one.... Curiouser and curiouser it has all become[.]”); *United States v. Chapman*, 866 F.3d 129, 136–38 (3d Cir. 2017) (Jordan, J., concurring) (expressing dismay at the “kudzu quality of the categorical approach, which seems to be always enlarging its territory[,]” and which “often asks judges to feign amnesia,” and to “ignore facts already known and instead proceed with eyes shut”); *United States v. Faust*, 853 F.3d 39, 61 (1st Cir. 2017) (Lynch, J., concurring) (observing that the categorical approach “can lead courts to reach counterintuitive results, and ones which are not what Congress intended”); *United States v. Doctor*, 842 F.3d 306, 313–15 (4th Cir. 2016) (Wilkinson, J., concurring) (stating that the categorical approach has caused judges to “swap[] factual inquiries for an endless gauntlet of abstract legal questions[,]” and recommending that the categorical approach should “loosen[] its present rigid grip upon criminal sentencing”).

187 F.Supp.3d 356
United States District Court, E.D. New York.

UNITED STATES of America,

v.

Jorge PALAGUACHI, also known as “Jorge Palajuachi,” and “Antonio Palaguachi,” Defendant.

15-CR-133 (WFK)

|

Signed May 16, 2016

|

Filed 05/17/2016

Synopsis

Background: Defendant pled guilty to illegal reentry and failure to register.

Holdings: At sentencing, the District Court, William F. Kuntz, II, J., held that:

[1] two concurrent sentences of 57 months in prison with five years of supervised release were warranted, and

[2] prior conviction under New York law for statutory rape was a crime of violence.

Ordered accordingly.

West Headnotes (2)

- [1] **Aliens, Immigration, and Citizenship** ↗ Sentencing and punishment
Sentencing and Punishment ↗ Other Offenses, Charges, Misconduct

Two concurrent sentences of 57 months in prison with five years of supervised release with special conditions and \$200 special assessment were warranted after defendant pled guilty to illegal reentry and failure to register; defendant had prior conviction under New York law for rape in the second degree, which required him to register as a sex offender, he was removed from the United States, defendant was

later charged with assault and other crimes for conduct against his then girlfriend after he illegally reentered, defendant's return showed lack of respect for law, defendant had history of sex offenses, he had prior conviction for crime of violence, which warranted sentencing enhancement, defendant demonstrated ability to hide from law enforcement by remaining in the U.S. undetected for years, and defendant was a tier III sex offender under the Sex Offender Registration and Notification Act (SORNA). 18 U.S.C.A. §§ 2250, 3553(a).

- [2] **Sentencing and Punishment** ↗ Offense or adjudication in other jurisdiction

Defendant's prior conviction under New York law for statutory rape was a crime of violence under the modified categorical approach, warranting sentencing enhancement under the sentencing guidelines following his guilty plea to illegal reentry and failure to register; crime had an age component and a physical act component. N.Y. Penal Law § 130.30; U.S.S.G. § 2L1.2(b) (1)(A)(ii).

2 Cases that cite this headnote

Attorneys and Law Firms

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Jan Alison Rostal, Federal Defenders of New York, Inc., Brooklyn, NY, for Defendant.

MEMORANDUM AND ORDER

HON. WILLIAM F. KUNTZ, II, UNITED STATES DISTRICT JUDGE

Defendant Jorge Palaguachi (“Defendant”) is a twenty-eight year old citizen of Ecuador who pled guilty to a two-count indictment for Illegal Reentry and Failure to Register. Guilty Plea, ECF Sept. 28, 2015. Defendant was first removed from the United States on February 22, 2008 after being convicted of statutory rape of a twelve year old. Presentence

Investigation Report (“PSR”) ¶ 31, ECF No. 18. Federal authorities arrested Defendant after learning of his illegal reentry into the United States following Defendant’s arrest for sexual assault of his then-girlfriend. *Id.* ¶ 3. The Court provides a complete statement of reasons pursuant to 18 U.S.C. § 3553(c) of those factors set forth by Congress and the President and contained in 18 U.S.C. § 3553(a). For the reasons discussed below, Defendant is sentenced to 57 months of incarceration for Count One and 57 months of incarceration for Count Two, to run concurrently. Defendant is further sentenced to five years of supervised release with special conditions for Count One and five years of supervised release with special conditions for Count Two, to run concurrently; no fine; and the \$200 special assessment.

*358 BACKGROUND

On September 28, 2015, Defendant pled guilty to a two-count indictment, charging Defendant with Illegal Entry (“Count One”) and Failure to Register (“Count Two”). Guilty Plea, ECF No. 15; Plea Agree. ¶ 1, ECF No. 16. Federal authorities arrested Defendant for Illegal Reentry after the New York Police Department arrested and charged Defendant with Assault in the Third Degree, Forcible Touching: Forcibly Touch of Other Person Sexual/Intimate Parts [*sic*], and Harassment in the Second Degree. Defendant, a convicted sex offender, is also charged with Failure to Register as required by the Sex Offender Registration and Notification Act (“SORNA”). *See* 18 U.S.C. § 2250 (requiring registration).

The Court hereby sentences Defendant and sets forth its reasons pursuant to 18 U.S.C. § 3553(c)(2).

DISCUSSION

I. Legal Standard

Section 3553 of Title 18 of the United States Code outlines the procedures for imposing sentence in a criminal case. When the District Court imposes a sentence outside of the Sentencing Guidelines range, the Court “shall state in open court the reasons for its imposition of the particular sentence, and ... the specific reason for the imposition of a sentence different from that described” in the Guidelines. 18 U.S.C. § 3553(c)(2). The Court must also “state[] with specificity” its reasons for so departing “in a statement of reasons form[.]” *Id.*

“The sentencing court’s written statement of reasons shall be a simple, fact-specific statement explaining why the guidelines range did not account for a specific factor or factors under [Section] 3553(a).” *United States v. Davis*, 08-CR-332, 2010 WL 1221709, at *1 (E.D.N.Y. Mar. 29, 2010) (Weinstein, J.) (internal quotation marks and citation omitted). Section 3553(a) provides a list of reasons for the Court to consider in choosing what sentence to impose on a criminal defendant. The Court addresses each of the seven 18 U.S.C. § 3553(a) factors in turn.

II. Analysis

1. The Nature and Circumstances of the Offense and the History and Characteristics of the Defendant

[1] The first § 3553(a) factor considers “the nature and circumstances of the offense and the history and characteristics of the defendant.” 18 U.S.C. § 3553(a)(1). The Court finds a significant sentence is justified under this factor.

On March 5, 2007, Defendant, a citizen of Ecuador, was convicted in Queens County Supreme Court of rape in the second degree, an aggravated felony offense. PSR ¶ 3; Compl. ¶¶ 3-4, ECF No. 1; Letter, ECF No. 11. Defendant, who was eighteen years old at the time, had vaginal intercourse with a twelve year-old, where he inserted his penis into the victim’s mouth and against her anus. PSR ¶ 31. He then ejaculated on her abdomen and thigh. *Id.* Defendant admitted his guilt upon his arrest, claiming that the victim consented and that she had informed him she was fourteen years of age. *Id.* Defendant was originally charged with Rape in the First Degree, but later pled guilty to the lesser-included offense of Rape in the Second Degree, statutory rape. *Id.*

Defendant was convicted for Rape in the Second Degree on March 5, 2007 in Queens County Supreme Court. *Id.* ¶ 3. As a result, Defendant was required to register on the New York State Sex Offender Registry. *Id.* Defendant was sentenced to ten years of probation and was thereafter excluded and removed from the United States. *Id.* ¶ 3; Compl. ¶ 3-4. Nevertheless, in March of 2012, Defendant illegally reentered *359 the United States without permission to reenter. PSR ¶ 7. Defendant has been employed at the Hunts Point Market in Bronx, New York since his illegal reentry. *Id.* ¶ 57.

On February 1, 2015, Defendant, using the name “Antonio Palaguachi” was arrested by the New York City Police Department and charged with Assault in the Third Degree, Forcible Touching: Forcibly Touch Other Persons Sexual/

Intimate Parts, and Harassments in the Second Degree.¹ PSR ¶ 2; Comp. ¶ 2; *see* NY Penal Law §§ 120.00(1), 130.52, 240.26(1). The United States Immigration and Customs Enforcement (“ICE”) was notified of this arrest, and ICE officials ran a criminal history report on Antonio Palaguachi, who turned out to be the defendant in this case. *See* PSR ¶ 4; Comp., ¶¶ 3, 5.

On February 24, 2015, Defendant was arrested outside of the residence of his then-girlfriend—the victim of the February 1st arrest—for illegally reentering the United States. PSR ¶ 5. On March 20, 2015, Defendant was indicted on two counts: Illegal Entry (“Count One”) and Failure to Register (“Count Two”). Indictment, ECF No. 7. Count One charged Defendant with violating 8 U.S.C. §§ 1326(a) and 1326(b) (2). Indictment at 1. Defendant, an alien previously deported from the United States after an aggravated-felony conviction, was found on February 1, 2015 in the United States without consent for admission from the Secretary of the United States Department of Homeland Security. PSR ¶ 1. Count Two charged Defendant with violating 18 U.S.C. § 2250. Indictment at 2. Although Defendant was required to register under SORNA, he failed to update his registration. PSR ¶ 1.

2. The Need for the Sentence Imposed

The second § 3553(a) factor instructs the Court to consider “the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.” 18 U.S.C. § 3553(a)(2).

a. Reflecting the Seriousness of the Offense, Promoting Respect for the Law, and Providing Just Punishment

The Court finds that a significant sentence is necessary to accomplish the purposes of reflecting the seriousness of the offense, promoting respect for the law, and providing just punishment. *See* 18 U.S.C. § 3553(a)(2)(A).

Defendant was deported on February 22, 2008 from the United States following his conviction for Rape in the Second Degree. Despite his removal, Defendant returned to the United States without permission in March of 2012. PSR ¶

7. Defendant's illegal return demonstrates his lack of respect for the laws of the United States. Between March of 2012 and the instant arrest, Defendant lived illegally, and undetected, in the United States, working at Hunts Point Market in Bronx, New York. *Id.* ¶ 57. Even though Defendant has earned enough money to require him to file tax returns, Defendant has failed to do so. *Id.* ¶¶ 35, 83. Furthermore, the record before this Court demonstrates Defendant's serial sex offenses. Defendant's first sexual offense was perpetrated upon a twelve-year-old *360 girl. *Id.* ¶ 31. Defendant allegedly committed his second sexual offense against his own girlfriend. *Id.* ¶ 37.

A significant sentence is necessary to reflect the seriousness of Defendant's offenses, promote respect for the laws of the United States, and provide just punishment for Defendant.

b. Affording Adequate Deterrence to Criminal Conduct

“Under section 3553(a)(2)(B), there are two major considerations: specific and general deterrence.” *Davis*, 2010 WL 1221709, at *2. The Court finds a significant sentence of incarceration is necessary to afford adequate deterrence, both specific and general, to criminal conduct. See 18 U.S.C. § 3553(a)(2)(B).

A significant sentence, followed by removal from the United States, is necessary to punish Defendant for his crimes of Illegal Reentry and Failure to Register. Defendant has shown his willingness to return to the United States despite his prior removal from the country. Defendant has also shown a proclivity towards sexual assault. A significant sentence sends a clear message to Defendant that the Court seriously considers such illegal actions, and adequately deters Defendant from committing either offense again. The Court's significant sentence more directly deters Defendant through incapacitation.

The Court's significant sentence further provides adequate general deterrence, sending a signal to sex offenders who have been removed that failing to register as required under SORNA is a serious offense. Imprisonment for illegal reentry “will send a clear message that illegal reentry into this country will result in a substantial prison sentence, likely deportation, and stringent conditions during the period of supervised released.” *See United States v. Williams*, 07-CR-176, 2007 WL 3010583, at *2 (E.D.N.Y. Oct. 11, 2007) (Weinstein, J.).

c. Protecting the Public from Further Crimes of the Defendant

Defendant has demonstrated an ability to hide from law enforcement officers. For example, Defendant operated under the name “Antonio Palaguachi” during his arrest on February 1, 2015. PSR ¶ 2. This makes Defendant harder to detect, and therefore more dangerous. Furthermore, Defendant, a sex offender of the highest tier recognized under SORNA, has failed to maintain and update his registration information. *See* 18 U.S.C. § 2250. As a recidivist, Defendant is precisely the type of sex offender contemplated by Congress when it enacted SORNA.

Defendant is charged with multiple counts. Multiple terms of supervised release shall run concurrently. 18 U.S.C. § 3624(e). Defendant is unable to pay a fine, PSR ¶ 64, but must pay the mandatory \$200.00 special assessment. Defendant is eligible for not less than one nor more than five years of probation because Counts One and Two are both classified as Class C Felonies. 18 U.S.C. § 3561(c)(1). A fine, restitution, or community service must be imposed as a condition of probation unless extraordinary circumstances exist. 18 U.S.C. § 3563(a)(2). Multiple terms of probation shall run concurrently. 18 U.S.C. § 3564(b).

Furthermore, due to Defendant's sex offenses, Defendant is subject to the sex offender registration provisions of SORNA. *See* 18 U.S.C. § 4042(c).

d. Providing Defendant with Needed Educational or Vocational Training, Medical Care, or Other Correctional Treatment in the Most Effective Manner

During Defendant's incarceration, he has suffered and been treated for a skin rash, two abscesses of the right underarm, and edema on his right big toe. Defendant shall continue to receive treatment, if necessary.

3. The Kinds of Sentences Available

The third § 3553(a) factor requires the Court to discuss “the kinds of sentences available” for Defendant. 18 U.S.C. § 3553(a)(3).

Under Count One, Illegal Reentry in violation of 8 U.S.C. §§ 1326(a) and 1326(b)(2), Defendant is subject to a maximum imprisonment term of twenty years, 8 U.S.C. § 1326(b)(2); a maximum supervised release term of three years to follow any term of imprisonment, 18 U.S.C. § 3583(b); a maximum fine of \$250,000.00, 18 U.S.C. § 3571(b)(3); a \$100.00 special assessment, 18 U.S.C. § 3013; and removal, as set forth in paragraph six of the plea agreement, Plea Agree. ¶¶ 1, 6.

***361** Under Count Two, Failure to Register in violation of 18 U.S.C. § 2250, Defendant faces a maximum imprisonment term of ten years, 18 U.S.C. § 2250(a)(3); a mandatory supervised release term of five years for violating SORNA, 18 U.S.C. § 3583(k); a maximum fine of \$250,000.00, 18 U.S.C. § 3571(b)(3); a \$100 special assessment, 18 U.S.C. § 3013; and removal, as set forth in paragraph six of the plea agreement, Plea Agree. ¶¶ 1, 6.

4. The Kinds of Sentence and the Sentencing Range Established For Defendant's Offenses

The fourth § 3553(a) factor requires the Court to detail “the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines.” 18 U.S.C. § 3553(a)(4)(A).

For Count One, Illegal Reentry in violation of 8 U.S.C. §§ 1326(a) and 1326(b)(2), Guidelines § 2L1.2 sets the base offense level at eight. U.S. Sentencing Guidelines Manual § 2L1.2 (U.S. Sentencing Comm'n 2015) (“U.S.S.G.”). Because Defendant was removed after a felony conviction for a crime of violence, *i.e.*, rape, a sixteen-level increase is added. U.S.S.G. § 2L1.2(b)(1)(A)(ii). This results in an adjusted offense level of twenty-four for Count One.

For Count Two, Failure to Register in violation of 18 U.S.C. § 2250, Guidelines § 2A3.5 sets a base offense level dependent upon the “tiered” categorization of Defendant's sex crime under SORNA. *See* U.S.S.G. § 2A3.5. SORNA provides a three-tiered classification of individuals convicted of a sex offense. *See* 42 U.S.C. § 16911. This tiered classification system builds atop one another. Thus, for a sex offender to be classified as a Tier III sex offender, the offender must first satisfy the requirements of both Tier I and Tier II. *See id.* §§ 16911(3)(C), (4)(C).

Probation considers Defendant to be a Tier III offender, because Defendant was convicted of a sex offense punishable by imprisonment for more than one year and the conviction is comparable to, or more severe than, abusive sexual contact against a minor under the age of thirteen. PSR

¶ 16. Specifically, Defendant's prior rape conviction was committed against a twelve year old, and carried a potential custodial sentence of two to four years. *Id.* As a Tier III sex offender, Defendant's base offense level for Count Two is sixteen. U.S.S.G. § 2A3.5(a)(1).

Defendant has been convicted under multiple counts. Under Guidelines § 3D1.2, counts of conviction are grouped together if they "involve substantially the same harm within the meaning of this rule." *Id.* § 3D1.2. Counts involve "substantially the same harm" under this rule when they satisfy any of these four requirements: (a) they "involve the same victim and the same act or transaction"; (b) they "involve the same victim and two or more acts or *362 transactions" that either are "connected by a common criminal objective" or constitute "part of a common scheme or plan"; (c) "one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts"; or (d) the offense level for each count "is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior." *Id.* § 3D1.2(a)-(d).

Defendant pled guilty to two counts that cannot be grouped together as "closely related." *See id.* § 3D1.2. Because neither Count One, Illegal Reentry, nor Count Two, Failure to Register, have a specific "victim," the Guidelines instruct the Court to consider "the societal interest that is harmed" in determining whether the counts are related. *Id.* § 3D1.2 cmt. n.2. The societal interest harmed by Defendant's Illegal Reentry is not the same, or even similar, to the societal interest harmed by Defendant's Failure to Register. Count One seeks to "enforce immigration laws" "effectively," *United States v. Jimenez-Cardenas*, 684 F.3d 1237, 1240 (11th Cir.2012) (collecting cases), whereas Count Two seeks to protect society against sex offenders. It is clear that Illegal Reentry and Failure to Register cause different societal harms. Accordingly, the Court finds that these two Counts are not sufficiently closely related to be grouped together under Guidelines § 3D1.2.

Accordingly, to take into account the lower offense, the greater adjusted offense level of twenty-four is increased by one offense level, *see* U.S.S.G. §§ 3D1.3, 3D1.4, resulting in a combined adjusted offense level of twenty five.

Defendant's Acceptance of Responsibility warrants a three-level adjustment. *Id.* § 3E1.1.

Taking all these considerations into account, Defendant has a total offense level of twenty-two. With a Criminal History category of II, the Guidelines recommend a sentence of forty-six to fifty-seven months of incarceration.

Defendant objects to the Probation Office's Guidelines calculation for Counts One and Two. Def. Mot. Continue, ECF No. 19 (outlining two grounds of objection); PSR Obj., ECF No. 21. The Court rejects the objections.

a. Defendant's Challenge to Guidelines Calculation for Illegal Reentry

Defendant argues that statutory rape is not a "crime of violence" and, thus, should not trigger the sixteen-level enhancement of Guidelines § 2L1.2(b)(1)(A)(ii). In making this argument, Defendant (1) analogizes the term "crime of violence" as understood under the Guidelines and the term "violent felony" as defined under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e); and (2) relies upon the recent *Johnson v. United States* Supreme Court case, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). The Court first addresses each component of this argument before turning to the argument itself.

Guidelines § 2L1.2 applies a sixteen-level enhancement for any defendant removed after being convicted of a felony that is a "crime of violence." U.S.S.G. § 2L1.2(b)(1)(A)(ii). The term "crime of violence" is not defined in the "black letter" of § 2L1.2. Instead, the term is defined in the Commentary immediately following § 2L1.2 through various offenses, which specifically include "forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, *363 incompetent, or coerced), statutory rape, [and] sexual abuse of a minor."²

ACCA required federal courts to impose a minimum imprisonment term of fifteen years for any person in unlawful possession of a firearm with "three previous convictions by any court ... for a violent felony." 18 U.S.C. § 924(e). A "violent felony," as defined by ACCA, is any crime that (1) "has as an element the use, attempted use, or threatened use of physical force against another person;" or (2) "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential

risk of physical injury to another[.]” *Id.* § 924(e)(2)(B)(i)-(ii). The first definition is commonly referred to as the “force clause.” The “or otherwise” clause of the second definition is commonly referred to as the “residual clause.” *Johnson*, 135 S.Ct. at 2556.

In *Johnson v. United States*, the Supreme Court held unconstitutional the enhancement of a criminal defendant's sentencing under the “residual clause” of ACCA, 18 U.S.C. § 924(e).³ *Id.* The Supreme Court reasoned that increasing a sentence under the residual clause of ACCA violates due process because “the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges.” *Johnson*, 135 S.Ct. at 2557.

In essence, Defendant argues that the “crime of violence” enhancement under Guidelines § 2L1.2 should be void for vagueness in light of *Johnson*'s finding that the residual clause of ACCA is the same. The Defendant is wrong. Unlike *Johnson*, the term “crime of violence” used under Guidelines § 2L1.2 does not “both den[y] fair notice to defendants and invite[] arbitrary enforcement by judges.” *Johnson*, 135 S.Ct. at 2557. Defendant's specific crime, *i.e.*, statutory rape, is unequivocally included in the “crime of violence” enhancement under Guidelines § 2L1.2.

Statutory rape unquestionably falls within the United States Sentencing Commission's understanding of a “crime of violence” as it applies to Illegal Reentry. *See supra* n.2 (providing the definition of “crime of violence” under § 2L1.2).

Unlike the residual clause of ACCA, the “crime of violence” term found under Guidelines § 2L1.2 does not “both den[y] fair notice to defendants and invite[] arbitrary enforcement by judges.” *Johnson*, 135 S.Ct. at 2557. Defendant is awarded fair notice, because the definition of the term includes statutory rape as a specific example of a “crime of violence” under Guidelines § 2L1.2. There is also no risk of inviting “arbitrary enforcement by judges,” because statutory rape is explicitly *364 covered under the term “crime of violence” under Guidelines § 2L1.2.

[2] Supreme Court's “modified categorical approach”—an approach that applies to “divisible” statutes. *See Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 2285, 186 L.Ed.2d 438 (2013) (defining a “divisible” statute as one that “lists multiple, alternative elements, and so effectively creates several different crimes”). Under this modified categorical

approach, the Court first “identif[ies] from among several alternatives, the crime of conviction” for the instant crime. *Descamps*, 133 S.Ct. at 2285. Here, the crime is statutory rape. The Court next compares that crime to “the generic offense,” which focuses “on the elements, rather than the facts, of a crime.” *Descamps*, 133 S.Ct. at 2285. Here, the Court considers the elements of the statutory rape statute under which Defendant was convicted. In determining whether statutory rape, N.Y. Penal Law § 130.30, is a crime of violence under the modified categorical approach, the Court does not consider the particular facts of Defendant's offense.

New York Penal Law § 130.30 provides:

A person is guilty of rape in the second degree when:

1. being eighteen years old or more, he or she engages in sexual intercourse with another person less than fifteen years old; or
2. he or she engages in sexual intercourse with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated.

It shall be an affirmative defense to the crime of rape in the second degree as defined in subdivision one of this section that the defendant was less than four years older than the victim at the time of the act.

Rape in the second degree is a class D felony.

N.Y. Penal Law § 130.30 (McKinney). Statutory rape under N.Y. Penal Law § 130.30 consists of an age component and a physical act component. Here, in order to be convicted under § 130.30, an offender must commit the physical act of “engag[ing] in sexual intercourse.” *Id.* The very act of sexual intercourse without the legal capability of consent constitutes a crime of violence. *See United States v. Banos-Mejia*, 2013 WL 1613222, at *2 (9th Cir. Apr. 16, 2013), withdrawn on denial of reh'g en banc, 2013 WL 4038591 (9th Cir. July 19, 2013) (“A conviction under Penal Law § 130.30 qualifies categorically as a ‘forcible sex offense’ because the full range of conduct prohibited by the statute of conviction falls within the meaning of a ‘forcible sex offense.’ ”); *United States v. Sanchez-Sanchez*, 13-CR-18, 2013 WL 3479559, at *2 (D.Or. July 10, 2013) (“I follow the Ninth Circuit's decision in *Banos-Mejia* and hold that defendant's conviction under § 163.355 categorically qualifies as a ‘crime of violence’ because it is a ‘forcible sex offense.’ ”).

Accordingly, a sixteen-level enhancement is appropriate and the Guidelines adjusted offense level of twenty-four is correct for Count One, Illegal Reentry.

b. Defendant's Objection to Guidelines Calculation for Failure to Register

Defendant argues that he should be classified as a Tier I sex offender, rather than a Tier III sex offender. The Court finds otherwise. Defendant falls within the definition of a Tier III sex offender as defined under 42 U.S.C. § 16911(4)(A)(ii).

A Tier III sex offender is defined, in relevant part, as “a sex offender whose offense is punishable by imprisonment for more than 1 year and ... is comparable to or more severe than ... abusive sexual contact ... against a minor who has not attained the age of 13 years.” *365 42 U.S.C. § 16911(4)(A)(ii). “Abuse sexual contact” is described in 18 U.S.C. § 2244, which makes reference to 18 U.S.C. § 2243. *See id.* Section 2243(a) provides, in relevant part, that a person commits sexual abuse of a minor when the person “knowingly engages in a sexual act with another person who (1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging[.]” 18 U.S.C. § 2243(a).

New York Penal Law § 130.30, to which Defendant pled guilty, prohibits a person who is eighteen years or older from “engag[ing] in sexual intercourse with another person less than fifteen years old.” The New York statutory rape law is more restrictive than the federal law, because the New York law prohibits sexual intercourse with an individual less than fifteen years of age, whereas the federal law prohibits sexual intercourse with an individual less than sixteen years of age.

The Court declines to apply the categorical imperative approach to the age component of § 16911. As the Tenth Circuit held last year in *United States v. White*, “Congress intended the courts to also consider the actual age of the victim by looking to the specific circumstances of the defendant's crime.” 782 F.3d 1118, 1134–35 (10th Cir.2015); *see also United States v. Byun*, 539 F.3d 982, 993 (9th Cir.2008) (“[T]he best reading of the statutory structure and language [of SORNA] is that Congress contemplated a non-categorical approach as to the age of the victim.”); *United States v. Berry*, 814 F.3d 192, 196 (4th Cir.2016) (agreeing with the Tenth Circuit). Looking to the facts of the instant case, Defendant was charged with Rape in the First Degree, which contains an age component of “less than thirteen years old,” N.Y. Penal

Law § 130.35(4), and here, the victim was twelve years old. PSR ¶ 31.

Accordingly, Defendant's base offense level for Count Two, Failure to Register, is sixteen.

* * *

Defendant argues for a total offense level of twelve, which, with a criminal history category of II, produces a Guidelines sentence of twelve to eighteen months of incarceration. Def. PSR Obj. at 1. Defendant requests time served, which would amount to fourteen months as of this writing. *Id.* at 9.

Probation disagrees on both fronts. PSR 2d Add., ECF No. 25. Probation recommends fifty-seven months of incarceration for each count to run concurrently and five years of supervised release with various special conditions. *Id.* The Government also disagrees and requests a Guidelines sentence of forty-six to fifty-seven months incarceration. Govt. Sentencing Mem. at 8, ECF No. 28.

The Court finds that Defendant's total offense level is twenty-two, and, with a Criminal History category of II, the Guidelines recommend forty-six to fifty-seven months of incarceration. The Guidelines further recommend supervised release for one-to-three years for Count One, U.S.S.G. § 5D1.2(a)(2), and the mandatory five years of supervised release under 18 U.S.C. § 3583(k), U.S.S.G. § 5D1.2(c). Defendant is ineligible for probation. U.S.S.G. § 5B1.1 cmt. n. 2.

5. Pertinent Policy Statement(s) of the Sentencing Commission

The fifth § 3553(a) factor requires the Court to evaluate “any pertinent policy statement issued by the Sentencing Commission ... and that ... is in effect on the date the defendant is sentenced.” 18 U.S.C. § 3553(a)(5). There are no pertinent policy statements issued by the Sentencing Commission in regards to this *366 case, and this factor is not relevant in the Court's sentence. The Sentencing Commission, however, has expressed an intent to revise the Guidelines after *Johnson v. United States*. *See Press Release U.S. Sentencing Comm'n, U.S. Sentencing Commission Adopts Amendments to Definition of “Crimes of Violence” in Federal Sentencing Guidelines and Proposes Additional Amendments (Jan. 8, 2016)*,

available at <http://www.ussc.gov/news/press-releases-and-news-advisories/january-8-2016> (“The amendment, which eliminates the so-called ‘residual clause,’ was informed by the recent Supreme Court case, *Johnson v. United States*, issued in June 2015.”)

As the Honorable Andrew S. Hanen, United States District Judge from the Southern District of Texas, noted in his letter to the United States Sentencing Commission dated October 23, 2015, the proposed changes are far from certain because: “In the proposed new definition, the Commission is deleting ‘sexual abuse of a minor’ and ‘statutory rape’ from its definition of a crime of violence. While one could argue that these crimes are subsumed under the reference to the definition of section in § 4B1.2(a) and its further reference in Application Note 2(E) to the two definitions contained in 18 U.S.C. § 2246, there is no reason to deliberately create such an ambiguity. The only possible rationale for this wording change is expediency. It has nothing to do with the recent Supreme Court case of *Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). Understandably, the Commission wants to make the Guidelines easy to use. Certainly, if the definition found in § 4B1.2(a) matched the definition used in § 2L1.2 it would be easier for courts to use. This is not an unworthy goal, but whatever is gained in expediency is not worth endangering the well-being of the children of this country.” See Letter from Andrew S. Hanen, U.S. District Judge, to U.S. Sentencing Commission (Oct. 23, 2015) (on file as exhibit A on ECF).

6. The Need to Avoid Unwarranted Sentence Disparities

The § 3553(a) factor requires the Court to consider “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6). The Court’s sentence does not pose a threat of unwarranted sentence disparities.

7. The Need to Provide Restitution

Lastly, the seventh § 3553(a) factor requires the Court to touch upon “the need to provide restitution to any victims of the offense.” 18 U.S.C. § 3553(a)(7). Restitution is not applicable in this case and is not a consideration in the Court’s sentence.

CONCLUSION

For Count One, a sentence of 57 months of incarceration, to be followed by 5 years of supervised release, with no fine and the \$100.00 mandatory assessment fee, is sufficient but no greater than necessary to accomplish the purposes of 18 U.S.C. § 3553(a)(2). For Count Two, a sentence of 57 months of incarceration, to be followed by five years of supervised release, with no fine and a \$100.00 mandatory assessment fee, which together with the Count One mandatory assessment fee brings the total mandatory assessment fees on Count One and Count Two to a total of \$200, is sufficient but no greater than necessary to accomplish the purposes of 18 U.S.C. § 3553(a)(2). The terms of incarceration and supervised release are to run concurrently. Furthermore, Defendant is subject to being removed from the United States after serving his 57 months of incarceration. An immigration detainer is already in *367 effect. U.S. Probation Dept. Sentencing Rec. at 1, ECF No. 18-1.

The Court expressly adopts the factual findings of the Presentence Investigation Report along with the findings of the two addendums to the Presentence Investigation Report.

SO ORDERED.

EXHIBIT A



UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF TEXAS

ANDREW S. HANEN

U.S. DISTRICT JUDGE

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BROWNSVILLE, TEXAS 78520-7114

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October 23, 2015

Office of Public Affairs

U.S. Sentencing Commission

One Columbus Circle, NE, Suite 2-500

Washington, DC 20002-8002

Via-Electronic Mail

Via-Regular Mail &

Re: *Proposed Amendments due to Johnson v. United States*

Dear Sir/Madam:

Please consider this letter as a comment on the proposed changes to the Sentencing Guidelines now being considered. This letter addresses two of the proposed changes that apply to some of the most violent criminals our population faces. Both are changes to the definitional sections contained in the Application Notes, and both are fraught with the danger of misinterpretation.

A. The Deletion of Sexual Abuse of a Minor and Statutory Rape as Crimes of Violence

In the proposed new definition, the Commission is deleting “sexual abuse of a minor” and “statutory rape” from its definition of a crime of violence. While one could argue that these crimes are subsumed under the reference to the definition section in § 4B1.2(a) and its further reference in Application Note 2(E) to the two definitions contained in 18 U.S.C. § 2246, there is no reason to deliberately create such an ambiguity. The only possible rationale for this wording change is expediency. It has nothing to do with the recent Supreme Court case of *Johnson v. United States*, — U.S. —, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015). Understandably, the Commission wants to make the Guidelines easy to use. Certainly, if the definition found in § 4B1.2(a) matched the definition used in § 2L1.2 it would be easier for courts to use. This is not an unworthy goal, but whatever is gained in expediency is not worth endangering the well-being of the children of this country. There are multiple reasons to reject these proposals, but let me highlight two.

First, the “statutory rape” and “sexual abuse of a minor” provisions are the only two provisions under which many sexual offenses perpetrated against minors fall. *368 To

delete these is to do a great injustice to our society and encourages (or at least fails to discourage) those who commit heinous crimes against children. This is especially true in the cases which fall under § 2L1.2—where courts are required to analyze not only federal law but the law of each of the fifty states. These laws vary greatly and do not necessarily contain the same elements or protect children in the same fashion. My court has had many cases where the underlying offense is a crime against a child which would not necessarily fall under the umbrella of a forcible sex offense as proposed (especially when courts are compelled to use the categorical approach) but which were clearly crimes involving sexual abuse of a minor. To understand my concern, one need only remember how narrowly most circuits interpreted “forcible sex offenses” prior to the 2008 Guideline changes in that § 2L1.2 definition. Latching onto the term “forcible,” many circuits held rape was not a crime of violence. Given this history, the Commission should not even consider the change. Additionally, in many cases covering a vast array of conduct which all would agree would otherwise constitute sexual abuse of a minor, the defendant pleads guilty as part of a plea agreement to statutory rape because it is an offense upon which both the prosecution and defense can agree (since many times the only proof needed is the conduct and the age differential). It saves the child from having to testify, and the label is more appealing to many defendants as being less disparaging. The Commission’s proposal will have the effect of lowering the penalties against seriously bad behavior perpetrated against children. It is hard to believe that the Commission intends to lessen the penalties against child abusers. If that is the intent, I think the Commission should seriously rethink its priorities.

If that is not the Commission’s intent, then it brings me to the second problem with this proposed amendment. By deleting these offenses from the definition section while at the same time including other similarly-situated enumerated offenses in the new definition found in § 4B1.2(a), it leads to the inescapable conclusion that the Commission meant for these crimes not to be considered as crimes of violence, thus precluding the argument that might otherwise be made that these offenses somehow fall under “forcible sexual offenses.” The case law concerning the interpretation of statutory deletions using the concept of “*expressio unius est exclusio alterius*” (or, stated in English, the expression of one concept is to exclude others) is found in every jurisdiction. See, e.g., *Hillman v. Maretta*, — U.S. —, 133 S.Ct. 1943, 1953, 186 L.Ed.2d 43 (2013), for a recent example. Carrying over the enumerated crimes of murder, voluntary manslaughter,

kidnapping, and aggravated assault from § 2L1.2 into the new definition found in § 4B1.2 but not doing the same for sexual abuse of a minor and statutory rape will lead to only one logical outcome: statutory rape and sexual abuse of a child are not crimes of violence because the Commission intended to drop these acts from the crime of violence definition.

There is an easy fix for this omission. The proposed definition of a “forcible sex offense” could be re-written as follows:

§ 4B1.2, Application Note 2(E)

A “forcible sex offense” is any offense requiring a sexual act or sexual contact to which consent to the actor's conduct (i) is not given, (ii) is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced, or (iii) is statutory rape or sexual abuse of a minor. The terms “sexual act” and “sexual contact” *369 have the meaning given in 18 U.S.C. § 2246.

If the law underlying Chapter 4 does not support this change for career offenders, then the Commission should not change the § 2L1.2 definition at all.

B. The Definition of Murder

The second area I suggest the Commission rethink is the use of the term “malice aforethought” in the definition of murder. I do not have the time or resources to analyze the law in all fifty states, but I do know that under the Model Penal Code and the penal code here in Texas “malice aforethought” is not a concept currently in use. Therefore, for those jurisdictions that are situated like Texas or that utilize statutes with language similar to the Model Penal Code, a murder under those laws would never be a murder under the Sentencing Guidelines. Is this the result that the drafters intended? I do not know how many jurisdictions would be excluded using this definition, but I think if it excludes even one it is a mistake. I strongly suggest that the Commission drop the “malice aforethought” language.

I realize that the manner in which the proposed amendment utilizes “malice aforethought” may be interpreted as a different way of expressing “purposefully [or intentionally], knowingly, or recklessly ...” given their inclusion in the parenthetical that follows that phrase, but that will not be how it will be interpreted. In all likelihood, given the way it is phrased, to qualify as murder there will have to be proof of an applicable *mens rea* (purposefully,

knowingly, or recklessly) and then additional proof of “malice aforethought.” BLACK'S LAW DICTIONARY defines “malice aforethought” as “[a] predetermination to commit an act without legal justification or excuse.” The second definition states it is the “intentional doing of an unlawful act” If it is the intention of the Commission that the use of “malice aforethought” means “intentional,” then why confuse it with concepts of legal justification or excuse which no doubt may vary greatly from state to state? Just say:

“Murder is (1) the intentional, purposeful, knowing, or reckless (under circumstances manifesting extreme indifference to human life) ... unlawful killing of a human being (including but not limited to an act done with malice aforethought or premeditation).”

This is an easier definition for courts to use. More importantly, it is less likely to be misinterpreted. It matches not only the generic, contemporary definition but also the more traditional definition of murder, and it conforms with the Model Penal Code. Further, it does not suggest that a court needs to investigate the facts and/or statutes underlying a conviction to try to determine how, if at all, that jurisdiction utilizes “malice aforethought.”

Secondly, with respect to murder, most state statutes include in their murder definition, either by exact wording or by interpretation, the concept of homicides that are committed in the course of a criminal attempt to commit a felony or in an effort to escape. These concepts could easily be included if the Commission would add the following:

causing the death of another human being in the course of committing, attempting to commit, or immediate flight from the commission or attempt to commit another felony

The Commission's proposed definition omits both the “attempting to commit another felony” language and the “immediate flight” language. The attempt language found in § 2L1.2, Application Note 5 of the Guidelines will not save this omission. I think both the “attempt” and “flight” language should be included if the Commission's goal is to encapsulate the current, *370 contemporary understanding of murder as it is found in most jurisdictions.

Of the two, I am most concerned about the Commission's willingness to adopt any measure which is either intended to be, or can be interpreted later to be, a measure to drop the penalties for rape or sexual abuse of a child. If the proposed amendments pass as currently drafted, it will certainly be the perception that the Sentencing Commission has lowered the penalties one faces for having sexually abused children. I hope that this is not the intent of these amendments, but, regardless of the intent, it certainly will be the result.

Yours truly,

/s/

Andrew S. Hanen

United States District Judge

ASH:am

cc: Judge Patti B. Saris
Chair—United States Sentencing Commission

United States Courthouse

One Courthouse Way, Room 6130

Boston, MA 02210

Via-Regular Mail

Chief Judge Ricardo Hinojosa

Vice-Chair United States Sentencing Commission

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McAllen, Texas 78502-5007

Via-Regular Mail

All Citations

187 F.Supp.3d 356

Footnotes

1 These charges have been dropped due to the victim's refusal to cooperate with law enforcement. See Govt. Sentencing Mem. at 2, ECF No. 28; PSR Add., ECF No. 20.

2 Commentary note 1.B.iii defines a crime of violence as "any of the following offenses under federal, state, or local law:

murder, manslaughter, kidnapping, aggravated assault, *forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.)*

U.S.S.G. § 2L1.2 (emphasis added).

3 In relevant part, ACCA provides:

In the case of a person who violates section 922(g) of this title and has three previous convictions by any court ... for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be ... imprisoned not less than fifteen years[.]

18 U.S.C. § 924(e)(1).

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2016 WL 5338711

Only the Westlaw citation is currently available.
United States District Court, M.D. Florida,
Tampa Division.

UNITED STATES of America

v.

Joseph Karl PHILLIPS.

Case No. 8:16-cr-117-T-33MAP

|

Signed 09/23/2016

Attorneys and Law Firms

Amanda C. Kaiser, US Attorney's Office, Tampa, FL, for
United States of America.

Defendant entered a plea of guilty to violating 13 V.S.A. § 2602, which provides:

A person who shall willfully and lewdly commit any lewd or lascivious act upon or with the body, or any part or member thereof, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of such person or of such child, shall be imprisoned for the first offense, not less than one year nor more than five years, or fined not more than \$3,000.00, or both....

ORDER

VIRGINIA M. HERNANDEZ COVINGTON, UNITED STATES DISTRICT JUDGE

*1 Defendant Joseph Karl Phillips entered a plea of guilty to failure to register as a sex offender in violation of the Sex Offender Registration and Notification Act. At sentencing, Defendant raised an objection to his presentence report in which he is categorized as a tier II sex offender. Defendant maintains that he should be scored as a tier I sex offender. Defendant filed his Sentencing Memorandum on September 15, 2016. (Doc. # 30). The Government filed its Sentencing Memorandum on September 18, 2016. (Doc. # 31). The Court pronounced its sentence on September 23, 2016, and as explained below, determined that Defendant is a tier II sex offender.

I. Background

While residing in Vermont, the Defendant was convicted of sexually molesting his fourteen year old step-daughter in August of 2005. The arrest affidavit from those proceedings generally states that after the victim went to bed, Defendant crawled naked into bed with her and placed his hand underneath her shirt. She told him to stop. Defendant then put his hand down the front of his step-daughter's pants and, after she crossed her legs so he could not go any further, Defendant put his hand down the back of her pants, touching her rectal area.

On June 20, 2006, Defendant was convicted of lewd and lascivious conduct with a child in the Vermont Superior Court for Essex County in Vermont in Case Number 70-9-5. (Doc. # 28 at 7). Under the Sex Offender Registration and Notification Act (SORNA), Defendant had a duty to register as a sex offender and keep the registration current, in each jurisdiction where he resided. 42 U.S.C. § 16901.

On July 23, 2009, upon Defendant's release from prison for the offense of lewd and lascivious conduct with a child, Defendant reported to a Vermont police station to register as a sex offender. (Doc. # 17 at 2). In December of 2013, Defendant moved to New Hampshire, where he initially continued registering as a sex offender. (*Id.*).

However, in October of 2014, Defendant moved to Tennessee, established his residence, and obtained a drivers' license, but did not notify New Hampshire authorities of his relocation. (*Id.* at 3). The state of New Hampshire issued a warrant for his arrest for failure to notify the authorities about his intent to leave New Hampshire. (*Id.*). Thereafter, in August of 2015, Defendant moved to Hudson, Florida. (*Id.*). On August 8, 2015, Defendant reported to a Florida DMV office to update his address, but he did not register as a sex offender in Florida. (*Id.*). On December 18, 2015, law enforcement conducted a check of the national sex offender registry and determined that Defendant had last registered as a sex offender in New Hampshire. (*Id.*).

*2 On March 17, 2016, Defendant was charged in a one-count indictment with knowingly and unlawfully failing to register and update registration as required by SORNA, in violation of 18 U.S.C. § 2250(a). (Doc. # 1). Defendant entered a plea of guilty to the offense of failing to register as a sex offender on June 13, 2016. (Doc. # 18). This Court accepted Defendant's guilty plea on June 29, 2016. (Doc. # 24).

The Defendant's sentencing began on September 19, 2016. (Doc. # 32). However, the Court continued the sentencing September 23, 2016, to resolve the issue of whether Defendant is a tier I or tier II sex offender.

In SORNA cases, the defendant's guidelines sentencing range is dependent upon the defendant's sex offender classification. Specifically, the Sentencing Guidelines assign base offense levels of sixteen, fourteen, and twelve for tier III, tier II, and tier I sex offenders, respectively. U.S.S.G. § 2A3.5(a). SORNA classifies defendants as tier I, tier II, or tier III depending on the seriousness of the underlying offense. United States v. Berry, 814 F.3d 192, 195 (4th Cir. 2016).

A tier II sex offender is:

a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and –

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

- (i) sex trafficking (as described in [18 U.S.C. § 1591]);
- (ii) coercion and enticement (as described in [18 U.S.C. § 2422(b)]);
- (iii) transportation with intent to engage in criminal sexual activity (as described in [18 U.S.C. § 2423(a)]);
- (iv) abusive sexual contact (as described in [18 U.S.C. § 2244]);

(B) involves –

- (i) use of a minor in a sexual performance;
- (ii) solicitation of a minor to practice prostitution; or
- (iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

42 U.S.C. § 16911(3)(emphasis added). Tier I, on the other hand, "serves as a catch-all provision for convicted sex offenders not otherwise grouped into Tier II or Tier III." United States v. Morales, 801 F.3d 1, 3 (1st Cir. 2015).

Defendant maintains that he is a tier I sex offender because the relevant Vermont Statute is not comparable to any of the above-enumerated offenses, while the Government contends that Defendant should be categorized as a tier II sex offender because his offense is comparable to "coercion and enticement" as criminalized in 18 U.S.C. § 2422(b).

II. Analysis

Recently, the Fourth Circuit determined that "Congress intended courts 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." Berry, 814 F.3d at 197 (quoting United States v. White, 782 F.3d 1118, 1135 (10th Cir. 2015)).

Here, both Defendant and the Government agree that it is appropriate to utilize a categorical approach because the Vermont statute in question is non-divisible. See United States v. Simard, 731 F.3d 156, 161 (2d Cir. 2013) ("13 Vt. Stat. Ann. § 2602...criminalizes a single, non-divisible offense"). The Government also concedes that "if the Vermont statute is compared to the federal statute of 'abusive sexual contact,' the state statute is broader than its supposed federal counterpart." (Doc. # 31 at 8).

*3 Thus, utilizing the categorical approach, the Court will compare the Vermont statute, 13 Vt. Stat. Ann. § 2602, to "coercion and enticement," as described in 18 U.S.C. § 2422(b).¹ In Simard, the Second Circuit carefully scrutinized 13 Vt. Stat. Ann. § 2602, explaining that the purpose of the Vermont statute is "protecting children from sexual exploitation by any form of physical contact initiated for that purpose," but also recognizing that under Vermont law, "lewd and lascivious conduct does not necessarily require physical contact between the perpetrator and the victim." Simard, 731 F.3d 163. The Vermont statute "targets exploitation and coercion, or the 'misuse or maltreatment of a minor for the purpose associated with sexual gratification.' " Id. (citing United States v. Barker, 723 F.3d 315, 324 (2d Cir. 2013)). And, in the Eleventh Circuit, it is well recognized that: "The

conclusion that ‘sexual abuse of a minor’ is not limited to physical abuse also recognizes an invidious aspect of the offense; that the act, which may or may not involve physical contact by the perpetrator, usually results in psychological injury for the victim, regardless of whether any physical injury was incurred.” United States v. Padilla-Reyes, 247 F.3d 1158, 1163 (11th Cir. 2001).

The question posed is whether the relevant offense in Vermont (violation of statute, 13 Vt. Stat. Ann § 2602), is comparable to or more severe than coercion and enticement, as described in 18 U.S.C. § 2422(b), such that Defendant may be classified as a tier II sex offender.

The coercion and enticement statute, 18 U.S.C. § 2422(b), targets those who “knowingly persuade[], induce[], entice[], or coerce[] any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense...”

Like the Vermont statute, the federal coercion and enticement statute seeks to protect minors from coercion and sexual predation. And, just like the Vermont statute, the coercion and enticement statute does not require any physical contact with the victim. In fact, the Court’s research revealed many cases in which defendants were tried with violation of the coercion and enticement statute (or an attempt to violate that statute) by communicating with the victim in an effort to persuade a minor to engage in a sexual act. See e.g. United States v. Engle, 676 F.3d 405, 423 (4th Cir. 2012) (“When a defendant initiates a conversation with a minor, describes the sexual acts that he would like to perform on the minor, and proposes a rendezvous to perform those acts, he has crossed the line toward enticing a minor to engage in unlawful sexual activity.”). With reference to § 2422(b), the Engle court explained: “Sexual abuse of minors can be accomplished by several means and is often carried out through a period of grooming.” Engle, 676 F.3d at 412 (citing United States v. Chambers, 642 F.3d 588, 593 (7th Cir. 2011)). Section 2422(b) “target[s] the sexual grooming of minors as well as the actual sexual exploitation of them.” Engle, 676 F.3d at 412 (citing United States v. Berg, 640 F.3d 239, 252 (7th Cir. 2011)).

With the benefit of oral argument, using a categorical approach, and not considering the facts of the actual offense against his step-child, the Court finds Defendant’s offense in Vermont is “comparable to” or even more serious than a violation of 18 U.S.C. § 2422(b), so that he is a tier II

offender. The Vermont statute was enacted to protect children from sexual exploitation, coercion, and abuse (whether with or without physical contact). To find a defendant guilty of lewd and lascivious conduct with a child under the Vermont statute, the state has to prove the following elements:

1. Defendant _____;
2. acting willfully;
3. Lewdly committed a [lewd] [lascivious] act [upon] [with] the body of (victim) _____, by (specific acts) _____;
- *4 4. At that time, (victim) _____ was under the age of 16 years; and
5. Defendant _____ intended to [arouse] [appeal to] [gratify] [his or her own] [the child’s] [lust] [passions] [sexual desires].

Meanwhile, “to establish a violation of § 2422(b), the government has to prove the following four elements: (1) the use of a facility of interstate commerce; (2) to knowingly persuade, induce, entice, or coerce, or attempt to persuade, induce, entice, or coerce; (3) any individual who is younger than 18; (4) to engage in any sexual activity for which any person can be charged with a criminal offense.” United States v. Cochran, 510 F. Supp. 2d 470, 475 (N.D. Ind. 2007).

These statutes criminalize coercion and enticement of minors to engage in sexual activity, and neither one requires physical contact with the victim. The Berry court instructs:

The categorical approach focuses solely on the relevant offenses’ elements, comparing the elements of the prior offense of conviction with the elements of the pertinent federal offense, also referred to as the generic offense. United States v. Price, 777 F.3d 700, 704 (4th Cir.) cert. denied, 135 S. Ct. 2911 (2015). If the elements of the prior offense “are the same, or narrower than,” the offense listed in the federal statute, there is a categorical match. Descamps, 133 S. Ct. at 2281. But if the elements of the prior conviction “sweep more broadly,” id. at 2283, such that there is a “realistic probability” that the statute of the offense of prior conviction encompasses conduct outside of the offense enumerated in the federal statute, the prior offense is not a match.

Berry, 814 F.3d at 195-196. The Court finds that the Vermont statute is narrower in scope than the generic federal statute of coercion and enticement and therefore, there is a match.

Defendant is therefore sentenced a tier II sex offender. As pronounced in open Court, the Court sentenced Defendant to a term of 15 months imprisonment. At the conclusion of the sentencing proceeding, the Government requested that the Court make an alternative finding that Defendant would be sentenced to 15 months imprisonment regardless of whether he was a tier I or tier II sex offender based on an analysis of the Sentencing Guidelines. The Court declines to make an alternative finding as a preventative measure in the instance that the Eleventh Circuit may disagree with the Court's tier

II finding. In the instance that an appeal is taken and the Eleventh Circuit reverses the Court's sentence, the Court will take the matter up upon remand.

DONE and **ORDERED** in Chambers in Tampa, Florida, this 23rd day of September, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 5338711

Footnotes

1 The Government and the Defendant agree that it is not necessary to compare the Vermont statute to the generic federal "abusive sexual contact" statute, and the Court has accordingly not compared the two statutes.

677 Fed.Appx. 575

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2.

United States Court of Appeals, Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Pedro RAMIREZ, Defendant-Appellant.

No. 15-15283

|

Non-Argument Calendar

|

Filed (January 26, 2017)

Synopsis

Background: Defendant pled guilty in the United States District Court for the Middle District of Florida, No. 8:13-cr-00614-EAK-EAJ-1, to failure to register as a sex offender and his guideline sentence range was calculated at 46 to 57 months' imprisonment. Defendant appealed.

Holdings: The Court of Appeals held that:

[1] imposition of a base offense level of 14 on defendant who was a Tier II sex offender was warranted, and

[2] imposition of an eight level sentencing enhancement based on defendant's commission of a sex offense while unregistered was warranted.

Affirmed.

West Headnotes (3)

[1] Sentencing and Punishment 🔑 Sex offenses, incest, and prostitution

Imposition of a base offense level of 14 on defendant, at sentencing following guilty plea to failure to register as a Tier II offender was warranted, as defendant was a Tier II

offender; while defendant had previously been found guilty of committing Florida offense of "sexual battery (slight force)," and had been found not guilty of Florida offense of unlawful sexual activity with a minor, defendant's sexual battery conviction required jury to find that his contact with victim was not consensual, and thus, defendant's prior conviction for sexual battery was comparable to federal offense of abusive sexual contact against a minor. 18 U.S.C.A. §§ 2244(b), 2250(a); 42 U.S.C.A. § 16911(3); Fla. Stat. Ann. § 794.011(5) (2000); U.S.S.G. § 2A3.5(a)(2).

[2] Sentencing and Punishment 🔑 Sex offenses, incest, and prostitution

Imposition of an eight level sentencing enhancement based on commission of a sex offense while unregistered was warranted at defendant's sentencing following his guilty plea to failure to register as a sex offender; while evidence of sex offense was in the form of hearsay reports that defendant had groped a 12-year old girl, and district court did not explicitly find hearsay was reliable, reliability of girl's reports to her mother and police investigator was apparent from record, and that defendant had not been convicted of sex offense against girl did not preclude enhancement, since guideline called for enhancement if defendant had "committed" a sex offense against minor. 18 U.S.C.A. § 2250(a); U.S.S.G. § 2A3.5(b)(1)(A), (C).

[3] Sentencing and Punishment 🔑 Manner and effect of weighing or considering factors

Defendant's sentence following his guilty plea to failure to register as a sex offender was not procedurally unreasonable, where district court considered statutory factors to be considered in imposing a sentence, and did not miscalculate guidelines range, which was 46 to 57 months' imprisonment. 18 U.S.C.A. §§ 2250(a), 3553(a).

Attorneys and Law Firms

***576** Peter J. Sholl, Arthur Lee Bentley, III, Jennifer Lynn Peresie, U.S. Attorney's Office, Tampa, FL, for Plaintiff-Appellee

Pedro Luis Amador, Jr., Amador Law Firm, PA, Tampa, FL, for Defendant-Appellant

Appeal from the United States District Court for the Middle District of Florida, D.C. Docket No. 8:13-cr-00614-EAK-EAJ-1

Before ED CARNES, Chief Judge, HULL and WILSON, Circuit Judges.

Opinion

PER CURIAM:

Pedro Ramirez pleaded guilty to failure to register as a sex offender in violation of 18 U.S.C. § 2250(a). The presentence investigation report recommended a base offense level of 14 under § 2A3.5(a)(2) of the United States Sentencing Guidelines (2014) because Ramirez met the criteria as a Tier II offender. The PSR also recommended an eight-level increase under § 2A3.5(b)(1)(C) of the guidelines because he had committed a sex offense against a minor during the period when he had ***577** failed to register as a sex offender. After taking into account Ramirez's acceptance of responsibility and calculating his total offense level to be 19, and after assigning Ramirez with a criminal history category of IV, the resulting advisory guidelines range was 46 to 57 months imprisonment.

Ramirez appeals that sentence, contending that (1) the district court erred in classifying him as a Tier II sex offender, (2) the district court erred in applying the eight-level enhancement for committing a sex offense against a minor while failing to register as a sex offender, and (3) that his sentence was procedurally unreasonable. As to his first two arguments, we review *de novo* the district court's interpretation and application of the sentencing guidelines and we review for clear error its factual findings. See *United States v. De La Cruz Suarez*, 601 F.3d 1202, 1219 (11th Cir. 2010). As for his third argument, we review for abuse of discretion the procedural reasonableness of a sentence. See *United States v. Register*, 678 F.3d 1262, 1266 (11th Cir. 2012).

I.

[1] Section 2A3.5(a)(2) of the guidelines provides for a base offense level of 14 for a defendant who "was required to register as a Tier II offender." U.S.S.G. § 2A3.5(a)(2). The definition of "Tier II sex offender" includes a person who was convicted of a sex offense that is both "punishable by imprisonment for more than 1 year" and "comparable to" the offense of "abusive sexual contact (as described in section 2244 of title 18)" when "committed against a minor." 42 U.S.C. § 16911(3). The crime of abusive sexual contact under § 2244 includes "engage[ing] in sexual contact with another person without that other person's permission." 18 U.S.C. § 2244(b).

In 2002 Ramirez was found guilty of committing Florida sexual battery (slight force) and found not guilty of unlawful sexual activity with a minor. Florida's crime of sexual battery (slight force) is governed by § 794.011(5) of the Florida code which, at that time, provided:

A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof does not use physical force and violence likely to cause serious personal injury commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, s. 775.084, or s. 794.0115.

Fla. Stat. § 794.011(5) (West 2000).¹ Ramirez contends that the fact that he was found not guilty of unlawful sexual activity with a minor demonstrates that the sexual encounter in that case was consensual, and that the only reason he was convicted of sexual battery was because the 16-year-old victim could not legally provide consent. That distinction, however, does not matter. Ramirez was convicted of sexual battery, which required that the jury find that the contact was not consensual. The district court did not err in finding that Ramirez qualified as a Tier II offender because of his prior conviction for sexual battery, a crime comparable to "abusive sexual contact" against a minor.

II.

[2] Ramirez also contends that the district court erred in applying the eight-level enhancement for committing a sex offense against a minor while unregistered. Section 2A3.5(b)(1)(A) of the guidelines provides that “[i]f, while in a failure to register status, the defendant committed ... a *578 sex offense against a minor, increase by 8 levels.” Ramirez argues that the enhancement was improper because the only evidence supporting the facts underlying it was unreliable hearsay.²

“When the government seeks to apply an enhancement under the Sentencing Guidelines over a defendant’s factual objection, it has the burden of introducing sufficient and reliable evidence to prove the necessary facts by a preponderance of the evidence.” United States v. Washington, 714 F.3d 1358, 1361 (11th Cir. 2013) (quotation marks omitted). “[A] court may rely on hearsay at sentencing, as long as the evidence has sufficient indicia of reliability, the court makes explicit findings of fact as to credibility, and the defendant has an opportunity to rebut the evidence.” United States v. Anderton, 136 F.3d 747, 751 (11th Cir. 1998). A district court’s failure to make explicit findings about the reliability of a witness’ hearsay testimony, however, does not require reversal when the reliability is apparent from the record. United States v. Docampo, 573 F.3d 1091, 1098 (11th Cir. 2009).

The conduct at issue for the eight-level enhancement involved Ramirez’s contact with a 12-year-old girl, and the hearsay Ramirez challenges is the statements the girl made to her mother and to a law enforcement investigator. At the sentence hearing the child’s mother testified that Ramirez was staying at her home one night when she woke up to find him standing outside of her daughter’s bedroom. After she went into that bedroom, her daughter, who was in a distressed state, told her that Ramirez had been in that room and had been groping her. The mother reported Ramirez to the police, and the investigator who responded to that report also testified at the sentence hearing that the child, who was visibly upset when he spoke to her, had told him that Ramirez had groped her.

While the district court did not explicitly state that it found the hearsay reliable, the consistency of the child’s statements to both her mother and the investigator, along with their testimony that the child was visibly upset that night, make the reliability of her statements apparent from the record. The district court did not err in allowing the hearsay testimony to

be admitted into evidence and concluding that the necessary facts had been established by a preponderance of the evidence at the sentence hearing.

Ramirez also argues that the eight-level enhancement was improper because he was not convicted of a sex offense for his actions toward the 12-year old child. After the mother reported Ramirez to law enforcement, he was charged with lewd or lascivious molestation but was convicted only of felony battery. He now contends that for the eight-level enhancement to apply he had to have been convicted of a sex offense against a minor. The language of the guideline enhancement, however, does not require a conviction. It instead calls for an enhancement if the defendant “committed” a sex offense against a minor. See U.S.S.G. 2A3.5(b)(1)(C); see also United States v. Lott, 750 F.3d 214, 220–21 (2d Cir. 2014) (“Neither 42 U.S.C. § 16911(5) nor U.S.S.G. § 2A3.5(b)(1)(C) require a sex offense conviction in order to apply an eight-level increase pursuant to section 2A3.5; conduct amounting to a ‘sex offense’ *579 is enough.”). As a result, the district court did not err in imposing the eight-level enhancement even though there was no sex offense conviction for the conduct.

III.

[3] Finally, Ramirez contends that his sentence is procedurally unreasonable. “A sentence may be procedurally unreasonable and therefore an abuse of discretion if the court commits a significant procedural error such as failing to consider the Guidelines or miscalculating the Guideline range, failing to give due weight to the [18 U.S.C.] § 3553(a) factors, or failing to explain the reason for a chosen sentence.” United States v. Bonilla, 579 F.3d 1233, 1245 (11th Cir. 2009).

Ramirez contends that his sentence is procedurally unreasonable because the district court incorrectly calculated the guidelines range and failed to consider the § 3553(a) factors. As we have already noted, the two guidelines challenges Ramirez makes—his classification as a Tier II offender and the imposition of the eight-level enhancement—fail. As for his contention that the district court failed to consider the § 3553(a) factors, at the sentence hearing the district court explicitly stated that it had considered all seven factors in § 3553(a) as well as Ramirez’s arguments. The district court did not commit procedural error in sentencing Ramirez.

AFFIRMED.

All Citations

677 Fed.Appx. 575

Footnotes

- 1 While Florida sexual battery is not limited to victims who are minors, Ramirez concedes that the victim of his Florida crime was 16 years old.
- 2 He also contends that the district court should not have allowed the hearsay to be admitted because he was deprived of the opportunity to confront the declarant. That argument has no merit and is foreclosed by our precedent. See United States v. Cantellano, 430 F.3d 1142, 1146 (11th Cir. 2005) (“The right to confrontation is not a sentencing right.”).

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2015 WL 13667427

Only the Westlaw citation is currently available.
United States District Court, D. New Mexico.

UNITED STATES of America, Plaintiff,

v.

Undrio Antwanne ROEBUCK, Defendants.

No. CR 13-3673 RB

|

Filed 01/26/2015

Attorneys and Law Firms

Anna R. Wright, United States Attorney's Office, Las Cruces, NM, for Plaintiff.

MEMORANDUM OPINION AND ORDER

ROBERT C. BRACK, UNITED STATES DISTRICT JUDGE

*1 Defendant Undrio Roebuck, who pled to the crime of failing to register as a sex offender, objected to the way the probation officer categorized his underlying sex offense. (Doc. 35.) The Government responded that the probation officer discounted the seriousness of Mr. Roebuck's sex offense and made its own objection. (Doc. 41.) Having reviewed the parties' submissions and arguments, the Court sustains the Defendant's objection and overrules the United States' objection.

I. BACKGROUND

Defendant Undrio Roebuck was indicted for failing to register as a sex offender in violation of 18 U.S.C. §§ 2250(a) and 16913. (Indictment, Doc. 2.) The length of Mr. Roebuck's sentence is partially determined by the severity of his prior sexual conviction, as defined by the Sex Offender Registration and Notification Act ("SORNA"). *See* 42 U.S.C. § 16901 *et seq.* SORNA categorizes sex offenders into three tiers of increasing severity. 42 U.S.C. § 16911. Although the definitions seem clear, it is no easy task determining which tier a particular conviction falls under.

When considering Mr. Roebuck's potential sentence during plea negotiations the Assistant United States Attorney, representing the Government, and Assistant Federal Public

Defender, representing Mr. Roebuck, considered Mr. Roebuck to be a Tier I sex offender. For Tier I sex offenders, the base offense level for failing to register is 12. USSG § 2A3.5. With this understanding, Mr. Roebuck plead to the Indictment. (Doc. 26.)

In the pre-sentencing report, the Probation Officer determined that Mr. Roebuck was a Tier II sex offender with a base offense level of 14. (PSR ¶ 18.) Mr. Roebuck and his counsel objected to this characterization and insisted that Mr. Roebuck is a Tier I sex offender. Mr. Roebuck argues that courts must take a "categorical approach" to determining the applicable Tier. Under the categorical approach, the court looks only to the elements of the statute for defendant's predicate offense and compares the elements to the tier definitions in the federal statute. The Court does not consider the facts or conduct underlying the defendant's prior offense.

Re-evaluating the facts and the law, the Government changed its position. After scouring the record for the underlying sex offense, the Government determined that Mr. Roebuck was a Tier III sex offender. The Government urges the Court to adopt a non-categorical, circumstance-specific approach, examining the underlying facts of the prior conviction, unanchored by the elements of the criminal statute.

II. DISCUSSION

The questions before the Court are (1) when determining the advisory Guideline sentence, should the Court use the element-based categorical approach or a circumstance-specific approach?; and (2) which tier level applies to Mr. Roebuck? The Court concludes that when determining a defendant's sentence, it will follow the categorical approach. Applying said approach, Mr. Roebuck is a Tier I sex offender.

A. The Categorical Approach

Courts are in flux over the correct way to apply SORNA. Some courts apply a categorical approach while other courts employ a circumstance-specific approach. The Tenth Circuit voiced its own uncertainty over the issue. *See United States v. Forster*, 549 Fed.Appx. 757, 676-80 ("[I]t is far from clear whether a categorical approach should be applied to SORNA."). On different occasions, the Tenth Circuit applied the SORNA statute using both methods. *Compare Forster*, 549 Fed.Appx. at 676-80 (applying a categorical approach to determine the defendant's tier), with *United States v. Black*,

773 F.3d 1113 (10th Cir. 2014) (looking at the defendant's and victim's ages to determine whether defendant could be required to register under SORNA).

*2 Some of the confusion over SORNA's application stems from the fact that the definitions in Section 16911 are applied to two related, but crucially different situations. The SORNA scheme contains both civil and criminal provisions. For the most part, SORNA is a non-punitive, civil statute. *See United States v. Lawrence*, 548 F.3d 1329, 1333 (10th Cir. 2008) ("SORNA is both civil in its stated intent and nonpunitive in its purpose."). To enforce the civil requirements, Congress created criminal penalties codified in United States Code, Title 18, Section 2250. *United States v. Lewis*, 768 F.3d 1086, 1089 (10th Cir. 2014). Sometimes courts are asked to interpret SORNA's definitions when considering if a defendant should be subject to the civil registration provisions. Other times, courts are asked to interpret the definitions when considering how to sentence a defendant charged with failing to register under SORNA.

Although courts strive to interpret statutes consistently, *Thompson/Ctr. Arms Co.*, 504 U.S. 505, 517-18 (1992), the current interpretations of SORNA differ depending on whether the court is applying the civil or criminal provisions. All of the cases the Government cites for applying a circumstance-specific approach to SORNA involve situations where a court was considering the civil provisions of the statute, namely whether a defendant is required to register as a sex offender. *See Black*, 773 F.3d at 1113; *United States v. Gonzalez-Medina*, 757 F.3d 425, 429 (5th Cir. 2014) (applying a circumstance-specific approach when determining if the defendant is exempt from reporting requirements under § 16911(5)(C)); *United States v. Dodge*, 597 F.3d 1347, 1355 (11th Cir. 2010) (examining underlying conduct when reviewing defendant's requirement to report); *United States v. Byun*, 539 F.3d 982, 992 (9th Cir. 2008) (applying a fact-based approach when determining if a defendant has to register as a sex offender). In contrast, courts interpreting SORNA's criminal penalties during sentencing have applied a categorical approach. *See Forster*, 549 Fed.Appx. at 676-80; *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1133 (9th Cir.), cert. denied, 135 S. Ct. 124 (2014); *United States v. Taylor*, 644 F.3d 573, 576 (7th Cir. 2011); *United States v. Backus*, 550 Fed.Appx. 260, 262 (6th Cir.) cert. denied, 134 S. Ct. 2153 (2014). The two different situations reveal a logical divide.

When applying SORNA's civil provisions, courts reason that the circumstance-specific approach helps effect Congress' broad purposes in enacting SORNA. SORNA's civil provisions created a "comprehensive national system for the registration of sex offenders." *Black*, 773 F.3d at 1113 (quoting 42 U.S.C. § 16901). As the Ninth Circuit in *Byun* notes, SORNA's "legislative history reveals substantial discussion of the necessity of identifying all child predators." 539 F.3d at 993. Given the congressional command, it is understandable that multiple courts have felt compelled to apply a circumstance-specific approach when determining if a defendant is required to register under SORNA. *But see United States v. Baptiste*, — F. Supp. 2d —, No. EP-13-CR-2311-KC, 2014 WL 3672971, at *3 (W.D. Tex. July 24, 2014) (finding that the Attorney General's federal regulations compel an element-based approach when determining if SORNA's registration requirements apply to a particular defendant).

The posture of courts sentencing registered sex offenders is different. When a defendant admits to being a sex offender under SORNA, the sentencing court metes a punishment for the failure to update registration, not for the predicate sex offense. In so doing, the court must "impose a sentence sufficient, but not greater than necessary" to comply with the purposes of sentencing. 18 U.S.C. § 3553(a). Sentencing courts have deferred to the utility of the categorical approach for analyzing a predicate sex offense. *Cabrera-Gutierrez*, 756 F.3d at 1133 ("[W]e follow the categorical approach established in *Taylor v. United States*.") Across a variety of statutes, sentencing courts employ the categorical approach. *See, e.g., Taylor v. United States*, 495 U.S. 575 (1990) (explaining the categorical approach when considering a prior conviction under the Armed Career Criminal Act ("ACCA")); *James v. United States*, 550 U.S. 192 (applying categorical approach to the residual clause in the ACCA); *United States v. Koufos*, 666 F.3d 1243, 1250 (10th Cir. 2011) (applying categorical approach to determine base level offense for firearms cases under USSG § 2k2.1(a)); *United States v. Barraza-Ramos*, 550 F.3d 1246, 1249 (10th Cir. 2008) (applying categorical approach to determine base offense level in illegal reentry cases under USSG § 2L1.2(b)(1)(A)).

*3 The Supreme Court recently reiterated its reasoning for using the categorical approach to determine predicate offenses during sentencing. *Descamps v. United States*, 133 S. Ct. 2276 (2013). In *Descamps*, the Supreme Court considered how a court should determine if a defendant's prior conviction could constitute a predicate offense under the

ACCA. The Supreme Court considered congressional intent, Sixth Amendment implications, the practical difficulties of a circumstance-specific approach, and the unfairness to defendants who previously entered into a plea bargain. The reasoning of *Descamps* holds true for categorizing underlying offenses under SORNA.

First, the Supreme Court analyzed the wording of the ACCA statute. Looking to the provision which requires three “previous convictions,” the Court reasoned that this language shows “Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions.” ⁴ *Id.* at 2287 (quoting *Taylor*, 495 U.S. at 600). The Court reasoned that this approach provides clarity to sentencing courts, defendants, and state legislators. “Congress … meant ACCA to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none.” *Id.*

Similar to the ACCA provision, the SORNA statutory provisions for failing to register require the offender to be “convicted” of the offense. 42 U.S.C. § 16911(1) (“The term ‘sex offender’ means an individual who was convicted of a sex offense.”). This alone could be “the relevant statutory hook” signaling a categorical analysis. *Moncreiffe v. Holder*, 133 S. Ct. 1678, 1685 (2013) (reasoning that “conviction” is the “relevant statutory hook” requiring a categorical approach). The text of SORNA, however, is inconsistent.

The SORNA statute later states that a “sex offense” can be defined as “a criminal offense that is a specified offense against a minor.” 42 U.S.C. § 16911(5)(A)(ii). The words “specified offense against” may suggest a circumstance-specific approach. *Byun*, 539 F.3d at 992. Other provisions sweep even more broadly. Subsection 7 states that a “specified offense against a minor” includes, among other definitions, “[a]ny conduct that by its nature is a sex offense against a minor.” 42 U.S.C. § 16911(7)(I). The term “any conduct” seemingly demands a fact-based approach. The Eleventh Circuit described this provision as a catch-all that “could not be any broader.” *Dodge*, 597 F.3d at 1355.

The Court could again draw a distinction between the statutory provisions necessary to determine the civil versus the criminal requirements. But that is unsatisfying. In Subsection 3, the statute states that several crimes constitute Tier II crimes “when committed against a minor.” 42 U.S.C. § 16911(3). This wording seems to require a court to look at the

age of the victim. *Byun*, 539 F.3d at 992. Cf. *United States v. Hayes*, 555 U.S. 415, 418, 427 (2009) (holding that a domestic —relationship requirement found in 8 U.S.C. § 921(a)(33)(A) need not be an element of the predicate statute of conviction because holding otherwise would make the provision a “dead letter”). In short, the wording of the SORNA statute neither commands nor rejects the categorical approach. The Court must look to the other *Descamps* factors.

Second, the *Descamps* Court reviewed the Sixth Amendment implication. “Under ACCA, the court’s finding of a predicate offense indisputably increases the maximum penalty.” *Descamps*, 133 S. Ct. at 2288. That in turn implicates a defendant’s Sixth Amendment rights. Unlike the ACCA enhancements, neither party argues that changing the base offense level under SORNA would increase the prescribed statutory maximum. In that respect, the Sixth Amendment is not directly implicated. See *United States v. Stock*, 685 F.3d 621, 628 n.5 (6th Cir. 2012) (“[T]he failure-to-register guideline does not to our knowledge require a district judge to find any fact that increases the available penalty for a SORNA violation.”). Determining that a defendant is a Tier III as opposed to a Tier I offender, however, could add eleven to sixteen months of imprisonment.

⁴ Although the defendant’s constitutional rights are not directly implicated, many of the concerns underlying the Supreme Court’s analysis of the Sixth Amendment issue do apply. Taking a circumstance-specific approach puts the later sentencing court in the uncomfortable position of questioning “what the defendant and state judge must have understood as the factual basis of the prior plea” or, in the case of a jury trial, what the jury members understood about the conviction. *Shepard v. United States*, 544 U.S. 13, 25 (2005) (plurality portion of the opinion). However, “the only facts the court can be sure the jury so found are those constituting elements of the offense....” *Descamps*, 133 S. Ct. at 2287; see also *Shepard*, 544 U.S. at 26 (applying similar logic to plea agreements).

Third, the Court in *Descamps* considered the “daunting difficulties” that a circumstance-specific approach entails. *Id.* at 2289. Anything but a categorical approach requires:

[S]entencing courts … to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial.... The

meaning of those documents will often be uncertain. And the statements of fact in them may be downright wrong.

Id. Here, the Government urges the Court to look at an even broader sweep of evidence, including the probable cause statement and police reports. (Tr. 27:15-18, 28:21-23.) Such evidence is not necessarily reliable because the reporting officer can rely on hearsay and has no duty to disclose exculpatory evidence. To fairly determine the facts underlying the predicate conviction, the Court would have to conduct a mini-retrial of the underlying facts. The Supreme Court stated that “avoidance of collateral trials” is at “the heart of the decision” to apply the categorical approach. *Shepard*, 544 U.S. at 23. A retrial is an especially daunting task given that violators of SORNA’s reporting requirements may have been convicted decades earlier. In this case, the sexual offense occurred sixteen years ago.

The Court finds the practicality argument especially compelling given that the office first charged with formally evaluating a defendant’s base offense level is the probation office. Probation officers are already asked to conduct detailed inquiries into a defendant’s history, criminal record, and the nature of the instant offense. Asking a probation officer to also adjudicate the nature of the conduct underlying a predicate offense—notwithstanding the elements of the statute—puts a tremendous and precarious burden on the shoulders of probation officers. Employing the categorical approach is more efficient because it acts as “an on-off switch.” *Descamps*, 133 S. Ct. at 2287. Once the judiciary determines a statute can or cannot serve as a predicate, the probation office can apply the ruling consistently in all future cases.

Finally, the Court in *Descamps* considered the potential inequities of the circumstance-specific approach. Specifically, the Court raised the concern that the fact-based approach “will deprive some defendants of the benefits of their negotiated plea deals.” *Id.* Defendants waive their constitutional rights to plead to crimes, often in exchange for being charged with a lesser crime. *See id.* Under the circumstance-specific approach, “a later sentencing court could treat the defendant as though he had pleaded to [a more serious offense], based on legally extraneous statements found in the old record.” *Id.* Such a system “would allow a later sentencing court to rewrite the parties’ bargain.” *Id.*

Although the concerns in *Descamps* do not perfectly align with the circumstances facing a sentencing court in the SORNA context, the reasoning is nonetheless persuasive. Given the practical and fairness considerations in *Descamps*, applying the categorical approach to Section 2250 violators is the best approach. The Government’s two arguments advocating for the circumstance-specific method on policy grounds do not change this analysis.

*5 First, the Government argues that the categorical approach will reduce sex offenders’ sentences based on technicalities and the vagaries of the laws. The Government cites the Tenth Circuit’s categorical approach in *Forster* for this proposition. In *Forster*, the defendant was convicted under a state statute for a “gross sexual imposition” against a minor younger than 13 years of age. *Forster*, 549 Fed.Appx. at 759. SORNA cross-references a federal statute that carves out a criminal category for sex offenses against a minor under 12. 42 U.S.C. § 16911(4)(A)(ii) (referencing 18 U.S.C. § 2244). The Tenth Circuit held that the two statutes were comparable and “protect the same age group of minors from unlawful sexual contact.” *Forster*, 549 Fed.Appx. at 769. The Government explains that the Appeals Court must have glossed over the age gap and looked at the underlying age of the victim. (Tr. 24:22-25:8.) This, the Government argues, reveals the Circuit’s desire to circumvent mere technicalities. However, as the Tenth Circuit explained, it did not need to gloss over anything. The relevant age definitions are identical “because [SORNA] expressly defines the scope of § 2244’s substantive provisions, for purposes of the tier regime, to apply to only a ‘minor who has not attained the age of 13 years.’” *Forster*, 549 App’x at 769 (quoting 42 U.S.C. § 16911(4)(A)(ii)). Thus, the state statute in *Forster* is comparable to the Tier III definition in Section 16911.

The Government’s age-gap technicality fears are not convincing given the broad wording in SORNA’s tier regime. The age cut-off for Tier III offenses is defined as under 13 years of age, regardless of the age references in the cross-referenced federal statutes. Similarly, Tier II applies to “minors.” 42 U.S.C. § 16911(3)(A). A minor is defined as anyone under the age of 18. 42 U.S.C. § 16911(14). As the Government argues, “§ 16911(3)(A) has the effect of expanding the definition [of age under Section 2243] for the purposes of Tier II.” (Doc. 41 at 7.) The definition of minor broadens SORNA’s scope to remedy inconsistencies in the laws of the various states and territories.

Second, the Government raises the concern that the element-based approach will discount the seriousness of a defendant's prior crimes. The tier classification, however, only determines the base offense level in the Sentencing Guideline. The base offense level is a starting point, but not the final sentence. *See Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011) ("The Guidelines provide a framework or starting point ... for the judge's exercise of discretion."). Sentencing judges can exercise their discretion to depart upwards if the Sentencing Guideline does not reflect the grave nature of a defendant's crimes. *See* 18 U.S.C. § 3553(a)(1) (requiring a sentencing court to consider the "history and characteristics of the defendant"). The categorical approach does not foreclose a judge's discretionary determination.

In sum, given the fact that the Circuits reviewing sentencing under Section 2250 use the categorical approach, the considerations analyzed in *Descamps*, and a court's ability to consider relevant conduct, the Court concludes that it will apply the categorical approach. Defendant's objection to the presentence report is sustained.

B. Applying the Approach

Although more practical and efficient than the circumstance-specific approach, the categorical approach is by no means easy to apply.

Mr. Roebuck was previously convicted under a Texas statute that defines sexual assault as a "person: ... (2) intentionally or knowingly: (A) caus[ing] the penetration of the anus or female sexual organ of a child by any means." V.T.C.A. § 22.011(a)(2)(A). A "child" is defined as "a person younger than 17 years of age." V.T.C.A. § 22.011(c)(1). The statute is a strict liability statutory rape statute. *Byrne v. State*, 358 S.W.3d 745, 747 (Tex. App. 2011).

Under the federal statute, the elements of Mr. Roebuck's predicate conviction do not make him a Tier III sex offender. To be considered Tier III, the crime has to be punishable by more than one year of prison and include an element of abuse against a minor under 13 years of age, kidnapping, or recidivism. *See* 42 U.S.C. § 16911(4). The statute under which Mr. Roebuck was convicted does not qualify as a predicate for Tier III sex offenses.

*⁶ Turning to the next tier, a Tier II sex offender is anyone whose offense is punishable by more than one year of prison

and, among other crimes, commits sexual abuse against a minor under the age of 18. 42 U.S.C. § 16911(3)(A)(iv). Through layers of cross-references, sexual abuse is, among other definitions, knowingly (1) engaging in a sexual act with another "by threatening or placing that person in fear;" (2) engaging in a sexual act with another who is "incapable of appraising the nature of the conduct;" (3) engaging in a sexual act with an individual between the ages of 12 and 16; (4) engaging in a sexual act with a ward; or (5) knowingly engaging in a sexual act without the other person's permission. 18 U.S.C. § 2244 (referencing Sections 2241-2243).

The statute under which Mr. Roebuck was convicted does not include any elements of force or non-consent. The most pertinent provision is Section 2243(a), which prohibits a "knowing[] ... sexual act" with another person who (1) is between 12 and 16 years old; and (2) is at least four years younger than the offender. 18 U.S.C. § 2243(a). Importantly, Section 2243(a) allows a defendant to argue mistake of fact—that he "reasonably believed that the other person had attained the age of 16 years." *Id.* § 2243(c)(1). The Texas statute, in contrast, is a strict liability statute which applies even if there is a mistake of fact. *Byrne*, 358 S.W.3d at 747. Thus, the Texas statute sweeps more broadly than the federal statute.

Because the Texas statute is broader than—and not identical or comparable to—the federal definition of the crime, Mr. Roebuck's prior Texas conviction cannot serve as a predicate for a Tier II sex offense. As a default, Mr. Roebuck is classified as a Tier I sex offender.

C. Motion for a Downward Departure

The Defendant moves for two downward departures.

First, the Defendant asks that his Criminal History be changed from a Category IV to a Category III based on his rehabilitation. The Government opposes this change, noting that the Defendant's criminal history was correctly calculated. The Court declines to alter Defendant's criminal history category. This objection is overruled.

Second, based on his status as a family man and his rehabilitation, the Defendant requests a lower than Guideline sentence, based on the Section 3553(a) factors. The Government opposes this variance based on Defendant's repeated failures to register. Mr. Roebuck spoke eloquently about the changes he has made in his life. However, the Court

cannot completely ignore Mr. Roebuck's repeated failures to register. The Court will vary slightly, imposing a sentence of twelve months and one day.

III. CONCLUSION

The Court agrees that courts sentencing registered sex offenders should employ the categorical approach when comparing an underlying sex offense to SORNA's definitions. Applying this approach, the Court determines that Mr. Roebuck is a Tier I sex offender. Taking this ruling into account, Defendant has a total offense level of 10 and a criminal history category of IV. The advisory Guideline sentence is 15 to 21 months imprisonment. After granting a downward variance based on Section 3553(a) factors, the Court commits Mr. Roebuck to the custody of the Bureau of Prisons for a term of 12 months and one day. He must comply with other conditions and terms of release, as detailed in his Judgment.

THEREFORE,

IT IS ORDERED that:

- (1) Defendant's objection to the presentence report (Doc. 35) is **SUSTAINED**;
- (2) Defendant's Motion for a Downward Departure (Doc. 35) is **GRANTED** in part and **DENIED** in part; and
- (3) The United States' objection to the presentence report (Doc. 41) is **OVERRULED**.

All Citations

Not Reported in Fed. Supp., 2015 WL 13667427

872 F.3d 742
United States Court of Appeals, Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Alton YOUNG, Defendant–Appellant.

No. 16-60790

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FILED October 6, 2017

Synopsis

Background: Defendant pleaded guilty in the United States District Court for the Northern District of Mississippi to failing to register as a sex offender in violation of Sex Offender Registration and Notification Act (SORNA). Defendant appealed.

Holdings: The Court of Appeals, Jennifer Walker Elrod, Circuit Judge, held that:

[1] defendant's prior Mississippi conviction for touching a child for lustful purposes subjected him to Tier III base offense level under Sentencing Guidelines, and

[2] defendant waived his argument that Mississippi statute of conviction criminalized conduct against a person under the age of 16 years and so was broader than federal offense of abusive sexual contact.

Affirmed.

West Headnotes (7)

- [1] **Mental Health** Offenses and prosecutions
Sentencing and Punishment Sex offenses, incest, and prostitution
If a state statute is comparable to or more severe than the federal offenses of aggravated sexual abuse, sexual abuse, or abusive sexual contact, a defendant with a prior conviction under that state statute will be subject to the Tier III base offense level under the Sentencing Guidelines for failure to register as a sex offender in violation of

Sex Offender Registration and Notification Act (SORNA). 18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20911; U.S.S.G. § 2A3.5.

8 Cases that cite this headnote

[2] **Criminal Law** Review De Novo

For properly preserved claims, Court of Appeals reviews the district court's interpretation and application of the Sentencing Guidelines de novo. U.S.S.G. § 1B1.1 et seq.

2 Cases that cite this headnote

[3] **Mental Health** Offenses and prosecutions

Court of Appeals would follow the categorical approach in determining whether defendant's prior Mississippi conviction for touching a child for lustful purposes was comparable to or more severe than the generic federal crimes of aggravated sexual abuse, sexual abuse, or abusive sexual contact, and thus subjected defendant to Tier III base offense level under Sentencing Guidelines for his conviction for failing to register as sex offender in violation of Sex Offender Registration and Notification Act (SORNA). 18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20911(4)(A); Miss. Code. Ann. § 97-5-23; U.S.S.G. § 2A3.5.

12 Cases that cite this headnote

[4] **Mental Health** Offenses and prosecutions

Sentencing and Punishment Sex offenses, incest, and prostitution

Defendant's prior Mississippi conviction for touching a child for lustful purposes was comparable to federal offense of sexual abusive contact, and thus subjected defendant to Tier III base offense level under Sentencing Guidelines upon his conviction for failing to register as sex offender in violation of Sex Offender Registration and Notification Act (SORNA); although defendant pointed to possible ways that conduct could fall within Mississippi statute of conviction but outside of federal offense of abusive sexual contact, such as lustful touching of a child's shoulder, ear, or toe, he failed

to establish realistic probability that State of Mississippi would apply its statute to such conduct, and the relevant offenses contained comparable elements, even if the body parts that were the subject of the touching were specifically listed in federal definition. 18 U.S.C.A. §§ 2244, 2246(3), 2250(a); 34 U.S.C.A. § 20911; Miss. Code. Ann. § 97-5-23; U.S.S.G. § 2A3.5.

8 Cases that cite this headnote

[5] **Sentencing and Punishment** ↗ Objections and disposition thereof

Defendant waived his argument on appeal that Mississippi statute under which he was previously convicted of touching a child for lustful purposes criminalized conduct against a person under the age of 16 years and so was broader than federal offense of abusive sexual contact, which restricted the age of the victim to less than 13 years, and thus he was not subject to sentencing as Tier III sex offender for failing to register as a sex offender in violation of Sex Offender Registration and Notification Act (SORNA); in his written objection to the presentence investigation report (PSR) and at sentencing, defendant stated that he raised no argument with respect to the age requirements of the state and federal statutes involved in the analysis. 18 U.S.C.A. § 2250(a); 34 U.S.C.A. § 20911(4)(A)(ii); Miss. Code. Ann. § 97-5-23; U.S.S.G. § 2A3.5.

3 Cases that cite this headnote

[6] **EstoppeL** ↗ Nature and elements of waiver
“Waiver” is the intentional relinquishment or abandonment of a known right.

[7] **Criminal Law** ↗ Presentation of questions in general
Waived errors are unreviewable.

*744 Appeal from the United States District Court for the Northern District of Mississippi

Attorneys and Law Firms

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Before JOLLY and ELROD, Circuit Judges, and RODRIGUEZ, District Judge.*

Opinion

JENNIFER WALKER ELROD, Circuit Judge:

Alton Young appeals the district court’s classification of Young as a Tier III sex offender based on his prior conviction for touching a child for lustful purposes in violation of Mississippi Code section 97–5–23. On appeal, Young argues that the district court should have applied the categorical approach in making its tier determination and, in doing so, found that the Mississippi statute criminalizes a broader range of conduct than the generic federal offenses that result in Tier III classification. Applying the categorical approach and concluding that the Mississippi statute and the federal offense of abusive sexual contact are comparable, we AFFIRM.

I.

On November 17, 2009, Alton Young was convicted of touching a child for lustful purposes in violation of section 97–5–23 of the Mississippi Code. As a result of his conviction, Young was required to register as a sex offender pursuant to the Sex Offender Registration and Notification Act (SORNA). Young failed to register as a sex offender. On March 30, 2016, an arrest warrant was issued and executed for Young. On August 4, 2016, Young pleaded guilty to one count of failure to register as a sex offender in violation of 18 U.S.C. § 2250(a).

Prior to his sentencing, Young filed a written objection to the Presentence Investigation Report (PSR) prepared in his case. Specifically, Young objected to his classification as a Tier III sex offender based on his Mississippi conviction. Young

asked the district court to apply the categorical approach and find the language of the Mississippi statute too broad to fall under the generic definitions called for by *745 42 U.S.C. § 16911, which defined a Tier III sex offender.¹ If scored as a Tier I offender, as Young requested, Young faced a recommended sentencing range of 10–16 months, as opposed to 18–24 months as a Tier III offender.

At sentencing, Young again argued against his classification as a Tier III offender. The government responded that Fifth Circuit precedent supports use of a circumstance-specific approach over a categorical approach, which would show the need for Young’s Tier III classification.² With respect to the breadth of Mississippi Code section 97–5–23, the government suggested it is in fact narrower than the federal statutes because under the federal statutes an individual could be convicted for touching to humiliate or degrade, while the Mississippi statute specifically requires that the touching be to satisfy lust or depraved sexual desires.

The district court agreed with the government’s argument and overruled Young’s objection. The district court accepted the PSR and sentenced Young to 24 months imprisonment and five years supervised release. Young appeals his sentence as a Tier III sex offender.

II.

[1] Section 2A3.5 of the United States Sentencing Guidelines sets forth three base offense levels for failure to register as a sex offender in violation of 18 U.S.C. § 2250(a). U.S. Sentencing Guidelines Manual § 2A3.5 (U.S. Sentencing Comm’n 2016). Each level corresponds with one of three offender tiers established under SORNA. *Id.* Included within the definition of a Tier III sex offender is “a sex offender whose offense is punishable by imprisonment for more than 1 year and (A) is comparable to or more severe than ... (i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or (ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years.” 34 U.S.C. § 20911(4). Thus, if a state statute is comparable to or more severe than the federal offenses of aggravated sexual abuse, sexual abuse, or abusive sexual contact, a defendant with a prior conviction under that state statute will be subject to the Tier III base offense level. *See, e.g., United States v. Coleman*, 681 Fed.Appx. 413, 418 (5th Cir. 2017).

[2] “For properly preserved claims, this court reviews the district court’s interpretation and application of the Sentencing Guidelines *de novo*.” *Id.* (quoting *United States v. Cedillo-Narvaez*, 761 F.3d 397, 401 (5th Cir. 2014)).

III.

[3] In the present case, the government appears to concede now that the categorical approach should be used in determining a sex offender’s tier. In a recent opinion issued by this court, we addressed a question similar to the one at issue here: whether a Minnesota statute is “comparable to or more severe than” the federal offense of abusive sexual contact. *Coleman*, 681 Fed.Appx. at 416–17. The court noted that “[i]f the Minnesota statute is comparable to the federal crime of abusive sexual contact, [the] analysis need not go *746 any further because [the defendant] would qualify as a Tier III offender under either the categorical or circumstance-specific approach.” *Id.* at 416. While the same is true here, in line with at least four other circuits, we follow the categorical approach in determining whether Mississippi Code section 97–5–23 is comparable to or more severe than the generic crimes listed in 34 U.S.C. § 20911(4)(A). *See United States v. Berry*, 814 F.3d 192, 197 (4th Cir. 2016); *United States v. Morales*, 801 F.3d 1, 4–6 (1st Cir. 2015); *United States v. White*, 782 F.3d 1118, 1130–35 (10th Cir. 2015); *United States v. Cabrera-Gutierrez*, 756 F.3d 1125, 1133–34 (9th Cir. 2014).

[4] The relevant portion of Mississippi Code section 97–5–23 states as follows: “Any person above the age of eighteen (18) years, who, for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his or her body or any member thereof, or with any object, any child under the age of sixteen (16) years, with or without the child’s consent, or a mentally defective, mentally incapacitated or physically helpless person as defined in [Mississippi Code] Section 97-3-97, shall be guilty of a felony....” Miss. Code Ann. § 97-5-23. The government argues that this offense is comparable to abusive sexual contact as set forth in 18 U.S.C. § 2244.

“Sexual contact,” as it is used in 18 U.S.C. § 2244, is defined as “the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(3).

Young argues that Mississippi Code section 97–5–23 is broader than the federal offense of abusive sexual contact because: (1) it criminalizes conduct beyond the touching of a particular list of body parts, in contrast to the federal offense, and includes touching with an object; and (2) it criminalizes conduct against a person under the age of 16 years, while 34 U.S.C. § 20911(4)(A)(ii) restricts the age of the victim to less than 13 years.

According to Young, the focus of his argument is “[t]he conduct being criminalized, i.e. the touching of the body parts.” Young emphasizes that because a person could be convicted by lustfully touching any part of a child, “this could include a shoulder, an ear, or even a pinky toe.” These are all body parts not listed in the federal statute, and thus, Young argues, the Mississippi statute is broader. In response, the government points to the intent element of the Mississippi statute, which requires that the touching be “for the purpose of gratifying his or her lust, or indulging his or her depraved licentious sexual desires.” According to the government, “[t]he assertion that one could be convicted of fondling or touching a child for lustful purposes by touching them on the shoulder, ear, or toe is a clever argument, but not a realistic one,” as evidenced by the fact that Young failed to provide even one example of a Mississippi court applying section 97–5–23 in a way inconsistent with the touching described in the federal statute.

In *United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc), we held that “[a] defendant who argues that a state statute is nongeneric cannot simply rest on plausible interpretations of statutory text made in a vacuum.” 853 F.3d at 222. “He must also show ‘a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of the crime.’” *Id.* (quoting **747 Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007)). Here, we agree with the government that Young has failed to show such a realistic probability.

While Young points to possible ways that conduct could fall within Mississippi Code section 97–5–23 but outside of the federal offense of abusive sexual contact, such as the lustful touching of a child’s shoulder, ear, or toe, he has failed to establish a realistic probability that the State of Mississippi would apply its statute to such conduct. In fact, Young could not identify even a single case in which Mississippi has done so. And the cases Young provided are from different states

and involve different statutes. *See, e.g., People v. Calusinski*, 314 Ill.App.3d 955, 247 Ill.Dec. 956, 733 N.E.2d 420, 426 (2000); *People v. Diaz*, 41 Cal.App.4th 1424, 49 Cal.Rptr.2d 252, 254 (1996); *Cornelius v. State*, 213 Ga.App. 766, 445 S.E.2d 800, 804 (1994). We do not find these persuasive. Nor do we agree with Young that the majority holding in *Castillo-Rivera* should not apply simply because this is a SORNA tier classification case and not an illegal reentry case. Young provides no reasons why this distinction between the cases makes a difference, nor can we find one.

Consequently, Young’s argument that Mississippi Code section 97–5–23 is not comparable to the federal offense of sexual abusive contact fails. The relevant offenses contain comparable elements, even if the body parts that are the subject of the touching are specifically listed in the federal definition. *See Coleman*, 681 Fed.Appx. at 418 (holding that the elements of a Minnesota statute are comparable to the elements of the federal crime of criminal sexual abuse “even if the Minnesota statute has been applied to a slightly broader range of conduct”).

[5] [6] [7] With respect to Young’s second point regarding the victim’s age, because Young explicitly waived this argument both in his written objection to the PSR and at sentencing, we do not review it. “Waiver is the ‘intentional relinquishment or abandonment of a known right.’” *United States v. Arviso-Mata*, 442 F.3d 382, 384 (5th Cir. 2006) (quoting *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993)). “Waived errors are unreviewable.” *United States v. Rodriguez*, 602 F.3d 346, 350 (5th Cir. 2010). Here, in Young’s written objection, he stated he “raise[d] no argument with respect to the age requirements of the state and federal statutes involved in the analysis.” At sentencing, after discussing the difference between the Mississippi statute and 34 U.S.C. § 20911(4)(A)(ii) regarding the victim’s age, Young again said he was “not raising any argument to that effect.” We take these statements as an intentional relinquishment of Young’s right to appeal his sentence on this basis. Thus, we will not discuss it.

We do note, however, that this opinion should not be read as holding that the categorical approach applies both when comparing prior convictions with the generic offenses listed under 34 U.S.C. § 20911(4) and when it comes to the specific circumstance of the victims’ ages. Other circuits have handled these parts of 34 U.S.C. § 20911 differently. *See, e.g., White*, 782 F.3d at 1133–35 (“In light of the text of the statute, its legislative history, and these practical and equitable concerns,

we conclude Congress intended courts 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."); *see also Berry*, 814 F.3d at 197 (reaching the same conclusion as the Tenth Circuit in *White*); *cf. United States v. Gonzalez-Medina*, 757 F.3d 425, 432 (5th Cir. 2014) (holding that "the language, *748 structure, and broad purpose of SORNA all indicate that Congress intended a non-categorical approach to the age-differential determination in [34 U.S.C. § 20911(5)(C)]"). We

save discussion of any argument on this point for a day when it is properly raised.

IV.

Having determined that the district court correctly classified Young as a Tier III offender, we AFFIRM his sentence.

All Citations

872 F.3d 742

Footnotes

- * District Judge of the Western District of Texas, sitting by designation.
- 1 Effective September 1, 2017, 42 U.S.C. § 16911 was transferred to 34 U.S.C. § 20911. See 42 U.S.C. § 16911. The relevant substance of the statute, however, remains the same.
- 2 According to the indictment, Young's underlying conviction involved the touching of a 12-year-old girl's vagina when he was 45 years old. With these facts, if the district court were allowed to consider them, Young qualifies as a Tier III sex offender.

 KeyCite Yellow Flag - Negative Treatment
Distinguished by [U.S. v. Marrowbone](#), D.S.D., March 2, 2015

550 Fed.Appx. 260

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Sixth Circuit Rule 28. (Find CTA6 Rule 28)
United States Court of Appeals,
Sixth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.

Bruce Allen BACKUS, Defendant–Appellant.

No. 12–5916.
|
Jan. 6, 2014.

Synopsis

Background: Defendant was charged with failing to properly update his sex-offender registration pursuant to Sex Offender Registration and Notification Act (SORNA) and pled guilty. Prior to sentencing, defendant moved to withdraw plea, claiming that he was not guilty because he was a Tier I, rather than Tier II, sex offender, and thus was subject to shorter registration period. The United States District Court for the Eastern District of Tennessee denied motion and sentenced defendant to 27 months in prison. Defendant appealed denial of his motion and his sentence.

Holdings: The Court of Appeals, [Alice M. Batchelder](#), Chief Judge, held that:

[1] defendant was Tier II sex offender, and

[2] sentence was not abuse of discretion.

Affirmed.

West Headnotes (2)

[1] **Mental Health** Scores and risk levels

Mental Health Effect of assessment or determination; notice and registration

Defendant, who was convicted of failing to properly update his sex-offender registration pursuant to SORNA, was Tier II sex offender under SORNA, and thus subject to 25-year registration period, where defendant was convicted of Florida statute that prohibited penetration of the sexual organs of a child under age of 16, which statute was comparable to federal statute, a conviction under which resulted in Tier II sex offender status. [18 U.S.C.A. §§ 2243\(a\), 2250\(a\); Sex Offender Registration and Notification Act, §§ 111\(3\)\(A\)\(iv\), 115\(a\), 42 U.S.C.A. §§ 16911\(3\)\(A\)\(iv\), 16915\(a\); F.S.1994 Supp. § 800.04\(3\).](#)

4 Cases that cite this headnote

[2] **Mental Health** Offenses and prosecutions

Defendant's sentence of 27 months imprisonment for failing to properly update his sex-offender registration pursuant to SORNA was not abuse of discretion on part of District Court; defendant was Tier II sex offender, which resulted in an increase of two offense levels, and guideline range for defendant's sentence was 27 to 33 months. [18 U.S.C.A. § 2250\(a\); Sex Offender Registration and Notification Act, § 111\(3\)\(A\)\(iv\), 42 U.S.C.A. § 16911\(3\)\(A\)\(iv\); U.S.S.G. § 2A3.5\(a\), 18 U.S.C.A.](#)

3 Cases that cite this headnote

***261** On Appeal from the United States District Court for the Eastern District of Tennessee.

BEFORE: [BATCHELDER](#), Chief Judge; [GRIFFIN](#), Circuit Judge; and [BELL](#), District Judge.*

Opinion

ALICE M. BATCHELDER, Chief Judge.

In December 2011, Bruce Backus was indicted in the district court for violating 18 U.S.C. § 2250(a) by failing to properly update his sex-offender registration pursuant to the Sex Offender Registration and Notification Act (SORNA). Although Backus initially pled guilty to the charge, he moved to withdraw that plea prior to his sentencing. He claimed that he was not guilty because he was a Tier I sex offender, rather than a Tier II sex offender, and his 15-year registration period as a Tier I sex offender had expired at the time of his failure to update his registration. Finding that Backus is a Tier II sex offender, the district court denied his motion and sentenced him to 27 months in prison. Because we agree that Backus is a Tier II sex offender, we AFFIRM the district court's judgment.

I.

On May 1, 1994, Backus—then 20 years old—engaged in sexual intercourse with a child under the age of 16. Before a Florida court in 1995, Backus entered a plea of *nolo contendere* for violating Florida Statute § 800.04(3) (1994), which prohibited committing “an act defined as sexual battery under s.794.011(h) upon any child under *262 the age of 16 years.”¹ The Florida court withheld adjudication of guilt and sentencing, and instead, placed Backus on probation. On August 30, 2002, the Florida court revoked Backus' probation and sentenced him to 70 months in prison. The judgment described Backus' offense using language very similar to that which described the crime prohibited by § 800.04(4) (1994): “[L]ewd or lascivious act in the presence of a child under the age of 16 years.” However, the judgment listed “§ 794.011(1)(h)” —the statute cross-referenced in § 800.04(3) (1994)—as the violated statute. On the day of Backus' release from prison in 2005, the Florida court entered an amended judgment to reflect that the violated statute was indeed § 800.04(3) (1994).

Based on his violation of § 800.04(3) (1994), Backus was considered a sex offender under Florida law, and was required to register as such pursuant to SORNA. See 42 U.S.C. § 16913. At various times after his release from prison, Backus lived in both Florida and Tennessee, frequently traveling between those states. Backus last updated his sex-offender registration in Florida on June 14, 2011. In July 2011 he moved to Tennessee but did not notify authorities in Florida

or Tennessee of his move, even though such notification was required by SORNA.

In December 2011, Backus was indicted in the district court for knowingly failing to update his registration as required by SORNA in violation of 18 U.S.C. § 2250(a). Although Backus originally pled guilty to violating 18 U.S.C. § 2250(a), he moved to withdraw his guilty plea five months later, claiming that he was actually innocent. The district court denied the motion and sentenced Backus to 27 months in prison in accordance with his advisory guidelines range as a Tier II sex offender. Backus appeals his sentence and the denial of his motion.

II.

We generally review for abuse of discretion a district court's sentence and a district court's denial of a motion to withdraw a guilty plea. See *Peugh v. United States*, — U.S. —, 133 S.Ct. 2072, 2080, 186 L.Ed.2d 84 (2013); *United States v. Parks*, 700 F.3d 775, 779 (6th Cir.2012). But here, the district court's proper or improper use of its discretion turns on a question of statutory interpretation—whether Backus is a Tier II sex offender as defined in 42 U.S.C. § 16911(3)—and we review this question *de novo*. See *United States v. Lombard*, 706 F.3d 716, 720 (6th Cir.2013) (“A matter requiring statutory interpretation is a question of law requiring *de novo* review.” (internal quotation marks omitted)).

SORNA requires a sex offender to “register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, or where the offender is a student.” 42 U.S.C. § 16913(a). A Tier II sex offender is subject to a 25-year registration period, which begins after the offender is convicted, but excludes any time the sex offender is in custody. 42 U.S.C. § 16915(a). A Tier I sex offender, on the other hand, is subject only to a 15-year registration period. *Id.*

A Tier II sex offender is an individual whose offense “is comparable to or more severe than … abusive sexual contact (as described in section 2244 of Title 18).” 42 U.S.C. § 16911(3)(A)(iv). Section 2244 of *263 Title 18 defines abusive sexual contact as “knowingly engag[ing] in or caus [ing] sexual contact with or by another person, if to do so would violate … subsection (a) of 2243 of this title had the sexual contact been a sexual act.” 18 U.S.C. § 2244. Section 2243(a) of the same title prohibits “knowingly engag[ing] in

a sexual act with another person who (1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging.” [18 U.S.C. § 2243\(a\)](#). Thus, if an individual violates a statute by committing an offense that is comparable to or more severe than that described in [Section 2243\(a\)](#), that individual is a Tier II sex offender.

The Florida court convicted Backus of violating [Florida Statute § 800.04\(3\) \(1994\)](#), which prohibited committing “an act defined as sexual battery under [s.794.011\(h\)](#) upon any child under the age of 16 years.” Although Backus argues that he was actually convicted of violating only [§ 800.04\(4\) \(1994\)](#),² based on the language used by the court, this argument is incorrect. The Florida judgment listed the violated statute as “[§ 794.011\(1\)\(h\)](#),” which is the statute cross-referenced in [§ 800.04\(3\) \(1994\)](#); and on the day of Backus’ release from prison in 2005, the Florida court entered an amended judgment to reflect that the violated statute was indeed [§ 800.04\(3\) \(1994\)](#).³ The 1994 version of [§ 794.011\(h\)](#)—the statute cross-referenced in [§ 800.04\(3\) \(1994\)](#)—defines “sexual battery” as “oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object.” Similarly, [18 U.S.C. § 2246\(2\)](#) defines “sexual act,” as applied to [Section 2243\(a\)](#), as “contact between the penis and the vulva or the penis and the anus ...; the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object.”

[1] When read together with their definitions, [Florida Statute § 800.04\(3\) \(1994\)](#) and [18 U.S.C. § 2243\(a\)](#) prohibit the same activity—penetration of the sexual organs of a child under the age of 16. The only notable difference between the two statutes is that [§ 800.04\(3\) \(1994\)](#) was slightly more strict than [18 U.S.C. § 2243\(a\)](#) because it did not require that the child be at least four years younger than the defendant. Because both statutes prohibit the same activity, the offense prohibited by [§ 800.04\(3\) \(1994\)](#) “is comparable to” that prohibited by

[18 U.S.C. § 2243\(a\)](#). See [42 U.S.C. § 16911\(3\)\(A\)\(iv\)](#). And given that Backus was convicted of committing the offense prohibited by [§ 800.04\(3\) \(1994\)](#), Backus is a Tier II sex offender, and is subject to a 25-year registration period. See [42 U.S.C. § 16915\(a\)](#). The Florida court originally convicted Backus in 1995, sentenced him to prison in 2002, and released [*264](#) him from prison in 2005. Backus contends that his 25-year registration period began in 1995, not in 2005 as the trial court held in its order denying Backus’ motion to withdraw his guilty plea. We need not resolve this question because, in any event, the registration period had not expired by July 2011. Therefore, Backus violated SORNA when he did not update his registration in Tennessee or Florida in July 2011, and the district court did not abuse its discretion when it denied Backus’ motion to withdraw his guilty plea.

[2] Further, the district court correctly determined Backus’ sentence in accordance with his advisory guidelines range as a Tier II sex offender. Under the United States Sentencing Guidelines, a classification of Tier II results in an increase of two offense levels (from level 12 to level 14) in calculating a defendant’s advisory guidelines range. [U.S.S.G. § 2A3.5\(a\)](#). Backus’ pre-sentencing report (PSR) calculated Backus’ sentence in this manner, yielding an advisory guidelines range of 27 to 33 months in prison. The district court concluded that the PSR was accurate, and sentenced Backus to 27 months in prison. Because Backus is a Tier II sex offender, the district court did not abuse its discretion in sentencing Backus in accordance with that status.⁴

III.

For the foregoing reasons, we **AFFIRM** the judgment of the district court.

All Citations

550 Fed.Appx. 260

Footnotes

* The Honorable [Robert Holmes Bell](#), United States District Judge for the Western District of Michigan, sitting by designation.

- 1 The 1994 version of Florida Statute § 794.011(h) defines “sexual battery” as “oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object.” [Fla. Stat. § 794.011\(h\) \(1994\)](#).
- 2 [Fla. Stat. § 800.04\(4\) \(1994\)](#) prohibited a different act: “[L]ewd or lascivious act in the presence of a child under the age of 16 years.”
- 3 Although the Florida court used language in its judgment such as “lewd or lascivious act” to describe Backus’ offense, this language does not necessarily describe [Florida Statute § 800.04\(4\)](#). Rather, the title of the entire statute ([§ 800.04](#)) describes all the offenses listed in that statute—including [§ 800.04\(3\)](#)—as “Lewd, lascivious, or indecent assault or act upon or in presence of child.” [Fla. Stat. § 800.04 \(1994\)](#). And the subsections of the statute describe different acts that fall under that title. Therefore, we find that the Florida court used language such as “lewd or lascivious act” in its judgment to describe the title of the entire statute, not to describe [§ 800.04\(4\)](#), and that it correctly listed the specific subsection of the act that Backus violated —[Florida Statute § 800.04\(3\)](#). See also [United States v. Beasley, 442 F.3d 386, 394 \(6th Cir.2006\)](#) (district court’s factual findings regarding an ambiguous state court judgment are reviewed for clear error).
- 4 Given that Backus is a Tier II sex offender, we need not examine his second argument on appeal—that, as a Tier I sex offender, he was not required to update his registration pursuant to SORNA in July 2011. Regardless of when his registration period began—1995 or 2005—Backus was required to update his registration pursuant to SORNA in July 2011 because his 25-year registration period as a Tier II sex offender could not have expired by that time from either proposed starting date.

386 Fed.Appx. 50

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Cit. of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7. United States Court of Appeals, Third Circuit.

UNITED STATES of America

v.

Noel K. BANGO, Appellant.

No. 09-3863

|

Submitted Pursuant to Third Circuit LAR 34.1(a) June 24, 2010.

|

Filed: July 2, 2010.

Synopsis

Background: Defendant was convicted in the United States District Court for the District of Delaware, Gregory M. Sleet, J., for failure to register as a sex offender, and he appealed.

Holdings: The Court of Appeals, Fisher, Circuit Judge, held that:

[1] if error, defendant's brief lack of counsel at his post-plea detention hearing constituted harmless error, and

[2] court did not abuse its discretion in imposing a special condition of supervised release requiring defendant to disclose to current and prospective female tenants his convictions for sexual battery with force or injury and failing to register as a sex offender.

Affirmed.

West Headnotes (4)

[1] Criminal Law Counsel for Accused

If error, defendant's brief lack of counsel at his post-plea detention hearing constituted harmless

error because it did not undermine the reliability of the entire criminal proceeding; defendant was represented by counsel at every other stage of his criminal proceeding. U.S.C.A. Const.Amend. 6.

[2] **Criminal Law** Representations, promises, or coercion; plea bargaining
Oral representations could not modify the terms of a written plea agreement.

[3] Sentencing and Punishment Validity

In sentencing defendant for failure to register as a sex offender, district court did not abuse its discretion in imposing a special condition of supervised release requiring defendant to disclose to current and prospective female tenants his convictions for sexual battery with force or injury and failing to register as a sex offender; such condition was reasonably related to the need for the sentence to protect the public from further crimes of the defendant. 18 U.S.C.A. §§ 3553(a)(2)(C), 3583(d).

1 Case that cites this headnote

[4] Mental Health Offenses and prosecutions
Minimum 21 month sentence of incarceration for failure to register as a sex offender was substantively reasonable. 18 U.S.C.A. §§ 2250(a), 3553(a).

***51** On Appeal from the United States District Court for the District of Delaware (D.C. No. 1-08-cr-00153-001), District Judge: Honorable Gregory M. Sleet.

Attorneys and Law Firms

Ilana H. Eisenstein, Esq., Lesley F. Wolf, Esq., Office of United States Attorney, Wilmington, DE, for United States of America.

Peter A. Levin, Esq., Philadelphia, PA, for Appellant.

Before: SMITH, FISHER and GREENBERG, Circuit Judges.

OPINION OF THE COURT

FISHER, Circuit Judge.

Noel Bango appeals his judgment of conviction and sentence for failure to register as a sex offender, in violation of 18 U.S.C. § 2250(a). For the reasons set forth below, we will affirm.

I.

We write exclusively for the parties, who are familiar with the factual context and legal history of this case. Therefore, we recite only those facts necessary to our analysis.

On June 5, 1996, Bango was convicted of sexual battery with force or injury, in violation of Fla. Stat. § 794.011(3), in the Circuit Court for Palm Beach County, Florida. As a result, he served a term of imprisonment and was required to register as a sex offender under 42 U.S.C. § 16913.

Shortly after his release from prison in May 2007, Bango registered as a sex offender in Florida and Pennsylvania, providing a Philadelphia address as his residence. In September 2007, he purchased a home in Delaware, but did not immediately reside there. In January 2008, Bango registered as a sex offender in North Carolina, providing the address of a hotel as his residence. In February 2008, Bango began residing in his Delaware home, but never registered with the Delaware Sex Offender Central Registry. He was arrested on September 23, 2008, and charged with one count of violating § 2250(a), under which individuals who travel interstate and fail to register in accordance with 42 U.S.C. § 16913 may be charged criminally.

On April 29, 2009, Bango entered a guilty plea in the United States District Court for the District of Delaware. However, on May 22, 2009, he filed a *pro se* motion to withdraw his guilty plea, arguing that the Federal Public Defender's Office ("FPDO") had coerced him into accepting the agreement. Despite these allegations, on May 26, 2009, Bango filed an "addendum" in which he requested that the FPDO continue representing him. The FPDO subsequently filed a motion to withdraw from representing Bango and denied the allegations of coercion.

On May 28, 2009, at Bango's post-plea detention hearing, the District Court considered both motions. The Court concluded that the FPDO had provided "fine representation," but that, given Bango's allegations, there had been an "irretrievable breakdown" in the attorney-client relationship. (Supp.App. 89, 93.) The Court then granted the FPDO's motion to withdraw as counsel and denied Bango's motion to withdraw his guilty plea. After *52 continuing the detention hearing with Bango proceeding *pro se*, the Court granted the government's motion for detention pending sentencing, noting that Bango had not met his burden of showing that he did not pose a danger to the community.

The District Court appointed new counsel eight days later, on June 5, 2009. On September 24, 2009, Bango was sentenced to 21 months of incarceration followed by a three-year period of supervised release. This timely appeal followed.

II.

On appeal, Bango argues that (1) his Sixth Amendment right to counsel was violated when the District Court required him to proceed *pro se* for the remainder of the May 28, 2009 post-plea detention hearing, after the FPDO's motion to withdraw was granted, (2) the government breached his plea agreement by failing to request a downward departure, and (3) his sentence was procedurally and substantively unreasonable. The District Court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

We exercise plenary review over constitutional challenges to a defendant's conviction. *See United States v. Walker*, 473 F.3d 71, 75 (3d Cir.2007). We also conduct plenary review of an alleged breach of a plea agreement. *See United States v. Hodge*, 412 F.3d 479, 485 (3d Cir.2005). We review a sentence for reasonableness, under an abuse of discretion standard. *See Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007).

A.

We first consider Bango's claim that his conviction was obtained in violation of his Sixth Amendment right to counsel because he was temporarily denied counsel at the May 28, 2009 post-plea detention hearing. The Sixth Amendment guarantees "an accused the assistance of counsel at all

critical stages of a proceeding.” *Henderson v. Frank*, 155 F.3d 159, 166 (3d Cir.1998). Notwithstanding this guarantee, reversal is only warranted where the “deprivation of the right to counsel affected—and contaminated—the entire criminal proceeding.” *Satterwhite v. Texas*, 486 U.S. 249, 257, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988). Thus, we apply a harmless error standard to denials of counsel, even at allegedly critical stages of criminal proceedings. *See, e.g., Ditch v. Grace*, 479 F.3d 249, 256 (3d Cir.2007) (applying harmless error standard to deprivation of counsel at preliminary hearing). Any alleged error based on a deprivation of counsel is harmless where it does not “undermine the reliability of the entire criminal proceeding.” *Ditch*, 479 F.3d at 255.

[1] We reject Bango's argument that his brief lack of counsel at his post-plea detention hearing constitutes reversible error because it clearly did not “undermine the reliability of the entire criminal proceeding.” *Id.* As to the reliability of his conviction, Bango was represented by counsel at every other stage of his criminal proceeding, including the change of plea hearing on April 29, 2009. Bango then filed his motion to withdraw his guilty plea *pro se* on May 22, 2009, despite the fact that he was represented by counsel at the time. The District Court denied Bango's motion immediately after granting the FPDO motion to withdraw, noting, “I have prepared an order denying that motion, which we will file right now,” and without hearing argument from either party. (Supp.App. 96.) Bango's *pro se* appearance at the remainder of the hearing thus cannot have “contaminated” the District Court's denial of his motion to withdraw *53 his guilty plea, as the District Court resolved the merits of his motion in advance of that hearing, when Bango was still represented by counsel.

Nor are we persuaded that Bango's later sentencing, at which he was represented by counsel, was “contaminated” by his earlier lack of representation. The District Court did not rely on any information from the May 28, 2009 hearing when it imposed Bango's sentence of 21 months in prison. Additionally, his 4-month detention between the post-plea hearing and sentencing did not prejudice him because it was counted against his 21-month sentence. Thus, even if we were to hold that the District Court's decision to deny Bango counsel was error, it would be harmless error for which no remedy is afforded.

We therefore reject Bango's Sixth Amendment challenge to his conviction and sentence.

B.

[2] Next, we will address Bango's argument that the government breached the plea agreement by failing to move for an additional one-point reduction in his offense level under U.S.S.G. § 3E1.1(b). The plea agreement explicitly states that “[t]he Government will not ... move for an additional one-point reduction under United States Sentencing Guideline Section 3E1.1(b).” Bango's only arguments to the contrary pertain to alleged oral representations which do not support his contentions and, in any event, cannot modify the terms of a written agreement. (Bango Br. 16–18.) Accordingly, we reject Bango's claim that the government breached the terms of his plea agreement.

C.

Finally, we address the procedural and substantive reasonableness of Bango's sentence.

Bango argues that the District Court incorrectly calculated his Sentencing Guidelines range by assigning a Base Offense Level of 16, rather than 12. Guidelines § 2A3.5 assigns a Base Offense Level of 16 for violations of 18 U.S.C. § 2250(a) by defendants who were required to register as Tier III sex offenders. Thus, the only issue is whether Bango was a “Tier III” sex offender as defined in 42 U.S.C. § 16911(4). Section 16911(4) defines a Tier III sex offender as one “whose offense is punishable by imprisonment for more than 1 year and ... is comparable to or more severe than ... aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18).” Bango was convicted under Fla. Stat. § 794.011(3) which states, “A person who commits sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury commits a life felony.” This statute is certainly “comparable to or more severe than” the criminal conduct described in §§ 2241 and 2242. *See* 18 U.S.C. § 2241 (defining “aggravated sexual abuse” as “knowingly caus[ing] another person to engage in a sexual act ... by using force against that other person; or ... by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnaping.”); *id.* § 2242 (defining “sexual abuse” as “knowingly caus[ing] another person to engage in a sexual act by threatening or placing that other

person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping"). The District Court therefore properly concluded that Bango was a Tier III sex offender with a Base *54 Offense Level of 16 under the Sentencing Guidelines.

[3] Bango also challenges the District Court's imposition of a special condition of supervised release requiring him to disclose to current and prospective female tenants his convictions for sexual battery with force or injury and failing to register as a sex offender. We review special conditions of supervised release under a deferential abuse of discretion standard. *See United States v. Voelker*, 489 F.3d 139, 143 n. 1 (3d Cir.2007). A district court may impose a special condition of supervised release so long as it is "reasonably related" to the sentencing factors in § 3553(a) and "involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth" in that statute. 18 U.S.C. § 3583(d). Among the § 3553(a) factors that a special condition must be "reasonably related" to is the need for the sentence "to protect the public from further crimes of the defendant." *Id.* § 3553(a) (2)(C).

In imposing this special condition, the District Court reasoned that

[a]s a landlord, Mr. Bango would likely have a key to [his] houses and at the very least would know where the properties were and who lived in them. Given the nature of Mr. Bango's underlying offense and his failure to register in this case, requiring Mr. Bango to notify actual and prospective female tenants of his past ... is a reasonable condition for supervision.

(Supp.App. 135–36.) We agree. The existence of a registration requirement for certain sexual offenders evidences Congress' judgment that the public has a right to be forewarned of the location of such individuals. As a landlord, Bango is entrusted to some degree with the safety of his tenants' homes and persons. His prior failure to register as a sex offender deprives his tenants, who may be uniquely vulnerable to any future criminal conduct, of that information. Thus, the District Court's imposition of a

notification requirement for female tenants is "reasonably related" to the need for Bango's sentence "to protect the public from further crimes of the defendant." 18 U.S.C. §§ 3553(a) (2)(C), 3583(d).

Bango next challenges the denial of his two motions for downward departures, as well as his additional motion for a downward departure that the District Court did not consider because it was untimely made. "We do not have jurisdiction to review discretionary decisions by district courts to not depart downward ... [unless] the district court's refusal to depart downward is based on the mistaken belief that it lacks discretion to do otherwise." *United States v. Jones*, 566 F.3d 353, 366 (3d Cir.2009) (quoting *United States v. Vargas*, 477 F.3d 94, 103 (3d Cir.2007)). The transcript from Bango's sentencing hearing demonstrates that the District Court considered his first two motions and was well aware of its authority to grant them. Accordingly, we lack jurisdiction to consider these claims. With regard to the untimely motion, a district court retains the discretion to consider an untimely motion for a downward departure but is not obligated to do so. *See United States v. Rashid*, 274 F.3d 407, 416 (6th Cir.2001). Bango's third motion was plainly untimely,¹ and the District Court was within its discretion in declining to consider it.

*55 Finally, Bango alleges that his sentence of 21 months of incarceration is procedurally and substantively unreasonable because the District Court failed to adequately consider and apply the sentencing factors in § 3553(a), and failed to credit mitigating factors such as evidence of rehabilitation. We first note that the District Court properly began by correctly calculating the Sentencing Guidelines and ruling on any motions for departure. *See United States v. Wise*, 515 F.3d 207, 216 (3d Cir.2008) ("[A] district court must begin the process by correctly calculating the applicable Guidelines range ... [and then] 'formally rul[ing] on the motions of both parties.'") (quoting *United States v. Gunter*, 462 F.3d 237, 247 (3d Cir.2006)). The District Court then carefully considered each § 3553(a) factor in light of Bango's individual situation. (*See* Supp.App. 163–70.) The sentence is therefore procedurally reasonable.

[4] Substantively, a district court is required to give the § 3553(a) factors "meaningful consideration" as they relate to the defendant's individual case, including consideration of relevant mitigating factors. *United States v. Cooper*, 437 F.3d 324, 329 (3d Cir.2006). A sentence is not, however, rendered unreasonable simply because the district court "fail[ed] to give mitigating factors the weight a defendant contends they

deserve.” *United States v. Bungar*, 478 F.3d 540, 546 (3d Cir.2007). The record here is clear that the District Court gave “meaningful consideration” to the relevant sentencing factors and weighed those factors against any allegedly mitigating considerations. The Court addressed Bango’s background and characteristics, record evidence of his medical evaluations, and the seriousness of his offense. (Supp.App. 164–69.) The District Court then imposed the minimum sentence recommended by the Guidelines—21 months—which we may afford a “presumption of reasonableness.” See *Rita v. United States*, 551 U.S. 338, 347, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007).

Because Bango’s sentence is both procedurally and substantively reasonable, we will affirm the District Court.

III.

For the foregoing reasons, we affirm the District Court’s judgment of conviction and sentence.

All Citations

386 Fed.Appx. 50

Footnotes

- 1 Rule 32 of the Federal Rules of Criminal Procedure and the District of Delaware Local Rule 8 require that objections to the presentence report be made 14 days prior to the sentencing hearing. Bango raised his third motion for a downward departure at the sentencing hearing.

814 F.3d 192

United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Brian Keith BERRY, Defendant–Appellant.
Federal Public Defender Office,
Amicus Supporting Appellant.

No. 14–4934.

|

Argued: Dec. 10, 2015.

|

Decided: Feb. 19, 2016.

Synopsis

Background: Defendant was convicted in the United States District Court for the Eastern District of North Carolina, Louise W. Flanagan, J., 2014 WL 7149736, of failing to register as sex offender, in violation of provisions of the Sex Offender Registration and Notification Act (SORNA), after relocating from New Jersey to North Carolina, and he appealed from sentence imposed based on court's alleged error in treating him as tier III sex offender.

Holdings: The Court of Appeals, Wynn, Circuit Judge, held that:

[1] as matter of apparent first impression in the Circuit, court must look to actual age of his victim, but otherwise employ “categorical” approach, when deciding whether sex offender's prior state law offense made him a tier III sex offender under SORNA, and

[2] sex offender's prior conviction of New Jersey offense of endangering welfare of child, under statute that did not require as element any sexual contact, or attempted sexual contact, with child, did not make him a tier III offender under SORNA.

Vacated and remanded.

West Headnotes (9)

[1] **Criminal Law** Sentencing

Court of Appeals reviews sentences imposed by district court under “abuse of discretion” standard to determine, among other things, whether they are procedurally or substantively unreasonable.

11 Cases that cite this headnote

[2] **Sentencing and Punishment** Operation and effect of guidelines in general

Sentence is procedurally unreasonable if district court failed to calculate or improperly calculated the Guidelines range. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

7 Cases that cite this headnote

[3] **Criminal Law** Review De Novo

Criminal Law Sentencing

When considering a sentence's reasonableness, the Court of Appeals reviews district court's legal conclusions de novo and its factual findings for clear error.

3 Cases that cite this headnote

[4] **Mental Health** Persons and offenses included

“Categorical approach” for determining whether sex offender's prior state law offense makes him a tier III sex offender under the Sex Offender Registration and Notification Act (SORNA) requires court to compare elements of state statute forming basis of sex offender's conviction with elements of “generic” tier III federal offense; only if the statute's elements are the same as, or narrower than, those of the generic offense will tier III classification be appropriate pursuant to this “categorical” approach. Sex Offender Registration and Notification Act, § 111(2–4), 42 U.S.C.A. § 16911(2–4).

29 Cases that cite this headnote

- [5] **Mental Health** Persons and offenses included
 “Modified categorical” approach for determining whether sex offender's prior state law offense makes him a tier III sex offender under the Sex Offender Registration and Notification Act (SORNA) applies when prior conviction is for violating divisible statute, which sets out one or more elements in alternative. Sex Offender Registration and Notification Act, § 111(2–4), 42 U.S.C.A. § 16911(2–4).

15 Cases that cite this headnote

- [6] **Mental Health** Persons and offenses included
 “Modified categorical” approach for determining whether sex offender's prior state law offense makes him a tier III sex offender under the Sex Offender Registration and Notification Act (SORNA) permits court to consult limited class of documents, such as indictment, plea agreement, and jury instructions, to determine which alternative formed basis of prior conviction. Sex Offender Registration and Notification Act, § 111(2–4), 42 U.S.C.A. § 16911(2–4).

11 Cases that cite this headnote

- [7] **Mental Health** Persons and offenses included
 To determine whether sex offender's prior state law offense made him a tier III sex offender under the Sex Offender Registration and Notification Act (SORNA), court had to look to actual age of his victim, but otherwise employ “categorical” approach, by comparing elements of state statute under which he was convicted with elements of “generic” tier III federal offense. Sex Offender Registration and Notification Act, § 111(2–4), 42 U.S.C.A. § 16911(2–4).

20 Cases that cite this headnote

- [8] **Statutes** Language
 When interpreting any statute, court begins by analyzing statutory text.
 1 Case that cites this headnote
- [9] **Mental Health** Persons and offenses included
 Sex offender's prior conviction of New Jersey offense of endangering welfare of child, under statute that did not require as element any sexual contact, or attempted sexual contact, with child, did not make him a tier III offender under the Sex Offender Registration and Notification Act (SORNA), so that district court erred in treating him as such, based on specific circumstances underlying his conviction, when sentencing him for violating SORNA by failing to register as sex offender after moving to North Carolina. Sex Offender Registration and Notification Act, § 111(2–4), 42 U.S.C.A. § 16911(2–4).

Attorneys and Law Firms

***193 ARGUED:** Jorgelina E. Araneda, Araneda Law Firm, Raleigh, North Carolina, for Appellant. Phillip Anthony Rubin, Office of the United States Attorney, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Thomas G. Walker, United States Attorney, Jennifer P. May-Parker, Yvonne V. Watford-McKinney, Assistant United States Attorneys, Office of the United States Attorney, Raleigh, North Carolina, for Appellee. Thomas P. McNamara, Federal Public Defender, Stephen C. Gordon, Assistant Federal Public Defender, Jennifer C. Leisten, Research & Writing Attorney, Office of the Federal Public Defender, Raleigh, North Carolina, for Amicus Curiae.

Before WILKINSON, KING, and WYNN, Circuit Judges.

Opinion

***194** Vacated and remanded by published opinion. Judge WYNN wrote the opinion, in which Judge WILKINSON and Judge KING joined.

WYNN, Circuit Judge:

Defendant Brian Keith Berry was convicted of a sex offense in state court and obligated to register under the federal Sex Offender Registration and Notification Act, also known as SORNA. Defendant failed to register as required and pled guilty to violating 18 U.S.C. § 2250(a).

At sentencing, the district court calculated Defendant's United States Sentencing Guidelines ("Guidelines") range as if he were a tier III sex offender. Defendant challenges that tier designation. Using the categorical approach, which we hold applicable here, and comparing his state court conviction for endangering the welfare of a child to the generic offenses enumerated in 42 U.S.C. § 16911(4)(A), we must agree: the district court erred in deeming Defendant a tier III offender. Accordingly, we vacate Defendant's sentence and remand for resentencing.

I.

In 2002, Defendant pled guilty in New Jersey state court to endangering the welfare of a child in violation of N.J. Stat. Ann. § 2C:24–4(a) (2002). Upon Defendant's release from prison, he was advised that he must register as a sex offender with the New Jersey police. He initially registered with a New Brunswick, New Jersey, address; but, in March 2013, law enforcement agents found that he no longer lived at that listed address. Thereafter, the State of New Jersey thus issued a warrant to arrest Defendant for violating the conditions of his parole. Ultimately, Defendant was found in North Carolina where he admitted to law enforcement officials that he had not registered as a sex offender in the State of North Carolina.

Defendant pled guilty to one count of failing to register as a sex offender in violation of 18 U.S.C. § 2250. At sentencing, the district court found Defendant to be a tier III sex offender under SORNA, with a corresponding base offense level of sixteen. In a memorandum opinion, the court explained that its tier III determination was "based upon description of the conduct underlying defendant's prior sex offense as set forth

in the presentence report." *United States v. Berry*, No. 5:13-CR-329-FL-1, 2014 WL 7149736, at *1 (E.D.N.C. Dec. 15, 2014). The court found that the conduct underlying the offense, penetrating the vagina of a five-year-old victim with his hand, was comparable to the offense of "abusive sexual contact ... against a minor who has not attained the age of 13 years" listed in the definition of a tier III sex offender in 42 U.S.C. § 16911(4)(A). *Id.* at *3.

Based on his tier III designation and other factors, the district court determined Defendant's Guidelines range to be thirty-three to forty-one months. The district court sentenced Defendant to thirty-three months in prison and five years of supervised release. Defendant appeals, arguing that the district court erred in its determination that he qualified as a tier III sex offender.

II.

A.

[1] [2] [3] On appeal, we must determine whether the district court imposed an unreasonable sentence by calculating Defendant's Guidelines range as if he were a tier III sex offender under SORNA. We review sentences under an abuse of discretion ***195** standard.¹ *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). Such a review includes procedural and substantive reasonableness components. *Id.*; *United States v. Dimache*, 665 F.3d 603, 606 (4th Cir.2011). Relevant here, a sentence is procedurally unreasonable if the district court "fail[ed] to calculate (or improperly calculat[ed]) the Guidelines range." *Gall*, 552 U.S. at 51, 128 S.Ct. 586; *United States v. Avila*, 770 F.3d 1100, 1103 (4th Cir.2014). Further, "[w]hen considering a sentence's reasonableness, we 'review the district court's legal conclusions *de novo* and its factual findings for clear error.'" *United States v. Thornton*, 554 F.3d 443, 445 (4th Cir.2009) (quoting *United States v. Abu Ali*, 528 F.3d 210, 261 (4th Cir.2008)).

B.

SORNA requires sex offenders to register "in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. § 16913(a). Further, sex offenders must update their registration

upon a change in residence. *Id.* § 16913(c). And 18 U.S.C. § 2250 imposes criminal penalties on persons who are required, but knowingly fail, to register.

SORNA classifies sex offenders into three tiers depending on the nature of their underlying sex offense. 42 U.S.C. § 16911(2)-(4). Sex offenders who have committed more serious sex offenses are classified under tiers II and III. *Id.* § 16911(3)-(4). Tier I is a catch-all provision for all other sex offenders. *Id.* § 16911(2). A defendant's tier designation plays into his sentencing, as the Guidelines assign base offense levels of sixteen, fourteen, and twelve for tier III, tier II, and tier I sex offenders, respectively. U.S.S.G. § 2A3.5(a).

To determine a defendant's tier classification, courts compare the defendant's prior sex offense conviction with the offenses listed in SORNA's tier definitions. *See* 42 U.S.C. § 16911(2)-(4). Courts have embraced two analytical frameworks for such inquiries: 1) the "categorical approach" and its derivative, the "modified categorical approach," and 2) the "circumstance-specific approach" (also known as the "noncategorical approach"). *See Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 2281, 186 L.Ed.2d 438 (2013); *Nijhawan v. Holder*, 557 U.S. 29, 34, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009).

[4] The categorical approach focuses solely on the relevant offenses' elements, comparing the elements of the prior offense of conviction with the elements of the pertinent federal offense, also referred to as the "generic" offense. *United States v. Price*, 777 F.3d 700, 704 (4th Cir.), *cert. denied*, — U.S. —, 135 S.Ct. 2911, 192 L.Ed.2d 941 (2015). If the elements of the prior offense "are the same as, or narrower than," the offense listed in the federal statute, there is a categorical match. *Descamps*, 133 S.Ct. at 2281. But if the elements of the prior conviction "sweep[] more broadly," *id.* at 2283, such that there is a "realistic probability" that the statute of the offense of prior conviction encompasses conduct outside of the offense enumerated in the federal statute, the prior offense is not a match, *196 *Price*, 777 F.3d at 704 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007)).

[5] [6] The modified categorical approach serves as a "tool for implementing the categorical approach" where the defendant's prior conviction is for violating a "divisible" statute—that is, a statute that "sets out one or more elements of the offense in the alternative." *Descamps*, 133 S.Ct. at 2281, 2284–85. The modified categorical approach permits

the court to consult a limited menu of so-called *Shepard* documents, such as the indictment, the plea agreement, and jury instructions, to "determine which alternative formed the basis of the defendant's prior conviction." *Id.* at 2281; *see also id.* at 2283–85 (citing *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)). Once the elements of the offense of conviction have been identified, the examination of any *Shepard* documents ends, and the court proceeds with employing the categorical approach, comparing the elements of the offense of conviction with the elements of the offense identified in the federal statute. *Id.* at 2281.

In contrast to the categorical and modified categorical approaches, the circumstance-specific approach focuses on the circumstances underlying the defendant's prior conviction, not the offense's elements. *Price*, 777 F.3d at 705. "In utilizing the circumstance-specific approach, the reviewing court may consider reliable evidence concerning whether the prior offense involved conduct or circumstances that are required by the federal statute." *Id.*

C.

[7] The Tenth Circuit recently considered which approach best fits the portion of the tier III definition found in Section 16911(4)(A)—the precise question before us here—and held that "Congress intended courts to look to the actual age of the defendant's victim, but to otherwise employ a [categorical] approach." *United States v. White*, 782 F.3d 1118, 1133, 1135 (10th Cir.2015). We agree.

[8] Like the Tenth Circuit, and as with any statutory interpretation, we begin by analyzing SORNA's text. Generally, when a federal statute refers to a generic offense, the text evidences Congress's intent that the categorical approach be applied. *See Nijhawan*, 557 U.S. at 34–35, 129 S.Ct. 2294; *see also Moncrieffe v. Holder*, — U.S. —, 133 S.Ct. 1678, 1685, 185 L.Ed.2d 727 (2013). However, when the statute refers to specific conduct or a factual circumstance, its text suggests Congress's intent to allow for the circumstance-specific approach. *Nijhawan*, 557 U.S. at 34, 37–38, 129 S.Ct. 2294; *Price*, 777 F.3d at 705.

Here, Section 16911(4) defines a "tier III sex offender," in relevant part, as:

[an] offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years.

42 U.S.C. § 16911(4)(A). Thus, a defendant cannot be classified as a tier III sex offender under Section 16911(4)(A) unless the prior sex offense conviction is “comparable to or more severe than” aggravated sexual abuse, sexual abuse, or abusive sexual *197 contact as the offenses are “described in” Sections 2241, 2242, and 2244 of the Criminal Code. *Id.* § 16911(4)(A)(i)-(ii).

As the Tenth Circuit recently noted in *White*, “a reference to a corresponding section of the [C]riminal [C]ode” like here “strongly suggests a generic intent.” 782 F.3d at 1132. In *Nijhawan v. Holder*, for example, the Supreme Court analyzed subsections of an “aggravated felony” provision, 8 U.S.C. § 1101(a)(43), which similarly cross-references “offense[s] described in’ a particular section of the Federal Criminal Code.” 557 U.S. at 37, 129 S.Ct. 2294 (citation omitted). According to the Supreme Court, such language “must refer to generic crimes.” *Id.* (emphasis added). SORNA’s text therefore suggests that the categorical approach should be used to determine whether a prior conviction is comparable to or more severe than the generic crimes listed in Section 16911(4)(A).

Nonetheless, we must also consider the language in Section 16911(4)(A)(ii) stating that a defendant is a tier III sex offender if his prior conviction is comparable to or more severe than abusive sexual contact “against a minor who has not attained the age of 13 years.” 42 U.S.C. § 16911(4)(A)(ii) (emphasis added). The definition of abusive sexual contact encompasses a number of alternative elements. *See* 18 U.S.C. § 2244. However, it does not include an element specifying a victim “who has not attained the age of 13 years.” 42 U.S.C. § 16911(4)(ii); *see* 18 U.S.C. § 2244. Congress’s decision to reference in SORNA a victim “who has not attained the age of 13 years,” 42 U.S.C. § 16911(4)(A)(ii), must therefore be read as an instruction to courts to consider the specific

circumstance of a victim’s age, rather than simply applying the categorical approach.

The language used to define a tier II sex offender also supports the conclusion that Congress intended courts to use a categorical approach when the sex offender tier definition references a generic offense, with the exception of the specific circumstance regarding the victim’s age. *White*, 782 F.3d at 1133–34. Section 16911(3)(A) indicates that a defendant is a tier II sex offender if he has committed an offense that is “comparable to or more severe than” a list of generic crimes cross-referenced in the Criminal Code. *See* 42 U.S.C. § 16911(3)(A)(i)–(iv) (listing the offenses of sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, and abusive sexual contact “as described in” Sections 1591, 2422(b), 2423(a), and 2244 respectively). However, Section 16911(3)(A) qualifies that such a generic offense reaches tier II status only when committed “against a minor,” i.e., “an individual who has not attained the age of 18 years.” *Id.* § 16911(3)(A), (14) (emphasis added). Thus, the language of Section 16911(3)(A), like the language of Section 16911(4)(A), instructs courts to apply the categorical approach when comparing prior convictions with the generic offenses listed except when it comes to the specific circumstance of the victims’ ages. *White*, 782 F.3d at 1134; *see also United States v. Mi Kyung Byun*, 539 F.3d 982, 991 (9th Cir.2008).

In sum, an examination of 42 U.S.C. § 16911(4)(A)’s text and structure leads us to the same conclusion the Tenth Circuit reached in *White*: “Congress intended courts 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.” 782 F.3d at 1135.²

***198** Our approach to Section 16911(4)(A) also accords with the Supreme Court’s instructions that courts account for practical considerations when determining whether to employ the categorical or circumstance-specific approach.³ The Supreme Court has noted that the circumstance-specific approach can create “daunting difficulties” for sentencing courts, tasking them with examining evidence to understand the specific circumstances of past convictions. *Descamps*, 133 S.Ct. at 2289 (internal quotation marks omitted). Such examinations could require the review of aged documents, “[t]he meaning of [which] will often be uncertain,” and “statements of fact … [that are] downright wrong.” *Id.* A

defendant may contest much of this, raising the possibility of “minitrials” wherein past convictions are re-litigated. *Moncrieffe*, 133 S.Ct. at 1690; see *Taylor v. United States*, 495 U.S. 575, 601–02, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).

Applying the categorical approach to the generic crimes listed in SORNA’s tier III definition will avoid such practical difficulties. And looking to the circumstances of prior convictions for the limited purpose of identifying the age of the victim raises less concern. Determining age is a “straightforward and objective” inquiry that “involves the inspection of a single threshold fact.” *Hernandez-Zavala v. Lynch*, 806 F.3d 259, 267 (4th Cir.2015).

The government nevertheless contends that we should employ the circumstance-specific approach wholesale, relying primarily on our recent *United States v. Price* decision. True, we there employed the circumstance-specific approach—but to a different, and differently-worded, SORNA subsection. 777 F.3d 700. In *Price*, we had to decide which approach to employ in assessing whether a defendant’s prior conviction qualified as a “sex offense” under Section 16911(7)(I). *Id.* at 707–09. That term includes “[a]ny conduct that by its *nature* is a sex offense against a minor.” 42 U.S.C. § 16911(7)(I) (emphasis added). Examining this language, we found that the “explicit reference to the ‘conduct’ underlying a prior offense, as well as the ‘nature’ of that conduct, refers to how an offense was committed—not a generic offense.” *Price*, 777 F.3d at 709. As explained above, the relevant statutory language—and the conclusions we must draw from it—differ markedly here.

We also reject the government’s contention that practical considerations weigh in favor of adopting a circumstance-specific approach wholesale. According to the government, considering the specific circumstances to determine tier classifications should be unproblematic after *Price*, *199 since the factfinder must already consider the specific circumstances to determine whether a defendant has committed a “sex offense.” While perhaps true in some cases, that assertion may well be untrue in many others, like here, where it is uncontested that Defendant’s prior conviction constitutes a sex offense.

Moreover, *Price* held only that the circumstance-specific approach is applicable to determinations with respect to 42 U.S.C. § 16911(7)(I). 777 F.3d at 709. Subsection (7)(I) is but one of several subsections comprising SORNA’s definition of the term “sex offense.” See 42 U.S.C. § 16911(5)(A)-(C), (7)

(A)-(I). The Court acknowledged in *Price* that the language of at least one other subsection included in the sex offense definition calls for an elements-based, categorical approach. See 777 F.3d at 708. Thus, in some cases, one can and should determine whether a defendant was convicted of a sex offense without looking at the factual circumstances of the prior offense.

D.

[9] Having determined that we apply the categorical approach in assessing whether a defendant’s prior conviction constitutes a tier III sex offense under Section 16911(4)(A), with the exception that we look to the specific circumstance of the victim’s age, we now apply this approach to Defendant’s case. And, doing so, we conclude that the district court erred in deeming Defendant a tier III sex offender.

As we already noted, in 2002 Defendant pled guilty to endangering the welfare of a child in violation of N.J. Stat. Ann. § 2C:24–4(a). At that time, the statute stated:

Any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child *who engages in sexual conduct* which would impair or debauch the morals of the child, *or who causes the child harm* that would make the child an abused or neglected child as defined in R.S. 9:6–1, R.S. 9:6–3 and P.L. 1974, c. 119, s. 1 (C. 9:6–8.21) is guilty of a crime of the second degree. Any other person who engages in conduct or who causes harm as described in this subsection to a child under the age of 16 is guilty of a crime of the third degree.

N.J. Stat. Ann. § 2C:24–4(a) (2002) (emphasis added).

Because the statute provided alternative elements that could constitute child endangerment—“engag[ing] in sexual conduct” or “caus[ing] ... harm”—the statute is divisible. *Id.*; see *Omargharib v. Holder*, 775 F.3d 192, 198 (4th Cir.2014) (“[C]rimes are divisible ... if they set out elements in the alternative and thus create multiple versions of

the crime.” (internal quotation marks omitted)). Generally, therefore, we would use the modified categorical approach to determine the elements of Defendant’s child endangerment conviction. *See Descamps*, 133 S.Ct. at 2281.

Here, however, there is no need to do so—because regardless of whether Defendant’s New Jersey conviction was based on “sexual conduct which would impair or debauch the morals of [a] child” or “harm that would make [a] child ... abused or neglected,” N.J. Stat. Ann. § 2C:24–4(a) (2002), neither alternative would qualify as a tier III sex offense.

The only subsection of relevance to Defendant’s potential tier III classification is subsection (4)(A), which identifies the generic crimes of aggravated sexual abuse, sexual abuse, and abusive sexual contact defined in the Criminal Code. 42 U.S.C. § 16911(4)(A). And all three—aggravated sexual abuse, sexual abuse, and abusive sexual contact—require a defendant to ***200** have engaged in or attempted physical contact.

Specifically, aggravated sexual abuse and sexual abuse require an actual or attempted sexual act, 18 U.S.C. §§ 2241, 2242, which, in turn, involves physical contact, *see id.* § 2246(2) (defining sexual act to include contact between genitals, contact between the mouth and genitals, penetration of genitals with a hand or object with a specific intent, or intentional touching of a person under the age of sixteen with a specific intent). Similarly, the offense of abusive sexual contact requires physical contact. *See id.* § 2244 (defining “abusive sexual contact”); *id.* § 2246(3) (defining “sexual contact” as “intentional touching” with a specific intent).

The New Jersey Supreme Court has, however, made clear that actual or even attempted physical contact is not necessary for conviction under the child endangerment statute at issue here. For example, the New Jersey Supreme Court held in 2001 that “mere nudity repeatedly presented at a window can constitute endangering the welfare of children if the other elements of the endangering crime are met.” *State v. Hackett*, 166 N.J. 66, 764 A.2d 421, 428 (2001). The statute’s first alternative, “sexual conduct which would impair or debauch the morals of [a] child,” N.J. Stat. Ann. § 2C:24–4(a) (2002), thus does not qualify for tier III classification, *see United States v. Aparicio-Soria*, 740 F.3d 152, 154 (4th Cir.2014) (en banc) (“To the extent that the statutory definition of the prior

offense has been interpreted by the state’s highest court, that interpretation constrains our analysis of the elements of state law.”).

Nor is physical contact necessary to “cause[] [a] child harm that would make the child an abused or neglected child”—the statute’s second alternative. N.J. Stat. Ann. § 2C:24–4(a) (2002). For example, one could cause such harm by “willfully failing to provide proper and sufficient food.” *See id.* § 9:61.

In sum, the New Jersey child endangerment statute under which Defendant was convicted, N.J. Stat. Ann. § 2C:24–4(a) (2002), can encompass conduct, such as repeated nudity and willing failure to provide proper food, that clearly falls outside of the generic crimes of aggravated sexual abuse, sexual abuse, and abusive sexual contact, all of which require actual or attempted physical contact. And because the New Jersey statute sweeps more broadly than the generic crimes listed in 42 U.S.C. § 16911(4)(A), Defendant’s New Jersey conviction is not “comparable to or more severe than” those crimes. 42 U.S.C. § 16911(4)(A); *see Descamps*, 133 S.Ct. at 2283. Accordingly, Defendant cannot properly be classified as a tier III offender, and the district court thus erred in so classifying him. Because that error led to an improper calculation of Defendant’s base offense level under the Sentencing Guidelines, Defendant’s sentence is procedurally unreasonable and must be vacated. *See, e.g., United States v. Clay*, 627 F.3d 959, 964, 970 (4th Cir.2010).⁴

III.

For the reasons above, the district court erred in classifying Defendant as a tier III sex offender. We therefore vacate Defendant’s ***201** sentence and remand for the district court to determine Defendant’s proper tier classification (i.e., I or II), calculate the corresponding Sentencing Guidelines range, and impose a sentence.

VACATED AND REMANDED

All Citations

814 F.3d 192

Footnotes

- 1 We reject out of hand the government's suggestion that Defendant failed to preserve this issue and that we should thus review only for plain error. The record clearly shows that Defendant's counsel objected to the district court's tier classification and the court's consideration of the facts and circumstances surrounding Defendant's prior sex offense conviction. Not surprisingly, the district court thus addressed the preserved argument in its memorandum opinion. *Berry*, 2014 WL 7149736, at *2. We do the same.
- 2 The portions of the tier III definition found in 42 U.S.C. § 16911(4)(B) and (C) are irrelevant to this case. We therefore do not address them here.
- 3 The Supreme Court has identified additional factors, including legislative history, equitable considerations, and Sixth Amendment implications, relevant to the determination of whether to apply the categorical or circumstance-specific approach. See *Descamps*, 133 S.Ct. at 2287–89. Because the text and structure of Section 16911(4)(A) clearly evidence Congress's intent, we need not address these additional factors in our analysis, as none would change the result here. We note, however, that two of these factors—legislative history and equitable considerations—lend particularly strong additional support to our conclusion that the categorical approach should apply with the exception that we look to the specific circumstance of a victim's age. See *White*, 782 F.3d at 1134–35 (discussing SORNA's legislative history); see also *Descamps*, 133 S.Ct. at 2289 (explaining the potential unfairness of the circumstance-specific approach in the context of prior conviction sentencing enhancements, as it may allow for consideration of factual allegations from past convictions that the defendant had little incentive to challenge at trial or deprive the defendant of the benefits of a negotiated plea deal).
- 4 We summarily reject Defendant's argument that the Court should defer to New Jersey's classification of him as a tier II offender. The Guidelines make clear that a defendant's base offense level for violation of 18 U.S.C. § 2250 is determined by the defendant's tier classification under SORNA. U.S.S.G. § 2A3.5 cmt. And even a cursory review of New Jersey's sex offender tier system reveals that it is grounded in criteria distinct from SORNA's tier definitions. See, e.g., N.J. Stat. Ann. § 2C:7–8.

963 F.Supp.2d 790
United States District Court, E.D. Tennessee.

UNITED STATES of America

v.

Richard BLACK.

No. 1:12-CR-117.

|

Aug. 8, 2013.

Synopsis

Background: Defendant, indicted for failure to register and update his registration pursuant to the Sex Offender Registration and Notification Act (SORNA), moved to dismiss.

Holdings: The District Court, Curtis L. Collier, J., held that:

- [1] defendant was a Tier II sex offender under SORNA;
- [2] defendant's rights under the Ex Post Facto Clause were not violated by requirement that he register as a sex offender; and
- [3] issue of whether defendant had adequate notice that he was required to register as a sex offender, was question for jury.

Motion denied.

West Headnotes (6)

- [1] **Criminal Law** ↗ Indictment or information in general

Dismissal of an indictment is appropriate only if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is grave doubt that the decision to indict was free from the substantial influence of such violations.

- [2] **Criminal Law** ↗ Defenses in General

Generally, a defense can be determined before trial if it involves questions of law instead of questions of fact on the merits of criminal liability.

[3] **Indictments and Charging Instruments** ↗ Findings

In considering motions to dismiss an indictment, trial court may ordinarily make preliminary findings of fact necessary to decide questions of law presented by pretrial motions so long as the trial court's conclusions do not invade the province of the ultimate factfinder. Fed.Rules Cr.Proc.Rule 12(b), 18 U.S.C.A.

[4] **Mental Health** ↗ Scores and risk levels

Mental Health ↗ Effect of assessment or determination; notice and registration

Having previously been convicted in Louisiana of indecent behavior with a juvenile, defendant, charged with failure to register and update his registration pursuant to the Sex Offender Registration and Notification Act (SORNA), was a Tier II sex offender under SORNA, making him subject to the 25-year registration requirement; conduct for which defendant was previously convicted constituted abusive sexual contact with a minor because it fell within the broad parameters of a "lewd or lascivious act" against a minor. 18 U.S.C.A. §§ 2244(a)(3), (b), 2250(a); LSA-R.S. 14:81.

4 Cases that cite this headnote

[5] **Constitutional Law** ↗ Registration

Mental Health ↗ Sex offenders

Defendant's rights under the Ex Post Facto Clause were not violated by requirement, pursuant to the Sex Offender Registration and Notification Act (SORNA), that he register as a sex offender; defendant was convicted of his offense prior to enactment of SORNA. U.S.C.A. Const. Art. 1, § 9, cl. 3; U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 2250(a).

3 Cases that cite this headnote

[6] **Mental Health** Proceedings

Issue of whether defendant had adequate notice, within meaning of the Due Process Clause, that he was required, pursuant to the Sex Offender Registration and Notification Act (SORNA), to register as a sex offender, was question for jury; issue was in part dependent upon factual determination as to whether defendant's alleged failure to register and update a registration was knowing. U.S.C.A. Const. Art. 1, § 9, cl. 3; U.S.C.A. Const. Amend. 5; 18 U.S.C.A. § 2250(a).

3 Cases that cite this headnote

Attorneys and Law Firms

***791** Perry H. Piper, U.S. Department of Justice, Chattanooga, TN, for United States of America.

***792 MEMORANDUM**

CURTIS L. COLLIER, District Judge.

Defendant Richard Black ("Defendant") has filed a motion to dismiss the indictment (Court File No. 12). The Government submitted a response in opposition to Defendant's motion (Court File No. 13), and Defendant submitted a reply (Court File No. 17). The Court held a hearing on June 17, 2013, at which time the parties argued their positions and requested additional time to brief a newly raised issue by Defendant. The Court granted the parties' request. To date, a supplemental brief has been filed by the Government (Court File No. 19), a supplemental response has been filed by Defendant (Court File No. 20), and a supplemental reply has been filed by the Government (Court File No. 21).

The issues raised by the parties involve novel questions of law and apply to a unique fact pattern. Therefore, the Court commends counsel on their advocacy for their respective party. After considering the arguments made by counsel both at the hearing and in their briefs, as well as the relevant law, the Court will **DENY** Defendant's motion to dismiss the indictment (Court File No. 12).

I. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

In May 1988, Defendant pleaded guilty in Louisiana to engaging in indecent behavior with a juvenile, in violation of La.Rev.Stat. Ann. § 14:81. After serving a term of incarceration, Defendant was released on June 30, 1992. On June 18, 1992, just days prior to his release, new legislation became effective in Louisiana imposing a ten-year registration requirement for sex offenders upon release from imprisonment; that period would expire after ten years as long as the convicted sex offender did not become subject again to this same chapter in the statute. *See* La.Rev.Stat. Ann. § 15:544. Defendant registered under Louisiana law upon release from prison. His parole ended in 1996.

Defendant was not charged with any subsequent offenses until 2007, when he was charged with aggravated assault on a peace officer with a firearm, in violation of La.Rev.Stat. Ann. § 14:37.2. Defendant was convicted and sentenced to five years in prison. He was released in October 2011 and placed on parole. On October 24, 2011, his parole officer ordered that he register under the sex offender registry law, and Defendant acquiesced. According to Defendant, however, he only registered out of fear his parole might be revoked. On June 7, 2012, a warrant was issued by the state of Louisiana for Defendant's failure to register. On July 20, 2012, Defendant was arrested in Tennessee. Defendant had not registered in Tennessee nor had he updated his registration information in Louisiana.

On September 25, 2012, Defendant was indicted by a federal grand jury and charged with failure to register and update his registration pursuant to the Sex Offender Registration and Notification Act ("SORNA"), in violation of 18 U.S.C. § 2250(a) and 42 U.S.C. §§ 16911 and 16913. Now pending before the Court is Defendant's motion to dismiss the indictment.

II. STANDARD OF REVIEW

[1] Outside the context of the Speedy Trial Act, dismissing an indictment on a defendant's motion is a significant step for a district court to take. "[D]ismissal of the indictment is appropriate only if it is established that the violation substantially influenced the grand jury's decision to indict, or if there is 'grave doubt' that the decision to indict was free from the substantial ***793** influence of such violations."

Bank of Nova Scotia v. United States, 487 U.S. 250, 254, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988).

[2] [3] Motions to dismiss are governed by Rule 12 of the Federal Rules of Criminal Procedure, which permits pretrial consideration of any defense “the court can determine without a trial of the general issue.” Fed.R.Crim.P. 12(b)(2). Rule 12 provides a defendant may bring a motion challenging “a defect in the indictment or information,” including “a claim that the indictment or information fails to invoke the court's jurisdiction.” Fed.R.Crim.P. 12(b)(3)(B). Generally, a defense can be determined before trial if it involves questions of law instead of questions of fact on the merits of criminal liability. *United States v. Craft*, 105 F.3d 1123, 1126 (6th Cir.1997). Accordingly, the defense may use a Rule 12(b) motion to raise for consideration such matters as “former jeopardy, former conviction, former acquittal, statute of limitations, immunity [and] lack of jurisdiction.” *Id.* In considering such motions, a trial court may “ordinarily make preliminary findings of fact necessary to decide questions of law presented by pretrial motions so long as the trial court's conclusions do not invade the province of the ultimate factfinder.” *Craft*, 105 F.3d at 1126.

III. DISCUSSION

In light of the parties' arguments at the June 17 hearing and their averments in their supplemental briefs, the Court observes two issues remain for the Court's consideration.¹ The first issue pertains to whether Defendant is a Tier I or Tier II sex offender for purposes of SORNA. Defendant's classification is relevant because it would have a direct impact on when Defendant's registration period ended under SORNA.² In the event the Court determines Defendant is a Tier II offender, the second issue would be whether applying the SORNA requirements would result in both *Ex Post Facto* and Due Process violations.

A. Classification under SORNA

[4] Defendant argues under SORNA he is a Tier I, not a Tier II, offender. The distinction is significant because as a Tier I sex offender, Defendant would only be subject to a fifteen year period of registration, or even possibly a ten year period of registration if he maintained a “clean record” as defined by statute. Given that Defendant was released from prison for committing a sex offense in 1992, Defendant argues his registration period would have expired in either 2002 or 2007. Thus, the time period for registering would have ended

well before the instant offense. On the other hand, Defendant acknowledges that as a Tier II offender he would have been subject to a twenty-five year registration period.

As background, Title 18, United States Code, Section 2250 makes it a crime for a sex offender to fail to register under the Sex Offender Registration and Notification Act or “SORNA,” 42 U.S.C. §§ 16901 *et seq.* Specifically, 18 U.S.C. § 2250 makes *794 it a crime not to register if the person “is required to register under [SORNA]”; “is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law ... or the law of any territory or possession of the United States”; “travels in interstate or foreign commerce”; and “knowingly fails to register or update a registration as required by [SORNA].” 18 U.S.C. § 2250. Although SORNA was passed on July 27, 2006, the statute was not made effective until August 1, 2008. See *United States v. Utesch*, 596 F.3d 302, 311 (6th Cir.2010). At issue here is whether Defendant was a Tier I or Tier II sex offender and, depending upon his classification, whether he was still required to register.

Sex offenders under SORNA are classified into one of three categories: Tier I, II, or III. A Tier I sex offender is subject to a fifteen year registration period, and with a clean record, that period can be reduced to ten years. 42 U.S.C. § 16915(a)-(b). A Tier II sex offender, on the other hand, is subject to a twenty five year registration period. *Id.* Finally, a Tier III sex offender is generally subject to a registration period of life. *Id.*

The statute defines a Tier I sex offender as “a sex offender other than a tier II or tier III sex offender.” 42 U.S.C. § 16911(2). A Tier II sex offender is defined as follows:

a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

...

(iv) abusive sexual contact (as described in section 2244 of Title 18)

42 U.S.C. § 16911(3).

Title 18, United States Code, Section 2244 provides limited guidance regarding the definition of “abusive sexual contact.” The Court observes that two provisions in § 2244 could be relevant to Defendant’s case and the manner in which “abusive sexual contact” should be defined: (1) 18 U.S.C. § 2244(a)(3), which pertains specifically to offenses against minors as described in § 2243(a), and (2) 18 U.S.C. § 2244(b), which is more akin to a catch-all provision. Section 2244(a)(3) applies to anyone who “knowingly engages in or causes sexual contact with or by another person” if under § 2243(a) the sexual contact would have been a “sexual act.” Section 2243(a) applies to anyone who “knowingly engages in a sexual act with another person who (1) has attained the age of 12 years but has not attained the age of 16 years; and (2) is at least four years younger than the person so engaging; or attempts to do so.” 18 U.S.C. § 2243(a). The statute defines a “sexual act” as, *inter alia*, “the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(2).

Section 2244(b), on the other hand, addresses sexual conduct not otherwise covered by the other provisions of § 2244. Section 2244(b) pertains to anyone who “knowingly engages in sexual contact with another person without that other person’s permission.” “Sexual contact” is defined in the statute as “the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, *795 or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(3).

The “SMART” Guidelines were promulgated by the United States Attorney General in 2008 pursuant to § 112(b) of Title I of the Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16912(b). See The National Guidelines for Sex Offender Registration and Notification, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking (“SMART”), Office of the Attorney General, 73 FR 38030–01, 2008 WL 2594934 (July 2, 2008). One area in which the SMART Guidelines provide guidance is with respect to determining a sex offender’s classification. For instance, the SMART Guidelines provide “jurisdictions generally may premise the determination on the elements of the offense, and are not required to look to underlying conduct that is not reflected in the offense of conviction.” *Id.* at *38053. Moreover, while the definition of “sexual act” as stated in the SMART Guidelines is consistent

with the language in the statute, *see id.* at *38050, the SMART Guidelines also make an attempt to simplify the process by which courts make a determination as to whether an offense satisfies the criteria of a particular Tier. For example, the Guidelines state “[d]etermining whether a jurisdiction’s offenses satisfy the criteria for [Tier II] is simplified by recognizing that the various cited and described offenses essentially cover” what can be grouped into four categories. *Id.* at *38053. One of those categories is “[o]ffenses against minors involving sexual contact—i.e., any sexual touching of or contact with the intimate parts of the body, either directly or through the clothing—and inchoate or preparatory offenses (including attempts, conspiracies, and solicitations) that are directed to the commission of such offenses.” *Id.*

Here, the Court must determine whether Defendant—who committed a sex offense in Louisiana in 1988, i.e. Indecent Behavior with a Juvenile—satisfies the criteria of a Tier I or Tier II sex offender. It is undisputed that the offense was punishable by a term of imprisonment for more than one year; therefore, the first criterion for a Tier II sex offender is satisfied. The second and more highly contested issue is whether Defendant engaged in “abusive sexual contact” with a minor. The Court will begin by considering § 2244(a)(3), which appears to be more pertinent because it cross-references another provision that directly applies to offenses against minors. Defendant claims § 2244(a)(3) cannot be met because the provision is dependent upon § 2243(a), which requires a “sexual act” with a minor.³ Defendant argues his underlying sex offense does not satisfy the definition of a “sexual act,” because among other things, there is no indication the offense involved the “intentional touching, not through the clothing, of the genitalia of another person” The Government argues to the contrary pointing to both a guilty plea transcript in which the court, in listing the elements of the offense, mentioned molestation and the prosecutor, in stating the factual basis, indicated Defendant “fondl[ed] the genital area” of the fourteen-year-old victim.

The state offense at issue is La.Rev.Stat. Ann. § 14:81, which would have read in pertinent part:

Indecent behavior with juveniles is the commission by anyone over the age of seventeen of any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, *796 where there is an age difference

of greater than two years between the two persons, with the intention of arousing or gratifying the sexual desires of either person.

Broken down into its elements, the State must show: "(1) the defendant is a person over the age of seventeen; (2) the juvenile is a person under the age of seventeen; (3) there is an age difference greater than two years between the defendant and the juvenile; (4) the defendant committed a lewd or lascivious act upon the person of the juvenile; and (5) the act committed by the defendant was with the intention of arousing or gratifying the sexual desires of either person." *State v. Ruple*, 426 So.2d 249, 251 (La.Ct.App.1983). The fourth element is the primary element at issue.

As the parties have pointed out, there is no case that directly addresses whether a violation of § 14:81 should be treated as a Tier II offense. Nonetheless, the Court finds some consolation from the guidance provided in the SMART Guidelines. As noted earlier, the SMART Guidelines provide that a Court can generally consider the elements of the offense to determine an individual's classification without having to consider the underlying conduct. One of the elements of the state offense here involves the commission of a "lewd or lascivious act" upon a minor. While this element does not specifically require that the act involve the intentional touching of genitalia not through clothing, it is certainly arguable that such conduct could fall within the broad parameters of a "lewd or lascivious act" against a minor.⁴ Taking the SMART Guidelines at face value, the Court would not be required to delve any deeper into the underlying conduct to determine whether the Louisiana offense falls within the purview of Tier II.

Alternatively, applying § 2244(b), the Court reaches the same conclusion. Although Defendant argues § 2244(a)(3) is the more appropriate provision to apply because it applies to offenses against minors, the Court observes that 42 U.S.C. § 16911(3) does not specify a particular provision of § 2244 that must be applied. As the Government has pointed out, § 2244(b) uses the broader term "sexual contact," and that term is defined, *inter alia*, as intentional touching that is "either directly or through the clothing." Thus, even the conduct as described by Defendant would fall within this definition. Moreover, there does not appear to be any dispute that Defendant did not have "permission" to engage in sexual conduct with the fourteen year old victim.

Accordingly, the Court concludes Defendant is a Tier II sex offender. Thus, he is subject to the twenty five year registration requirement.

B. Notice Requirement

[5] Defendant next argues that, even if the twenty five year registration requirement under SORNA applies, the indictment should be dismissed because he lacked notice of the requirement. Defendant argues holding him in violation of SORNA would in itself be an *Ex Post Facto* violation and a Due Process violation. Specifically, Defendant contends that because he was not advised he had to register under SORNA, applying those requirements now would be punitive since he has not had an opportunity to register. He argues this would violate the *Ex Post Facto* Clause. Alternatively, Defendant *797 argues the lack of notice violates his right to Due Process.

The Government, in response, contends Defendant's arguments are unavailing. First, the Government argues Defendant was not deprived of an opportunity to register and that he did, in fact, register in 2011 when he was released from prison. Second, the Government points out that Defendant's *Ex Post Facto* argument must fail because it is well established that the retroactive application of SORNA does not violate the *Ex Post Facto* Clause. Finally, while acknowledging the law is still developing with regard to due process challenges, the Government contends the majority of courts have determined actual notice under SORNA is not required so long as the defendant had notice under the state's statutory scheme.

Defendant's first argument must fail. Numerous circuit courts, including the United States Court of Appeals for the Sixth Circuit, have already concluded the application of SORNA to defendants convicted prior to its enactment does not violate the *Ex Post Facto* Clause. See *United States v. Felts*, 674 F.3d 599, 606 (6th Cir.2012) (relying upon Supreme Court precedent in a related context, it noted the *Ex Post Facto* Clause is not implicated because "SORNA provides for a conviction for failing to register; it does not increase the punishment for the past conviction"); see also *United States v. Coleman*, 675 F.3d 615, 619 (6th Cir.2012) (citing *Felts*, 674 F.3d at 605–06). This circuit has expressly rejected the argument made by Defendant that having to register under SORNA is a punitive measure.

[6] With regard to Defendant's second argument, however, the Court acknowledges the case law is less clear. For

instance, in *Felts*, the defendant argued there was a Due Process violation due to lack of notice. 674 F.3d at 604. The defendant was convicted of a sex offense in Tennessee and upon release from incarceration failed to register. At the time, Tennessee had not completely implemented SORNA. In addition to holding that the defendant was required to register even if Tennessee had not completely implemented SORNA, The Sixth Circuit briefly discussed the defendant's due process argument observing that this issue could be problematic if there was an inconsistency between SORNA's requirements and the state law requirements. *Id.* at 604–05. The Sixth Circuit noted two different scenarios where this issue might arise. The first involved a situation where the state law requirements are equal to or greater than that imposed by SORNA. Under those circumstances, there would not be an issue because “[i]f an offender has fair notice of, and fulfills all of the requirements under the state law, then by definition, the offender will fulfill all of the requirements under federal law.” *Id.* Thus, “there would be sufficient fair notice to satisfy due process.” *Id.* at 606.

The other scenario involved a situation where the state law imposed lesser restrictions. The Sixth Circuit described this scenario as follows:

The second, potentially more problematic, circumstance, occurs where the requirements under the non-compliant state registry are less onerous than the requirements under SORNA, and the offender may thus lack fair notice of what federal law requires. This is what *Felts* alleges. For example, 42 U.S.C. § 16915(a) lists different durations of the registration requirement based on the severity of the offense. For a Tier III sex offender, registration is required for life. *Id.* § 16915(a)(3). If a non-implementing state were to require registration for a period less than that mandated by SORNA, and a state official *798 only informed an offender of the state requirement, would an offender who stopped registering after the state-prescribed period violate SORNA?

United States v. Felts, 674 F.3d 599, 605 (6th Cir.2012). The Sixth Circuit never resolved the question, however, because it determined the defendant knew he was required to register under Tennessee law and failed to do so. Therefore, his argument that he lacked notice had to fail. Cf. *United States v. Stock*, 685 F.3d 621, 626 (6th Cir.2012) (concluding the defendant could not argue he lacked notice when he “admitted in his plea agreement that he knew about SORNA’s registration requirement”).

Notwithstanding the fact that the latter scenario discussed in *Felts* may be more akin to the facts of this case, a preliminary matter this Court must resolve is whether Defendant had adequate notice. The issue of whether Defendant had adequate notice is in part dependent upon a factual determination that would require a trial of the general issue. In fact, one of the elements the Government must prove in establishing a violation of 18 U.S.C. § 2250 is that Defendant “knowingly fail[ed] to register or update a registration as required by [SORNA].” *Id.* (emphasis added). The Government is of the position that Defendant had notice. In particular, the Government notes in its brief that when Defendant was released from incarceration, he actually registered as a sex offender in Louisiana at the instruction of his probation officer. Moreover, at the time he moved to Tennessee, there was an outstanding warrant for his arrest for failure to register. Finally, he failed to register when he moved to Tennessee or update his registration in Louisiana. Defendant, however, disputes these facts. Because the larger issue of whether Defendant had adequate notice is a question for the jury, the Court concludes the Government, and Defendant if he so chooses, should have an opportunity to present evidence on this issue. With that said, once that evidence has been offered at trial, the Court would be willing, upon renewal of Defendant's due process argument, to reconsider this issue.

IV. CONCLUSION

For the foregoing reasons, the Court will **DENY** Defendant's motion to dismiss the indictment (Court File No. 12).

An Order shall enter.

All Citations

963 F.Supp.2d 790

Footnotes

- 1 At the hearing, counsel for Defendant alluded to the fact she may assert equitable estoppel as a grounds for dismissal of the indictment. However, in Defendant's supplemental brief, Defendant concedes that this issue need not be decided by this Court or at this time (see Court File No. 20 at 8–9 n. 5).
- 2 The Government, in its reply brief, appears to concede that Defendant's registration period under Louisiana law, which was ten years at the time the law became applicable to Defendant, would have expired in 2002. Therefore, the focus now is whether Defendant was still required to register under SORNA.
- 3 Defendant essentially concedes the other elements of § 2243(a) are satisfied.
- 4 Moreover, the Court acknowledges that the language highlighted by the Government in the guilty plea transcript, which the Court need not rely upon here, does mention conduct from which it could be inferred the sexual act was not just "through the clothing."

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756 F.3d 1125

United States Court of Appeals, Ninth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Pedro CABRERA–GUTIERREZ, Defendant–Appellant.

No. 12–30233

|

Argued and Submitted April 11, 2013.

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Filed June 3, 2013.

|

Amended March 17, 2014.

Synopsis

Background: Defendant was convicted in the United States District Court for the Eastern District of Washington, Wm. Fremming Nielsen, Senior District Judge, of failing to register under the Sex Offender Registration and Notification Act (SORNA). Defendant appealed.

Holdings: On grant of panel rehearing, the Court of Appeals, Tashima, Circuit Judge, held that:

[1] Congress had the power under the Commerce Clause to enact SORNA;

[2] under the categorical approach, defendant's prior Oregon conviction could not serve as predicate for defendant's classification as Tier III sex offender; and

[3] modified categorical approach did not apply.

Conviction affirmed; sentence vacated and remanded.

Callahan, Circuit Judge, filed opinion concurring and dissenting.

Opinion, 718 F.3d 873, withdrawn and superseded.

West Headnotes (10)

[1] **Criminal Law** ↗ Review De Novo

Court of Appeals would review district court's denial of defendant's motion to dismiss the indictment de novo.

[2] **Commerce** ↗ Federal Offenses and Prosecutions

Commerce ↗ Subjects and regulations in general

Mental Health ↗ Sex offenders

United States ↗ Necessary and Proper Clause

Congress had the power under the Commerce Clause to enact the Sex Offender Registration and Notification Act (SORNA) and to compel convicted sex offender who traveled interstate to register under SORNA, notwithstanding that only SORNA's penalty provision, and not its registration provision, contained an interstate travel requirement; because SORNA's registration requirement was necessary to the effectuation of the broader SORNA scheme, the Necessary and Proper Clause provided Congress ample authority to punish a state sex offender who traveled interstate for failing to register. U.S.C.A. Const. Art. 1, § 8, cl. 3; U.S.C.A. Const. Art. 1, § 8, cl. 18; Sex Offender Registration and Notification Act, § 113, 42 U.S.C.A. § 16913; 18 U.S.C.A. § 2250.

19 Cases that cite this headnote

[3] **Criminal Law** ↗ Review De Novo

Criminal Law ↗ Sentencing

A court of appeals reviews a district court's interpretation of the Sentencing Guidelines de novo, and the district court's factual findings for clear error. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

[4] **Courts** ↗ In general; retroactive or prospective operation

Supreme Court case applied to case currently before Court of Appeals because Supreme Court issued its opinion while the other case was still pending direct review and not yet final.

[5] **Mental Health** Persons and offenses included

Under the categorical approach for determining whether a prior state conviction may serve as a predicate for a classification as Tier III sex offender, a sentencing court must begin by comparing the statutory definition of the prior offense with the elements of the generic federal offense specified as a sentencing predicate; the prior conviction may operate as a predicate if it is defined more narrowly than, or has the same elements as, the generic federal crime, but if the statute defining the prior offense sweeps more broadly than the generic crime, the prior offense cannot serve as a statutory predicate, and the key to this comparison is elements, not facts. Sex Offender Registration and Notification Act, § 111(4), 42 U.S.C.A. § 16911(4).

11 Cases that cite this headnote

[6] **Mental Health** Persons and offenses included

Mental Health Proceedings

A sentencing court using the categorical approach for determining whether a prior state conviction may serve as a predicate for a classification as Tier III sex offender may not consult extra-statutory materials, even if the materials show that the defendant actually committed the predicate offense in its generic form; the crime's elements are all that is relevant. Sex Offender Registration and Notification Act, § 111(4), 42 U.S.C.A. § 16911(4).

17 Cases that cite this headnote

[7] **Mental Health** Persons and offenses included

Under the categorical approach, the Oregon statute setting forth the offense of sexual abuse in the second degree swept more broadly than the federal statute setting forth the offense of sexual abuse, and, thus, absent exception to categorical rule, prior Oregon conviction could not serve as predicate for defendant's classification as Tier III sex offender; Oregon statute required the

subjection of another to certain types of sexual activity and that "the victim does not consent thereto," while generic federal crime of sexual abuse required that a defendant cause another to engage in a sexual act by certain types of threat or fear or to engage in a sexual act with a victim who was mentally or physically incapable. 18 U.S.C.A. § 2242; Sex Offender Registration and Notification Act, § 111(4), 42 U.S.C.A. § 16911(4); ORS 163.425 (2008).

11 Cases that cite this headnote

[8] **Mental Health** Persons and offenses included

The modified categorical approach for determining whether a prior state conviction may serve as a predicate for a classification as Tier III sex offender is available only when a defendant is convicted of violating a statute that sets out multiple, divisible elements; in such cases, the statute effectively creates several different crimes pertaining to the possible combinations of alternative elements, and, thus, a sentencing court may consult certain extra-statutory materials to identify the defendant's actual crime of conviction and to compare the elements of that crime with the generic crime. Sex Offender Registration and Notification Act, § 111(4), 42 U.S.C.A. § 16911(4).

14 Cases that cite this headnote

[9] **Mental Health** Persons and offenses included

Mental Health Proceedings

Where a statute states a single, indivisible set of elements, the modified categorical approach for determining whether a prior state conviction may serve as a predicate for a classification as Tier III sex offender has no role to play; in such cases, the sentencing court cannot consult extra-statutory materials to determine which crime formed the basis of the defendant's conviction, because only the single set of indivisible elements could apply. Sex Offender Registration and Notification Act, § 111(4), 42 U.S.C.A. § 16911(4).

12 Cases that cite this headnote

[10] **Mental Health** Persons and offenses included

The Oregon statute setting forth the offense of sexual abuse in the second degree was not divisible, and the modified categorical approach thus did not apply to determining whether defendant's prior conviction under that statute could serve as a predicate for a classification as Tier III sex offender; the Oregon statute stated only the two elements of the subjection of another to certain types of sexual activity and non-consent, those two elements were indivisible as opposed to alternative, and, although another Oregon statute listed four types of legal incapacity to consent, defendant was not convicted under such statute. 18 U.S.C.A. § 2242; Sex Offender Registration and Notification Act, § 111(4), 42 U.S.C.A. § 16911(4); West's Or.Rev. Stat. Ann. § 163.315; ORS 163.425 (2008).

7 Cases that cite this headnote

Attorneys and Law Firms

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Appeal from the United States District Court for the Eastern District of Washington, Wm. Fremming Nielsen, Senior District Judge, Presiding. D.C. No. 2:12-cr-02027-WFN-1.

Before: A. WALLACE TASHIMA and CONSUELO M. CALLAHAN, Circuit Judges, and RANER C. COLLINS, District Judge.*

Opinion by Judge TASHIMA; Partial Concurrence and Partial Dissent by Judge CALLAHAN.

TASHIMA, Circuit Judge:

ORDER

Defendant–Appellant's petition for panel rehearing is granted. The Opinion, filed June 3, 2013, and reported at 718 F.3d 873, is withdrawn and replaced by the Amended Opinion and concurring and dissenting opinion filed concurrently with this Order. The petition for rehearing en banc is denied as moot. Further petitions for panel rehearing and/or rehearing en banc may be filed with respect to the Amended Opinion.

OPINION

Our original Opinion was filed on June 3, 2013. *See United States v. Cabrera–Gutierrez*, 718 F.3d 873 (9th Cir.2013). Shortly thereafter, on June 20, 2013, the Supreme Court decided *Descamps v. United States*, —U.S.—, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), which worked a substantial change in sentencing law. We therefore granted the petition for panel rehearing and withdrew our Opinion. We now affirm the conviction, but vacate the sentence and remand for resentencing.

Pedro Cabrera–Gutierrez (“Cabrera”) appeals his conviction and sentence for failing to register under the Sex Offender Registration and Notification Act (“SORNA”). On appeal he advances two arguments. First, he contends that Congress lacked authority under the Commerce Clause to compel his registration as a sex offender. Second, he contends that the district court erred in sentencing him as a Tier III sex offender based on his prior conviction of second degree sexual abuse.¹

***1128** We reject Cabrera's first argument, but agree with his second. We hold that Congress has authority under the Commerce Clause to compel Cabrera, a convicted sex offender who traveled interstate, to register under SORNA. But, following the Supreme Court's recent decision in *Descamps*, we hold that the district court erred when it applied the modified categorical approach in sentencing Cabrera as a Tier III sex offender. *Descamps* precludes application of the modified categorical approach in this case.

I.

Cabrera was born in Mexico and has been removed from the United States several times. In 1998, Cabrera was convicted in Oregon of second degree sexual abuse. In his guilty plea statement, Cabrera admitted:

I on May 2, 1998 did knowingly have sexual intercourse with [redacted] and she was unable to legally consent to having sexual intercourse with me because she was under the influence of alcohol at the time of the sexual intercourse. Further [redacted] was 15 years old on May 2, 1998.

Cabrera was sentenced to 36 months' imprisonment and required to register as a sex offender. When Cabrera was released from custody in September 2000, he was advised of his responsibility to register as a sex offender under Oregon law and promptly removed to Mexico.

On February 3, 2012, Cabrera was arrested for a traffic violation in Yakima, Washington. He was subsequently charged with failing to register as a sex offender in violation of 18 U.S.C. § 2250. The indictment alleged that Cabrera was an individual who was required to register under SORNA, and having traveled in interstate commerce, did knowingly fail to register in violation of 18 U.S.C. § 2250. It further alleged that Cabrera failed to meet his registration obligation during the period February 3, 2011, through February 3, 2012.

Cabrera filed a motion to dismiss the indictment, arguing that Congress lacked authority to require him to register as a sex offender. The district court denied the motion, noting that although *United States v. George*, 625 F.3d 1124 (9th Cir.2010), had been vacated, 672 F.3d 1126 (9th Cir.2012), "the Court finds the reasoning in *George* persuasive and notes that the opinion was vacated on different grounds." Thereafter, Cabrera entered a conditional plea of guilty, preserving his right to appeal the denial of his motion to dismiss.

The Pre-Sentence Investigation Report ("PSR") listed Cabrera's offense level as 16 under U.S.S.G. § 2A3.5(a) (1) because he was required to register as a Tier III sex offender. Cabrera objected to the PSR. He argued that his prior conviction only qualified him as a Tier I sex offender, not a Tier III offender, because his Oregon conviction was

not comparable to, or more severe than, "aggravated sexual abuse or sexual abuse," as defined in 42 U.S.C. § 16911. The district court rejected this argument, noting that Cabrera's guilty *1129 plea admitted that the girl was intoxicated and fifteen years old. The court sentenced Cabrera to seventeen months' imprisonment and three years' supervised release. Cabrera timely appeals from his conviction and sentence.

II.

[1] We review the district court's denial of Cabrera's motion to dismiss the indictment *de novo*. *United States v. Milovanovic*, 678 F.3d 713, 719–20 (9th Cir.2012) (en banc); *United States v. Marks*, 379 F.3d 1114, 1116 (9th Cir.2004).

[2] SORNA requires sex offenders to, among other things, register their names, addresses, employment or school information, update that information, and appear in person at least once a year for verification of the information. 42 U.S.C. § 16901 *et seq.* These obligations, Cabrera asserts, are an unconstitutional regulation of his inactivity under the Supreme Court's recent opinion in *National Federation of Independent Business v. Sebelius*, — U.S. —, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012). Cabrera accepts that Congress has broad powers under the Commerce Clause, but points out that in *Sebelius*, the Court stated that "[c]onstruing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority." *Id.* at 2587. Cabrera further argues that, unlike the Affordable Care Act at issue in *Sebelius*, SORNA has nothing to do with commerce. Its purpose is to "protect the public from sex offenders and offenders against children." 42 U.S.C. § 16901. He argues that this purpose, while laudable, is not an appropriate purpose under the Commerce Clause because public safety measures lie exclusively in the realm of the States.

In anticipation of the government's reliance on "an additional jurisdictional hook," such as travel across state lines, Cabrera argues that SORNA requires all sex offenders to register, regardless of travel, and that the duty to register under SORNA precedes any act of travel. Thus, he continues, "SORNA would hold an individual who fails to register, travels and then registers equally responsible as an individual who never registers, before or after travel." He argues, citing *Sebelius*, 132 S.Ct. at 2590, that "the proposition that Congress may dictate conduct of an individual today

[i.e., registering as a sex offender] because of prophesied future activity [i.e., interstate travel] finds no support in [the applicable Commerce Clause] precedent.” Cabrera concludes that because Congress lacks the power to require an individual to register as a sex offender, it follows that it cannot penalize him for failing to register, even if he has traveled in interstate commerce.

We are not persuaded. In *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995), the Supreme Court recognized Congress’s “broad” power under the Commerce Clause to regulate: (1) “the use of the channels of interstate commerce”; (2) “the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities”; and (3) “those activities having a substantial relation to interstate commerce.” *Id.* at 558–59, 115 S.Ct. 1624 (citations omitted). The government asserts that the requirement of interstate travel meets “the first two categories of Congress” Commerce Clause authority, because an interstate traveler is both a person “in interstate commerce” and one who uses the “channels of interstate commerce.”

We held in *George*, 625 F.3d at 1130, vacated on other grounds, 672 F.3d 1126, that “Congress had the power under its broad commerce clause authority to enact *1130 the SORNA,” and we now reaffirm that holding, which has been embraced by our fellow circuits. In *George*, we explained:

SORNA was enacted to keep track of sex offenders. See *Carr v. United States*, 560 U.S. 438, 455 [130 S.Ct. 2229, 176 L.Ed.2d 1152] (2010) (“[SORNA was] enacted to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks.”). Such offenders are required to “register, and keep registration current, in each jurisdiction” where the offender lives, works, or goes to school. 42 U.S.C. § 16913(a). As stated by the Eighth Circuit, “[t]his language indicates Congress wanted registration to track the movement of sex offenders through different jurisdictions.” *United States v. Howell*, 552 F.3d 709, 716 (8th Cir.2009). “Under § 2250, Congress limited the enforcement of the registration requirement to only those sex offenders who were either convicted of a federal sex offense or who move in interstate commerce.” *Id.* (citing 18 U.S.C. § 2250(a)(2)). The requirements of § 16913 are reasonably aimed at “regulating persons or things in interstate commerce and the use of the channels of interstate commerce.” *Id.* at 717 (quoting [*United States v. May*, 535 F.3d [912,] 921 [(8th Cir.2008)]]) (quotation marks omitted).

625 F.3d at 1129–30 (emendations, except in the last sentence, in the original).

George noted that, in addition to the Eighth Circuit, the Fourth, Fifth, Tenth, and Eleventh Circuits had upheld SORNA’s constitutionality under the Commerce Clause.² *Id.* at 1130. The Second Circuit has also affirmed the constitutionality of SORNA under the Commerce Clause.³ In at least two extant opinions, we have approvingly referenced *George*.⁴ Moreover, the Supreme Court’s opinions in *Reynolds v. United States*, — U.S. —, 132 S.Ct. 975, 181 L.Ed.2d 935 (2012), and *Carr v. United States*, 560 U.S. 438, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010), affirming but limiting SORNA, implicitly affirm SORNA’s constitutionality.

We recognize, as Cabrera observes, that only SORNA’s penalty provision, 18 U.S.C. § 2250, and not its registration provision, 42 U.S.C. § 16913, contains an interstate travel requirement. But we reject the significance of the distinction for several reasons. First, because Cabrera was charged

*1131 and convicted of failing to register *after* having traveled in interstate commerce, it is questionable whether he may properly challenge the duty to register without interstate travel. More importantly, such a parsing of SORNA has been rejected by the Supreme Court and the circuit courts that have considered the issue. In *Carr*, the Court explained that “Section 2250 is not a stand-alone response to the problem of missing sex offenders; it is embedded in a broader statutory scheme enacted to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks.” 560 U.S. at 455, 130 S.Ct. 2229 (citation omitted). The Seventh Circuit explained the symbiotic relationship between the two sections in *United States v. Sanders*, 622 F.3d 779, 783 (7th Cir.2010), stating:

[S]ection 16913 cannot be divorced from section 2250 in evaluating whether the Commerce Clause gives Congress the authority to require anyone convicted of a sex offense to register. Imposing a duty to register as a matter of federal law would do little to solve the problem of sex offenders slipping through the cracks absent the enforcement mechanism supplied by section 2250. Interstate travel by a sex offender is not merely a jurisdictional hook but a critical part of the problem that Congress was attempting to solve, for whenever sex offenders cross state lines they tend to evade the ability of any individual state to track them and thereby “threaten the efficacy of the statutory

scheme....” [Carr; 130 S.Ct.] at 2239; *see also id.* at 2238 (it was reasonable for Congress to give States primary responsibility to supervise and ensure compliance among state sex offenders and subject such offenders to federal criminal liability only when “they use the channels of interstate commerce in evading a State’s reach”); *id.* at 2240 (act of travel by sex offender is not merely a jurisdictional predicate but is “the very conduct at which Congress took aim”); *id.* at 2241 (section 2250 “subject[s] to federal prosecution sex offenders who elude SORNA’s registration requirements by traveling in interstate commerce”).

The Second, Fifth, Eighth, and Eleventh Circuits are in accord.⁵ Because SORNA’s registration requirement is necessary to the effectuation of the broader SORNA scheme, we agree with our sister circuits⁶ *1132 in concluding that the Necessary and Proper Clause provided Congress ample authority to enact § 16913 and to punish a state sex offender who, like Cabrera, traveled interstate, for failing to register. *Cf. United States v. Kebodeaux*, — U.S. —, 133 S.Ct. 2496, 2502–05, 186 L.Ed.2d 540 (2013) (holding that the Necessary and Proper Clause enabled SORNA’s application to a pre-enactment federal offender); *United States v. Elk Shoulder*, 738 F.3d 948, 958–59 (9th Cir.2013) (same).

Finally, unlike *Sebelius*, SORNA does not regulate individuals “precisely because they are doing nothing.” 132 S.Ct. at 2587. SORNA applies only to individuals who have been convicted of a sexual offense. Thus, registration is required only of those individuals who, through being criminally charged and convicted, have placed themselves in a category of persons who pose a specific danger to society. Moreover, SORNA’s application to Cabrera is based on his further admitted activities of traveling in interstate commerce and then failing to register. Thus, SORNA does not punish the type of inactivity addressed in *Sebelius*.

In sum, agreeing with our sister circuits, we see no reason to depart from our previously expressed reasoning in *George*. We thus conclude that Congress had the authority to enact SORNA and that SORNA’s application to Cabrera is constitutional.

III.

[3] In considering Cabrera’s challenge to his sentence, we review a district court’s interpretation of the Sentencing Guidelines *de novo*, and its factual findings for clear error.

United States v. Swank, 676 F.3d 919, 921 (9th Cir.2012); *United States v. Laurienti*, 611 F.3d 530, 551–52 (9th Cir.2010).⁷

A.

As applied to Cabrera’s situation, 42 U.S.C. § 16911(4) defines a “tier III sex offender” as “a sex offender whose offense is punishable by imprisonment for more than 1 year and ... is comparable to or more severe than ... aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18).”⁸ *1133 Section 2242 defines the crime of sexual abuse to include knowingly (1) causing another to engage in a sexual act “by threatening or placing that person in fear,” or (2) engaging in a sexual act with another who is “(A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act.”⁹

The Oregon statute under which Cabrera was convicted provided:

A person commits the crime of sexual abuse in the second degree when that person subjects another person to sexual intercourse, deviate sexual intercourse or, [with certain exceptions], penetration of the vagina, anus or penis with any object not a part of the actor’s body, and the victim does not consent thereto.

Or.Rev.Stat. § 163.425 (1998).

B.

Our task is to determine whether Cabrera’s prior state conviction under § 163.425 may properly serve as a predicate for his classification as a Tier III sex offender under 42 U.S.C. § 16911(4). That is, we must decide whether the conviction is “comparable to or more severe than” the federal crime of sexual abuse.

[4] [5] [6] In making this comparison, we follow the categorical approach established in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), as recently refined in *Descamps*.¹⁰ Under that approach, a sentencing court must begin by comparing the statutory definition of the prior offense with the elements of the “generic” federal offense specified as a sentencing predicate. *Descamps*, 133 S.Ct. at 2283 (quoting *Taylor*, 495 U.S. at 599–600, 110 S.Ct. 2143). The prior conviction may operate as a predicate if it is defined more narrowly than, or has the same elements as, the generic federal crime. *Id.* If, however, the statute defining the prior offense “sweeps more broadly than the generic crime,” the prior offense cannot serve as a statutory predicate. *Id.* *Descamps* affirms that the “key” to this comparison is “elements, not facts.” *Id.* A sentencing court may not consult “extra-statutory materials,” *id.* at 2287, “even if [the materials show that] the defendant actually committed the [predicate] offense in its generic form,” *id.* at 2283. The crime’s elements are all that is relevant. *Id.*

[7] Applying the categorical approach, we conclude that the statute of Cabrera’s conviction, Or.Rev.Stat. § 163.425, is broader than the federal crime of sexual abuse.¹¹ The Oregon statute requires the *1134 subjection of another to certain types of sexual activity and “the victim does not consent thereto.” Or.Rev.Stat. § 163.425(1). The statute’s non-consent element applies broadly, both where a victim does not actually consent and where the victim lacks capacity to consent. See *State v. Ofodrinwa*, 353 Or. 507, 300 P.3d 154, 167 (2013) (en banc).

By contrast, the generic federal crime of sexual abuse requires that a defendant cause another to engage in a sexual act by certain types of threat or fear or to engage in a sexual act with a victim who is mentally or physically incapable. 18 U.S.C. § 2242. The Oregon statute, therefore, penalizes a broader class of behavior than the federal statute. Nonconsensual intercourse with a mentally and physically capable individual not involving a threat or the use of fear might violate Or.Rev.Stat. § 163.425, but it would not violate 18 U.S.C. § 2242.

Oregon and federal law also diverge on the age at which an individual gains legal capacity to consent to a sexual act. Compare Or.Rev.Stat. § 163.315 (stating that anyone under eighteen years of age is legally incapable of consent), with *United States v. Acosta-Chavez*, 727 F.3d 903, 908–09 (9th Cir.2013) (recognizing that federal law defines a minor as someone under sixteen years of age). Thus, sexual intercourse

with a person under eighteen, but not under sixteen, would violate Or.Rev.Stat. § 163.425, but not necessarily 18 U.S.C. § 2242. In this respect also, § 163.425 sweeps more broadly than § 2242.

Because Or.Rev.Stat. § 163.425 “sweeps more broadly” than 18 U.S.C. § 2242, Cabrera’s statute of conviction is not a categorical match to the federal crime of sexual abuse. Absent an exception to this categorical rule, Cabrera’s prior conviction cannot serve as a predicate for his classification as a Tier III sex offender under 42 U.S.C. § 16911(4).

C.

The government contends that such an exception applies in this case. *Taylor* and *Descamps* recognize that, in a “narrow range of cases,” courts may look beyond the statutory definition of a prior offense to certain other documents, including a defendant’s plea agreement. *Descamps*, 133 S.Ct. at 2283–84 (quoting *Taylor*, 495 U.S. at 602, 110 S.Ct. 2143). Cabrera admitted in his plea statement that the victim of his crime was both intoxicated and a minor. The district court relied on those admissions in determining that Cabrera committed a crime “comparable to or more severe than” sexual abuse and that Cabrera qualified as a Tier III offender.

[8] [9] While our previous case law might have permitted the district court’s approach—known as the “modified categorical approach”—in this case, we conclude that *Descamps* now forecloses it. *Descamps* clarifies that the modified categorical approach is available only when a defendant is convicted of violating a statute that sets out multiple, “divisible” elements. *Id.* at 2281, 2285. In such cases, the statute “effectively creates ‘several different ... crimes’ ” pertaining to the possible combinations of alternative elements. *Id.* (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009)). Thus, a sentencing court may consult certain extra-statutory materials to identify the defendant’s actual crime of conviction and to compare the elements of that crime with the generic crime. *Id.* at 2284–85. Where, however, a statute states a single, indivisible set of elements, the modified categorical approach “has no role to play.” *Id.* In such cases, the sentencing court need not—indeed, cannot—consult extra-statutory materials to determine *1135 “which crime formed the basis of the defendant’s conviction,” *id.* at 2284, because only the single set of indivisible elements could apply.

[10] We hold that Or.Rev.Stat. § 163.425 is not divisible within the meaning of *Descamps*. The statute, by its terms, states only two elements: (1) the subjection of another to certain types of sexual activity and (2) non-consent. These elements are indivisible, not alternative; a conviction under § 163.425 requires that both elements are satisfied. As in *Descamps*, then, “[w]e know [Cabrera’s] crime of conviction”—the subjection of another to intercourse without that person’s consent—and the modified approach has “no role to play.” *Descamps*, 133 S.Ct. at 2285–86.

In support of its position that § 163.425 states divisible elements, the government points to Or.Rev.Stat. § 163.315, which lists four types of legal incapacity to consent. Or.Rev.Stat. § 163.315 (1998) (stating that a person is incapable of consenting if that person is under eighteen years of age, mentally defective, mentally incapacitated, or physically helpless); *see also United States v. Beltran-Munguia*, 489 F.3d 1042, 1045 (9th Cir.2007). The government contends that the listing of “several alternative modes” of non-consent in Or.Rev.Stat. § 163.315 renders Or.Rev.Stat. § 163.425 divisible.

We reject the government’s argument for the simple reason that Cabrera was convicted of violating § 163.425, not § 163.315. Even if § 163.315 establishes four “alternative modes” of proving lack of consent, none of these four modes need be proven in order to convict a defendant of second degree sexual abuse. A statute cannot state elements of a crime if none of those “elements” need apply to secure a conviction. *See Beltran*, 489 F.3d at 1045 (“To constitute an element of a crime, the particular factor in question needs to be ‘a constituent part’ of the offense [that] must be proved by the prosecution *in every case* to sustain a conviction under a given statute.’” (alteration and emphasis in original) (citing *United States v. Hasan*, 983 F.2d 150, 151 (9th Cir.1992) (per curiam))).

Neither the text of the statute nor Oregon case law supports the position that the phrase “does not consent” in § 163.425 is limited to the forms of non-consent delineated in § 163.315. Section 163.425 does not reference § 163.315, and no provision of the Oregon criminal code purports to define the phrase “does not consent.” Contrary to the government’s contention, § 163.315 is not a “definitional provision.”¹² As we have recognized elsewhere, § 163.315, entitled “Incapacity to consent,” merely “delineates four types of legal incapacity that apply to all sexual offenses listed in the Oregon criminal code.” *Beltran*, 489 F.3d at 1045. The “four

types” *1136 are alternative avenues of proving non-consent in all cases. But they are not the exclusive means of doing so, including in cases of victims who do *not* lack capacity to consent.¹³ Indeed, it would be odd for the Oregon legislature to have defined § 163.425’s non-consent requirement in § 163.315 without having so much as referenced § 163.315 or employed the same terminology in each.

Further, the government cites no support for its position that § 163.315 defines the non-consent element of § 163.425. To the contrary, Oregon appears routinely to charge and convict defendants of second degree sexual abuse without reference to any one of the four “alternative modes” contained in § 163.315.¹⁴ Oregon’s model jury instructions listing the “elements” of second degree sexual abuse reflect that practice. *See* Or. Uniform Crim. Jury Instr. No. 1613 (omitting mention of § 163.315 or its four modes).

A recent decision of the Oregon Supreme Court further reinforces our reading of § 163.425. In *Ofodrinwa*, 300 P.3d 154, the court was confronted with the question of whether the phrase “does not consent” in § 163.425 refers “only to those instances in which [a] victim does not actually consent” or whether it also “includes instances in which the victim lacks the capacity to consent.” *Id.* at 155. The fact that the Supreme Court had to ask whether legal incapacity can satisfy the “does not consent” requirement strongly suggests that that requirement neither naturally refers to nor is limited to legal incapacity. It would be odd, again, for the Oregon legislature to have defined “does not consent” by a provision entitled “Incapacity to consent,” especially where nothing in § 163.315 clearly encompasses actual non-consent. We do not attribute to the Oregon legislature such an oddity. The most logical reading of the statute is that non-consent under § 163.425 is broader than the forms of non-consent specified in § 163.315. Thus, § 163.315 cannot state elements of second degree sexual abuse, because none needs to apply to sustain a conviction.

Finally, our dissenting colleague argues that § 163.425 is divisible because—as *Ofodrinwa* makes clear—the statute “covers the offense of sexual intercourse where the victim, although capable of consenting, does not consent, as well as the offense of sexual intercourse where the victim is incapable of consenting.” Partial Dissent at 1141–42. But the fact that § 163.425 “covers” multiple means of commission, and that a separate provision of the Oregon code specifies one of those means (legal incapacity), does not render § 163.425 divisible. Indeed, *Descamps* rejects our dissenting

colleague's approach almost exactly. Like the partial dissent, the lower *1137 court in *Descamps* defended application of the modified categorical approach based on the court's conclusion that the statute at issue in that case "create[d] an *implied* list of every means of commission," even though the statute did not *explicitly* state those means. *Descamps*, 133 S.Ct. at 2289 (alterations in original) (quoting *United States v. Aguila-Montes de Oca*, 655 F.3d 915, 927 (9th Cir.2011) (en banc)) (internal quotation marks omitted).¹⁵ Similarly, the dissent here argues that the phrase "does not consent" in § 163.425 is divisible because the phrase *implicitly* covers both actual non-consent and incapacity to consent. *Descamps*, however, rejects that approach because it would not "enable a sentencing court to conclude that a jury (or judge at a plea hearing) has convicted the defendant of every element of the generic crime." *Id.* at 2290. In other words, *implied* means of commission cannot render a statute divisible because, unlike with an explicitly divisible statute, they do not allow the sentencing court to home in on the defendant's actual crime of conviction; "[a]s long as the statute itself requires only an indeterminate [element]," like non-consent, "that is all the indictment must (or is likely to) allege and all the jury instructions must (or are likely to) mention." *Id.* To use this case's example, to convict a defendant under § 163.425, the state need prove only that a defendant has engaged in intercourse with another and that the other "does not consent thereto." In the general run of cases, then, a sentencing court cannot tell whether the jury or judge convicted a defendant of intercourse with a victim who did not actually consent or a victim who lacked capacity to consent. The partial dissent's approach thus creates just the problem that *Descamps* identified and that motivated the Court specifically to reject it. We also note that our dissenting colleague's approach would render every criminal statute divisible in which a separate provision of the criminal code specified one or more means of commission. We would hesitate before adopting a rule with such sweeping implications, even if *Descamps* did not already squarely foreclose it.¹⁶

In short, Cabrera's statute of conviction, Or.Rev.Stat. § 163.425, is not divisible. The statute states "a single, indivisible set of elements," and the modified categorical approach does not apply. *Descamps*, 133 S.Ct. at 2282; see also *Acosta-Chavez*, 727 F.3d at 909 (holding that where the state statute's age element is broader than the federal definition and "is not divisible ... we may not apply the modified categorical approach").

IV.

Cabrera, having been convicted in Oregon of the crime of second degree sexual abuse and having been ordered to register as a sex offender, chose to travel interstate *1138 and failed to register under SORNA. We conclude, as have our sister circuits, that Congress has the authority under the Commerce Clause to enact SORNA and to require Cabrera to register under SORNA as a sex offender.

The district court erred, however, in applying the modified categorical approach to determine that Cabrera qualified as a Tier III sex offender. Cabrera's prior conviction under Or.Rev.Stat. § 163.425 is categorically overbroad and cannot serve as a sentencing predicate under 42 U.S.C. § 16911(4). The government has made an inadequate showing of harmlessness.¹⁷ See *Acosta-Chavez*, 727 F.3d at 909 (recognizing that the government bears the burden of establishing harmlessness). Therefore, we vacate Cabrera's sentence and remand to the district court pursuant to 18 U.S.C. § 3742(f)(1) for resentencing proceedings consistent with this opinion.

CONVICTION AFFIRMED, SENTENCE VACATED and REMANDED FOR RESENTENCING.

CALLAHAN, Circuit Judge, concurring and dissenting:
I agree with my brethren that Congress had the authority to enact the Sex Offender Registration and Notification Act ("SORNA") and that SORNA's application to Pedro Cabrera-Gutierrez ("Cabrera") is constitutional. We part company, however, in our reading of the Supreme Court's opinion in *Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), and its application to Cabrera's state conviction. Because I read the relevant Oregon statutes to be "divisible" as that term is defined by the Supreme Court in *Descamps*, I would affirm Cabrera's conviction and his sentence as a Tier III sex offender.

I

The federal statute that concerns Cabrera's situation is 42 U.S.C. § 16911(4) which defines a "tier III sex offender" as "a sex offender whose offense is punishable by imprisonment for more than 1 year and ... is comparable to or more

severe than ... aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18)."¹ Section 2242 defines the crime of sexual abuse to include knowingly engaging "in a sexual act with another person if that other person is—(A) incapable of appraising the nature of the conduct; or (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act."²

***1139** Two Oregon statutes govern Cabrera's prior conviction. He was convicted under Or.Rev.Stat. § 163.425 (1998), which states: "(1) A person commits the crime of sexual abuse in the second degree when that person subjects another person to sexual intercourse, deviate sexual intercourse ... and the victim does not consent thereto." Or.Rev.Stat. § 163.425 (1998). In addition, Or.Rev.Stat. § 163.315 provides that "does not consent thereto" includes instances where "(1) A person is considered incapable of consenting to a sexual act if the person is: (a) Under 18 years of age; (b) Mentally defective; (c) Mentally incapacitated; or (d) Physically helpless." *See State v. Ofodrinwa*, 353 Or. 507, 300 P.3d 154 (2013) (en banc).

A careful reading of *Ofodrinwa* and the Oregon statutes reveals that the Oregon scheme is divisible and that Cabrera pled guilty to sexual assault as that term is defined in 18 U.S.C. § 2242.

II

Our task, as refined by the Supreme Court's opinion in *Descamps*, is to determine whether Cabrera's state conviction is a crime of sexual abuse as that term is defined in 18 U.S.C. § 2242. Following *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), we first determine whether the state statute has the same elements as the generic federal crime or defines the crime more narrowly. *Descamps*, 133 S.Ct. at 2283. The Supreme Court held: "But if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as a[] ... predicate [for the enhancement], even if the defendant actually committed the offense in its generic form. The key, we emphasized, is elements, not facts." *Id.*

Here, the Oregon statutory statute is broader than the federal crime of sexual abuse. The federal statute requires that the victim be incapable of appraising the nature of the conduct, of declining to participate, or communicating unwillingness.

See 18 U.S.C. § 2242. But Or.Rev.Stat. § 163.315 requires only that the victim "does not consent." In addition, the Or.Rev.Stat. § 163.315 provides that anyone under 18 years of age is considered incapable of consenting to a sexual act. However, we have held that under federal law a minor is someone under the age of 16. *See United States v. Acosta-Chavez*, 727 F.3d 903, 908–09 (9th Cir.2013). Because Or.Rev.Stat. §§ 163.315 and 163.425 are broader than the definition of sexual abuse in 18 U.S.C. § 2242, we turn to the modified categorical approach.

In *Descamps*, the Supreme Court clarified that under the modified categorical approach, the focus is not on what the defendant did, but on "which statutory phrase was the basis for the conviction." *Descamps*, 133 S.Ct. at 2285 (quoting ***1140** *Johnson v. United States*, 559 U.S. 133, 144, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010)). The Court explained:

Applied in that way—which is the only way we have ever allowed—the modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute. The modified approach thus acts not as an exception, but instead as a tool. It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's. All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates "several different ... crimes." *Nijhawan [v. Holder]*, 557 U.S. [29], at 41 [129 S.Ct. 2294, 174 L.Ed.2d 22 (2009)]. If at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of. That is the job, as we have always understood it, of the modified approach: to identify, from among several alternatives, the

crime of conviction so that the court can compare it to the generic offense.

Id. (parallel citation omitted).

The Court's definition of divisible is shaped by its response to Justice Alito's dissent. Justice Alito wrote:

My understanding is that a statute is divisible, in the sense used by the Court, only if the offense in question includes as separate elements all of the elements of the generic offense. By an element, I understand the Court to mean something on which a jury must agree by the vote required to convict under the law of the applicable jurisdiction.

Id. at 2296. He then goes on to observe that the Court's decisions in *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), *Johnson*, 559 U.S. 133, 130 S.Ct. 1265, and *Taylor*, 495 U.S. 575, 110 S.Ct. 2143, suggest a generous definition of divisible. He commented:

Shepard concerned prior convictions under two Massachusetts burglary statutes that applied not only to the entry of a “building” (as is the case with generic burglary) but also to the entry of a “ship, vessel, or vehicle.” Mass. Gen. Laws Ann., ch. 266, § 16 (West 2000). *See also* § 18; 544 U.S. at 17, 125 S.Ct. 1254. And the *Shepard* Court did not think that this feature of the Massachusetts statutes precluded the application of the modified categorical approach. *See id.*, at 25–26, 125 S.Ct. 1254; *ante*, at 2283–2284. *See also Nijhawan*, 557 U.S. at 35, 129 S.Ct. 2294 (discussing *Shepard*).

In today's decision, the Court assumes that “building” and the other locations enumerated in the Massachusetts statutes, such as “vessel,” were alternative elements, but that is questionable. It is quite likely that the entry of a building and the entry of a vessel were simply alternative means of satisfying an element.

Id. at 2297. Justice Alito continued:

Johnson, like *Shepard*, involved a statute that may have set out alternative means, rather than alternative elements. Under the Florida statute involved in that case, a battery occurs when a person either “1. [a]ctually and intentionally touches or strikes another person against the will of the other; or 2. [i]ntentionally causes bodily harm to another person.” Fla. Stat. § 784.03(1)(a) (2010). It is a distinct possibility (one not foreclosed by any Florida decision of which I am aware) that a conviction under this provision does not require juror agreement as to whether a defendant firmly touched or lightly struck the *1141 victim. Nevertheless, in *Johnson*, we had no difficulty concluding that the modified categorical approach could be applied.

Id. at 2298.³

The Court responded to Justice Alito's concerns in its footnote 2.

But if, as the dissent claims, the state laws at issue in those cases set out “merely alternative means, not alternative elements” of an offense, *post*, at 2298, that is news to us. And more important, it would have been news to the *Taylor*, *Shepard*, and *Johnson* Courts: All those decisions rested on the explicit premise that the laws “contain[ed] statutory phrases that cover several different … crimes,” not several different methods of committing one offense. *Johnson*, 559 U.S. at 144 [130 S.Ct. 1265] (citing *Nijhawan*, 557 U.S. at 41 [129 S.Ct. 2294]).

Id. at 2298 n. 2 (parallel citations omitted).

Thus, in determining whether a state statute is divisible, we may take as our mark the Supreme Court's indication that the statutes in *Shepard*, which defined burglary to include entry of a building or a ship, and in *Johnson*, which defined battery as either a touching of a person against his will or intentionally causing bodily harm, were divisible.

III

Applying *Descamps* to Cabrera's case, we learn that although Or.Rev.Stat. § 163.425 is broader than 18 U.S.C. § 2242, the Oregon Supreme Court has interpreted § 163.425 as covering convictions based either on the victim's lack of consent or on the victim's incapacity to consent.

In *Ofodrinwa*, 300 P.3d 154, the Oregon Supreme Court ruled that “does not consent” as used in § 163.425 covers both lack of capacity to consent and lack of actual consent. *Id.* at 166. In *Ofodrinwa*, the defendant argued that “does not consent” in § 163.425 referred only to instances in which the victim does not actually consent. He asserted that there was no evidence that his victim had not consented, and that the victim's lack of capacity to consent was not sufficient to prove a violation of the statute. *Id.* at 155. The Oregon Supreme Court rejected that interpretation holding that the state could prove sexual abuse under § 163.425 either by showing the victim's lack of actual consent or by showing that the victim lacked the capacity to consent pursuant to Or.Rev.Stat. § 163.315. *Id.* at 167.

Thus, the Oregon statutory scheme is divisible as that term is defined in *Descamps*.⁴ Section 163.425 covers the offense *1142 of sexual intercourse where the victim, although capable of consenting, does not consent, as well as the offense of sexual intercourse where the victim is incapable of consenting. Furthermore, Or.Rev.Stat. § 163.315 provides for distinct definitions of incapable. The victim may be shown to be incapable because she is under the age of 18, mentally defective, mentally incapacitated, or physically helpless. Although under 18 years of age would not qualify for incapacity under 18 U.S.C. § 2242, the other grounds of incapacity are covered by § 2242.

In *Shepard*, 544 U.S. at 26, 125 S.Ct. 1254, the Supreme Court held that in determining whether a plea of guilty to a nongeneric statute necessarily admitted elements of the generic offense, a court's review “is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.” *See also Young v. Holder*, 697 F.3d 976, 983 (9th Cir.2012) (en banc) (“we may review only the charging instrument, transcript of the plea colloquy, plea agreement, and comparable judicial record of this information”).

Here, the district court had Cabrera's handwritten “Petition to Enter Plea of Guilty” to sexual abuse in the second degree. The petition states:

I on May 2, 1998 did knowingly have sexual intercourse with [redacted] and she was unable to legally consent to having sexual intercourse with me because she was under the influence of alcohol at the time of the sexual intercourse. Further [redacted] was 15 years old on May 2, 1998.

Thus, Cabrera freely admitted to violating Or.Rev.Stat. § 163.425 by having sexual intercourse with a victim who was mentally incapacitated as the term is defined in Or.Rev.Stat. § 163.315(1)(c).⁵

It is true that Cabrera also stated that his victim was a minor, and perhaps a conviction based solely on his violation of Or.Rev.Stat. § 163.315(1)(a) (lack of consent because victim was under 18 years of age), would not fit within the generic definition of sexual assault. However, Cabrera chose to first admit to his victim's actual incapacity to consent, a violation of a divisible portion of the state statutes that fall well within the federal definition of sexual abuse.⁶

*1143 Because: (1) Or.Rev.Stat. §§ 163.425 and 163.315 are divisible state statutes as that term is defined by the Supreme Court in *Descamps*; (2) Cabrera's guilty plea unquestionably shows that he pled guilty to sexual intercourse with a person who was mentally incapacitated, as that term is defined in Or.Rev.Stat. 163.315(1)(c); and (3) sexual intercourse with a person who was mentally incapacitated falls well within the generic definition of the crime of sexual abuse set forth in 18 U.S.C. § 2242, I would hold that the district court properly sentenced Cabrera as a Tier III sex offender.

All Citations

756 F.3d 1125, 14 Cal. Daily Op. Serv. 2879, 2014 Daily Journal D.A.R. 3332

Footnotes

- * The Honorable Raner C. Collins, Chief United States Judge for the District of Arizona, sitting by designation.
- 1 Cabrera raises a third issue: whether the government improperly denied him a third level of reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(b). While our precedents foreclosed Cabrera's contention at the time of our original Opinion, see *United States v. Johnson*, 581 F.3d 994, 1001 (9th Cir.2009), § 3E1.1 was amended, effective November 1, 2013, to clarify that "the government should not withhold ... a motion [for reduction for acceptance of responsibility] based on interests not identified in § 3E1.1, such as whether the defendant agrees to waive his or her right to appeal." U.S.S.G. § 3E1.1, comment n. 6. This amendment applies to this case. See *United States v. Catalan*, 701 F.3d 331, 333 (9th Cir.2012) ("When an amendment to the Guidelines clarifies, rather than alters, existing law, we use the amendment to interpret the Guidelines provision retroactively."). Because we vacate Cabrera's sentence and remand for resentencing based on Cabrera's erroneous classification as a Tier III offender, see *infra*, we need not consider the effect of this amendment. The district court, however, should consider on remand whether Cabrera should receive a third level of reduction for acceptance of responsibility in light of this amendment.
- 2 See *United States v. Gould*, 568 F.3d 459, 471 (4th Cir.2009) (holding "that § 2250(a) does not violate the Commerce Clause"); *United States v. Whaley*, 577 F.3d 254, 258 (5th Cir.2009) ("Through § 2250, Congress has forbidden sex offenders from using the channels of interstate commerce to evade their registration requirements, and we have no doubt that it was within its power under the Commerce Clause to do so."); *United States v. Hinckley*, 550 F.3d 926, 940 (10th Cir.2008) ("By requiring that a sex offender travel in interstate commerce before finding a registration violation, SORNA remains well within the constitutional boundaries of the Commerce Clause."), abrogated on other grounds by *Reynolds v. United States*, — U.S. —, 132 S.Ct. 975, 978, 181 L.Ed.2d 935 (2012); *United States v. Ambert*, 561 F.3d 1202, 1210 (11th Cir.2009) ("Section 2250 is a proper regulation falling under either of the first two *Lopez* categories because it regulates both the use of channels of interstate commerce and the instrumentalities of interstate commerce.").
- 3 See *United States v. Guzman*, 591 F.3d 83, 90 (2d Cir.2010) ("We have no difficulty concluding that § 2250(a) is a proper congressional exercise of the commerce power under *Lopez*.").
- 4 See *United States v. Fernandes*, 636 F.3d 1254, 1256 n. 2 (9th Cir.2011) (per curiam) (noting the argument that SORNA "is an invalid exercise of Congress' power under the Commerce Clause was rejected by this court" in *George*); *United States v. Valverde*, 628 F.3d 1159, 1161 (9th Cir.2010) (noting that *George*'s holding of constitutionality was binding).
- 5 See *Guzman*, 591 F.3d at 90 ("Sections 2250 and 16913 were enacted as part of the Adam Walsh Child Protection and Safety Act of 2006, and are clearly complementary...." (internal quotation mark omitted)); *Whaley*, 577 F.3d at 259 (same); *United States v. Howell*, 552 F.3d 709, 716 (8th Cir.2009) ("[T]he statutory scheme Congress created to enforce § 16913 demonstrates Congress was focused on the interstate movement of sex offenders, not the intrastate activity of sex offenders."); *Ambert*, 561 F.3d at 1212 (commenting that "an examination of § 16913 and § 2250 makes the interstate focus abundantly clear," and "the only federal enforcement provision against individuals is found in § 2250, which explicitly subjects state sex offenders to federal prosecution under SORNA only if they travel in interstate or foreign commerce and fail to register under § 16913" (internal quotation marks and emphasis omitted)).
- 6 See *Guzman*, 591 F.3d at 91 (stating "[t]o the extent that § 16913 regulates solely intrastate activity, its means are reasonably adapted to the attainment of a legitimate end under the commerce power" (internal quotation marks omitted)); *United States v. Pendleton*, 636 F.3d 78, 88 (3d Cir.2011) (holding that "§ 16913 is a law made in pursuance of the constitution because it is necessary and proper for carrying into execution

Congress's power under the Commerce Clause" (internal quotation marks and citations omitted)); *Gould*, 568 F.3d at 475 (stating “[r]equiring all sex offenders to register is an integral part of Congress' regulatory effort and the regulatory scheme could be undercut unless the intrastate activity were regulated” (internal quotation marks omitted)); *Whaley*, 577 F.3d at 261 (concluding that “requiring sex offenders to register both before and after they travel in interstate commerce … is ‘reasonably adapted’ to the goal of ensuring that sex offenders register and update previous registrations when moving among jurisdictions”); *United States v. Vasquez*, 611 F.3d 325, 331 (7th Cir.2010) (holding that “[t]o the extent that § 16913 regulates solely intrastate activity, the regulatory means chosen are reasonably adapted to the attainment of a legitimate end under the commerce power” (internal quotation marks omitted)); *Amber*, 561 F.3d at 1212 (“Section 16913 is reasonably adapted to the attainment of a legitimate end under the commerce clause.”).

- 7 We have noted “an intracircuit conflict as to whether the standard of review for application of the Guidelines to the facts is de novo or abuse of discretion.” *Swank*, 676 F.3d at 921–22. As in those cases, however, we need not resolve this conflict because our conclusion is the same under either standard. See *id.* at 922; *Laurienti*, 611 F.3d at 552.
- 8 42 U.S.C. § 16911(4) defines a Tier III offender as follows:

The term “tier III sex offender” means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

- (A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:
 - (i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or
 - (ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;
- (B) involves kidnapping of a minor (unless committed by a parent or guardian); or
- (C) occurs after the offender becomes a tier II sex offender.

- 9 18 U.S.C. § 2242 reads:

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly—

- (1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or
 - (2) engages in a sexual act with another person if that other person is—
 - (A) incapable of appraising the nature of the conduct; or
 - (B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;
- or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

- 10 *Descamps* applies to this case because the Supreme Court issued its opinion while this case was still “pending direct review [and] not yet final.” *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987).
- 11 The government concedes as much in its briefing, as does the partial dissent. See Partial Dissent at 1139–40.
- 12 This fact distinguishes this case from *Ganzhi v. Holder*, 624 F.3d 23 (2d Cir. 2010), on which the government relies. *Ganzhi* held, as the government observes, that an otherwise indivisible statute could be rendered divisible by a “separate definitional provision” setting out alternative means of accomplishing an element of the indivisible crime. *Id.* at 29–30. But in both examples at play in *Ganzhi*, the language of the definitional provisions indicated that the provisions exhaustively defined, in all cases, the meaning of the indivisible element. See *id.* at 29 (citing N.Y. Penal Law § 135.00 (stating that “[r]estrain”—an element of the relevant crime—“means” certain acts (emphasis added))); *id.* at 30 (citing N.Y. Penal Law § 130.05 (stating that “lack of consent”—an element of the relevant crime—“results from” certain acts (emphasis added))). Here, no language in Or.Rev.Stat. § 163.315 purports to *define* the phrase “does not consent” in § 163.425. Section 163.315 merely lists four possible ways of demonstrating a lack of consent—those involving legal incapacity. In any case, *Ganzhi* predicated *Descamps*, limiting its relevance to our analysis.
- 13 Thus, for example, intercourse perpetrated by the use of force—the subject of *Beltran*’s analysis—might not implicate any of the “four types” listed in § 163.315. We doubt that Oregon would be unable to convict a defendant of second degree sexual abuse if the defendant forcibly raped another person but that person was not a minor, mentally defective, mentally incapacitated, or physically helpless. Or.Rev.Stat. § 163.315; *id.* § 163.305(5) (defining “physically helpless” as “unconscious or for any other reason ... physically unable to communicate”). We understand “does not consent” in § 163.425 to encompass such abuses.
- 14 A quick search of second degree sexual abuse convictions and the underlying indictments yields, e.g., *State v. Steltz*, 259 Or.App. 212, 313 P.3d 312, 313–16 (2013), *State v. Roquez*, 257 Or.App. 827, 308 P.3d 250, 252–53 (2013), *State v. Calhoun*, 250 Or.App. 474, 280 P.3d 1045 (2012), and *State v. Jackson*, 178 Or.App. 233, 36 P.3d 500, 500–01 (2001). None of the convictions in these cases—all reversed on unrelated grounds—involved victims who were argued to be minors, mentally defective, mentally incapacitated, or physically helpless.
- 15 *Aguila-Montes de Oca* was abrogated by *Descamps*, as recognized in *United States v. Flores-Cordero*, 723 F.3d 1085, 1089 (9th Cir. 2013).
- 16 The partial dissent’s divisibility argument loses sight of the fact that, under *Descamps*, what must be divisible are the elements of the crime, not the mode or means of proving an element. See *Descamps*, 133 S.Ct. at 2293 (noting that we “may use the modified approach only to determine which *alternative element* in a divisible statute formed the basis of the defendant’s conviction”); *id.* at 2283 (“The key, we emphasized, is elements, not facts.”). All of the partial dissent’s arguments focus on one of the means of proving the element of “does not consent.” See Partial Dissent at 1141–42 n. 4 (“§ 163.315 sets forth divisible definitions of legal incapacity”); *id.* at 1142–43 (§ 163.315 is a “divisible state statute [] as that term is defined ... in *Descamps* ”). Moreover, Cabrera’s crime of conviction was under § 163.425—not § 163.315—and the partial dissent does not respond to our discussion that a violation of § 163.425 can be proved without resort to § 163.315. See Maj. Op., *supra*, at 1135–37.
- 17 The government states conclusorily that even if Cabrera were classified as a Tier I offender, his actual sentence (17 months) would fall within the adjusted Guideline range, properly construed (15–21 months, instead of 27–33 months as a Tier III offender). This argument ignores that the district court gave Cabrera a 16-month downward variance for time served. Assuming the district court would have applied the same

or a similar variance, Cabrera's sentence would have fallen well below the 17 months to which the court sentenced him.

1 42 U.S.C. § 16911(4) defines a Tier III offender as follows:

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender.

2 18 U.S.C. § 2242 reads:

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly—

(1) causes another person to engage in a sexual act by threatening or placing that other person in fear (other than by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping); or

(1) engages in a sexual act with another person if that other person is—

(A) incapable of appraising the nature of the conduct; or

(B) physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act;

or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life.

3 Justice Alito further noted that *Taylor* "may also have involved a statute that was not divisible, but the situation is less clear." *Id.* at 2298 n. 2. The Missouri burglary provisions "applied not only to buildings but also to 'any booth or tent,' 'any boat or vessel,' or a 'railroad car.'" *Id.* Justice Alito notes that "[i]t is not entirely clear whether a Missouri court would have required jurors to agree on a particular choice from this list." *Id.*

4 This conclusion is consistent with our opinion in *United States v. Beltran-Munguia*, 489 F.3d 1042 (9th Cir.2007). In *Beltran*, the issue was whether a conviction under § 163.425 qualifies as a crime of violence under United States Sentencing Guideline § 2L1.2. *Id.* at 1043. In determining that the conviction did not qualify as a crime of violence, we noted that Oregon Rev. Stat. § 165.315 "delineates four types of legal incapacity that apply to all sexual offenses listed in the Oregon criminal code, including second-degree sexual abuse." *Id.* at 1045. We wrote:

Given the applicability of ORS section 163.315 to ORS section 163.425, a perpetrator could commit second-degree sexual abuse by surreptitiously adding to his victim's drink a drug that affects one's judgment, thereby rendering her "mentally incapacitated." She would then be legally incapable of consent

even if she participated fully in the sex act. Similarly, the victim could be “mentally defective,” yet fully physically cooperative. Under both those circumstances, a perpetrator would not necessarily have to use, attempt to use, or threaten to use any force above and beyond the force inherent in the act of penetration, *see infra* p. 1047, to commit second-degree sexual abuse. In other words, under such circumstances, a perpetrator would not have categorically committed a “crime of violence,” as the term is defined for purposes of § 2L1.2(b)(1)(A)(ii).

489 F.3d at 1046. Of course, *Beltran* concerned a different feature of the Oregon statute than the question raised by Cabrera, but our opinion recognized both the relationship between § 163.425 and § 163.315 and that § 163.315 sets forth divisible definitions of legal incapacity.

- 5 Intoxication can be the cause of a victim's incapacity to consent. See *United States v. Smith*, 606 F.3d 1270, 1281–82 (10th Cir.2010) (noting that victim was heavily intoxicated before the assault); *United States v. Carter*, 410 F.3d 1017, 1027 (8th Cir.2005) (holding that evidence the victim smoked marijuana and drank alcohol, and felt drowsy and really tired, was sufficient to conclude that the victim was unable to appraise the nature of the perpetrator's conduct).
- 6 Our opinion in *Young*, 697 F.3d 976, is not to the contrary. There we were concerned with a plea that implied a conviction for “A” or “B.” *Id.* at 986–87. Here, Cabrera pled guilty to “A” and “B.”

549 Fed.Appx. 757

This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1. United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.

Robert Walter FORSTER, Defendant–Appellant.

No. 11–2230
|
Dec. 6, 2013.

Synopsis

Background: Defendant was convicted by jury in the United States District Court for the District of New Mexico of failure to comply with Sex Offender Registration and Notification Act (SORNA), and he appealed from his conviction and sentence.

Holdings: The Court of Appeals, Jerome A. Holmes, Circuit Judge, held that:

[1] evidence was sufficient to convict defendant of knowingly “failing to register” under SORNA;

[2] district court did not abuse its discretion by refusing to give defendant's requested instructions on “residence” under SORNA;

[3] defendant was not deprived of unanimous jury verdict, as indictment was not facially duplicitous and district court did not err by permitting trial to proceed or failing to give more specific unanimity instruction; and

[4] district court did not commit procedural error in calculating defendant's advisory United States Sentencing Guidelines (USSG) range.

Affirmed.

West Headnotes (5)

[1] **Mental Health** Offenses and prosecutions
Evidence was sufficient to convict defendant of knowingly “failing to register” under Sex Offender Registration and Notification Act (SORNA); though defendant claimed he went on extended vacation for eight months, traveling to various locations including the Philippines and left some possessions including a car at New Mexico home, evidence established that he moved out of that home after being asked to leave by its owner and suggested that defendant was engaged in various activities consistent with establishing full-time residence in the Philippines such as purchasing a motorcycle. 18 U.S.C.A. § 2250(a)(3); Sex Offender Registration and Notification Act, § 113(c), 42 U.S.C.A. § 16913(c).

3 Cases that cite this headnote

[2] **Mental Health** Offenses and prosecutions
District court did not abuse its discretion by refusing to give defendant's requested instruction on “residence” under Sex Offender Registration and Notification Act (SORNA); instructions given clearly and correctly stated SORNA standards. Sex Offender Registration and Notification Act, § 113(c), 42 U.S.C.A. § 16913(c).

4 Cases that cite this headnote

[3] **Criminal Law** Assent of required number of jurors

Criminal Law Failure to instruct in general

Defendant was not deprived of unanimous jury verdict; indictment was not facially duplicitous, and district court did not commit plain error by failing to offer tailored unanimity instruction sufficient to cure any confusion resulting from government's alleged change in theory during trial.

1 Case that cites this headnote

- [4] **Mental Health** Offenses and prosecutions District court did not commit procedural error in calculating defendant's advisory Guidelines range for failure to comply with Sex Offender Registration and Notification Act (SORNA) by concluding that he should be considered a Tier III sex offender based on his prior Ohio conviction of gross sexual imposition. 18 U.S.C.A. §§ 2244, 2250(a); Sex Offender Registration and Notification Act, §§ 111(4), 113, 42 U.S.C.A. §§ 16911(4), 16913; U.S.S.G. § 2A3.5, 18 U.S.C.A.; Ohio R.C. § 2907.05(A)(4).

12 Cases that cite this headnote

- [5] **Sentencing and Punishment** Sex offenses, incest, and prostitution District court did not commit clear error in calculating defendant's advisory Guidelines range for failure to comply with Sex Offender Registration and Notification Act (SORNA) by failing to decrease defendant's base offense level by three levels for his alleged voluntary correction of his failure to register. 18 U.S.C.A. § 2250(a); Sex Offender Registration and Notification Act, § 113, 42 U.S.C.A. § 16913; U.S.S.G. § 2A3.5(b)(2), 18 U.S.C.A.

1 Case that cites this headnote

Attorneys and Law Firms

***758** Laura Fashing, Office of the United States Attorney, Albuquerque, NM, for Plaintiff–Appellee.

Andre Courtney Poissant, Office of the Federal Public Defender, Las Cruces, NM, for Defendant–Appellant.

Before HOLMES, O'BRIEN, and MATHESON, Circuit Judges.

JEROME A. HOLMES, Circuit Judge.

Following a jury trial, Defendant–Appellant Robert Walter Forster was convicted of failure to comply with the Sex Offender Registration and Notification Act (“SORNA”), in violation of 18 U.S.C. § 2250(a) ***759** and 42 U.S.C. § 16913. The conviction stemmed from Mr. Forster’s failure to register or update his registration as required by SORNA. Mr. Forster appeals from his conviction and sentence, raising four claims: (1) the evidence was insufficient to convict him of knowingly “failing to register” under SORNA; (2) the district court erred as a matter of law in refusing to give his requested instructions on “residence” under SORNA; (3) he was deprived of a unanimous jury verdict because the indictment was duplicitous and the district court failed to cure the error by giving a more specific unanimity instruction; and (4) the district court committed procedural error in calculating his advisory United States Sentencing Guidelines (“U.S.S.G.” or the “Guidelines”) range. Exercising jurisdiction under 28 U.S.C. § 1291, we reject these challenges and affirm Mr. Forster’s conviction and sentence.

I

Around January 2010, Mr. Forster moved into 123 Lomas Street, Mesquite, New Mexico. The house belonged to Jose Saavedra. Mr. Forster is required to register as a sex offender in New Mexico due to his August 2000 conviction on two counts of “gross sexual imposition” against a minor younger than thirteen years of age, in violation of Ohio Rev.Code. Ann. § 2907.05(A)(4) (West 2000). Consequently, around the time he moved in with Mr. Saavedra, Mr. Forster met with Deputy Harvell of the Doña Ana County Sheriff’s Office to update his address in the sex-offender registry.

Within a few months of Mr. Forster living at 123 Lomas Street, Mr. Saavedra stopped accepting rent money from Mr. Forster because he wanted Mr. Forster to move out. In March 2010, Mr. Forster left 123 Lomas Street for roughly eight months, traveling to various locations including the Philippines. Subsequently, Deputy Harvell and Deputy U.S. Marshal Gunder began investigating Mr. Forster’s whereabouts. They determined that Mr. Forster had moved out of his room at 123 Lomas Street in March, despite the fact that he apparently left some of his possessions there, including his car. Mr. Saavedra showed the deputies a letter written by Mr. Forster, which was apparently sent from the Philippines.

ORDER AND JUDGMENT *

Mr. Forster returned to New Mexico in late 2010 and stayed with Mr. Saavedra for a few days before moving to Hobbs, New Mexico. On December 14, 2010, Mr. Forster called Deputy Harvell to notify the Sheriff's Office of his change in address. He also sent a letter to Deputy Harvell, dated December 15, 2010. He then went to the Sheriff's Office on December 21, 2010, apparently to follow up on his change-in-address notification.

Mr. Forster was subsequently indicted for failure to comply with SORNA's registration requirements. According to the government, Mr. Forster had, in fact, moved out of Mr. Saavedra's home in March 2010, and never updated his registration information.

II

Mr. Forster raises four challenges to his conviction and sentence: (1) the evidence was insufficient to convict him of knowingly "failing to register" under SORNA; (2) the district court erred as a matter of law in refusing to give his requested instructions on "residence" under SORNA; (3) he was deprived of a unanimous jury verdict because the indictment was duplicitous and the district court failed to cure the error by giving a more specific unanimity instruction; and (4) the district court committed procedural error in calculating his advisory Guidelines range. We address each claim in turn.

*760 A

[1] Mr. Forster first argues that the government presented insufficient evidence that he either actually changed his residence or knowingly failed to update his registration. He raised this issue in a motion for judgment of acquittal.

"In reviewing the sufficiency of the evidence and denial of a motion for judgment of acquittal, this court reviews the record *de novo* to determine whether, viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the defendant guilty of the crime beyond a reasonable doubt." *United States v. Irvin*, 682 F.3d 1254, 1266 (10th Cir.2012). In conducting this inquiry, the court may "not 'weigh conflicting evidence.'" *Id.* (quoting *United States v. Evans*, 318 F.3d 1011, 1018 (10th Cir.2003)). Moreover, the "court considers the entire record, including both direct and circumstantial evidence, together with the

reasonable inferences to be drawn from it." *United States v. Mendez*, 514 F.3d 1035, 1041 (10th Cir.2008).

"SORNA includes civil and criminal components." *United States v. Carel*, 668 F.3d 1211, 1213 (10th Cir.2011), *cert. denied*, — U.S. —, 132 S.Ct. 2122, 182 L.Ed.2d 881 (2012). Its civil component, 42 U.S.C. § 16913, requires sex offenders, or those "convicted of a sex offense," *id.* § 16911(1), to register, "and keep the registration current, in each jurisdiction where the offender resides." *Carel*, 668 F.3d at 1213 (quoting 42 U.S.C. § 16913) (internal quotation marks omitted). This requirement is more specifically stated as follows: "Sex offenders who change their name, residence, employment, or student status, must appear in person in at least one jurisdiction involved to inform the state's authorities of the change." *United States v. Murphy*, 664 F.3d 798, 799 (10th Cir.2011) (internal quotation marks omitted).

SORNA's corresponding criminal provision, 18 U.S.C. § 2250(a), "imposes criminal penalties for failure to comply with § 16913's registration requirements." *Carel*, 668 F.3d at 1213. And, while § 16913 "applies to all sex offenders regardless of whether their convictions arise under federal or state law," *id.* at 1213–14 (quoting *United States v. Yelloweagle*, 643 F.3d 1275, 1278 (10th Cir.2011)) (internal quotation marks omitted), § 2250(a) imposes criminal penalties only on SORNA offenders who are sex offenders "by reason of a conviction under federal law" or who otherwise "travel[] in interstate or foreign commerce," *id.* at 1214 (quoting *Carr v. United States*, 560 U.S. 438, 451, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010)) (internal quotation marks omitted).

To establish a violation of SORNA in the instant case, the government had to prove that (1) Mr. Forster had a legal obligation under SORNA to update his registration due to a change in residence in a "jurisdiction where [he] resides," 42 U.S.C. § 16913(a)—*viz.*, a "jurisdiction involved," *id.* § 16913(c); (2) he knowingly failed to comply with the obligation; and (3) he traveled in interstate or foreign commerce. See 18 U.S.C. § 2250; see also *United States v. Husted*, 545 F.3d 1240, 1243 (10th Cir.2008). The parties stipulated that Mr. Forster was required by law to register as a sex offender. Mr. Forster contends, however, that the government failed to carry its burden of proof because the evidence showed that he went on an extended vacation, not that he changed his residence, and that he did not "knowingly" violate SORNA. We disagree.

Under SORNA, the “‘jurisdiction where the offender resides’ is usually a U.S. *761 state—the state where the individual keeps his home or habitually lives.” *Murphy*, 664 F.3d at 800–01 (quoting 42 U.S.C. § 16913(a)). On the other hand, “an offender’s ‘residence’ is a specific dwelling place—for example, a house, apartment, or even a homeless shelter where an offender habitually lives.” *Id.* at 801 (quoting 42 U.S.C. § 16913(c)). It is uncontested that 123 Lomas Street, while not Mr. Forster’s home, is the place where he “habitually lived” from the beginning of 2010 to at least March of that year. “[T]he statutory language naturally supports the conclusion that abandoning one’s living place constitutes a change in residence under SORNA. When [a sex offender] changes residences—whether by leaving his home, moving into a new dwelling, becoming homeless, or other means—he has a reporting obligation.” *Id.*; accord *United States v. Voice*, 622 F.3d 870, 875 n. 2 (8th Cir. 2010) (suggesting that “an updated registration is required if a sex offender leaves his registered residence with no intent to return”); *United States v. Van Buren*, 599 F.3d 170, 174 (2d Cir. 2010) (“[D]efendant’s conduct in terminating his residence to travel ..., with no intention of returning to his residence ..., qualifies as a ‘change’ in his residence regardless of which definition of ‘change’ one uses.”).

The government offered evidence establishing that Mr. Forster moved out of Mr. Saavedra’s home in March 2010, after being asked to leave. The government also presented a letter written by Mr. Forster from the Philippines, suggesting that he was engaged in various activities consistent with establishing a full-time residence there, such as purchasing a motorcycle. Mr. Forster contends that “on at least one occasion,” he returned to New Mexico from a short “trip” and stayed with Mr. Saavedra. Aplt. Opening Br. at 17. But the incident to which he refers concerned a single instance where he stayed with Mr. Saavedra for only “a couple of days or a week.” R., Vol. 4, at 151 (Test. of Jose Saavedra). This brief episode does not establish that 123 Lomas Street remained Mr. Forster’s residence. Mr. Forster points to the fact that he left some possessions, including a car, at 123 Lomas Street as evidence that he did not intend to leave but instead wanted to take “an extended vacation.” Aplt. Opening Br. at 18. While this argument is not entirely unreasonable, the jury was not required to accept it—particularly where the owner of the home, Mr. Saavedra, though acknowledging that Mr. Forster stored property at his home, clearly testified that he

expected Mr. Forster to live somewhere else upon his return from his travels. See R., Vol. 4, at 118 (responding “No” to the prosecutor’s inquiry, “Did you have an understanding that [Mr. Forster] could come back and live with you [after his travels]?”).

Viewing the evidence in the light most favorable to the government, *Irvin*, 682 F.3d at 1266, a rational trier of fact could have found that Mr. Forster no longer “habitually lived” at 123 Lomas Street beginning in March 2010 because he left that residence and had no intention of returning there—indeed, he could not do so, given that Mr. Saavedra had asked him to move out.

Mr. Forster contends that “[t]here was no evidence that New Mexico law required [him] to update his registration if he went on a trip” and that he “was never told he had to inform Deputy Harvell if he took a vacation.” Aplt. Opening Br. at 21–22. It follows, reasons Mr. Forster, that he did not “knowingly” commit a violation of *762 SORNA.² We are not persuaded.

The government’s theory was not that Mr. Forster went on a vacation, but rather, that he intentionally abandoned his residence at 123 Lomas Street and failed to inform authorities of the change. In that vein, the government offered evidence that Mr. Forster knew that he was required to update his registration in light of *any* change in his address. See R., Vol. 4, at 165–66 (Test. of Adrian Gunder) (noting that Mr. Forster had acknowledged receipt of an instructional registration document); cf. *id.* at 160 (noting that Mr. Forster contacted Deputy Harvell in December 2010 to notify him of an address change). The jury was not required to credit Mr. Forster’s contrary version of the facts. As such, viewing the evidence in the light most favorable to the government, *Irvin*, 682 F.3d at 1266, a rational jury could have found that Mr. Forster knowingly violated SORNA.

Because a rational jury could have found that Mr. Forster had a legal obligation under SORNA to update his registration due to a change in residence and that he knowingly failed to comply with this obligation, see *Husted*, 545 F.3d at 1243, Mr. Forster’s sufficiency challenge to his SORNA failure-to-register conviction cannot prevail.

B

[2] Mr. Forster next claims that the district court committed legal error by rejecting his requested instruction on the SORNA “residence” requirement. This proposed instruction provided that “[r]esidence requires more than physical presence at a place.” R., Vol. 2, at 60 (Def.’s Req. Jury Instructions, filed Apr. 19, 2011). Rather, according to his instruction, residence depends on the person’s “intent in being there,” and a person has not effectively abandoned his current residence by “travel[ing].” *Id.* The instruction ultimately given by the district court stated, in pertinent part:

[SORNA] requires a sex offender to report a change of ... residence.... To change something means to make different *763 from what it is or to substitute one thing for another. One’s residence is defined as where one resides or maintains his home. The term “resides” means location of the individual’s home or other place where the individual habitually lives. A change in residence does not require that you find that the defendant has established a new residence; rather, it is enough for you to find that the defendant’s home or other place where he habitually lives is no longer the same as the one listed in the register.

Id., Vol. 4, at 198–99. Mr. Forster contends that the district court’s definition of “residence” permitted the jury to conclude that he violated SORNA simply by virtue of his “habitually being at some other place”—*viz.*, supposedly, because it was misled by the court’s instructions, the “jury could have found that [he] had a duty to update his registration under SORNA ... without finding that he had actually abandoned 123 Lomas as his residence.” Aplt. Opening Br. at 23, 25.

“We review de novo the jury instructions as a whole and view them in the context of the entire trial to determine if they accurately state the governing law and provide the jury with an accurate understanding of the relevant legal standards and factual issues in the case.” *United States v.*

Diaz, 679 F.3d 1183, 1188 (10th Cir.2012) (quoting *United States v. Bedford*, 536 F.3d 1148, 1152 (10th Cir.2008)) (internal quotation marks omitted). We review the district court’s decision whether or not to give a particular instruction for abuse of discretion. *See id.*

The district court’s instructions clearly and correctly stated the SORNA standards. The court instructed the jury that a “change in residence” occurs when one leaves his current place of residence, even if he has not yet found another residence. *See R.*, Vol. 4, at 199. This instruction is consistent with SORNA’s mandate that *any* change in residence must be reported, even if it does not lead to the establishment of another residence. *See Murphy*, 664 F.3d at 801 (“When someone changes residences—whether by leaving his home, moving into a new dwelling, *becoming homeless*, or other means—he has a reporting obligation.” (emphasis added)). And, by instructing the jury that a “change in residence” occurs when the defendant no longer habitually lives at the same residence “as the one listed in the register,” R., Vol. 4, at 199, the district court expressly articulated the action that must be taken to effectuate such a change.

It is not an abuse of discretion to reject a defendant’s proposed instruction in favor of other legally correct ones. *See, e.g.*, *United States v. Turner*, 553 F.3d 1337, 1347 (10th Cir.2009) (“A district court properly exercises its discretion if the jury instructions as a whole ‘correctly state the governing law and provide an ample understanding of the issues and the applicable standards.’ ” (quoting *United States v. Gonzales*, 535 F.3d 1174, 1179 (10th Cir.2008))); *cf. United States v. Bader*, 678 F.3d 858, 872–73 (10th Cir.) (discerning no abuse of discretion in the district court’s failure to give the defendant’s requested instructions where his supportive arguments were “meritless”), *cert. denied*, — U.S. —, 133 S.Ct. 355, 184 L.Ed.2d 159 (2012). Accordingly, the district court did not abuse its discretion by refusing to give Mr. Forster’s proposed instruction.

C

[3] Mr. Forster contends that he was deprived of a unanimous jury verdict in light of the government’s assertion of duplicitous legal allegations and the district court’s failure to properly instruct the jury on unanimity in light of the duplicity issue. *764 Specifically, he claims that during trial the government argued that he had violated SORNA by, *inter alia*, (1) moving to Hobbs, New Mexico in March

2010 and not updating his registration to reflect that move; and (2) moving to the Philippines and failing to update his registration. Furthermore, according to Mr. Forster, there was more potential for confusion, for which the government apparently should be blamed: “There was even evidence that Mr. Forster may have traveled to Kentucky, and some jurors may have concluded that Mr. Forster should have registered in Kentucky.” Aplt. Opening Br. at 33.

“An indictment is sufficient if it sets forth the elements of the offense charged [and] puts the defendant on fair notice of the charges against which he must defend....” *United States v. Gama-Bastidas*, 222 F.3d 779, 785 (10th Cir.2000) (quoting *United States v. Dashney*, 117 F.3d 1197, 1205 (10th Cir.1997)) (internal quotation marks omitted). “An indictment is duplicitous,” and therefore improper, “if it ‘charges the defendant with two or more separate offenses in the same count.’” *United States v. Washington*, 653 F.3d 1251, 1262 (10th Cir.2011) (quoting *United States v. Haber*, 251 F.3d 881, 888 (10th Cir.2001)). A duplicitous indictment presents the potential danger that the jury will convict based upon one charged offense or the other in the same count, without necessarily reaching a verdict in unanimity, thus violating the defendant’s Sixth Amendment guarantee of a unanimous verdict. *See id.*

As a threshold matter, Mr. Forster correctly acknowledges that the indictment is not duplicitous on its face. *See Aplt. Opening Br. at 30; R., Vol. 2, at 5* (Indictment, filed Jan. 19, 2011). Nevertheless, he reasons that the government’s arguments *at trial* spawned multiple new theories of the case that the jury may have relied upon in reaching a verdict. This argument lacks merit.

To begin, we note that Mr. Forster did not make a duplicity objection below. A “challenge to an indictment based on duplicity must be raised *prior to trial*.... Raising the objection at the close of the government’s case is too late.” *United States v. Trammell*, 133 F.3d 1343, 1354 (10th Cir.1998) (omission in original) (emphasis added) (quoting *United States v. Hager*, 969 F.2d 883, 890 (10th Cir.1992)); *see Fed.R.Crim.P. 12(b)(2); id. § 12(b)(3)(B)*. Consequently, Mr. Forster’s subsequent challenge on appeal is arguably waived. However, upon a showing of “cause” that could overcome the waiver, we may consider the merits of Mr. Forster’s argument. *Trammell*, 133 F.3d at 1354. Mr. Forster argues that such cause is demonstrated by virtue of the fact that the indictment is not facially duplicitous. As Mr. Forster sees it, he thus had no reason to object before trial, as *Trammell* requires.³ *See id.*

Even assuming that Mr. Forster has shown cause for his failure to present a duplicity objection *prior to* trial, he also did not object to the government’s alleged change in theory *during* trial—a change that he now claims rendered the indictment duplicitous—nor did he object during *765 trial to the district court’s failure to offer a tailored unanimity instruction sufficient to cure any resulting confusion.⁴ We therefore review both of these arguments for plain error—which Mr. Forster acknowledges is appropriate. *See United States v. Fredette*, 315 F.3d 1235, 1243 (10th Cir.2003) (“Where, as in this case, a defendant does not request a specific unanimity instruction, we review the lack of such an instruction under the plain error standard.” (citation omitted) (internal quotation marks omitted)). To prevail on plain-error review, Mr. Forster

must demonstrate: “(1) an error, (2) that is plain, which means clear or obvious under current law, and (3) that affects substantial rights. If he satisfies these criteria, this Court may exercise discretion to correct the error if [4] it seriously affects the fairness, integrity, or public reputation of judicial proceedings.”

United States v. Cooper, 654 F.3d 1104, 1117 (10th Cir.2011) (alteration in original) (quoting *United States v. Goode*, 483 F.3d 676, 681 (10th Cir.2007)).

Mr. Forster cannot prevail on his duplicity argument because it was not error, much less plain error, for the district court to permit the trial to proceed or to fail to give a more specific unanimity instruction. Nothing in the government’s pre-trial or trial arguments suggested that its theory of the case was multi-faceted. Cf. *Pietrantonio*, 637 F.3d at 869 (“[A]t oral argument, the government conceded that the indictment was duplicitous....”). To the contrary, the government repeatedly emphasized that its sole theory was that Mr. Forster failed to update his New Mexico registration when he left 123 Lomas Street. Evidence regarding where Mr. Forster set up a home afterward—though probably relevant to establishing a separate SORNA violation—was offered merely to show that he did not intend to return to 123 Lomas Street. *See, e.g.*, R., Vol. 4, at 84–85 (Pre-trial Tr., filed Jan. 21, 2012) (“We object to the inclusion [in the instructions] of the localities at issue, because we think it just frankly misstates our case. It states that the government alleges the defendant violated 2255[sic] by changing his residence to the Philippines. That’s frankly not true. We allege that Mr. Forster violated SORNA by leaving 123 Lomas Street and then not returning, and so we don’t want to be [required] to prove that he actually moved

to the Philippines ... or anywhere else."); *id.* at 212 (Trial Tr., filed Jan. 21, 2012) ("So the question you need to figure out, the question of fact for you to decide is, did defendant change his address from 123 Lomas Street sometime after March [2010] and sometime before December [2010] ...?"); *cf. Pietrantonio*, 637 F.3d at 870 ("[T]he evidence at trial suggested that [the SORNA violation] could have occurred in Minnesota, Nevada and/or Massachusetts."). Mr. Forster's arguments to the contrary misinterpret the government's theory and conflate supporting evidence with a separate criminal charge. ...

For the foregoing reasons, there is no basis to conclude that the government presented multiple ways for the jury to convict Mr. Forster. Consequently, Mr. Forster has failed to show that the indictment was rendered duplicitous by the government's arguments at trial. *See Washington*, 653 F.3d at 1263. Likewise, the district court did not plainly err in failing to give a more detailed unanimity instruction to remedy any purported duplicity.

[4] Pursuant to U.S.S.G. § 2A3.5,⁵ a court should apply a base offense level of sixteen if the defendant is a Tier III sex offender. *See U.S.S.G. § 2A3.5(a)(1)*. The offenses that qualify a defendant for the designation of Tier III sex offender are set forth in 42 U.S.C. § 16911(4). Of particular importance here, a "Tier III offender" includes "a sex offender whose offense is punishable by imprisonment for more than 1 year" and "[the offense] is comparable to or more severe than ... abusive sexual contact (as described in [18 U.S.C. § 2244]) against a minor who has not attained the age of 13 years." 42 U.S.C. § 16911(4)(A)(ii); *see U.S.S.G. § 2A3.5 cmt. n. 1*. *See generally John A. Hall, Sex Offenders and Child Sex Tourism: The Case for Passport Revocation*, 18 Va. J. Soc. Pol'y & L. 153, 180 n. 149 (2011) ("Tier III sex offenders are those convicted of the crimes of conspiracy to commit the crimes of aggravated sexual abuse or sexual abuse, abusive sexual contact against a minor under thirteen years old, or involving non-parental kidnapping of a minor.").

*766 D

Lastly, Mr. Forster argues that the district court committed procedural error in calculating his advisory Guidelines range. *See United States v. Lente*, 647 F.3d 1021, 1030 (10th Cir. 2011) ("[A] procedural challenge relates to the 'method by which the sentence is calculated.'") (quoting *United States v. Wittig*, 528 F.3d 1280, 1284 (10th Cir. 2008))). Specifically, Mr. Forster contests the court's conclusion that he should be considered a Tier III sex offender pursuant to U.S.S.G. § 2A3.5 and its denial of a three-level reduction for his purportedly having voluntarily corrected his registration in December 2010.

"We review a sentence for abuse of discretion. We review the court's legal conclusions de novo and its factual findings for clear error." *United States v. Burgess*, 576 F.3d 1078, 1101 (10th Cir. 2009) (citations omitted). "A sentence is procedurally reasonable when the district court computes the applicable Guidelines range, properly considers the [18 U.S.C.] § 3553(a) factors, and 'afford[s] the defendant his] rights under the Federal Rules of Criminal Procedure.' " *United States v. Martinez-Barragan*, 545 F.3d 894, 898 (10th Cir. 2008) (second alteration in original) (citation omitted).

The PSR classified Mr. Forster's prior conviction of "gross sexual imposition," *see Ohio Rev.Code Ann. § 2907.05(A)(4)*,⁶ as a Tier III sex offense, and Mr. Forster lodged an objection. *See R.*, Vol. 2, at *767 186–87 (Def.'s Objections to the PSR & Sentencing Mem., filed Aug. 26, 2011). Mr. Forster reasoned that his conviction should have been categorized as a Tier I offense because there is no indication that it involved any of the conduct underlying Tier II and Tier III offenses. *See id.* at 186–88. The district court disagreed.

The district court found that Mr. Forster's prior conviction, while not precisely identical to 18 U.S.C. § 2244, was comparable in that both statutes prohibit sexual abuse of a minor—that is, § 2244 facially protects minors under the age of twelve, and Ohio Rev.Code Ann. § 2907.05(A)(4) protects minors under the age of thirteen. *See R.*, Vol. 4, at 250–51 (Sentencing Tr., dated Oct. 27, 2011). The court alluded to the disturbing circumstances of Mr. Forster's crime, noting that he "was convicted for vaginally and anally penetrating his then eight-year-old daughter" and that "the victim ... had indicated the abuse had been going on since she was five." *Id.* at 251. Moreover, the court pointed out that had the conduct forming the basis of Mr. Forster's prior conviction taken place on federal land, it would have been punishable under § 2244. *See id.*

In arguing that the district court erred in assigning him to Tier III, Mr. Forster vigorously objects to the district court's consideration of the facts underlying his prior conviction. He insists that the district court should have employed a categorical approach that would compare the elements of his Ohio offense to the elements of the relevant enumerated offenses under 42 U.S.C. § 16911(4)(A)—most importantly, for present purposes, the elements of § 2244.

However, notwithstanding Mr. Forster's insistence that a categorical approach is the correct one, our circuit actually has not had occasion to consider the appropriate methodology for assessing whether a prior conviction is comparable to or more severe than a named offense under SORNA.

In the contexts of immigration law and of the enhancement of criminal sentences, courts usually apply a categorical, or modified categorical, approach to determine whether the crime of which the defendant was convicted meets the statutory requirements to have immigration consequences or provides the basis for a sentencing enhancement, rather than allowing examination of the underlying facts of an individual's crime.

United States v. Mi Kyung Byun, 539 F.3d 982, 990 (9th Cir.2008); *see, e.g., Taylor v. United States*, 495 U.S. 575, 602, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (applying the categorical approach in assessing applicability of a sentencing enhancement under the Armed Career Criminal Act); *United States v. Venzor-Granillo*, 668 F.3d 1224, 1227 (10th Cir.2012) (applying the categorical approach in the illegal re-entry context in addressing whether a defendant's "prior conviction is an aggravated felony under the Sentencing Guidelines").

However, it is far from clear whether a categorical approach should be applied in the SORNA context. *See, e.g., United States v. Stock*, 685 F.3d 621, 628 (6th Cir.2012) ("Admittedly, there was (and remains) some doubt about the extent to which Guidelines § 2A3.5(a) directs district courts to look beyond the mere fact of a prior sex-offense conviction and into the specific factual circumstances of that offense.");

Byun, 539 F.3d at 991 (applying a non-categorical approach at least to the limited question of "the age of the victim"). But we need not definitively opine on the subject; even giving Mr. Forster the benefit of this approach, he cannot prevail on his sentencing challenge.

In applying the categorical approach, we look first to the elements of Mr. Forster's *768 state offense of conviction. *See, e.g., United States v. [Kenneth] Taylor*, 644 F.3d 573, 576 (7th Cir.2011) ("To calculate the advisory Guideline range for a violation of SORNA, the judge must first determine the defendant's tier classification. The judge usually accomplishes this task by examining the elements of the statute under which the defendant was convicted. This is called the 'categorical approach.' ") (citation omitted)). This statute provides in pertinent part that "[n]o person shall have sexual contact with another ... when ... [t]he other person ... is less than thirteen years of age...." Ohio Rev.Code Ann. § 2907.05(A)(4). "Sexual contact" is defined under Ohio law as "any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if the person is female, a breast, for the purpose of sexually arousing or gratifying either person." *Id.* § 2907.01(B) (emphasis added).

Thus, the Ohio statute would appear by its plain terms to punish any sexually-oriented touching—whether directly or through the clothing—of an erogenous zone of a minor less than thirteen years of age. *See, e.g., State v. Young*, No. 96 CA 1780, 1997 WL 522808, at *4 (Ohio Ct.App. Aug. 15, 1997) ("[T]he definition of 'sexual contact' ... should be interpreted to include touching of erogenous zones covered by clothing.") (citation omitted)); *State v. Mundy*, 99 Ohio App.3d 275, 650 N.E.2d 502, 510 (1994) ("In order to convict a defendant of this offense, the state is obligated to prove beyond a reasonable doubt that the defendant's purpose or specific intention in touching the victim on the proscribed areas of the body ... was sexual arousal or gratification of either the perpetrator or the victim.") (citation omitted)).

We now turn to 18 U.S.C. § 2244 to see whether the elements of any of the offenses that this statute proscribes are sufficiently comparable to the elements of Ohio Rev.Code Ann. § 2907.05(A)(4). Section 2244's structure is not commonplace; the statute sets forth its prohibited acts in large part through cross-references to very serious criminal conduct punished by other criminal provisions found in 18 U.S.C. §§ 2241, 2242, and 2243. In very broad strokes, § 2244 punishes any person who, "in the special maritime

and territorial jurisdiction of the United States ... knowingly engages in or causes sexual contact with or by another person, if so to do would violate" those cross-referenced criminal provisions, *see id.* § 2244(a)(1)–(5), if the specific misconduct at issue had constituted a "sexual act"—which is the proscriptive concern of those cross-referenced provisions—instead of "sexual contact"—which is the proscriptive concern of § 2244.

"[S]exual contact" is defined as "the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." *Id.* § 2246(3) (emphasis added). As defined, "sexual contact" would seemingly "require the actual touching, a meeting of body surfaces," but "the touching could occur either directly or through the clothing."

United States v. Hayward, 359 F.3d 631, 641 (3d Cir.2004).⁷

*769 The provisions that § 2244 cross-references involve a wide range of "sexual acts"—significantly, many relate to unlawful sexual conduct directed at minors. *See, e.g.*, 18 U.S.C. § 2243(a) (punishing a person who "knowingly engages in a sexual act with another person who ... has attained the age of 12 years but has not attained the age of 16 years ... [and] is at least four years younger than the person so engaging"). For purposes of the comparability analysis, it is especially noteworthy that (by cross-reference) § 2244 proscribes "knowingly engag[ing]" in sexual contact "with another person who has not attained the age of 12 years," *id.* § 2241(c). Just viewing this provision alone, one might reasonably conclude that the Ohio statute at issue—which forbids a person from having "sexual contact with another ... when ... [t]he other person ... is less than thirteen years of age," Ohio Rev.Code Ann. § 2907.05(A)(4)—is comparable to § 2244.

To be sure, on its face, the protective sweep of the Ohio statute would appear to be slightly broader, protecting minors under thirteen—instead of just those under twelve—from unlawful sexual contact. However, SORNA's tier regime only demands that the statutes be "comparable," not that they be identical. 42 U.S.C. § 16911(3)(A). And, more importantly, SORNA effectively negates this temporal point of distinction because it expressly defines the scope of § 2244's substantive provisions, for purposes of the tier regime, to apply to only "a minor who has not attained the age of 13 years." *Id.* § 16911(4)(A)(ii). In other words, viewed through the lens of SORNA, the Ohio statute and § 2244—by cross-reference

to § 2241(c)—protect the same age group of minors from unlawful sexual contact.

Thus, it can be said that both statutes punish sexually-oriented touching—whether directly or through the clothing—of an erogenous zone of a minor less than thirteen years of age. The only patent difference between Ohio's "gross sexual imposition" statute and § 2244, as we have discussed it here, relates to the latter's specifications regarding where the offense must occur—a site with a sufficient federal nexus, e.g., "the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 2244(a). However, such specifications relate to jurisdiction alone and, as such, plainly do not bear on the rationale for SORNA's "tier" system, which categorizes the severity of a sex-offense conviction based on the nature of the underlying conduct. We deem this jurisdictional point to be an immaterial difference for purposes of our comparability analysis.

Therefore, applying a categorical approach, we conclude that Ohio Rev.Code Ann. § 2907.05(A)(4) is comparable to a violation of 18 U.S.C. § 2244. In other words, even assuming *arguendo* that the district court should have ignored the factual circumstances of Mr. Forster's offense in determining his tier status for purposes of U.S.S.G. § 2A3.5(a)(1), we conclude that Mr. Forster was properly designated as a Tier III sex offender. Accordingly, we uphold the district court's ruling to this effect.

2

[5] Mr. Forster contends that the district court erred in calculating his Guidelines range by failing to decrease his base offense level under U.S.S.G. § 2A3.5(b)(2) for voluntarily correcting his failure to register. That provision provides that "[i]f the defendant voluntarily (A) corrected the failure to register; or (B) attempted to register but was prevented from registering by uncontrollable circumstances [to which he] did not contribute," the court *770 should reduce his base offense level by three levels. U.S.S.G. § 2A3.5(b)(2). Under § 2A3.5(b)(2), "the defendant's voluntary attempt to register or to correct the failure to register must have occurred prior to the time the defendant knew or reasonably should have known a jurisdiction had detected the failure to register." *Id.* § 2A3.5(b)(2) cmt. n. 2(A).

The district court noted that Mr. Forster had eventually sought to update his registration in December 2010, but nonetheless

denied Mr. Forster's request to apply the reduction for voluntary correction because he failed to notify the authorities of his earlier changes in address. *See R.*, Vol. 4, at 260. The court reasoned:

Mr. Forster first contacted the Doña Ana County Sheriff's Department task force officer the day after his return from the second international trip and indicated he intended to move from Mesquite, New Mexico, to Hobbs, New Mexico. There was no mention during the conversation of his trips to the Philippines where the first time was an approximately two-month stay, the second time was approximately a three-month stay. Now, based on this, the Probation Office as well as the government asserts that [Mr. Forster] is not entitled to a three-level reduction under [U.S.S.G. § 2A3.5(b) (2)], and [the court] agree[s] with th[is] analysis....

Id.

It is patent that the inquiry under U.S.S.G. § 2A3.5(b)(2) is an inherently factual one.⁸ Accordingly, we review only for clear error. "We may reverse the district court's ... [factual finding] as clearly erroneous only if it is implausible in light of the entire record on appeal." *United States v. McClatchey*, 316 F.3d 1122, 1129 (10th Cir.2003). "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *accord United States v. Salazar-Samaniega*, 361 F.3d 1271, 1278 (10th Cir.2004).

We conclude that the district court's ruling was not clearly erroneous. In effect, the district court determined that Mr.

Forster's purportedly corrective conduct in December 2010 did not constitute a voluntary correction of his failure to register because it actually reflected "his desire to perpetuate the false claim that he had been residing at 123 Lomas Street the whole time." Aplee. Br. at 35. The court's reasoning is consonant with the apparent concern of the Guidelines commentary that any corrective action be genuine and free from guile or deception. That is, just as a defendant is disqualified from receiving the downward adjustment if his corrective action occurs after he knows or reasonably should have known that law enforcement has detected his registration delict, *see U.S.S.G. § 2A3.5(b)(2) cmt. n. 2(A)*, a defendant should be disqualified from receiving the downward adjustment *771 if his purported corrective action is not a genuine attempt to correct his registration record, but rather an effort to cover up falsity and to embed it into that record.

And the district court's ruling finds support in the record. Specifically, Mr. Forster contacted Deputy Harvell by phone on December 14, 2010 and by a letter dated December 15, 2010. But, in both the phone call and the letter, Mr. Forster reported only a change in residence from Mesquite, New Mexico to Hobbs, New Mexico. At no point did Mr. Forster disclose that he had left 123 Lomas Street in March 2010 and traveled to the Philippines, among other places, during the eight months that he was out of contact with Deputy Harvell. Given Mr. Forster's failure in both his phone call and his letter to disclose his whereabouts since March 2010, we conclude that the district court did not clearly err in determining that Mr. Forster's efforts did not amount to a voluntary correction of his failure to register.⁹

III

For the foregoing reasons, we **AFFIRM** Mr. Forster's conviction and sentence.

All Citations

549 Fed.Appx. 757

Footnotes

- * This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.
- 2 For the sake of clarity, we pause to expressly note a proposition that Mr. Forster does *not* advance here and that, accordingly, is *not* at issue: Mr. Forster does not argue that the government was obliged to prove that he acted with knowledge that his conduct violated SORNA, as opposed to proving only that he knowingly failed to update his registration. See Aplt. Opening Br. at 19 (“Mr. Forster contends that the government failed to present sufficient evidence from which a reasonable jury could find that he knowingly failed to comply with the registration requirements.”). A number of circuits have addressed whether the more specific *mens rea* is an element of a prosecution under § 2250(a) and concluded that it is not—*viz.*, they have held § 2250(a)’s knowledge element is satisfied so long as the government proves that the sex offender was aware that he did not register or update his registration. See, e.g., *United States v. Crowder*, 656 F.3d 870, 876–77 (9th Cir.2011) (“In light of this analysis, we interpret § 2250(a)(3) as requiring the government to prove that a convicted sex offender knew of a registration requirement and knowingly failed ‘to register or update a registration.’ It does not require the government to prove that the sex offender also knew that the failure to register violates SORNA.” (quoting 18 U.S.C. § 2250(a)(3))); *United States v. Vasquez*, 611 F.3d 325, 328 (7th Cir.2010) (“Today we join the Fourth, Fifth, Eighth, and Eleventh Circuits … and hold that SORNA merely requires that a defendant have knowledge that he was required by law to register as a sex offender. The government need not prove that, in addition to being required to register under state law, a defendant must also know that registration is mandated by a federal statute.”); see also *Voice*, 622 F.3d at 876 (“18 U.S.C. § 2250(a) does not require proof of specific intent to violate the law.”). We have not had occasion to address this *mens-reas* question. And, because Mr. Forster does not press the point here, we leave the resolution of this question for another day.
- 3 Some courts have indeed suggested that, where the duplicitous of the indictment later becomes apparent, a defendant cannot be faulted for failing to object before trial. See *United States v. Pietrantonio*, 637 F.3d 865, 871 (8th Cir.2011) (recognizing that an indictment may be “rendered duplicitous by the evidence presented at trial”); cf. *United States v. Coiro*, 922 F.2d 1008, 1013 (2d Cir.1991) (holding that a pre-trial objection was not necessary to the alleged *multiplicity* of an indictment because “neither the nature of [the defendant’s] conduct nor the fact that [two counts] charge the same conduct was evident from the face of the indictment”).
- 4 The district court did give a *general* unanimity instruction. See R., Vol. 4, at 208. This was not, in Mr. Forster’s opinion, sufficient to cure the prejudice arising from the duplicitous indictment.
- 5 The U.S. Probation Office used the 2010 version of the Guidelines in computing the applicable advisory sentencing range for the Presentence Investigation Report (“PSR”). See R., Vol. 3, at 9 (PSR, filed Feb. 1, 2012). Neither party has objected to the use of the 2010 version. Therefore, that version provides the framework for our analysis here.
- 6 In pertinent part, the statute reads:
 - (A) No person shall have sexual contact with another, not the spouse of the offender; cause another, not the spouse of the offender, to have sexual contact with the offender; or cause two or more other persons to have sexual contact when any of the following applies:

....

 - (4) The other person, or one of the other persons, is less than thirteen years of age, whether or not the offender knows the age of that person.

Ohio Rev.Code Ann. § 2907.05(A)(4). Another provision of the same statute further provides that whoever commits a violation of subsection (A)(4) is “guilty of gross sexual imposition,” which is “a felony of the third degree,” *id.* § 2907.05(B), punishable by more than one year of imprisonment, see *id.* § 2929.14(A)(3).

- 7 On the other hand, “sexual act” is defined as, *inter alia*, “the intentional touching, *not through the clothing*, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.” 18 U.S.C. § 2246(2)(D) (emphasis added). A “sexual act” “requires skin-to-skin touching.” *Hayward*, 359 F.3d at 641.
- 8 We have viewed “voluntariness” in other contexts as a factual question because it depends on the defendant’s state of mind and can be determined only upon inferences drawn from the evidence. See, e.g., *United States v. Hunter*, 663 F.3d 1136, 1145 (10th Cir.2011). Moreover, whether the “defendant knew or reasonably should have known a jurisdiction had detected the failure to register,” U.S.S.G. § 2A3.5(b)(2) cmt. n. 2(A), is an inherently fact-based question. Cf. *United States v. Borst*, 62 F.3d 43, 47 (2d Cir.1995) (considering a challenge to an “actual or constructive knowledge” Guideline and finding it to be factual in nature); *Dzenits v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 F.2d 168, 172 (10th Cir.1974). Accordingly, our review here is for clear error. See *United States v. Diaz*, 313 Fed.Appx. 735, 736 (5th Cir.2009) (per curiam) (reviewing for clear error the district court’s ruling under U.S.S.G. § 2A3.5(b)(2)).
- 9 During oral argument, the government argued that we could also uphold the district court’s ruling on the related theory that Mr. Forster—by virtue of his deceptive conduct—actually failed to correct his registration. This theory finds footing in the text of the Guidelines. Specifically, a defendant could seemingly be disqualified from receiving the voluntary-correction reduction not only if he made the correction involuntarily, but also if he actually did not make the correction to begin with—*viz.*, a voluntary correction of a failure to register must be both (1) voluntary and (2) a correction. Although we disfavor the government’s interjection of this theory into the litigation at the late stage of oral argument, we recall that “[w]e have long said that we may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or even presented to us on appeal.” *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir.2011). We believe that this actual-correction theory provides an alternative ground to affirm the district court. By virtue of his deceptive conduct in failing most notably to disclose to law enforcement his trips overseas, Mr. Forster did not actually correct his registration record when he contacted the Sheriff’s Office in December 2010.

801 F.3d 1
United States Court of Appeals,
First Circuit.

UNITED STATES of America, Appellee,

v.

Christian J. MORALES, Defendant, Appellant.

No. 13-1999.

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Aug. 27, 2015.

Synopsis

Background: Following a guilty plea, defendant was convicted in the United States District Court for the District of Rhode Island, William E. Smith, Jr., of failing to register as a sex offender and was sentenced as Tier III offender under Sex Offender Registration and Notification Act (SORNA). Defendant appealed.

Holdings: The Court of Appeals, Howard, Chief Judge, held that:

[1] Rhode Island first degree child molestation statute was not comparable to or more severe than offenses listed in Tier III of Sex Offender Registration and Notification Act (SORNA) that applied irrespective of the victim's age;

[2] Rhode Island first degree child molestation statute was not comparable to or more severe than offenses listed in Tier III of SORNA that applied to offenses in which victims were 12 years of age and under; and

[3] district court plainly erred in sentencing defendant convicted in state court of violating Rhode Island first degree child molestation statute as a Tier III offender.

Vacated and remanded.

West Headnotes (6)

[1] **Criminal Law** Necessity of Objections in General

To show plain error, a defendant must show that: (1) an error occurred which was; (2) clear or obvious and which not only; (3) affected his substantial rights, but also; (4) seriously impaired the fairness, integrity, or public reputation of the judicial proceedings.

2 Cases that cite this headnote

[2]

Mental Health Offenses and prosecutions

In determining whether a state offense is comparable to or more severe than any of generic offenses listed in Sex Offender Registration and Notification Act (SORNA) Tier III offenses, as would warrant sentencing offender who has been convicted of a state offense and has failed to register as sex offender under SORNA as Tier III offender, a court's analysis is limited to the elements of indivisible state predicate offenses, along with the generic crimes referenced in SORNA. Sex Offender Registration and Notification Act, § 111(4)(A), 42 U.S.C.A. § 16911(4)(A).

18 Cases that cite this headnote

[3]

Mental Health Offenses and prosecutions

Rhode Island first-degree child-molestation statute was not comparable to or more severe than any offense listed in Tier III of Sex Offender Registration and Notification Act (SORNA) that applied irrespective of victim's age, for purposes of determining whether defendant who was convicted under statute could be treated as Tier III offender when imposing sentence for failure to register under SORNA, since statute lacked analogous characteristics in that it contained only two elements, the sexual act and the age of the victim, while the Tier III offenses included additional elements such as threat of force and did not narrowly protect specific classes of victims. Sex Offender Registration and Notification Act, § 111(4)(A)(i), 42 U.S.C.A. § 16911(4)(A)(i); R.I.Gen.Laws 1956, § 11-37-8.1.

14 Cases that cite this headnote

- [4] **Mental Health** Offenses and prosecutions
Rhode Island first-degree child-molestation statute, which criminalized sexual penetration with a person 14 years or under, was not comparable to or more severe than offenses listed in Tier III of SORNA that applied to offenses in which the victims were 12 years of age and under, and thus defendant who was convicted under statute could not be treated as Tier III offender when imposing sentence for failure to register under SORNA. Sex Offender Registration and Notification Act, § 111(4)(A)(ii), 42 U.S.C.A. § 16911(4)(A)(ii); R.I.Gen.Laws 1956, § 11–37–8.1.

7 Cases that cite this headnote

- [5] **Criminal Law** Sentencing and Punishment
District court plainly erred in sentencing defendant, who had been convicted in state court of violating Rhode Island's first-degree child-molestation statute, as Tier III offender under SORNA for failure to register as a sex offender, based on finding that Rhode Island statute was comparable to or more severe than Tier III offense; it was clear and obvious that Rhode Island statute was not comparable to or more severe than any Tier III offense, incorrect guideline range played role in court's incarcerative sentencing determination, and there was significant possibility that defendant would receive reduced sentence upon remand. Sex Offender Registration and Notification Act, § 111(4), 42 U.S.C.A. § 16911(4); R.I.Gen.Laws 1956, § 11–37–8.1.

12 Cases that cite this headnote

- [6] **Criminal Law** Necessity of Objections in General
In determining whether a district court committed plain error, the plainness of an error is considered at the time of an appeal, and the Court of Appeals can thus account for developments in the law even if the district court did not have the benefit of those changes.

4 Cases that cite this headnote

Attorneys and Law Firms

*2 K. Hayne Barnwell for appellant.

Donald C. Lockhart, Assistant United States Attorney, with whom Peter F. Neronha, United States Attorney, was on brief, for appellee.

Before HOWARD, Chief Judge, KAYATTA and BARRON, Circuit Judges.

Opinion

HOWARD, Chief Judge.

This appeal presents the question of whether a state Rhode Island conviction for first degree child molestation, R.I. Gen. Laws § 11–37–8.1, is “comparable to or more severe than” one of the offenses listed in Tier III of the federal Sex Offender Registration and Notification Act (“SORNA”), 42 U.S.C. § 16911(4). Appellant–Defendant Christian Morales, who had previously been convicted under that Rhode Island law, was sentenced in federal court to 65 months in prison and a lifetime of supervised release for failing to register as a sex offender under SORNA, 18 U.S.C. § 2250(a). At sentencing, the district court utilized the prior Rhode Island conviction to deem Morales a Tier III offender, resulting in a base-offense level two levels higher than if he had been deemed a Tier II offender. Finding the Tier III designation to be plain error, we vacate Morales's prison term and remand for re-sentencing.

I.

In December 2006, Morales entered a plea of *nolo contendere* to two counts of first degree child molestation in the state of Rhode Island. R.I. Gen. Laws § 11–37–8.1. At the time that he committed the sexual assault, he was 18 and the victim was 13. The state of Rhode Island sentenced Morales to a 30–year incarcerated term, with all but seven years suspended.

As a result of that sentence, Morales was required to register as a sex offender *3 under SORNA. That law classifies offenders into three tiers based on the severity of the sex offense. Those categories, in turn, detail the frequency and longevity of an individual's registration requirements. For

instance, a Tier III offender must register for the remainder of his or her life, while a Tier II offender must register for 25 years. 42 U.S.C. § 16915.

In 2010, a federal grand jury indicted Morales in the District of Rhode Island for failing to register, and Morales subsequently pled guilty. Prior to sentencing, the probation officer prepared a pre-sentence report classifying Morales as a Tier III sex offender. U.S.S.G. § 2A3.5(a) (setting the base-offense level at 16 for a Tier III offender, as defined in SORNA, rather than 14 for a Tier II offender). The district court accepted this designation, which increased Morales's Guidelines sentence range from 46–57 months in prison to 57–71 months.

At sentencing, the court imposed a mid-guidelines incarcerative sentence of 65 months. With respect to supervised release, however, the district court emphasized Morales's behavior since the time of the predicate conviction (including an alleged sexual assault on a minor during his unregistered period) and concluded that a lifetime of supervised release was necessary. At a subsequent hearing, the court reaffirmed its view on supervised release and made clear that public safety demanded an upward variance to the statutory maximum.

Morales timely appealed, asserting a litany of challenges. Finding the Tier III contention to be the only arguably meritorious claim, we requested further briefing and oral argument solely on that issue.¹

II.

We begin by setting forth the statutes at issue before delving into the merits. SORNA classifies sex offenders into three tiers with each category corresponding to specific, enumerated crimes or to offenses incorporated from other federal sexual abuse laws. The most egregious offenders are grouped into Tier III. 42 U.S.C. § 16911(4)(A). Meanwhile, Tier II of the statute captures, *inter alia*, sexual offenses against victims aged 13 through 16 if the perpetrator is four or more years older than the victim. § 16911(3)(A)(iv). The final category, Tier I, serves as a catch-all provision for convicted sex offenders not otherwise grouped into Tier II or Tier III. § 16911(2).

Most relevant for our purposes is Tier III. This tier covers individuals who have committed crimes “comparable to or

more severe than” a number of enumerated offenses. § 16911(4)(A). Those offenses essentially break down into two categories.

First, Tier III includes sexual offenses against a child aged 12 or under. Part of section (i) in Tier III adopts the definition of “aggravated sexual abuse” from 18 U.S.C. § 2241, which penalizes crossing state lines “with intent to engage in a sexual act with a person who has not attained the age of 12 years,” or actually engaging in such conduct. § 16911(4)(A)(i) (incorporating § 2241). Also included in this category, from section (ii) of Tier III, is “abusive sexual contact … against a minor who has not attained the age of 13 years.” § 16911(4)(A)(ii) (incorporating 18 U.S.C. § 2243(a)). “Abusive sexual contact” is defined as any sexual offense against a 12 year old if the perpetrator is 16 years or older. *Id.*

*4 Second, Tier III encompasses sex offenses that are committed with force, result in additional harm, or are perpetrated against particularly vulnerable victims. These offenses, also found in section (i), incorporate other aspects of “abusive sexual contact” from 18 U.S.C. § 2241, along with “sexual abuse” as defined in 18 U.S.C. § 2242.²

The final statute of interest is the source of Morales's predicate conviction. That Rhode Island law merely states, “A person is guilty of first degree child molestation sexual assault if he or she engages in sexual penetration with a person fourteen (14) years of age or under.” R.I. Gen. Laws. § 11–37–8.1.

III.

[1] Given the lack of an objection below, the parties agree that our review is for plain error only. This requires Morales to show that “(1) an error occurred which was (2) clear or obvious and which not only (3) affected his substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of the judicial proceedings.” *United States v. Tavares*, 705 F.3d 4, 16 (1st Cir.2013) (citation omitted). We begin by asking whether any error occurred.

i.

Morales contends that it was error for the district court to enhance his offense level based on a Tier III designation, since his Rhode Island conviction was not “comparable to or more severe than” any offense listed in that section of

SORNA. Our analysis of this argument proceeds in two steps. First, we must ask what analytical approach applies to this comparative inquiry. Second, under that framework, we must then determine whether the specific Rhode Island law that Morales was convicted under is, in fact, “comparable to or more severe than” any offense in Tier III.

a.

The threshold question in this case is whether our comparison of the statutes is limited to the elements of each crime or whether we can account for Morales’s specific conduct when determining whether he is a Tier III offender. At its core, this requires us to give some meaning to the term “offense” as it is utilized in Tier III of the SORNA statute. The Supreme Court has provided significant guidance on how to answer this question.

In *Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), the Court described the analytical framework for comparing a state predicate offense with the generic crimes listed in the Armed Career Criminal Act (“ACCA”). Key to its decision was a distinction between indivisible statutes (those not containing alternative elements) and divisible statutes (those providing alternative elements). For the latter set of statutes, *5 limited factual consideration is appropriate to determine under which portion of the statute the offense lies.

However, for indivisible predicate statutes, like the Rhode Island law at issue here, the comparison must be limited solely to the elements of the crimes. The Court emphasized three main justifications for this. *Descamps*, 133 S.Ct. at 2287–89, citing *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). First, the text of the ACCA, using the term “convictions” rather than a phrase such as “has committed,” implied that Congress was focused on a defendant’s convictions irrespective of the underlying facts. *Descamps*, 133 S.Ct. at 2287–88; contra *Nijhawan v. Holder*, 557 U.S. 29, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009) (where the statute’s requirement of a loss exceeding \$10,000 called for an inquiry into the specific circumstances leading to the offense). Second, the Court was concerned that fact-finding on the predicate offense could run afoul of the Sixth Amendment right to a jury trial. *Descamps*, 133 S.Ct. at 2288–89. Finally, such a categorical approach eschewed the possibility of any mini- or collateral-trial at sentencing to probe the predicate offense. *Id.* at 2289.

At least two of these considerations strongly militate towards adopting the same method in this context. First, the text yields the same result. Certainly, the word “offense” itself does not provide us the same clarity as the use of the word “conviction” in the ACCA, see *Nijhawan*, 557 U.S. at 33–34, 129 S.Ct. 2294; see also Black’s Law Dictionary (9th ed. 2009) (defining offense as “violation of the law; a crime”), but we have recently ascribed meaning to that word in the context of the sexual abuse statutory scheme. In *United States v. Jones*, 748 F.3d 64 (1st Cir.2014), a defendant challenged his life sentence, imposed under 18 U.S.C. § 2241© (providing the definition of aggravated sexual assault incorporated into the Tier III statute). To determine whether an enhanced sentence under that statute was appropriate as a result of a predicate sexual offense, we asked whether a state law penalizing sexual penetration with a victim under 13 (Jones’s predicate crime) “would have been an offense” under federal law (§ 2241©). *Id.* at 73–74. After citing *Descamps*, we determined that “offense” in this context was limited to the “state court judgment and the statute of conviction—not at what [the defendant] did to trigger the statute’s application.” *Id.* at 73. In other words, we adopted a categorical approach.

We see no reason to depart from that understanding of “offense.” It is axiomatic that when considering two statutes on the same subject “courts construe words or phrases from a prior act on the same subject in the same sense,” Sutherland Statutory Construction § 51:2 (7th ed.), and that “identical words used in different parts of the same act are intended to have the same meaning,” *Dep’t of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 342, 114 S.Ct. 843, 127 L.Ed.2d 165 (1994) (citation omitted). Here, the SORNA statute explicitly incorporates § 2241(c) and both sections use the term “offense” in precisely the same way; they each mandate a comparison of a predicate state offense with the federal law. The government, perhaps recognizing this, does not provide any reason to avoid this consistent reading. Instead, it merely adds a footnote in its brief saying that “some courts have expressed doubt about whether the so-called ‘categorical approach’ even applies in this setting.” Absent any justification to find otherwise, *Jones* answers this textual question. Since it limits “offense” to the elements of the crime, this *Descamps* *6 consideration implores us to follow the categorical approach.

The third *Descamps* consideration, the need to avoid collateral trials about the factual grounding of the predicate offense, is also directly relevant. There, relying on its previous

explanation in *Taylor*, the Court maintained that requiring a district court to delve into the facts of a predicate offense could turn into a daunting task. Indeed,

In some cases, the indictment or other charging paper might reveal the theory or theories of the case presented to the jury. In other cases, however, only the Government's actual proof at trial would indicate whether the defendant's conduct constituted [the offense]. Would the Government be permitted to introduce the trial transcript before the sentencing court, or if no transcript is available, present the testimony of witnesses? Could the defense present witnesses of its own and argue that the jury might have returned a guilty verdict on some theory that did not require a finding that the defendant committed the [generic offense]?

Taylor, 495 U.S. at 601, 110 S.Ct. 2143. Relatedly, the Court observed that where a defendant pleads to a lesser included offense of one listed in the ACCA, this fact-intensive approach could subject a defendant to a mini-trial on, and an enhanced punishment from, that broader crime. *Id.* In effect, this could deprive him or her of the benefit of the plea bargain.

Not much more need be said here, as a similar concern also points to the answer in this case. Under a fact-centric analysis, an equally intensive investigation could be required to determine whether a defendant's predicate actions fall within the Tier III category. Although it is plausible that the issue could be resolved from the plea agreement, plea colloquy, or judgment alone, it is also conceivable that the court would need to review the entire record. As the Court in *Taylor* noted, it could even require further factual development outside of the initial trial record. This is particularly concerning in this context where requiring the victim to testify again could increase the likelihood of secondary trauma. *See, e.g.*, L. Christine Brannon, *The Trauma of Testifying in Court for Child Victims of Sexual Assault v. the Accused's Right to Confrontation*, 18 Law & Psychol. Rev. 439 (1994). Finally, depending on the nature of the defendant's plea to the

underlying offense, the approach could also render his or her bargain meaningless.

[2] Ultimately, limiting our analysis to the elements of indivisible state predicate offenses, along with the generic crimes referenced in SORNA, best comports with the Supreme Court's considerations in *Descamps*. Indeed, we are not alone in reaching this conclusion. *See United States v. Backus*, 550 Fed.Appx. 260 (6th Cir.2014) (applying the categorical approach to the SORNA context); *United States v. Cabrera-Gutierrez*, 756 F.3d 1125 (9th Cir.2013) (same); *see also United States v. Forster*, 549 Fed.Appx. 757 (10th Cir.2013) (casting some doubt on the approach but applying it nonetheless); *contra United States v. Gonzalez-Medina*, 757 F.3d 425 (5th Cir.2014) (applying a fact-based approach when comparing an "age differential" distinction between a state and federal statute). Therefore, our analysis will be limited solely to the elements of the relevant statutes.³

*7 b.

The heart of this case turns on whether the Rhode Island law is "comparable to or more severe than" any of the SORNA Tier III offenses. At its core, Tier III breaks down into two categories: (1) offenses that apply irrespective of the victim's age—i.e., if the offense either includes some additional conduct or harm, or is committed against a particularly vulnerable individual, § 16911(4)(A)(i); and, (2) any sexual crime against a victim 12 or under, § 16911(4)(A)(i)-(ii). We address each category in turn.

Initially, Tier III applies in a number of situations irrespective of the victim's age. Specifically, it applies to offenders who engage in certain, additional conduct (other than the sexual act alone) in the course of committing the crime; who inflict some additional harm during the offense; or who abuse a specified victim. § 16911(4)(A)(i) (enumerating these offenses and including: offenders who commit the crime utilizing force or the threats of force, offenders who commit the crime against an unconscious victim, or offenders who commit the crime against a victim who is incapable of appraising the nature of the conduct).

[3] The Rhode Island statute lacks analogous characteristics. Instead, it contains only two elements: the sexual act and the age of the victim. It does not include additional elements such as threats or force, nor does it narrowly protect specific classes of victims in a comparable fashion. Quite simply, the

Rhode Island law in this case penalizes significantly broader behavior than this category of Tier III offenses.⁴

Our examination continues, however, since Tier III also encompasses any sexual act against a victim aged 12 or under. Specifically, section (ii) of Tier III includes offenses where the victim is 12 years old or under and the perpetrator is at least four years older, § 16911(4)(A)(ii), and section (i) (in addition to the crimes previously discussed) includes offenses where the perpetrator crosses state lines with the intent to engage in sexual conduct, or actually does engage in such conduct, if the individual is under the age of 12, § 16911(4)(A)(i). Such crimes are considered so severe that, without anything more, they warrant Tier III designation.

The government anchors its argument in the latter, section (i) crime. It emphasizes that section (i) of the statute penalizes the mere intent to sexually abuse an individual under 12 (together with the actus reus of crossing state lines), while Rhode Island penalizes more severe conduct: an actual sexual act. The government simply views the difference in the age cut-offs as inconsequential.

The government's position runs head first into a congressional judgment that lies at the core of the tiered framework. The structure of the law makes clear that while "comparable to" may, as the government argues, provide us some flexibility in examining the offenses, the question of age *8 is so essential to the framework that the congressional cut-off must be strictly construed. *See Saysana v. Gillen*, 590 F.3d 7, 13 (1st Cir. 2009) (stating that the meaning "of a statutory provision is often made clear not only by the words of the statute but by its structure as well"). This is manifested by the distinctions within section (i) of Tier III, by the interplay of section (i) and (ii), and by the differences between Tier II and Tier III.

First, the structure of section (i) of Tier III implies that this congressional line-drawing was critical. At the risk of repetition, Congress determined that the intent to abuse a victim under 12 (or actually doing so) warrants Tier III classification. But, where a victim is any other age, Congress made a different statement; although the conduct may be severe, without additional evidence of other conduct or harm (such as threats or force), or some other particularly vulnerable attribute about the victim (such as being unable to comprehend what was happening), only Tier II applies. Thus, for crimes against victims over 12, only additional conduct, or a more vulnerable victim, renders the crime commensurate with an offense against a victim under that age.

Comparing the different sub-sections in Tier III yields the same conclusion. Section (i) of Tier III already covers all conduct where the victim is under 12. § 16911(4)(A)(i) (incorporating 18 U.S.C. § 2241(c) ("intent to engage in ... [or] knowingly engages in a sexual act with another person who has not attained the age of 12.")). Section (ii) adds only one additional class of offenses: specified sexual abuse against 12 year old children. § 16911(4)(A)(ii). If the age limit in section (i) could be disregarded, as the government suggests, then a state crime penalizing a sexual act against a 12 year old would already be captured by section (i) of Tier III. This would leave the second sub-section of Tier III without any purpose. *See Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (noting the importance of giving every word or section in a statute meaning when possible).

The differences across the tier hierarchy further underscore the age distinction's importance. Compare § 16911(3)(A)(iv) with § 16911(4)(A). If a person engages in sexual conduct against a victim 16 or under and is convicted under a state's general statutory rape law, Tier II status is imposed. § 16911(3)(A)(iv). If the victim is 12 or under, however, then the same exact conduct warrants Tier III classification. In crafting this law, Congress plainly did not envision placing every offender who violated any statutory rape law under the Tier III umbrella. But, here, too, the government's position would likely do just that. Indeed, it would raise the question of whether Tier III applied to a violation of any state's statutory rape law. By moving a significant number of Tier II offenders into Tier III in this way, an entire section of Tier II could thus be left without any purpose.

Nor is the tier system the only place that Congress emphasized this age distinction in the sexual abuse statutory regime. *See Util. Air Regulatory Grp. v. EPA*, — U.S. —, 134 S.Ct. 2427, 2442, 189 L.Ed.2d 372 (2014) (noting that a provision in a statute must be read in the broader context of the law); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342–45, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997) (trying to decipher the meaning of a term by examining its usage in other provisions in the statute). For example, Congress specifically enhanced the penalty for "offenses involving young children." 18 U.S.C. § 2244(c). In that law, Congress said that if a victim had not attained the age of 12 "the maximum *9 term of imprisonment that may be imposed for the offense shall be twice that otherwise provided in this section." *Id.* The purpose of that enhancement, Congress specifically noted, was its

concern over an increase in abuse (roughly one-third of all sexual offenses) against children 11 and under. H.R.Rep. No. 105-557 (1998). This suggests that Congress was not setting an arbitrary age limit, but was intentionally drawing a line at that specific age.

Ultimately, the age of the victim is a critical component of the tier system. Although it now sings a different tune, even the government has acknowledged this fact. As the Department of Justice (“DOJ”) noted in its own guidelines implementing the law, the tier designation increases requirements corresponding to a number of factors, most prominently, “the nature and seriousness of the offense, *the age of the victim*, and the extent of the offender's recidivism.” *National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38,030 (July 2, 2008) (emphasis added). The DOJ seems to accept the idea, which we also adopt, that the victim's age is one of the core elements distinguishing the tiers in SORNA. Given that, a state law simply does not target comparatively grave conduct when it fails to include the same age cut-off.

[4] The Rhode Island law at issue here is significantly broader than a Tier III offense, since the state law penalizes sexual conduct alone—without anything more—against victims over the congressionally-designated age of 12. Although Rhode Island can certainly draw the line at 14 when crafting its own laws and setting its own registration requirements, it does not necessarily follow that specific federal requirements are automatically triggered. Where a distinction exists on such a foundational issue, we cannot consider the two laws comparable. Admittedly, this would be a different case if the Rhode Island statute required proof of some additional harm (even if it defined the harm differently than the federal statute) to victims over 12, since it would then mirror Congress's judgment on this crucial point. *See, e.g.*, N.H.Rev.Stat. Ann. § 632-A:2(I); M.G.L. ch. 265 § 23A. It would also be a different case if Rhode Island changed its laws to penalize sexual conduct against any individual 12 or under, as there would then be overlap with the federal scheme. *See, e.g.*, Me. Rev. Stat. Ann. tit. 17-A § 253(1)(c); N.H.Rev.Stat. Ann. § 632-A:2(I)(l) & (II). It might even be a different case if the Rhode Island law under which Morales was convicted specifically sanctioned abuse against victims with a mental capacity equivalent to a child 12 or under, as that might indicate an attempt to regulate equivalent harm. But, in penalizing sexual conduct alone against older victims, the law sweeps far too broadly in terms of the severity of the offenses it covers to be a Tier III congener.⁵

*10 Accordingly, the Rhode Island law cannot be read to be “comparable to or more severe than” any SORNA Tier III offense. Thus, the district court erred when it characterized Morales as a Tier III sex offender.

ii.

[5] Although we find error, our analysis does not end there. Instead, Morales must still establish the other prongs of plain error. First, he must show that the error was “plain.” In other words, it must be “clear” or “obvious.” *See United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). The government contends that we have never interpreted the SORNA tier regime in this context and that the conclusion we reach today is far from self-evident.

[6] The plainness of an error is considered at the time of an appeal, and we thus account for developments in the law even if the district court did not have the benefit of those changes. *See Henderson v. United States*, —U.S.—, 133 S.Ct. 1121, 1124–25, 185 L.Ed.2d 85 (2013); *United States v. Farrell*, 672 F.3d 27, 36 (1st Cir.2012). Despite the implication of the government's argument, the absence of a decision directly on point does not remove the potential for a finding of plain error. Instead, the inquiry is always whether the error is open to doubt or question. *See Henderson*, 133 S.Ct. at 1130 (“[P]lain’ means that lower court decisions that are questionable but not *plainly* wrong ... fall outside the Rule's scope.”); *Puckett v. United States*, 556 U.S. 129, 143, 129 S.Ct. 1423, 173 L.Ed.2d 266 (2009).

Two interwoven aspects of the error here make it “plain.” First, although the district court in this case should have conducted some analysis given *Descamps*, it was our recent decision in *Jones* that settled the matter definitively. With that case, one the district court did not have the benefit of reviewing, it became sufficiently clear that the *Descamps* analytical framework applied to the tier structure at issue.

Second, with the *Jones* decision in place (and assuming, *arguendo*, that the government's broader conception of “comparable to” applies) all this case then required was a comparison of the federal and state law. Although we have engaged in a thorough examination, even a cursory review of the statutes illustrates the importance of the age issue in the federal law and the breadth of the Rhode Island statute in comparison. *See United States v. Dávila-Félix*, 667 F.3d 47,

54–57 (1st Cir.2011) (finding plain error despite undertaking a significant legal analysis asking whether a prior conviction qualified as a predicate offense for sentencing enhancement purposes). Simply put, no faithful reading of the elements of the statutes, as our analysis shows, could lead one to conclude that Morales was a Tier III offender. Thus, given the framework mandated by *Jones*, and the clarity with which Congress spoke in SORNA, it was sufficiently obvious that Morales was incorrectly classified as a Tier III offender.

Morales must next show that the error affected his substantial rights. In other words, it “must have been prejudicial.” *Olano*, 507 U.S. at 734, 113 S.Ct. 1770. Here, it is important to distinguish Morales’s *11 incarcerative sentence from his supervised release term. As to the former, this case is somewhat analogous to others where much is at stake (for example, when an armed career criminal designation plays a role) and plain error is found because the district court erroneously considered a prior conviction to be a predicate offense. See *United States v. Torres–Rosario*, 658 F.3d 110, 116 (1st Cir.2011). As we noted in *Torres–Rosario*, “district courts have regained considerable discretion in sentencing but the guidelines are still highly influential.” *Id.* Thus, where the guidelines are augmented because the court improperly considers a prior conviction to be a predicate offense, we must, at a minimum, be on alert to the presence of prejudice.

In this case, the district court seemingly followed the guidelines, and imposed an incarcerative sentence directly in the middle of the range. Given the district court’s focus on the supervised release term rather than on the incarcerative sentence, we are unable to say with sufficient confidence that the erroneous guidelines range did not single-handedly drive the district court’s incarcerative sentencing decision. (“Now, the enhancement puts you in a guideline range of 57 to 71 months. If you are truly a child abuser, then the difference between 57, 60, 65, 71 months just keeps you off the street for a few more months, and eventually you’re going to return to society. So just as important as the prison term, it seems to me, are the terms of your release.”) Given the apparent role that the incorrect guideline range played, and the reasonable probability that a different sentence will be imposed, remand is appropriate. See, e.g., *United States v. Antonakopoulos*, 399 F.3d 68, 81 (1st Cir.2005) (noting with respect to a *Booker* error that “[e]ven in cases where the judge was silent, there may be cases in which the appellate panel is convinced by the defendant based on the facts of the case that the sentence would, with reasonable probability, have been different”).

Although Morales has shown that his substantial rights were affected as to his prison term, he cannot show prejudice with respect to his supervised release sentence. At the initial sentencing, the district court noted that a lifetime of supervised release was required because Morales was a recidivist and the public needed to be protected. After the initial sentencing, the government informed the court that it had changed its position. It believed that the guidelines called for a maximum of five years of supervised release even though the statute permitted the court to vary upwards to a lifetime sentence. At a subsequent hearing, the court again emphasized that public safety concerns mandated the lifetime order and it thus reaffirmed that part of its decision. Nothing from either proceeding indicates that the tier designation played any role in this part of the sentence, and we see no reason to disrupt it.⁶

Morales must finally show that the error seriously impaired the fairness, integrity, or reputation of the judicial proceedings. In other words, he must show that there is “a threat of injustice if we affirm.” *United States v. Rodriguez*, 630 F.3d 39, 42–43 (1st Cir.2010). Given the significant possibility that Morales will receive a reduced sentence upon remand with a different base-offense level, and since SORNA imposes *12 enhanced, lifelong requirements for Tier III offenders, such a threat does exist without correcting this error. Nor, we note, is there any injustice to the government from a remand. See *United States v. Ramos–Gonzalez*, 775 F.3d 483, 507–08 (1st Cir.2015) (“To the extent relevant to the plain error inquiry, the government asserts no offsetting circumstances.”) Since the error was one purely of law, the government faced no undue prejudice in responding to the argument for the first time on appeal. Moreover, the government faces no significant harm moving forward, as it can still argue for an upward variance upon remand.

Ultimately, this is one of the rare cases in which the plain error review standards have been satisfied and a remand to correct the mistake of law is required.

IV.

As the district court committed plain error when it characterized Morales as a Tier III sex offender and when it then utilized that designation in its guidelines calculation, we *vacate* the sentence with respect to Morales’s prison term and *remand* for proceedings consistent with this opinion.

All Citations

801 F.3d 1

Footnotes

- 1 We have considered Morales's additional contentions, and find them to be wholly unpersuasive.
- 2 These crimes include: causing another to engage in a sexual act "by using force ... or by threatening that other person" with force, § 2241(a); knowingly rendering a person unconscious or drugging that individual and then engaging in a sexual act with him or her, § 2241(b); or, engaging or attempting to engage in abuse defined in § 2241(a) & (b) with a person between the ages of 12 and 15 if the perpetrator is four years older than the victim, § 2241©. § 16911(4)(A)(i). This category also includes forcing "another person to engage in a sexual act by threatening or placing that other person in fear" or engaging in a sexual act with a victim if such an individual is "incapable of appraising the nature of the conduct; or physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act." § 16911(4)(A)(i) (incorporating 18 U.S.C. § 2242).
- 3 Despite its tepid argument against the categorical approach, the government vigorously insists that the phrase "comparable to" should have broad meaning. Morales, meanwhile, argues for a narrower construction of the term, similar to that given by two other circuits. See *Backus*, 550 Fed.Appx. at 263 (defining "comparable" as "prohibit[ing] the same activity"); *Cabrera-Guiterrez*, 756 F.3d at 1133–34 (stating that a statute that covers more activity than the federal statute is not comparable to the federal law). We need not decide this issue. Instead, we conclude that, no matter what the precise meaning of the term, the Rhode Island offense in question is not "comparable to" the federal offenses listed in Tier III.
- 4 We also note that other sections of Rhode Island law do proscribe force or additional harm in this context. See, e.g., R.I. Gen. Laws § 11–37–2. This evidences the legislature's capacity to target such activity when it so intends.
- 5 Although the government focuses on the section (i) intent crime, the importance of the age distinction would apply equally when comparing the Rhode Island statute to the offenses barred in section (ii) of Tier III (sexual conduct against a 12 year old child). However, we could potentially resolve that section (ii) comparison in another way. Unlike the offenses listed in sub-section (i), sub-section (ii) could either be read as a single unit (i.e. finding that "is comparable to or more severe than" applies to the entire section), or it could be read as two separate clauses ("is comparable to or more severe than ... abusive sexual contact" and is "against a minor who has not attained the age of 13 years.") Under the latter approach, the "comparable to" language might not apply to the age limit and thus that clause could be read as a stand-alone requirement. Courts could then engage in a factual inquiry into the victim's actual age when considering whether an offense matched sub-section (ii) of Tier III. Because the victim of the underlying crimes for which Morales was convicted was 13, we need not make that determination, since we would reach the same result regardless of which analytical framework applied to that one specific clause of Tier III.
- 6 Although we do not find that the plain error standard has been met with respect to supervised release, determining the appropriate balance of an incarcerative term and supervised release is an exercise committed to the sound discretion of the district court. The district judge should therefore be permitted, but not required, to revisit the supervised release aspect of the sentence on remand.

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This case was not selected for publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1. United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Gary James NEEL, Defendant–Appellant.

No. 14–7003

|

Jan. 27, 2016.

Synopsis

Background: Defendant was convicted in the United States District Court for the Eastern District of Oklahoma of failing to register and update his registration as a sex offender in violation of the Sex Offender Registration and Notification Act (SORNA), and was sentenced to 24 months' imprisonment and a five-year term of supervised release, in part based on a finding that he was a Tier III offender under SORNA. Defendant appealed.

Holdings: The Court of Appeals, Jerome A. Holmes, Circuit Judge, held that:

- [1] sufficient evidence supported defendant's conviction;
- [2] district court was entitled to classify defendant as Tier III offender;
- [3] supervised-release condition to register as sex offender was not unconstitutionally vague;
- [4] SORNA does not violate Tenth Amendment;
- [5] SORNA's retroactive application does not violate the federal Ex Post Facto Clause; and
- [6] SORNA does not violate the nondelegation doctrine.

Affirmed.

West Headnotes (6)

[1] **Mental Health** Offenses and prosecutions Sufficient evidence supported defendant's conviction for failing to register and update his registration as sex offender in violation of Sex Offender Registration and Notification Act (SORNA) when he moved from Oklahoma to Colorado; evidence indicated that detectives consulted online state registry, detectives would have been able to determine whether defendant had registered in Colorado, reasonable juror could have concluded that most likely point of contact with Colorado authorities would have occurred where he was staying and working, or nearby city where he called to inquire about registering given that detectives noted that registration in those cities was limited to those who either lived or worked in area, but law enforcement in neither city had any record of defendant registering. 18 U.S.C.A. § 2250(a); Sex Offender Registration and Notification Act, § 111(10)(A), 42 U.S.C.A. § 16911(10)(A).

[2] **Mental Health** Scores and risk levels

Following defendant's conviction for failing to register and update his registration as sex offender in violation of Sex Offender Registration and Notification Act (SORNA), district court was entitled to classify defendant as Tier III sex offender based on his actual, as opposed to hypothetical, underlying class E felony sex offense conviction for which state court was authorized to impose maximum four year sentence, although court exercised its statutorily authorized discretion to subject defendant to sentencing range with maximum of one year; defendant had notice of, and opportunity to contest, facts relevant to sentencing decision, and decision to treat defendant as Tier III offender did not depend on adding hypothetical facts or looking outside of record of conviction. Sex Offender Registration and Notification Act, § 111(4), 42 U.S.C.A.

§ 16911(4); N.Y.McKinney's Penal Law § 70.00(2)(e), (4).

1 Case that cites this headnote

[3] **Constitutional Law** Supervised release

Sentencing and Punishment Validity

District court instruction regarding application of supervised-release condition that defendant register as sex offender in event he resided in a state that did not currently require him to register was not unconstitutionally vague in violation of procedural due process; instruction's requirements that defendant attempt to register every 90 days, obtain documentation demonstrating inability to register, and present documentation to probation officer, were easily comprehensible by person of ordinary intelligence. U.S.C.A. Const.Amend. 14.

SORNA does not violate the nondelegation doctrine. U.S.C.A. Const. Art. 1, § 1; Sex Offender Registration and Notification Act, § 113(d), 42 U.S.C.A. § 16913(d).

[4] **Mental Health** Sex offenders

States Criminal justice

Nothing in SORNA compels Oklahoma officials to act, but rather SORNA imposes a duty on the sex offender to register; thus, SORNA does not violate the Tenth Amendment. U.S.C.A. Const.Amend. 10; Sex Offender Registration and Notification Act, § 113(a, c), 42 U.S.C.A. § 16913(a, c).

1 Case that cites this headnote

[5] **Constitutional Law** Registration

Mental Health Sex offenders

SORNA's retroactive application does not violate the federal Ex Post Facto Clause. U.S.C.A. Const. Art. 1, § 9, cl. 3; Sex Offender Registration and Notification Act, § 113(a), 42 U.S.C.A. § 16913(a); N.Y.McKinney's Correction Law § 168-h.

2 Cases that cite this headnote

[6] **Constitutional Law** Mental health

Mental Health Sex offenders

Attorneys and Law Firms

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Carl Adrian Folsom, III, Office of the Federal Public Defender, Topeka, KS, for Defendant–Appellant.

Before LUCERO, HOLMES, and PHILLIPS, Circuit Judges.

ORDER AND JUDGMENT*

JEROME A. HOLMES, Circuit Judge.

Defendant–Appellant Gary James Neel appeals from his conviction for failing to register and update his registration as a sex offender in violation of the Sex Offender Registration and Notification Act (“SORNA”). A jury found Mr. Neel guilty of knowingly failing to register after he left his residence in Oklahoma and spent several days at a motel in Denver, Colorado. The district court then sentenced Mr. Neel to twenty-four months' imprisonment and a five-year term of supervised release, in part based on a finding that he was a Tier III offender under SORNA.

Mr. Neel now challenges the sufficiency of the evidence against him, the reasonableness of his sentence, and the constitutionality of SORNA. Exercising our jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a), we **affirm** his conviction and sentence.

I

A

Mr. Neel was convicted of attempted sexual abuse in the first degree in New York in 1998. Under New York law, this conviction constituted a class E felony. *See* N.Y. Penal Law § 130.65 (McKinney 1998) (classifying sexual abuse in the first degree as a class D felony); *id.* § 110.05(6) (classifying

attempt to commit a class D felony as a class E felony). As such, Mr. Neel was subject to a maximum sentence that “shall not exceed four years.” *Id.* § 70.00(2)(e). However, New York law also provided that, for first-time offenders, “the court, having regard to the nature and circumstances of the crime and to the *785 history and character of the defendant,” could “fix a term of one year or less.” *Id.* § 70.00(4). The court in Mr. Neel’s case availed itself of this provision and sentenced him to 180 days in prison. Under New York law, after service of his prison term, Mr. Neel was required to register as a sex offender for a ten-year period. *See* N.Y. Correction Law § 168–h (McKinney 1998).

In 2006, Congress enacted SORNA as part of the Adam Walsh Child Protection and Safety Act. *See* Pub. L. No. 109–248, 120 Stat. 590 (2006). As relevant here, SORNA requires sex offenders, as defined in the statute, to register in the jurisdiction in which they reside and to update their registration if they change their residence. *See* 42 U.S.C. § 16913.¹ This registration requirement is enforced by criminal sanction; SORNA makes it a crime to knowingly fail to register or update a registration. *See* 18 U.S.C. § 2250(a). Pursuant to regulations promulgated by the United States Attorney General in 2007, SORNA’s registration requirements (as well as the accompanying criminal penalty for failing to register) apply retroactively to offenders, like Mr. Neel, who were convicted of sex-related offenses before SORNA was enacted. *See* Applicability of the Sex Offender Registration & Notification Act, 72 Fed. Reg. 8894, 8895–96 (Feb. 28, 2007) (codified at 28 C.F.R. § 72.3).

Mr. Neel appears to have been compliant with his SORNA registration requirement until 2012. Mr. Neel rented a trailer home in Wagoner, Oklahoma. He last registered this Wagoner trailer-home address with the county sex-offender registration unit on August 31, 2012. On September 5, 2012, Mr. Neel returned the trailer keys to the lessor and informed him that he had been offered a printing job in Houston, Texas and would be moving there immediately.

In fact, Mr. Neel traveled to Denver, Colorado, where he checked into a Super 8 Motel. Around September 7, Mr. Neel contacted Beacon Printing (“Beacon”), a commercial printing company in Denver, looking for employment. The owner of the firm put him in touch with the Denver Indian Center Workforce Program, which places individuals with local businesses to receive training. Through this program, Mr. Neel obtained a temporary position at Beacon, and expressed interest in finding permanent employment.

B

Mr. Neel was arrested on October 4, 2012, and subsequently indicted by a grand jury for traveling in interstate commerce and failing to register and update his registration as a sex offender between September 5, 2012 and his date of arrest. Mr. Neel moved to dismiss the charge on the grounds that SORNA’s registration requirements are unconstitutional. The district court denied the motion.

At trial, the government presented the testimony of several witnesses involved with sex-offender registration in Oklahoma and Colorado in order to prove that Mr. *786 Neel had not met his registration obligation. First, the records custodian at the Wagoner County, Oklahoma Sheriff’s Department, testified that Mr. Neel had registered or updated his information with her office on at least twenty different occasions, and that the last such in-person registration was on August 31, 2012. The custodian further described how her office processes completed sex-offender registration forms and submits them by mail to the Oklahoma Department of Corrections in Oklahoma City, which maintains a statewide database. She noted that her office has the ability to “log into and check on [the] status of registrants” in the state’s electronic database. R., Vol. II, at 159 (Tr. Jury Trial, dated Mar. 5–6, 2013).

The government also provided the testimony of a Detective Burgess of the Aurora, Colorado Police Department and a Detective Bourgeois of the Denver, Colorado Police Department. Detective Burgess testified that only those who live or work in Aurora are allowed to register with the Aurora Police Department. And someone named Gary Neel had called the office to inquire about registering, but the police department had “no record of Mr. Neel in [its] police database whatsoever.” *Id.* at 203. In any event, Detective Burgess testified, Mr. Neel would likely have been unable to register in Aurora, since both the Super 8 Motel where he was staying and the printing company where he was working are located in Denver.²

Detective Bourgeois testified that the Denver Police Department’s practice regarding in-person sex-offender registration is to “[m]ake sure the [] registration paperwork is completed successfully,” and to then “update that information up to the” National Crime Information Center and Colorado Crime Information Center databases. *Id.* at 209. This upload

is done “right at th[e] moment” on a “web-based system,” so that changes are “effective right then and there on the website and everywhere else that it’s displayed.” *Id.* at 216–17. He noted that because the Super 8 Motel where Mr. Neel was staying is in Denver, Mr. Neel would have been able to register with the Denver Police Department. However, from the police department’s records, it did not appear that Mr. Neel had in fact registered.

Mr. Neel unsuccessfully moved for a judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure, claiming that the evidence was insufficient to sustain a conviction. And the jury subsequently found him guilty.

C

The presentence investigation report (“PSR”) prepared by the United States Probation Office assigned Mr. Neel a base offense level of sixteen under § 2A3.5 of the United States Sentencing Guidelines (“U.S.S.G.” or “Guidelines”) on the basis that he was a Tier III sex offender under 42 U.S.C. § 16911(4).³ Mr. Neel objected to the PSR, claiming that he should have been classified as a Tier I offender because his underlying sex offense was not punishable by imprisonment of greater than one year. *See generally* 42 U.S.C. § 16911(2) (indicating, by cross-reference to the other Tiers, that an offender’s crime qualifies for Tier I only if it is punishable by a prison term of no more than one year). The district court nevertheless found that the PSR’s classification was appropriate.

***787** Notably, prior to sentencing, the Oklahoma Supreme Court had declared unlawful the retroactive application of the state’s sex-offender registration statute, *see Starkey v. Okla. Dep’t of Corr.*, 305 P.3d 1004, 1030 (Okla.2013), and the state corrections department had determined that Mr. Neel no longer had a duty to register and would be removed from the state’s registry. This development engendered some confusion regarding how Mr. Neel would comply with the federal SORNA registration requirement. Mr. Neel argued that requiring him to register would either violate the Tenth Amendment by forcing the state to register him, or run afoul of the Due Process Clause because he would be unable to comply. While admitting that the situation was “a hazy area,” R., Vol. II, at 298 (Tr. Sentencing Proceedings, dated Jan. 10, 2014), the district court concluded that “even if the state ... refuses to allow him to register, the defendant can remain in compliance with this condition by providing the probation

office ... documentation from the state registration authority of its inability to register” him, *id.* at 296–97.

The district court ultimately sentenced Mr. Neel to twenty-four months’ imprisonment and a five-year term of supervised release. As a special condition of his supervised release, the court ordered Mr. Neel to “inform the Probation Office every 90 days of his inability to register with accompanying documentation from the state registration authority,” in the event that “the state in which the defendant resides refuses to allow the defendant to register.” R., Vol. I, at 239 (J. Criminal Case, filed Jan. 14, 2014). Mr. Neel lodged this timely appeal.

II

On appeal, Mr. Neel challenges the sufficiency of the evidence and the reasonableness of his sentence, as well as the constitutionality of SORNA on multiple grounds. We address, and reject, each claim below, and conclude that: (1) the evidence, viewed in the light most favorable to the government, was sufficient to support Mr. Neel’s conviction; (2) Mr. Neel was correctly classified as a Tier III offender because his 1998 sex-offense conviction exposed him to a potential sentence of four years; (3) the district court adequately explained how Mr. Neel could attempt to register with the state as a condition of supervised release; and (4) Mr. Neel’s Tenth Amendment, *ex post facto*, and nondelegation challenges to SORNA are foreclosed by controlling precedent from our court.

A

[1] Mr. Neel first challenges the sufficiency of the evidence supporting his conviction for failing to register as a sex offender. “In reviewing the sufficiency of the evidence ... this court reviews the record *de novo*....” *United States v. Irvin*, 682 F.3d 1254, 1266 (10th Cir.2012). We consider “the entire record, including both direct and circumstantial evidence, together with the reasonable inferences to be drawn from it.” *United States v. Mendez*, 514 F.3d 1035, 1041 (10th Cir.2008). We do not, however, “weigh conflicting evidence or consider witness credibility,” *United States v. Jones*, 768 F.3d 1096, 1101 (10th Cir.2014) (quoting *United States v. King*, 632 F.3d 646, 650 (10th Cir.2011)); instead, our inquiry is limited to determining whether, “viewing the evidence in the light most favorable to the government, any rational trier of fact could have found the defendant guilty of the crime beyond a

reasonable doubt,” *Irvin*, 682 F.3d at 1266. Thus, to prevail, Mr. Neel must convince us that “no reasonable jury could have reached the challenged *788 verdict.” *United States v. Strohm*, 671 F.3d 1173, 1181 (10th Cir.2011).

Mr. Neel argues that because “jurisdiction” under SORNA is defined as a state, *see* 42 U.S.C. § 16911(10)(A), the government was obligated to prove beyond a reasonable doubt that he did not register anywhere in Colorado. He contends that this burden was not met by the testimony of detectives from only two cities, Denver and Aurora, since he “could have appeared in person at any one of the other 62 counties in Colorado to update his registration under federal law.” Aplt. Opening Br. at 13–14.

Even though Detectives Bourgeois and Burgess only represented the police departments of two cities, their testimony, considered as a whole, provided a sufficient basis to conclude that Mr. Neel had not registered elsewhere in Colorado. For example, Detective Bourgeois indicated that Colorado’s statewide registration database immediately reflects new entries and that these changes are displayed wherever the web-based system is accessed. Drawing reasonable inferences in the light most favorable to the government, this testimony could have indicated to a jury that by consulting the online state registry, Detective Bourgeois would have been able to determine whether Mr. Neel had registered in some other county in Colorado.

Additionally, both detectives noted that registration in Aurora and Denver is limited to those who either live or work in the area. While this testimony itself is not indicative of the registration policies of other counties, a reasonable juror could have concluded that Mr. Neel’s most likely point of contact with the Colorado authorities would have occurred in Denver, where he was staying and working, or nearby Aurora, where he apparently called to inquire about registering.⁴ But law enforcement in neither Denver nor Aurora had any record of Mr. Neel registering.

In short, though seemingly the prosecution could have more thoroughly demonstrated Mr. Neel’s failure to register in Colorado by providing statewide evidence,⁵ we do not require the government to “exclude every other reasonable hypothesis and ... negate all possibilities except guilt.” *United States v. Wells*, 739 F.3d 511, 528 (10th Cir.2014) (quoting *789 *United States v. Davis*, 437 F.3d 989, 993 (10th Cir.2006)). The testimony provided by the Aurora and Denver

police detectives was substantial enough for a reasonable jury to find that Mr. Neel failed to register in Colorado.

B

Mr. Neel next argues that the district court’s sentence is procedurally unreasonable because the court improperly classified him as a Tier III offender—i.e., “a sex offender whose offense is punishable by imprisonment for more than 1 year.” 42 U.S.C. § 16911(4). We review sentencing decisions for procedural reasonableness under an abuse-of-discretion standard. *See United States v. Gordon*, 710 F.3d 1124, 1160 (10th Cir.2013); *United States v. Lopez–Avila*, 665 F.3d 1216, 1218 (10th Cir.2011). Legal questions are reviewed de novo, while factual findings are subject to clear-error review. *See Gordon*, 710 F.3d at 1160; *Lopez–Avila*, 665 F.3d at 1218–19.

1

[2] At sentencing, the district court concluded that Mr. Neel was a Tier III offender because, regardless of the state court’s discretionary imposition of a sentence of less than one year, “the 1998 New York sentencing statute with regard to the convicted offense ha[d] a maximum punishment of four years.” R., Vol. II, at 293. Mr. Neel contends that this ruling was erroneous because the New York court found that he was eligible for a sentence of less than one year for his underlying sex offense and the maximum sentence that he faced under New York law was one year in prison. Relying on the Supreme Court’s decision in *Carachuri–Rosendo v. Holder*, 560 U.S. 563, 130 S.Ct. 2577, 177 L.Ed.2d 68 (2010), and our decision in *United States v. Brooks*, 751 F.3d 1204 (10th Cir.2014), he argues that the district court impermissibly relied on “hypothetical facts and hypothetical criminal history” in classifying him as a Tier III offender. Aplt. Opening Br. at 37. However, Mr. Neel’s reliance on these two cases is misplaced.

In *Carachuri–Rosendo*, the Supreme Court dealt with the question of whether a defendant’s second state misdemeanor drug conviction could be treated as an aggravated felony for removal purposes. Even though the defendant had a prior drug conviction, state prosecutors had not sought or proved a recidivist sentencing enhancement for his second drug conviction. *See* 560 U.S. at 570–71, 130 S.Ct. 2577. The federal government began removal proceedings against him, claiming that his second misdemeanor conviction qualified as

an aggravated felony because he *could have been* charged for felony recidivist possession due to his prior conviction. *Id.* at 571, 130 S.Ct. 2577. The Court rejected this “hypothetical approach.” *Id.* at 575–76, 130 S.Ct. 2577. It held that where the state prosecutor had “specifically elected to ‘[a]bandon’ a recidivist enhancement under state law,” *id.* at 579, 130 S.Ct. 2577 (alteration in original) (citation omitted), and the “record of conviction contain[ed] no finding of the fact of [the defendant’s] prior drug offense,” *id.* at 576, 130 S.Ct. 2577, the “mere possibility that the defendant’s conduct, coupled with facts outside of the record of conviction, could have authorized a felony conviction under federal law [wa]s insufficient” to establish that he had been convicted of an aggravated felony, *id.* at 582, 130 S.Ct. 2577.

In *Brooks*, we held that *Carachuri–Rosendo* ’s reasoning governed our analysis of whether a defendant could be deemed a career offender under the Guidelines. *See* 751 F.3d at 1210–11. The appellant in *Brooks* was convicted in Kansas state *790 court of both possessing cocaine with intent to sell and eluding a police officer. *Id.* at 1208. The latter crime carried a presumptive sentence of seven months, although the prosecutor could seek an upward departure. *Id.* However, “[t]he prosecutor did not seek an upward departure, meaning the state court could not have sentenced Defendant to more than seven months imprisonment.” *Id.* When the appellant later pleaded guilty to cocaine possession in federal court, the Probation Office sought to qualify the eluding conviction as a second felony for sentencing purposes because eluding a police officer was punishable by over one year in prison for “a defendant with the worst criminal history possible.” *Id.* at 1209. In light of *Carachuri–Rosendo*, we concluded that this hypothetical reasoning was unpersuasive; we emphasized that “a recidivist finding could only set the maximum term of imprisonment ‘when the finding is a part of the record of conviction.’ ” *Id.* at 1210 (quoting *Carachuri–Rosendo*, 560 U.S. at 577 n. 12, 130 S.Ct. 2577).

Thus, we reasoned, “in determining whether a state offense was punishable by a certain amount of imprisonment, the maximum amount of prison time a *particular* defendant could have received controls, rather than the amount of time the worst imaginable recidivist could have received.” *Id.* at 1213; *see also United States v. Simmons*, 649 F.3d 237, 243–45 (4th Cir.2011) (en banc); *United States v. Haltiwanger*, 637 F.3d 881, 884 (8th Cir.2011) (both rejecting the hypothetical approach to determining whether a state misdemeanor drug conviction qualified as a federal felony in light of *Carachuri–Rosendo*). However, in our view,

Carachuri–Rosendo and *Brooks* are distinguishable from Mr. Neel’s situation. In those cases, the state court *could not* impose a higher sentence without the state prosecutor seeking it and proving the necessary additional facts, which the prosecutor did not do. *See Carachuri–Rosendo*, 560 U.S. at 571, 130 S.Ct. 2577 (stating that the state prosecutor failed to seek a sentencing enhancement based on the petitioner’s prior conviction); *Brooks*, 751 F.3d at 1208 (noting that the state court could not impose a sentence longer than seven months because the prosecutor did not seek an upward departure). Consequently, for a federal sentencing court to subsequently treat the state misdemeanors as federal felonies based on the hypothetical possibility that the offenses *could have been* prosecuted as felonies would punish the defendant for prior charges the state prosecutor declined to pursue and prove, and about which the defendant had neither notice nor the opportunity to contest. *See Carachuri–Rosendo*, 560 U.S. at 576–78, 130 S.Ct. 2577 (expressing concern because there was no finding of fact with respect to the prior drug offense, the petitioner did not have notice that the government intended to prove the fact of the prior drug conviction, and there was no “opportunity to challenge the fact of the prior conviction itself”); *Brooks*, 751 F.3d at 1207–08 (noting that the hypothetical approach “would punish a defendant for recidivism without providing him notice or opportunity to contest said recidivism and would ‘denigrate the independent judgment of state prosecutors’ ” (quoting *Carachuri–Rosendo*, 560 U.S. at 580, 130 S.Ct. 2577)).

In contrast, with regard to Mr. Neel’s underlying sex offense, there was nothing more the state prosecutor needed to charge or prove in order for the court to impose a maximum sentence of up to four years on Mr. Neel. In other words, based on his actual (as opposed to hypothetical) class E felony conviction, the state court was authorized to impose a sentence on him in the default range that topped out at four years; however, the court was also *791 statutorily authorized, in an exercise of its discretion—weighing, *inter alia*, the seriousness of the offense and Mr. Neel’s criminal history—to determine that Mr. Neel should be subject to a sentencing range with a maximum of one year, and the court elected the latter. *See N.Y. Penal Law § 70.00(2)(e)* (prescribing a maximum sentence of four years for class E felonies); *id.* § 70.00(4) (stating that “the court *may* impose a definite sentence of imprisonment ... of one year or less” on a class E felon if the court determines that a longer sentence “would be unduly harsh” (emphasis added)). Crucially, Mr. Neel had notice of, and the opportunity to contest, the facts relevant to the state court’s sentencing decision.

Under these circumstances, in sentencing Mr. Neel, the district court here had no occasion to run afoul of *Carachuri-Rosendo* and its progeny. Specifically, the court's decision to treat Mr. Neel as a Tier III offender did not depend on adding hypothetical facts or looking "outside of the record of conviction." *Carachuri-Rosendo*, 560 U.S. at 582, 130 S.Ct. 2577. Instead of "attempt[ing] to modify the underlying conviction, ... the federal [district] court only consider[ed] the state offense *as charged* in the state court." *United States v. Ramirez*, 731 F.3d 351, 358 (5th Cir.2013) (emphasis added). It did not consider the prior sentence a hypothetical sex offender could have received—which would have been an abuse of discretion—but rather, correctly focused on the actual sentencing range that the particular defendant before it—i.e., Mr. Neel—faced for his prior state offense. Accordingly, Mr. Neel's challenge to his Tier III classification fails.

C

[3] Mr. Neel's third claim arises out of the dispute about whether he would be able to register as a sex offender in Oklahoma. After the jury trial had ended, the Supreme Court of Oklahoma determined that the state's sex-offender registration statute could not constitutionally be applied to those individuals, like Mr. Neel, who were convicted before the state statute went into effect. *See Starkey*, 305 P.3d at 1030 ("The Oklahoma Constitution prohibits the addition of sanctions imposed on those who were already convicted before the legislation increasing sanctions and requirements of registration were enacted."). The state subsequently advised Mr. Neel's attorney that Mr. Neel no longer had a duty to register. In light of the state's actions, Mr. Neel claims that the district court's instruction that he attempt to register as a special condition of supervised release is unconstitutionally vague.

We review this challenge to a supervised-release condition for an abuse of discretion, and will reverse if we find "a clearly erroneous finding of fact or an erroneous conclusion of law or ... a clear error of judgment." *United States v. Bear*, 769 F.3d 1221, 1226 (10th Cir.2014) (quoting *United States v. Batton*, 602 F.3d 1191, 1196 (10th Cir.2010)).

Due process necessitates that "laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City*

of Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *accord Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). This principle applies to supervised-release conditions: there is "a separate due process right to conditions of supervised release that are sufficiently clear to inform [a supervisee] of what conduct will result in his being returned to prison." *United States v. Guagliardo*, 278 F.3d 868, 872 (9th Cir.2002); *accord *792 United States v. Zobel*, 696 F.3d 558, 576 (6th Cir.2012); *see also United States v. Mike*, 632 F.3d 686, 694 (10th Cir.2011) (holding conditions regulating a sex-offender's computer use were impermissibly vague where it was "not clear to which computers the conditions in question appl[ied]")).

Here, it appears that Mr. Neel has cherry-picked excerpts from the sentencing transcript in arguing that the district court's registration requirement is unconstitutionally vague. To be sure, as Mr. Neel notes, the court observed that the Oklahoma Supreme Court's decision made the proper pathway for Mr. Neel to register "a hazy area." R., Vol. II, at 298. However, the court specifically provided a fallback option in case he could not register with the state:

[E]ven if the state in which the defendant resides refuses to allow him to register, the defendant can remain in compliance with this condition by providing the probation office ... at every 90 day increment documentation from the state registration authority of its inability to register the defendant.

Id. at 296–97. Towards the end of the sentencing hearing, the court again clarified the condition:

If the state in which the defendant resides refuses to allow the defendant to register, the defendant shall inform the probation office every 90 days of their inability ... to register with accompanying documentation from the state registration authority.

Id. at 306; *see also* R., Vol. I, at 239 (restating this alternative method of compliance in the court's final judgment).

These statements clearly elaborate what Mr. Neel must do in order to avoid “being returned to prison,” *Guagliardo*, 278 F.3d at 872: (1) attempt to register every ninety days; (2) if the relevant law enforcement authorities refuse to let him register, obtain documentation from them demonstrating his inability to register; and then (3) present this documentation to his probation officer. Because its instructions are easily comprehensible by a person of ordinary intelligence, the district court did not impose an unconstitutionally vague condition.

D

Mr. Neel also raises three constitutional challenges to SORNA under the Tenth Amendment, the Ex Post Fact Clause, and the nondelegation doctrine. “We review challenges to the constitutionality of a statute *de novo*.” *United States v. Hatch*, 722 F.3d 1193, 1196 (10th Cir.2013). We dispose of each of these challenges in short order because our court has already addressed, and rejected, such constitutional claims in precedential decisions, and Mr. Neel does not point to any intervening Supreme Court decision or en banc ruling of our court that undermines these prior holdings. *See, e.g., In re Smith*, 10 F.3d 723, 724 (10th Cir.1993) (per curiam) (“We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court.”); *accord United States v. Meyers*, 200 F.3d 715, 720 (10th Cir.2000).

1

Mr. Neel argues that SORNA unconstitutionally “force[s] state officials to enforce and administer a federal regulatory system” in violation of the Tenth Amendment by requiring state officials to accept SORNA registrations even where the state declines to implement SORNA. Aplt. Opening Br. at 16–17. Oklahoma has not created a SORNA-compliant registry; thus, Mr. Neel claims, “if SORNA registration requirements are in effect in Oklahoma, then state officials have been forced to register individuals and administer *793 federal law pursuant to SORNA.” *Id.* at 17. *See generally Printz v. United States*, 521 U.S. 898, 935, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) (“The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers ... to administer or enforce a federal regulatory program.”); *accord New York v. United*

States, 505 U.S. 144, 177, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992).

[4] However, we recently rejected the argument that “SORNA violates the Tenth Amendment by requiring Oklahoma officials to comply with federal sex offender registration” in *United States v. White*, 782 F.3d 1118, 1127–28 (10th Cir.2015). We held that nothing in SORNA *compels* Oklahoma officials to act; “SORNA imposes a duty on *the sex offender* to register.” *Id.* at 1128 (quoting *Kennedy v. Allera*, 612 F.3d 261, 269 (4th Cir.2010)); *accord United States v. Alexander*, 802 F.3d 1134, 1136 (10th Cir.2015); *see 42 U.S.C. § 16913(a)* (“*A sex offender shall* register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.” (emphasis added)); *id. § 16913(c)* (“*A sex offender shall*, not later than 3 business days after each change of name, residence, employment or student status, appear in person in at least 1 jurisdiction involved ... and inform that jurisdiction of all changes....” (emphasis added)).

Further, we concluded that SORNA “simply place[s] conditions on the receipt of federal funds.” *White*, 782 F.3d at 1128 (quoting *United States v. Felts*, 674 F.3d 599, 602 (6th Cir.2012)); *see 42 U.S.C. § 16925(a)* (stating that if a state fails to implement a SORNA-compliant registry, it “shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year” under the Omnibus Crime Control and Safe Streets Act of 1968). *See generally South Dakota v. Dole*, 483 U.S. 203, 207–08, 211, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) (holding that Congress is authorized, under its spending power, to place conditions on federal funds as long as the conditions are related to the general welfare and the purpose of the federal program, unambiguous, and not “so coercive as to pass the point at which ‘pressure turns into compulsion’” (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590, 57 S.Ct. 883, 81 L.Ed. 1279 (1937))).

Our position accords with that of every other circuit to have addressed the issue, *see White*, 782 F.3d at 1128 (collecting cases), and Mr. Neel points to no intervening Supreme Court case or en banc decision of our court that casts doubt on *White*’s holding that SORNA does not violate the Tenth Amendment. Accordingly, his challenge fails.

2

Mr. Neel next contends that the retroactive application of SORNA to his pre-2006 conviction violates the Ex Post Facto Clause of the Constitution. *See* U.S. Const. art. I, § 9, cl. 3. He argues that, at the time of his 1998 conviction, he was required to register for a period of ten years. *See* N.Y. Correction Law § 168-h (McKinney 1998). After 2006, SORNA retrospectively increased that registration requirement⁶ and imposed a criminal penalty for failure to register. The extended *794 registration requirement and the potential criminal sanction, he claims, render SORNA punitive and retroactively increase the punishment for his previous conviction.

This claim is foreclosed by our decision in *United States v. Lawrence*, 548 F.3d 1329 (10th Cir.2008), where we held that SORNA's registration provision is "both civil in its stated intent and nonpunitive in its purpose ... and therefore does not violate the Ex Post Facto Clause," *id.* at 1333. The fact that an offender could be prosecuted for failing to register only penalizes post-SORNA conduct, and does not "increase the penalty for [the] original sex offense." *Id.* at 1334. Mr. Neel does not point to any Supreme Court case or en banc ruling of our court that abrogates *Lawrence*. Indeed, perhaps the Supreme Court's most relevant decision supports our holding in *Lawrence*. That is, in *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003), the Court held that a state sex-offender statute that contained a similar registration requirement did not violate the Ex Post Facto Clause, *id.* at 89–90, 123 S.Ct. 1140.

[5] Nevertheless, Mr. Neel asks us to revisit and overturn *Lawrence* in light of several state-court decisions concluding that the retroactive application of state sex-offender statutes raises ex post facto concerns. *See Starkey*, 305 P.3d at 1030; *Doe v. Dep't of Pub. Safety & Corr. Servs.*, 430 Md. 535, 62 A.3d 123, 137 (2013); *State v. Williams*, 129 Ohio St.3d 344, 952 N.E.2d 1108, 1113 (2011); *State v. Letalien*, 985 A.2d 4, 26 (Me.2009); *Wallace v. State*, 905 N.E.2d 371, 384 (Ind.2009); *Doe v. State*, 189 P.3d 999, 1019 (Alaska 2008). Even if we were empowered to overturn *Lawrence* based on these non-binding state-court decisions (which we clearly are not), the cases Mr. Neel cites would not persuade us; they largely rely on *state* constitutional grounds to strike down the retroactive application of *state* registration requirements, and are thus of limited relevance in assessing the federal Ex Post Facto Clause implications of SORNA.⁷ And our decision in *Lawrence* is consistent with the consensus among our sister circuits that SORNA's retroactive application does not violate the federal Ex Post Facto Clause. *See, e.g.*, *United States v.*

Shoulder, 738 F.3d 948, 954 (9th Cir.2013), *cert. denied*, — U.S. —, 134 S.Ct. 1920, 188 L.Ed.2d 944 (2014); *United States v. Parks*, 698 F.3d 1, 5–6 (1st Cir.2012); *Felts*, 674 F.3d at 605–06; *United States v. Leach*, 639 F.3d 769, 773 (7th Cir.2011); *United States v. Shenandoah*, 595 F.3d 151, 158–59 (3d Cir.2010), *abrogated on other grounds by Reynolds v. United States*, — U.S. —, 132 S.Ct. 975, 181 L.Ed.2d 935 (2012); *United States v. Guzman*, 591 F.3d 83, 94 (2d Cir.2010); *United States v. Young*, 585 F.3d 199, 202–06 (5th Cir.2009); *United States v. Gould*, 568 F.3d 459, 466 (4th Cir.2009); *United States v. Ambert*, 561 F.3d 1202, 1207–08 (11th Cir.2009); *795 *United States v. May*, 535 F.3d 912, 919–20 (8th Cir.2008), *abrogated on other grounds by Reynolds*, 132 S.Ct. 975.

Thus, in light of controlling precedent from our circuit—confirmed by the overwhelming body of authority from other federal courts—we reject Mr. Neel's ex post facto challenge.

3

Finally, Mr. Neel argues that SORNA unconstitutionally delegates to the United States Attorney General "the authority to 'specify the applicability of the [registration] requirements ... to sex offenders convicted before the enactment'" of the law. Aplt. Opening Br. at 23 (quoting 42 U.S.C. § 16913(d)). He claims that "[t]his grant of unfettered discretion" violates the principle of separation of powers, as embodied in the nondelegation doctrine, by vesting legislative power in the Executive Branch. Aplt. Opening Br. at 24.

[6] Like his other constitutional challenges, Mr. Neel's nondelegation claim is doomed by controlling precedent from this court. Specifically, in *United States v. Nichols*, 775 F.3d 1225 (10th Cir.2014), *cert. granted on other grounds*, — U.S. —, 136 S.Ct. 445, 193 L.Ed.2d 346 (2015), we held that SORNA provides a sufficiently intelligible principle to guide the Attorney General's discretion in applying the registration requirements retroactively. We held that the "general policy upon which SORNA is based," *id.* at 1231—namely, "protect[ing] the public from sex offenders" by establishing "a comprehensive national system for the registration of those offenders," *id.* (quoting 42 U.S.C. § 16901)—coupled with the statute's specification of a detailed registration scheme, "clearly delineated the boundaries of the authority ... delegated to the Attorney General," *id.* Every one of our sister circuits that has addressed the question is in accord: SORNA does not violate the nondelegation doctrine.

See, e.g., *United States v. Richardson*, 754 F.3d 1143, 1145 (9th Cir.2014); *United States v. Cooper*, 750 F.3d 263, 271 (3d Cir.), cert. denied, — U.S. —, 135 S.Ct. 209, 190 L.Ed.2d 160 (2014); *United States v. Goodwin*, 717 F.3d 511, 516 (7th Cir.2013); *United States v. Kuehl*, 706 F.3d 917, 920 (8th Cir.2013); *Parks*, 698 F.3d at 7–8; *Felts*, 674 F.3d at 606; *Guzman*, 591 F.3d at 92–93; *United States v. Whaley*, 577 F.3d 254, 264 (5th Cir.2009); *Ambert*, 561 F.3d at 1214.

As such, Mr. Neel's nondelegation challenge also fails.

III

For the foregoing reasons, we **AFFIRM** Mr. Neel's conviction and sentence.

All Citations

641 Fed.Appx. 782

Footnotes

- * This Order and Judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Federal Rule of Appellate Procedure 32.1 and Tenth Circuit Rule 32.1.
- 1 42 U.S.C. § 16913(a) mandates that “[a] sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student.” Furthermore, another subsection of SORNA requires a sex offender to keep his registration current. Specifically,
 - [a] sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry.42 U.S.C. § 16913(c).
- 2 Aurora is a city adjacent to Denver.
- 3 The United States Probation Office used the 2012 edition of the Guidelines Manual in drafting the PSR. The parties do not challenge this choice; therefore, as needed, we also refer to this edition.
- 4 We note parenthetically that Colorado Revised Statute § 16–22–108(2) provides that sex offenders “who reside within the corporate limits of any city, town, or city and county shall register at the office of the chief law enforcement officer of such city, town, or city and county.” Thus, as a matter of law, it appears that Mr. Neel—who was living and working in the city and county of Denver—was required to register with the Denver Police Department. However, the jury received no instructions regarding this statute or its effect, and we have no reason to believe that this information was otherwise properly before it; therefore, we do not consider the statute in our sufficiency-of-the-evidence calculus.
- 5 We have held that “[w]hen an offender leaves a residence in a state, and then leaves the state entirely, that state remains a jurisdiction involved” for purposes of SORNA’s reporting requirements. *United States v. Murphy*, 664 F.3d 798, 803 (10th Cir.2011). Thus, when Mr. Neel abandoned his home in Wagoner, Oklahoma, he was required, within three days, to notify authorities in Oklahoma or Colorado of this change of residence. See *id.* (noting that “registering in a new SORNA jurisdiction can satisfy the obligation” but that “if it takes more than three days to relocate ... then the sex offender must register [in the former state] ...

within three days of abandoning his former residence"). We conclude that there was sufficient evidence to find that Mr. Neel did not register in Colorado, and note that Mr. Neel does *not* challenge the sufficiency of the evidence demonstrating that he failed to notify Oklahoma authorities of his change in residence within three days of departing.

- 6 Even if the Tier-classification circumstances were as Mr. Neel would have it—*viz.*, he was classified as a Tier I offender—SORNA would have the effect of increasing his registration term by five years, 42 U.S.C. § 16915(a)(1); however, in light of our conclusion *supra* that Mr. Neel was properly classified as a Tier III offender, SORNA had the effect of increasing his registration period from ten years to “the life of the offender,” *id.* § 16915(a)(3).
- 7 Indeed, in many of these cases, state courts have suggested that the language of state *ex post facto* clauses—even if similar or virtually identical to the federal counterpart—may be construed under state law as providing broader protection. See *Starkey*, 305 P.3d at 1021 (“Although Oklahoma’s *ex post facto* clause is nearly identical to the Federal Constitution’s provisions we are not limited in our interpretation of Oklahoma’s constitution.”); *Doe v. Dep’t of Pub. Safety & Corr. Servs.*, 62 A.3d at 137 (expressly declining to limit state *ex post facto* protection to that provided by the federal *Ex Post Facto Clause*); *Wallace*, 905 N.E.2d at 377–78 (“The Indiana Constitution has unique vitality, even where its words parallel federal language.” (quoting *State v. Gerschoffer*, 763 N.E.2d 960, 965 (Ind.2002))); *Doe v. State*, 189 P.3d at 1006 (concluding that the United States Supreme Court’s holding that Alaska’s registration statute did not violate the federal *Ex Post Facto Clause* did not mean that the same law was valid under Alaska’s *Ex Post Facto Clause*).

2012 WL 5902342

Only the Westlaw citation is currently available.
United States District Court, W.D. Virginia,
Big Stone Gap Division.

UNITED STATES of America,

v.

Paul McNeil ROBINSON, Jr., Defendant.

No. 2:12CR00012.

|

Nov. 25, 2012.

Attorneys and Law Firms

Zachary T. Lee, Assistant United States Attorney, Abingdon, VA, for United States.

Brian J. Beck, Assistant Federal Public Defender, Abingdon, VA, for Defendant.

OPINION AND ORDER

JAMES P. JONES, District Judge.

*1 In connection with sentencing for failure to register as a sex offender, the defendant filed objections to the Presentence Investigation Report (“PSR”) pursuant to Federal Rule of Criminal Procedure 32(f). A hearing was held on the objections, which are now resolved in this Opinion.

I

The defendant pleaded guilty in this court to a one-count Indictment charging him with failing to register and update his registration as required by the Sex Offender Registration and Notification Act (“SORNA”), 18 U.S.C.A. § 2250(a) (West Supp.2012). In 2006 the defendant was convicted in a Virginia state court of sexually abusing a child less than 13 years of age, in violation of Va.Code Ann. § 18.2–67.3 (2009). Because of this conviction, he was required to register in Virginia as a sex offender each three months and whenever his residence address changed. Upon investigation by Virginia authorities, it was learned that in August of 2011 he had left his Virginia residence. In December 2011 he was found living in Myrtle Beach, South Carolina, without having updated his Virginia sex offender registration as required.

The defendant's 2006 Virginia sexual abuse conviction resulted from an incident while he was babysitting for a relative's two-and-half-year-old daughter. After the child's mother picked her up, the child told her that the defendant “made her lick his pee pee for candy.” (PSR ¶ 23.) The defendant entered an *Alford* plea pursuant to a written plea agreement and was sentenced to three years and eight months imprisonment, to be followed by six years supervised probation.

In the PSR, the probation officer recommended that the court apply a Base Offense Level of 16, pursuant to U.S. Sentencing Guidelines Manual (“USSG”) § 2A3.5(a)(1) (2011), on the ground that the defendant was required to register as a Tier III offender. Applying that Base Offense Level, reduced by three levels for acceptance of responsibility, the defendant has a guideline range of 24 to 30 months imprisonment.

The PSR also recommended that the defendant be subjected to sex offender supervised release conditions following imprisonment, pursuant to this court's Standing Order No. 07–1.

The defendant objects to the application of the Tier III enhancement to the Base Offense Level. In addition, he objects to the imposition of certain of the sex offender supervised release conditions. These objections have been the subject of a hearing, were fully argued by the parties, and are ripe for determination.

II

As a first step in the sentencing process, the court is required to correctly calculate the advisory Sentencing Guideline range. *See Freeman v. United States*, 131 S.Ct. 2685, 2692 (2011) (“The Guidelines provide a framework or starting point ... for the judge's exercise of discretion” in sentencing). In addition, I must rule on any disputed portion of the PSR that will affect the sentence imposed. Fed.R.Crim.P. 32(i)(3)(B).

A

*2 The defendant does not dispute that he is “sex offender” in that he has been previously convicted of a “sex offense.” *See* 42 U.S.C.A. § 16911(1), (5)(A)(i) (West Supp.2012) Instead, he argues that his Base Offense Level should not

be 16 because he is not a Tier III sex offender. He contends that instead he is a Tier I sex offender and his Base Offense Level should be 12, with a Total Offense Level of 10 and a sentencing range of 15 to 21 months.¹

Under USSG § 2A3.5, the Base Offense Level for the crime of failing to register as a sex offender is calculated based upon the tier level described in 42 U.S.C.A. § 16911 (West Supp.2012) for the prior underlying sex offense. Section 16911 defines a Tier III offender as a sex offender whose offense of conviction is punishable by imprisonment for more than one year and

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

- (i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or
- (ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years.

42 U.S.C.A. § 16911(4)(A)(i), (ii).²

The Indictment to which the defendant pleaded guilty described his crime as follows:

PAUL McNEIL ROBINSON, JR. on or about April 8, 2006, in the said County of Scott, Commonwealth of Virginia, did knowingly, unlawfully, and feloniously sexually abuse a child less than 13 years of age, in violation of Section 18.2–67.3 of the Code of Virginia ... against the peace and dignity of the Commonwealth of Virginia.

(Sentencing Mem. Ex. 2.) Neither the Plea Agreement nor the Conviction and Sentencing Order in the state case describe the defendant's offense conduct other than as "aggravated sexual battery." (*Id.*)

The defendant contends that the application of his Virginia conviction to USSG § 2A3.5 requires the "categorical

approach" mandated for other sentencing enhancements based upon prior convictions. *See Taylor v. United States*, 495 U.S. 575, 602 (1990) (holding that in determining the application of the Armed Career Criminal Act, the sentencing court is limited to "the fact of conviction and the statutory definition of the prior offense"). Under certain circumstances, charging documents of the predicate offense may be considered using a "modified categorical approach," but the court cannot consider sources that would require "subsequent evidentiary enquiries" into the offense. *Shepard v. United States*, 544 U.S. 13, 20 (2005).

Using this approach, the defendant argues, would not allow the court to determine that his prior sexual offense conviction was a proper predicate for a Tier III classification. I disagree.

Even assuming that the categorical approach is applicable³ and that the court may only examine the elements of the prior offense and the approved charging documents, I find that the defendant's prior sex offense was "comparable to or more severe than" at least one of the federal crimes required for Tier III status.

*3 The state Indictment charged the defendant with sexual abuse of a child under the age of 13 years. The Virginia statute charged in the Indictment, Va.Code Ann. § 18.2–77.3(A)(1) (2009), criminalizes, among other things, sexual abuse of a person under the age of 13. "Sexual abuse" is further defined by statute to include conduct "committed with the intent to sexually molest, arouse, or gratify any person," where "the accused causes or assists the complaining witness to touch the accused's, the witness's own, or another person's intimate parts or material directly covering such intimate parts." Va.Code Ann. § 18.2–67.10(6)(c) (2009). One of the federal statute involved, 18 U.S.C.A. § 2244 (West Supp.2012), entitled "Abusive sexual conduct," punishes "sexual conduct" with another person. *Id.* § 2244(a). "Sexual conduct" is further defined as "the intentional touching either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C.A. § 2246(3) (2000).

It is true that § 2244 prescribes sexual conduct if so to do would violate other statutes, including 18 U.S.C.A. § 2241 (West 2000 & Supp.2012), "had the sexual conduct been a sexual act," 18 U.S.C.A. § 2244. The defendant points out that conduct involving a "sexual act" is limited in 18 U.S.C.A. § 2241(c)(5) to victims who have not attained the age of

12, rather than 13, as charged in the defendant's predicate state conviction. However, the Tier III statute, 42 U.S.C.A. § 16911(4)(A)(ii), modifies that requirement by expressly specifying age 13.

For these reasons, I find that Tier III is applicable to the defendant and overrule his objection thereto.

B

Even were I to rule to the contrary, however, that would not mean that I cannot consider the facts of the defendant's prior offense in arriving at an appropriate sentence. In one of the defendant's objections, he requests the court to remove the description of his prior sex offense conduct from the PSR. That objection will be denied.

It is established that the court may consider a wide range of information in determining an appropriate sentence. For example, it is provided that

[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

18 U.S.C.A. § 3661 (West 2000). Another statute requires the court in fixing a sentence to consider "the history and characteristics of the defendant." 18 U.S.C.A. § 3553(a)(1) (West 2000 & Supp.2011). "Permitting sentencing courts to consider the widest possible breadth of information about a defendant 'ensures that the punishment will suit not merely the offense but the individual defendant.'" *Pepper v. United States*, 131 S.Ct. 1229, 1240 (2011) (quoting *Wasman v. United States*, 468 U.S. 559, 564 (1984)).

*⁴ The Sentencing Guidelines themselves echo this principle, providing that the court may consider "any information" in fixing a sentence, even evidence that is not necessary in determining the guideline range. U.S. Sentencing Guidelines Manual § 1B1.4 cmt. (2011). Moreover, "[M]ere objection to the finding in the presentence report ... is not sufficient. The defendant has an affirmative duty to make

a showing that the information in the presentence report is unreliable, and articulate the reasons why the facts contained therein are untrue or inaccurate.'" *United States v. Powell*, 650 F.3d 388, 394 (4th Cir.) (quoting *United States v. Terry*, 916 F.2d 157, 162 (4th Cir.1990)), cert. denied, 132 S.Ct. 350 (2011).

In the present case, the defendant presented no evidence that the PSR's recitation of the facts surrounding his prior sex offense were untrue or unreliable. While he was permitted by the state court to enter an *Alford* plea to the charge, and thus presumably denies his guilt of the crime, that is insufficient to preclude this court from considering the serious nature of the charge to which he pleaded guilty. After all, in his Plea Agreement to the state charge of aggravated sexual battery, he stipulated "that the Commonwealth has substantial evidence of my guilt and there is a basis in fact to prove the allegations against me." (Sentencing Mem. Ex. 2, Plea Agreement ¶ 3.) Those allegations are contained in the PSR and I will consider them in fixing the defendant's sentence. See *United States v. Dean*, 604 F.3d 169, 176 (4th Cir.) (stating that the categorical approach "cannot be allowed to reach beyond [its] legitimate bounds if sentencing discretion is to be taken seriously"), cert. denied, 131 S.Ct. 342 (2010).

III

The defendant also objects to the imposition of certain proposed supervised release conditions.

In an addendum to the PSR, the probation officer recommended the imposition of 19 separate sex offender supervised release conditions, pursuant to this court's Standing Order No. 07-1. That Standing Order adopts, unless modified by the sentencing judge, certain standard sets or tiers of conditions for sex offenders. Tier I contains standard conditions for, among others, those convicted of failing to register as a sex offender. Tier III contains standard conditions for those convicted of aggravated sexual abuse. Tier III includes all conditions of Tiers I and II.

The defendant objects to all of the Tier II and Tier III conditions and to certain of the Tier I conditions.

As the Fourth Circuit has recently noted,

A sentencing court may impose any condition that is reasonably related to the relevant statutory sentencing

factors, which include considering “the nature and circumstances of the offense and the history and characteristics of the defendant”; providing “adequate deterrence”; “protect[ing] the public from further crimes”; and providing the defendant with training, medical care, or treatment. The condition must also be consistent with the Sentencing Commission policy statements. A particular restriction does not require an “offense-specific nexus,” but the sentencing court must adequately explain its decision and its reasons for imposing it.

*5 *United States v. Worley*, 685 F.3d 404, 407 (4th Cir.2012) (citations omitted).

I agree with the defendant that the Tier II and Tier III conditions are not appropriate his case and will not impose them, based upon this record.

He also objects to certain Tier I conditions, and specifically proposed conditions 4, 5, 9, and 10.

Conditions 4 and 5 prohibit the defendant's possession of certain sexually oriented material. While the defendant has no past record of possessing or viewing child pornography, in light of the nature of his relatively recent sexual conduct with a young child, I will impose condition 4, revised in the form as follows: “4. The defendant must not intentionally possess

or view any form of child pornography or other sexually stimulating material involving children.” The receipt of child pornography is of course a crime; the further prohibition is to prevent the defendant from succumbing to material which, while not technically child pornography, might stimulate illegal activity on his part. I will not impose condition 5.

Conditions 9 and 10 relate to warrantless searches. The defendant objects on the ground that these conditions “permit the warrantless search of any future computer that [the defendant] might own.” (Sentencing Mem. 4.) However, because of the undeniable fact that child pornography and the Internet are so closely connected, and in light of the defendant's prior sex offense conduct, I find that these conditions are appropriate.

VI

For the reasons stated, the defendant's objections are GRANTED IN PART AND DENIED IN PART.

It is so ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 5902342

Footnotes

- 1 The defendant originally objected to the recommended Criminal History Category, but now concedes that he is correctly scored in the PSR as a Criminal History Category IV, with seven criminal history points.
- 2 There are two other comparable offenses listed that clearly do not apply here. One involves the kidnapping of a minor and the other for sex offenses that occur after an offender becomes a Tier II offender. See 42 U.S.C.A. § 16911(4)(B), (C).
- 3 The defendant relies upon *United States v. Taylor*, 644 F.3d 573 (7th Cir.2011), cert. denied, 132 S.Ct. 1049 (2012). In *Taylor*, as here, the defendant had failed to register as a sex offender in violation of SORNA and was found to be a Tier III sex offender under USSG § 2A3.5 by the use of the categorical approach approved by the Supreme Court in *Taylor* and *Shepard*. The Seventh Circuit upheld the tier classification and noted that “[t]he rationale behind [the categorical approach] applies with equal force to this case.” *Id.* at 576. *Taylor* was criticized in *United States v. Stock*, 685 F.3d 621 (6th Cir.2012). There the sentencing court also determined that the defendant was a Tier III offender under USSG § 2A3.5. The Sixth Circuit reversed and remanded on the ground that the district court had failed to make any findings as to the applicability of the prior sex offense. In doing so, the court questioned whether the categorical approach was necessary, where the issue involves a Guideline determination and thus “does not appear to have constitutional dimensions.”

Id. at 628 n. 5. However, the categorical approach has been used to determine a number of purely Guideline enhancements, such as Career Offender status under USSG § 4B1.1 (2011), see, e.g., *United States v. Kirksey*, 138 F.3d 120, 124 (4th Cir.1998), the Base Offense Level in firearms cases under USSG § 2K2.1(a) (2011), see, e.g., *United States v. Donnell*, 661 F.3d 890, 893 (4th Cir.2011), and for the Base Offense Level in illegal reentry cases under USSG § 2L1.2(b)(1)(A) (2011), see, e.g., *United States v. Ventura-Perez*, 666 F.3d 670, 673 (10th Cir.2012).

In contrast to the present case, where the applicable Guideline refers to prior *conduct*, rather than a *conviction*, the categorical approach is not used. See *United States v. Davis*, 679 F.3d 177, 187 (4th Cir.2012) (holding that district court must engage in factfinding as to whether defendant actually committed the generic offense of robbery in order to apply the cross referencing permitted under USSG § 2K2.1(c)(1)(A) (2011)); see also *United States v. Byun*, 539 F.3d 982, 991 (9th Cir.2008) (holding that use of the word “committed” rather than “convicted” in the phrase “*when committed against a minor* ” in 42 U.S.C.A. § 16911(3)(A) indicates that a noncategorical approach may be used to determine if in fact the victim was a minor).

685 F.3d 621

United States Court of Appeals, Sixth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Jeffrey STOCK, Defendant–Appellant.

No. 10–5348

|

July 11, 2012.

Synopsis

Background: Defendant pleaded guilty in the United States District Court for the Eastern District of Tennessee, J. Ronnie Greer, Jr., to one count of failing to register under Sex Offender Registration and Notification Act (SORNA) as sex offender, after the court, 2009 WL 2905929, denied defendant's motion to dismiss. Defendant appealed.

Holdings: The Court of Appeals, Gwin, District Judge, sitting by designation, held that:

[1] registration requirements applied to defendant who had committed his registration offense just after Attorney General made SORNA retroactive;

[2] conditioning federal funds on States' voluntary compliance with federal registration regime did not violate Tenth Amendment;

[3] obligation for sex offenders to register did not violate Tenth Amendment;

[4] could not take position on appeal that he did not know about registration requirement after admitting in plea agreement that he did;

[5] district court plainly erred in its conclusion that defendant was required to register as Tier III offender; and

[6] defendant was not entitled to three-level offense-level reduction for voluntary registration.

Conviction affirmed. Sentence vacated and remanded.

Kethledge, Circuit Judge, filed opinion concurring in part and dissenting in part.

West Headnotes (7)

[1] Mental Health ↗ Sex offenders

Registration requirements of Sex Offender Registration and Notification Act (SORNA) applied to defendant who had committed his registration offense just after Attorney General made SORNA retroactive. Sex Offender Registration and Notification Act, § 113(d), 42 U.S.C.A. § 16913(d).

3 Cases that cite this headnote

[2] Mental Health ↗ Sex offenders

States ↗ Federal funding or spending

Conditioning federal funds on States' voluntary compliance with federal registration regime under Sex Offender Registration and Notification Act (SORNA) did not violate Tenth Amendment. U.S.C.A. Const.Amend. 10; Sex Offender Registration and Notification Act, § 113, 42 U.S.C.A. § 16913.

4 Cases that cite this headnote

States ↗ Surrender of state sovereignty and coercion of state; anticommandeering doctrine

Federal government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. U.S.C.A. Const.Amend. 10.

[4] Mental Health ↗ Sex offenders

States ↗ Criminal justice

Obligation under Sex Offender Registration and Notification Act (SORNA) for sex offenders to register did not violate Tenth Amendment, since obligation had been imposed on sex offenders, not States, and States could choose to

not accept sex-offender registrations. U.S.C.A. Const. Amend. 10; Sex Offender Registration and Notification Act, § 113, 42 U.S.C.A. § 16913.

11 Cases that cite this headnote

[5] Criminal Law ↗ Estoppel or Waiver

Defendant who had admitted in his plea agreement that he “knowingly failed to update his offender registration as required by the Sex Offender Registration and Notification Act [SORNA]” could not take position on appeal that he did not know about that requirement, in order to claim that government could not, consistent with due process, prosecute him for violating SORNA’s registration requirement because Attorney General had not yet prescribed regulations notifying out-of-custody sex offenders of that requirement or criminal penalty associated therewith. U.S.C.A. Const. Amend. 14; Sex Offender Registration and Notification Act, § 117(b), 42 U.S.C.A. § 16917(b).

5 Cases that cite this headnote

[6] Criminal Law ↗ Sentencing and Punishment

District court plainly erred in its conclusion that defendant who previously had been convicted of sexual battery was required to register as Tier III offender, in sentencing defendant after he had pleaded guilty to failing to register under Sex Offender Registration and Notification Act (SORNA) as sex offender, where there was nothing to establish that defendant’s state offenses were “comparable to or more severe than” listed federal offenses. Sex Offender Registration and Notification Act, § 111(2, 3), 42 U.S.C.A. § 16911(2, 3); U.S.S.G. § 2A3.5, 18 U.S.C.A.; IC 35–42–4–8 (2011).

15 Cases that cite this headnote

[7] Sentencing and Punishment ↗ Sex offenses, incest, and prostitution

Defendant, who had pleaded guilty to failing to register under Sex Offender Registration and Notification Act (SORNA) as sex offender, was

not entitled to three-level offense-level reduction for voluntary registration, where police officers had already learned from records check before defendant admitted his sex-offender status that defendant was sex offender required to register, defendant was required to complete registration before he could be released, and defendant’s contrary recollection that he had prepared and neatly typed registration document in 30 minutes and returned it to sheriff’s office was simply incredible. Sex Offender Registration and Notification Act, § 113, 42 U.S.C.A. § 16913; U.S.S.G. § 2A3.5(b)(2)(A), 18 U.S.C.A.

13 Cases that cite this headnote

Attorneys and Law Firms

***622** ON BRIEF: Clifton L. Corker, Johnson City, Tennessee, for Appellant. Helen C.T. Smith, United States Attorney’s Office, Greenville, Tennessee, for Appellee.

Before: KETHLEDGE and STRANCH, Circuit Judges; GWIN, District Judge.*

GWIN, D.J., delivered the opinion of the court, in which STRANCH, J., joined. KETHLEDGE, J. (pp. 630–31), delivered a separate opinion concurring in part and dissenting in part.

OPINION

GWIN, District Judge.

After failing to persuade the district court that the Sex Offender Registration and Notification Act violates the federal Constitution, Jeffrey Stock pleaded guilty to one count of failing to register as a sex offender. At sentencing, the district court set Stock’s Guidelines base offense level at sixteen, presuming that Stock had been required to register as a “Tier III offender.” See ***623** United States Sentencing Guidelines Manual (U.S.S.G.) § 2A3.5(a)(1) (2009); 42 U.S.C. § 16911(4). Stock’s base offense level —reduced by three levels for acceptance of responsibility and combined with Stock’s criminal-history category of VI —yielded an advisory Guidelines range of 33 to 41 months’

imprisonment. The district court sentenced Stock to 72 months' imprisonment with lifetime supervised release.

Stock now appeals, renewing his constitutional challenges and arguing, among other things, that the district court both incorrectly calculated his Guidelines offense level and imposed a substantively unreasonable sentence. Because we conclude that the district court selected the wrong base offense level, we vacate Stock's sentence and remand.

I.

The Sex Offender Registration and Notification Act (SORNA) requires a sex offender to "register, and keep the registration current, in each jurisdiction where the offender resides." 42 U.S.C. § 16913(a). And when a sex offender changes residence, he must—within "3 business days"—"inform" certain jurisdictions of that change. *Id.* § 16913(c). If a sex offender is required to register under these provisions, "travels in interstate ... commerce," and "knowingly fails to ... update a registration as required," he can be imprisoned for up to 10 years. 18 U.S.C. § 2250(a).

Appellant Jeffrey Stock is a sex offender; in 1998, he pleaded guilty to two counts of sexual battery, in violation of Indiana Code § 35–42–4–8. Before August 2008, Stock resided in Indiana. On August 21, 2008, he traveled from Indiana to Tennessee. A month and a half later, on October 2, 2008, Stock changed his residence to Tennessee.

By October 9, 2008, Stock had failed to update his sex-offender registration as required by SORNA. That same day, he was arrested in Tennessee on unrelated charges. Tennessee police held Stock in custody for eight days, during which time they learned that he was a sex offender. Police provided Stock a sex-offender registration form, which he signed and submitted "at or around the time" he was released.

On June 19, 2009, Stock was indicted for failing to register as required by SORNA, in violation of 18 U.S.C. § 2250(a). He moved to dismiss the indictment, arguing, among other things, (1) that parts of SORNA, in particular 18 U.S.C. § 2250(a) and 42 U.S.C. § 16913, go beyond Congress's power to regulate interstate commerce; (2) that 42 U.S.C. § 16913(d)—permitting the Attorney General to apply SORNA's registration requirement retroactively—violates the nondelegation doctrine; (3) that SORNA violates the Tenth Amendment because it requires every state to

accept sex-offender registrations whether or not the state has voluntarily implemented SORNA's provisions; and (4) that his prosecution violates due process because he was never notified that SORNA's registration requirement had been retroactively applied to him.

The district court denied Stock's motion. Thereafter, Stock pleaded guilty with an agreement that he be allowed "to appeal any ruling on a motion to dismiss the charges raising constitutional challenges to the statute (18 U.S.C. § 2250(a) and 42 U.S.C. §§ 16911 and 16913)."

Stock's Presentence Investigation Report (PSR) recommended a Guidelines range of 33 to 41 months' imprisonment, based in part on the Probation Officer's conclusion that Stock "was required to register as a Tier III offender." U.S.S.G. § 2A3.5(a)(1) (setting a base offense level *624 of sixteen for a "Tier III offender[s]" failure to register); *see* 42 U.S.C. § 16911(4) (defining "Tier III sex offender"). The PSR also recommended Stock should not receive a three-level reduction for voluntary registration, *see* U.S.S.G. § 2A3.5(b)(2), because Stock had not corrected his failure to register before "the time [he] knew or reasonably should have known a jurisdiction had detected the failure," *see id.* § 2A3.5 cmt. n. 2.

At sentencing, Stock failed to object to his classification as a Tier III offender but did argue that he was entitled to a three-level reduction for voluntary registration. The district court disagreed, finding that Tennessee police had detected Stock's failure to register and had required Stock to register before releasing him and concluding that, in any event, § 2A3.5(b)(2)'s three-level reduction does not apply to an offender, like Stock, who knows that his failure to register has been detected. Accordingly, the district court adopted the PSR's calculation of the recommended Guidelines range.

At this point, the district court heard argument on the appropriate sentence. Stock—pointing to the short period of time during which he had resided in Tennessee unregistered¹—asked for a downward variance from the 33– to 41-month Guidelines recommended range, "and if not that, then the minimum guideline sentence." The government took an extreme position: It asked the district court to sideline the Guidelines range and impose a statutory-maximum sentence of 10 years' imprisonment, arguing that any other sentence would be insufficient given "Mr. Stock's extremely violent nature." In support of this "theme," the government had offered testimony from Detective Jeffrey

Hearon—the Indiana police officer who investigated Stock's 1998 sexual-battery offenses—and from Detective Derrick Woods—a Tennessee police officer who suspected Stock's involvement in the 2009 disappearance of a young woman. Hearon testified that the two victims in the Indiana case had always claimed that Stock raped them, though neither was willing to testify at any criminal trial; Woods testified that Stock was the last person seen with the missing Tennessee woman, whose car was found abandoned and burned on a road “outside of the city.” The government's suggestion was, it seems, that Stock was dangerous because he had in fact raped the two Indiana victims and killed the Tennessee woman.²

The district court declined to “draw any conclusions about whether a rape was committed in 1998,” or to “place any weight in the sentencing determination on the fact that [Stock was] the target of interest in another criminal investigation,” after finding insufficient evidence in both cases. It then imposed a sentence of 72 months' imprisonment, roughly double the recommended Guidelines range. Stock filed this appeal.

II.

We must first consider Stock's numerous challenges to SORNA: (1) that Congress ~~*625~~ improperly delegated its legislative function when it authorized the Attorney General to make SORNA's registration requirement retroactive; (2) that SORNA lies beyond Congress's power to regulate interstate commerce; (3) that SORNA impermissibly commandeers the States; and (4) that due process required the Attorney General to notify Stock of SORNA's retroactive application. We consider Stock's arguments in that order.

A.

In January, the Supreme Court concluded that SORNA's registration requirements “do not apply to pre-Act offenders until the Attorney General specifies that they do apply.” *Reynolds v. United States*, — U.S. —, 132 S.Ct. 975, 978, 181 L.Ed.2d 935 (2012). The upshot is that Stock, who became a sex offender in 1998, was not required to register in accordance with SORNA (enacted July 27, 2006) until August 1, 2008, the effective date of the Attorney General's specification that “SORNA applies to all sex offenders, including those convicted of their registration offenses ... prior to particular jurisdictions' incorporation of the SORNA

requirements into their programs.” 73 Fed.Reg. 38030, 38063 (2008) (“SORNA applies to all sex offenders, including those convicted of their registration offenses ... prior to particular jurisdictions' incorporation of the SORNA requirements into their programs.”); *see United States v. Utesch*, 596 F.3d 302, 311 (6th Cir.2010) (“SORNA became effective against offenders convicted before its enactment thirty days after the final SMART guidelines were published: that is, on August 1, 2008.”); *see also* 42 U.S.C. § 16913(d).

[1] But that doesn't help Stock here; he committed his registration offense in October 2008, just after the Attorney General made SORNA retroactive. Moreover, a recent decision from a panel of this Court forecloses Stock's argument that 42 U.S.C. § 16913(d)—the source of the Attorney General's authority to make SORNA's registration requirements retroactive—impermissibly delegates Congress's legislative function. *See United States v. Felts*, 674 F.3d 599, 606 (6th Cir.2012) (“Congress's delegations under SORNA possess a suitable intelligible principle and are well within the outer limits of the Supreme Court's nondelegation precedents.” (alterations and internal quotation marks omitted)).

Accordingly, Stock was required to register in accordance with 42 U.S.C. § 16913.

B.

Stock next challenges both SORNA's registration requirement, *see* 42 U.S.C. § 16913, and the criminal penalties attached to a sex offender's failure to register, *see* 18 U.S.C. § 2250(a), as beyond Congress's power to regulate interstate commerce. But this argument is also foreclosed by a recent decision of this Court. *See United States v. Coleman*, 675 F.3d 615, 620–21 (6th Cir.2012) (“SORNA constitutes a valid regulation of the use of the channels of interstate commerce.... SORNA also constitutes a valid regulation of the instrumentalities of interstate commerce.... Thus, SORNA fits squarely within Congress's Commerce Clause powers....”).

C.

[2] Stock also says that SORNA violates the Tenth Amendment because it “forces [states] to register sex offenders before [those states have] an opportunity to

voluntarily comply with SORNA.” His theory is that requiring sex offenders to register in states where SORNA has not been implemented effectively requires *626 states “to accept federally required sex offender registrations.” We disagree.

[3] It is true that “[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.” *Printz v. United States*, 521 U.S. 898, 935, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). But SORNA does no such thing. Instead, it conditions federal funds on states' voluntary compliance with a federal registration regime. As far as the Tenth Amendment is concerned, that's okay. *See South Dakota v. Dole*, 483 U.S. 203, 207–12, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987).

[4] The obligation SORNA does impose—the obligation to register—is imposed on sex offenders, not states. *See* 42 U.S.C. § 16913(a) (“A sex offender shall register....”). That obligation exists whether or not a state chooses to implement SORNA's requirements and whether or not a state chooses to register sex offenders at all. *See* 73 Fed.Reg. 38030, 38063 (2008) (“SORNA applies to all sex offenders, including those convicted of their registration offenses ... prior to particular jurisdictions' incorporation of the SORNA requirements into their programs.”); *United States v. Trent*, 654 F.3d 574, 591 (6th Cir.2011) (“This Court does not disagree with the proposition that the failure of a state to implement SORNA does not affect the independent obligation of a sex offender to register under the Act.”). Because states can choose not to accept sex-offender registrations, SORNA does not, either directly or by necessary implication, violate the Tenth Amendment.³

D.

[5] Finally, Stock asserts that the government cannot, consistent with due process, prosecute him for violating SORNA's registration requirement because the Attorney General has not yet prescribed regulations notifying out-of-custody sex offenders of that requirement (or the criminal penalty associated therewith). *See* 42 U.S.C. § 16917(b). Although this constitutional claim survived Stock's guilty plea, the factual basis for it did not. Stock's theory depends on his lack of notice of SORNA's requirements. But Stock admitted in his plea agreement that he knew about SORNA's

registration requirement. Specifically, Stock admitted that he “knowingly failed to update his offender registration as required by the Sex Offender Registration and Notification Act.” He cannot now take the position—contrary to his plea—that he didn't know about that requirement. *See Gould*, 568 F.3d at 467 (defendant who stipulated when he pleaded guilty that he “knowingly failed to register” under state law “was fully aware of his registration duties”); *cf. Lambert v. California*, 355 U.S. 225, 228–30, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957) (“Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted [of a strict-liability *627 failure-to-register offense] consistently with due process.”).⁴

* * *

Accordingly, we affirm the district court's decision not to dismiss the indictment and affirm Stock's conviction.

III.

[6] We turn now to Stock's sentencing. Stock claims three errors here: (1) that the district court selected the wrong base offense level; (2) that the district court improperly denied Stock a three-level offense-level reduction for voluntarily registration; and (3) that the district court's sentence of 72 months' imprisonment plus lifetime supervised release was substantively unreasonable. We begin with Stock's first argument, which, because of Stock's failure to raise it below, we review only for plain error.

A.

Guidelines § 2A3.5 provides three alternative base offense levels for a failure-to-register offense: “(1) 16, if the defendant was required to register as a Tier III offender; (2) 14, if the defendant was required to register as a Tier II offender; or (3) 12, if the defendant was required to register as a Tier I offender.” U.S.S.G. § 2A3.5(a). “‘Tier I offender’, ‘Tier II offender’, and ‘Tier III offender’ have the meaning given those terms in 42 U.S.C. § 16911(2), (3), and (4), respectively.” *Id.* § 2A3.5 cmt. n. 1. The district court—consistent with the PSR's conclusion that Stock “was required to register as a Tier III offender”—set Stock's base offense level at 16. This was error.

"The term 'tier III sex offender' means a sex offender whose offense is ... comparable to or more severe than," among other offenses not relevant here, "aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18)." 42 U.S.C. § 16911(4). Both aggravated sexual abuse (as described in 18 U.S.C. § 2241) and sexual abuse (as described in 18 U.S.C. § 2242), require a "sexual act," which, among other things not relevant here, means:

- (A) contact between the penis and the vulva or the penis and the anus ...;
- (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; [or]
- (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person....

18 U.S.C. § 2246(2).

Stock's 1998 Indiana sexual-battery offenses were not—at least as far as we can tell from the record—"comparable or more *628 severe than" the two federal sexual-abuse offenses listed in 42 U.S.C. § 16911(4). *First*, the Indiana sexual-battery statute Stock violated does not require a "sexual act" as defined in 18 U.S.C. § 2246(2). Instead, it punishes

A person who, with the intent to arouse or satisfy the person's own sexual desires or the sexual desires of another person, touches another person when that person is:

- (1) compelled to submit to the touching by force or the imminent threat of force; or
- (2) so mentally disabled or deficient that consent to the touching cannot be given....

Ind.Code § 35–42–4–8(a). In other words, the Indiana statute prohibits all forced, sexually motivated touching, whether of the genitalia or not, and whether through the clothing or not. Accordingly, the mere fact that Stock was convicted of two violations of that statute tells us nothing about whether those offenses were "comparable to," 42 U.S.C. § 16911(4), federal offenses requiring "sexual acts," 18 U.S.C. § 2246(2), or were perhaps even more severe. It certainly does not establish that Stock was "required to register as a Tier III offender," rather than as a Tier II (or the default, Tier I), offender. U.S.S.G. § 2A3.5(a)(1).

Second, the district court found no other fact that would support its conclusion that Stock "was required to register as a Tier III offender." *Id.* Although the government had offered evidence that Stock's 1998 sexual-abuse offenses were, in fact, rapes, the district court concluded that too little evidence supported such a finding. All the district court could say for sure was that Stock "stood before a judge in 1998 and [Stock] told [the judge] that [he was] guilty of sexual battery."⁵

On this record, there is nothing to establish that Stock's Indiana offenses were "comparable to or more severe than" the federal offenses listed in 42 U.S.C. § 16911(4). Accordingly, there is nothing to support the district court's conclusion that Stock "was required to register as a Tier III offender," and the district court erred when it set Stock's base offense level at 16. U.S.S.G. § 2A3.5(a)(1).

Moreover, we think this error plain. Admittedly, there was (and remains) some doubt about the extent to which Guidelines § 2A3.5(a) directs district courts to look beyond the mere fact of a prior sex-offense conviction and into the specific factual circumstances of that offense. *See supra* *629 note 5. But there is no doubt that in this case nothing—neither the fact of Stock's prior convictions nor any other factual finding—supported the district court's conclusion that Stock was required to register as a Tier III offender. And, as a result of that incorrect conclusion, Stock "ended up with an adjusted offense level of [13] instead of [11] ..., and was therefore subjected to a higher sentencing range." *United States v. Gardiner*, 463 F.3d 445, 461 (6th Cir.2006) (finding plain error where the district court "erroneously applied [a] two point enhancement" and, "[a]s a consequence, [the defendant] ended up with an adjusted offense level of 21 instead of 19").

Accordingly, we vacate Stock's sentence.

B.

Because we conclude that the district court selected the wrong base offense level, we will address Stock's other claims only briefly.

[7] *First*, we think the district court properly rejected Stock's request for a three-level offense-level reduction for "voluntarily ... correct[ing] the failure to register." U.S.S.G. § 2A3.5(b)(2)(A). "In order for [this reduction] to apply,

the defendant's voluntary attempt ... to correct the failure to register must have occurred prior to the time the defendant knew or reasonably should have known a jurisdiction had detected the failure to register." *Id.* § 2A3.5 cmt. n. 2.

The district court found that before Stock admitted his sex-offender status to Tennessee police, those officers had already learned from a records check that Stock was a sex offender "required to register under Tennessee law" and, "therefore, required [Stock] to complete the [sex-offender] registration before he could be released." That finding, which is supported by the testimony of two witnesses, is not clearly erroneous. Nor did the district court clearly err when it found that Stock's contrary recollection—that he was released from custody before his failure to register was discovered but then "prepared and neatly typed [the registration] document and signed it[and] returned it to the Knox County Sheriff's Office" thirty or so minutes later—was "simply incredible." Those findings undermine Stock's claimed entitlement to a three-level reduction for voluntary registration.

Second, although the district court will need to conduct a new sentencing hearing, we observe that Stock's 72-month sentence is an outlier when compared to other sentences for failure-to-register violations, even when that comparison is limited to other criminal-history-category-VI offenders. In fact, it was by far the longest sentence imposed during all of 2008, 2009, and 2010—possibly ever—on a criminal-history-category-VI offender for a failure-to-register offense.⁶ The two next-longest *630 sentences during that period were a 60-month combined sentence (48 months of incarceration plus 12 months of alternative confinement) and a 53-month sentence to incarceration. And Stock's sentence was about double both the average sentence (37 months' imprisonment) and the median sentence (36 months' imprisonment) imposed during that period on criminal-history-category-VI offenders for failing to register. If that's startling, it shouldn't be surprising; after all, Stock's sentence was nearly twice the top of the (erroneously-high) Guidelines range of 33 to 41 months' imprisonment calculated by the district court.

District judges are not bound, of course, by the sentencing Guidelines and courts of appeals ultimately review both within- and without-Guidelines sentences for overall reasonableness. *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). But more substantial variances generally require more substantial justifications, and accordingly, a "major" variance like the one in this case

"should be supported by a more significant justification than a minor one." *Id.* at 50, 128 S.Ct. 586.

Because of the procedural error with the finding that Stock was a Tier III offender, we do not need to speak to whether Stock's sentence is substantively unreasonable. We see, as did the district court, that Stock has a large number of prior offenses, though most "are not among the most serious offenses." We understand, too, the district court's frustration that Stock has, until now, received "one suspended sentence after another," which "didn't serve [Stock's] interest and [] certainly didn't serve the public's interest." We reserve the question whether, on balance, those factors warrant six years of incarceration for a three- to sixty-day delay in failing to register after moving to a new location. *See United States v. Aleo*, 681 F.3d 290, 299–302 (6th Cir.2012) (concluding that a sentence more than double the Guidelines-range maximum was substantively unreasonable when the district court failed to identify compelling justifications for the Guidelines variance or to account for the disparity from other sentences for similar offenses).

IV.

For these reasons, we affirm Stock's conviction, vacate his sentence, and remand for resentencing.

KETHLEDGE, Circuit Judge, concurring in part and dissenting in part.

Stock never argued to the district court that his Indiana conviction for sexual battery should be treated as a Tier II offense *631 rather than a Tier III one. Thus, to the extent we choose to review the issue at all, we review it only for plain error. Here, there were conflicting signals both factually and legally: One other circuit has held that a similar conviction for sexual battery is properly treated as a Tier III offense, *see United States v. Bango*, 386 Fed.Appx. 50 (3d Cir.2010); and the alleged conduct giving rise to the Indiana conviction was outright rape. I therefore do not think that any error here was plain.

I also think that Stock's sentence fell within the latitude afforded the sentencing judge. Stock has been engaged in crime almost continuously throughout his adult life, with surprisingly little consequence in terms of incarceration. The district court properly emphasized these points and others in

its analysis under 18 U.S.C. § 3553(a). I would affirm the court's judgment.

All Citations

Subject only to these two points of departure, I join my colleagues' thoughtful opinion in this case. 685 F.3d 621

Footnotes

- * The Honorable James S. Gwin, United States District Judge for the Northern District of Ohio, sitting by designation.
- 1 Stock calculates this period as three days, starting with the end of the three-day grace period after he changed his residence and ending with his detention. The government calculates this period as the roughly sixty days between Stock's arrival in Tennessee and his registration. The district court determined that the length of Stock's SORNA violation was irrelevant and made no finding on the number of days it lasted.
- 2 The government denied below that it "was trying to prove that [the Indiana offense] was actually a rape instead of a sexual battery," apologizing "if that's how it appears." But that's exactly how it appears, particularly in light of the government's attempt to connect Stock to an unsolved missing-person case.
- 3 A state's theoretical refusal to accept SORNA-required sex-offender registrations is not a federal-state double bind for sex offenders. Although SORNA requires all sex offenders—including those residing in the 36 states that have not yet fully implemented SORNA—to register, "[i]n a prosecution for a violation [of SORNA's registration requirement], it is an affirmative defense that ... uncontrollable circumstances prevented the individual from complying." 18 U.S.C. § 2250(b); *accord United States v. Gould*, 568 F.3d 459, 466 (4th Cir.2009) ("[A] sex offender is able to register under SORNA if he is able to register by means of an existing state registration facility....").
- 4 Mixed into Stock's due-process briefing is a final glancing blow at 18 U.S.C. § 2250(a), which Stock suggests violates the Ex Post Facto Clause. Stock's theory, it seems, is that 18 U.S.C. § 2250(a) punishes him for conduct predating its enactment. But that section does not punish Stock's 1998 sex offenses; it punishes his unregistered 2008 interstate move. And Stock does not explain why the Ex Post Facto Clause prohibits imposition of a registration requirement on already-convicted sex offenders. To the contrary, see *Smith v. Doe*, 538 U.S. 84, 92–106, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003) (concluding that Alaska's similar sex-offender registration law "is nonpunitive, and its retroactive application does not violate the *Ex Post Facto Clause*"). Nor does Stock explain why the Ex Post Facto Clause prohibited the 109th Congress from criminalizing *future* failures to register in accordance with an otherwise nonpunitive, if retroactive, regulatory scheme. In the end, this undeveloped (and so waived) argument leaves us with more questions than answers. See Fed. R.App. P. 28(a)(9).
- 5 We decline to decide whether it would have been appropriate for the district court to inquire into the specific factual circumstances of Stock's 1998 Indiana violations, rather than to limit itself to the fact of Stock's convictions. Guideline § 2A3.5(a) isn't all that clear on this point. And the parties have not briefed this issue, although both the government, see Appellee's Br. at 15, and Stock, see Appellant's Br. at 21–23, support their arguments regarding Stock's proper Tier with facts other than the fact of Stock's convictions.

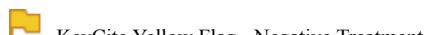
We also observe that the Seventh Circuit has authorized the use of the "modified categorical approach" in exactly this situation, see *United States v. Taylor*, 644 F.3d 573, 576–77 (7th Cir.2011), though we question

whether such a rigid approach is required where the Guidelines determination does not appear to have constitutional dimensions. Unlike, for example, the armed-career-criminal guideline—which requires a district court to determine the applicability of an enhanced statutory sentence, see U.S.S.G. § 4B1.4(a), and thus may in some cases subsume the limitations of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), see *Shepard v. United States*, 544 U.S. 13, 24–26, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005)—the failure-to-register guideline does not to our knowledge require a district judge to find any fact that increases the available penalty for a SORNA violation.

- 6 Helpfully, the United States Sentencing Commission provided this offense- and criminal-history category-specific data in response to a specific request from the Court. Included in this sample were all sentences imposed on criminal-history-category-VI offenders for offenses covered by Guidelines § 2A3.5 (“Failure to Register as a Sex Offender”) during fiscal years 2008, 2009, and 2010.

For whatever reason, the Commission does not publish offense- and criminal-history-category-specific sentencing data as a matter of course. The closest it comes is in a table attached to its yearly *Sourcebook of Federal Sentencing Statistics*, the 2010 version of which is available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/SBTOC10.htm. Table 14 of that publication, entitled *Length of Imprisonment for Offenders in Each Criminal History Category by Primary Offense Category*, and the 2010 version of which is available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table14.pdf, lists the nationwide mean and median sentences for offenders by “primary offense” and criminal-history category.

Table 14, then, is a starting point for district judges in their efforts “to avoid unwarranted sentence disparities among defendants with similar criminal records who have been found guilty of similar conduct.” 18 U.S.C. § 3553(a)(6). But it has its limitations. The thirty-two “primary offense” categories it lists are so general that it often is difficult to know whether offenders grouped into the same “primary offense” category have indeed “been found guilty of similar conduct.” *Id.* For example, the SORNA violation for which Stock was convicted falls within the primary-offense category “Other Miscellaneous Offenses,” which includes everything from “aircraft piracy” to the “illegal use of [a] regulatory number.” Appendix A of the *2010 Sourcebook of Federal Sentencing Statistics*, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/Table14.pdf. In light of the fact that the Sentencing Commission has the ability to generate true offense—and criminal-history-category-specific sentencing data, as it did for the Court in this case, the Court wonders why the Commission does not simply publish this data for the benefit of district judges.



KeyCite Yellow Flag - Negative Treatment
Declined to Follow by [State v. Moir](#), N.C., December 21, 2016

782 F.3d 1118

United States Court of Appeals, Tenth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

James William WHITE, Defendant–Appellant.

No. 14–7031

|

April 6, 2015.

Synopsis

Background: Defendant entered conditional guilty plea in the United States District Court for the Eastern District of Oklahoma admitting to violating the Sex Offender Registration and Notification Act (SORNA), but reserving five issues for appeal. Defendant appealed.

Holdings: The Court of Appeals, [McHugh](#), Circuit Judge, held that:

[1] SORNA did not violate Commerce Clause;

[2] SORNA did not violate Ex Post Facto Clause;

[3] as matter of first impression, SORNA did not violate Tenth Amendment;

[4] as matter of first impression, categorical approach applied in determining defendant's sex offender tier; and

[5] defendant was a level I sex offender, not a level III sex offender.

Affirmed in part, vacated in part, and remanded.

Procedural Posture(s): On Appeal.

West Headnotes (24)

[1] **Constitutional Law** Presumptions and Construction as to Constitutionality

Criminal Law Review De Novo

Court of Appeals reviews the district court's denial of a motion to dismiss indictment on constitutional grounds de novo; as a part of its de novo review, however, the Court must presume that the statute is constitutional.

1 Case that cites this headnote

[2] **Constitutional Law** Plainly unconstitutional

Court of Appeals may invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.

1 Case that cites this headnote

[3] **Commerce** Subjects and regulations in general

Mental Health Sex offenders

Sex Offender Registration and Notification Act (SORNA), which criminalizes failure to register as a sex offender coupled with interstate travel, was well within the constitutional boundaries of the Commerce Clause. [U.S.C.A. Const. Art. 1, § 8, cl. 3](#); [18 U.S.C.A. § 2250](#); Sex Offender Registration and Notification Act, § 113, [42 U.S.C.A. § 16913](#).

8 Cases that cite this headnote

[4] **Commerce** Constitutional Grant of Power to Congress

Commerce Commerce among the states

Commerce Activities affecting interstate commerce

Congress may regulate three areas under the Commerce Clause: (1) the channels of interstate commerce, (2) persons or things in interstate commerce, and (3) those activities that substantially affect interstate commerce. [U.S.C.A. Const. Art. 1, § 8, cl. 3](#).

5 Cases that cite this headnote

[5] **Constitutional Law** Registration

Mental Health Sex offenders

Defendant's prosecution under the Sex Offender Registration and Notification Act's (SORNA) failure to register provisions did not violate the Ex Post Facto Clause; SORNA did not retroactively increase punishment for past sex offenses, but, rather, punished defendant's failure to register after traveling in interstate commerce, and SORNA was both civil in its stated intent and nonpunitive in its purpose. [U.S.C.A. Const. Art. 1, § 9, cl. 3](#); [18 U.S.C.A. § 2250\(a\)](#).

4 Cases that cite this headnote

[6] Courts Number of judges concurring in opinion, and opinion by divided court

One panel of the Court of Appeals cannot overrule the judgment of another panel absent en banc consideration or an intervening Supreme Court decision that is contrary to or invalidates the panel's previous analysis.

26 Cases that cite this headnote

[7] States Surrender of state sovereignty and coercion of state; anticommandeering doctrine

Under the Tenth Amendment, federal officers may not conscript or commandeer state officials into administering and enforcing a federal regulatory program; in particular, the Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory provision. [U.S.C.A. Const. Amend. 10](#).

[8] United States State and local governments and agencies

Congress may constitutionally obtain state cooperation with a federal program by conditioning federal funding on state implementation of a federal mandate.

1 Case that cites this headnote

[9] United States State and local governments and agencies

Conditioning federal funding on state implementation of a federal mandate on state cooperation with a federal program is a constitutional exercise of the spending power so long as (1) the spending or withholding is in the pursuit of "the general welfare"; (2) the conditional nature is clear and "unambiguous"; (3) the condition is rationally related to the purpose of the federal interest, program, or funding; and (4) the condition does not require conduct that is barred by the Constitution itself.

1 Case that cites this headnote

[10] Mental Health Sex offenders

States Particular laws in general

Sex Offender Registration and Notification Act (SORNA) did not violate the Tenth Amendment, since SORNA did not require State to accept sex offender's registration, but, rather, simply placed conditions on the receipt of federal funds. [U.S.C.A. Const. Amend. 10](#); Sex Offender Registration and Notification Act, §§ 124, 125(a), [42 U.S.C.A. §§ 16924, 16925\(a\)](#).

15 Cases that cite this headnote

[11] Criminal Law Sentencing

Court of Appeals reviews sentences imposed by the district court under the abuse of discretion standard.

2 Cases that cite this headnote

[12] Sentencing and Punishment Discretion of court

A district court exceeds its discretion when it imposes a sentence that is arbitrary, capricious, whimsical, or manifestly unreasonable.

1 Case that cites this headnote

[13] Criminal Law Sentencing

When reviewing a sentence for reasonableness, Court of Appeals engages in a two-step process which examines both procedural and substantive reasonableness.

[14] Criminal Law **Review De Novo****Criminal Law** **Sentencing**

In examining a sentence for procedural reasonableness, Court of Appeals reviews the district court's legal conclusions de novo and its factual findings for clear error.

2 Cases that cite this headnote

[15] Statutes **Language and intent, will, purpose, or policy**

To discern Congress's intent, Court of Appeals applies its usual tools of statutory construction, beginning with an examination of the statutory language.

[16] Mental Health **Scores and risk levels**

Term "offense," as used in Sex Offender Registration and Notification Act (SORNA) provision defining sex offender tiers, referred to listed generic crimes, rather than defendant's particular conduct, and thus Court of Appeals would apply categorical approach for purposes of comparing defendant's prior sex offense with the listed section of the criminal code, combined with a circumstance-specific approach with respect to victim's age. Sex Offender Registration and Notification Act, § 111(3,4), [42 U.S.C.A. § 16911\(3,4\)](#).

30 Cases that cite this headnote

[17] Mental Health **Scores and risk levels**

Under modified categorical approach, defendant's prior North Carolina conviction of taking indecent liberties with a child was not an offense listed in SORNA provision defining level II or III sex offender tiers; unlike the listed federal offenses, which required sexual contact or a sexual act, which necessarily involved physical contact, physical contact was not an element of the North Carolina crime of which defendant was convicted. Sex Offender Registration and Notification Act, § 111(3)(A),

(4)(A), [42 U.S.C.A. § 16911\(3\)\(A\)](#), (4)(A); West's [N.C.G.S.A. § 14-202.1\(a\)](#).

23 Cases that cite this headnote

[18] Sentencing and Punishment **Residence, Association, and Communication**

General restrictions on contact with children as a condition of supervised release do not involve a greater deprivation of liberty than reasonably necessary in an ordinary case where a defendant has committed a sex offense against children or other vulnerable victims.

3 Cases that cite this headnote

[19] Sentencing and Punishment **Residence, Association, and Communication**

Restrictions on a defendant's contact with his own children, as a condition of supervised release, are subject to stricter scrutiny, because the relationship between parent and child is constitutionally protected, and a parent has a fundamental liberty interest in maintaining his familial relationship with his or her children.

4 Cases that cite this headnote

[20] Sentencing and Punishment **Residence, Association, and Communication**

Special conditions of supervised release that interfere with parental right of familial association can do so only in compelling circumstances, and must be especially fine-tuned to achieve the statutory purposes of sentencing.

3 Cases that cite this headnote

[21] Constitutional Law **Parent and Child Relationship**

The liberty interest parents have in the care, custody, and control of their children is a substantive due process right protected by the Fourteenth Amendment. [U.S.C.A. Const. Amend. 14](#).

5 Cases that cite this headnote

[22] **Constitutional Law** Delegation of Powers by Judiciary

Sentencing and Punishment Authority to impose

Article III of the United States Constitution confers the authority to impose punishment on the judiciary, and the judiciary may not delegate that authority to a nonjudicial officer. U.S.C.A. Const. Art. 3, § 1 et seq.

1 Case that cites this headnote

[23] **Constitutional Law** To probation or parole officers

Sentencing and Punishment Supervision

To decide whether a condition of supervised release improperly delegates sentencing authority to a probation officer, Court of Appeals distinguishes between permissible delegations that merely task the probation officer with performing ministerial acts or support services related to the punishment imposed and impermissible delegations that allow the officer to decide the nature or extent of the defendant's punishment. U.S.C.A. Const. Art. 3, § 1 et seq.

6 Cases that cite this headnote

[24] **Sentencing and Punishment** Validity or reasonableness of conditions in general

Conditions of supervised release that touch on significant liberty interests are qualitatively different from those that do not, and so allowing a probation officer to decide whether to restrict a significant liberty interest improperly delegates the judicial authority to determine the nature and extent of a defendant's punishment. U.S.C.A. Const. Art. 3, § 1 et seq.

5 Cases that cite this headnote

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Before [KELLY](#), [LUCERO](#), and [McHUGH](#), Circuit Judges.

[McHUGH](#), Circuit Judge.

I. INTRODUCTION

James White is a convicted sex offender who failed to keep his registration current after he moved from Oklahoma to Texas. He entered a conditional guilty plea admitting to violating the Sex Offender Registration and Notification Act (SORNA), 18 U.S.C. § 2250(a), but reserving five issues for appeal. Three are challenges to his conviction on the grounds that SORNA violates the Commerce Clause, the Tenth Amendment, and the Ex Post Facto Clause of the U.S. Constitution. Next, Mr. White attacks his sentence, claiming the district court erred: (1) by calculating his Sentencing Guidelines range as if he were a tier III sex offender; and (2) by imposing special conditions of supervised release limiting his contact with his minor grandchildren and nieces. We hold that SORNA is the product of a valid exercise of Congress's Commerce Clause power, and that it does not violate the Tenth Amendment or the Ex Post Facto Clause. But we conclude the district court erred in classifying Mr. White as a tier III sex offender and vacate Mr. White's sentence and conditions of supervised release. We therefore affirm Mr. White's conviction but remand to the district court for resentencing.

II. BACKGROUND

Mr. White took indecent liberties with a child in North Carolina on February 6, 2005, in violation of section 14–202.1 of the North Carolina Criminal Code. On July 27, 2006, Congress passed the Sex Offender Registration and Notification Act (SORNA). Mr. White was indicted by the State of North Carolina on December 11, 2006, and convicted on February 14, 2007. On February 28, 2007, two weeks

after Mr. White's conviction, the U.S. Attorney General issued a rule extending the requirements of SORNA "to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. § 72.3. Thus, although Mr. White committed his sex offense before SORNA was enacted, he is required to comply with its registration requirements.

In 2013, Mr. White moved from Oklahoma to Texas without registering in Texas or updating his Oklahoma sex offender registration as mandated by SORNA. He was subsequently indicted in Oklahoma for failing to register as a sex offender, in violation of 18 U.S.C. § 2250(a)(1), (a)(2)(B), and (a)(3).

Mr. White moved to dismiss the indictment, arguing that SORNA violates the Commerce Clause, the Tenth Amendment, and the Ex Post Facto Clause. The district *1122 court denied Mr. White's motion to dismiss and Mr. White entered a conditional guilty plea, reserving his right to appeal both the denial of his motion to dismiss and his sentence.

Prior to sentencing, the probation office prepared a Presentence Investigation Report (PSR). The PSR treated Mr. White as a "tier III" sex offender under 42 U.S.C. § 16911, giving him a base offense level of 16. U.S.S.G. § 2A3.5; see 42 U.S.C. § 16911 (defining tier I, tier II, and tier III sex offenders). It then credited Mr. White with acceptance of personal responsibility for the offense and assigned him a three-level reduction pursuant to U.S.S.G. § 3E1.1(a) and (b).¹ Based on these assumptions, the PSR calculated Mr. White's total offense level at 13. Mr. White's prior criminal history placed him in criminal history category III, which when combined with his offense level, resulted in a United States Sentencing Guidelines (Guidelines) range of 18 to 24 months of imprisonment.

Mr. White objected to the PSR, arguing he qualified as a "tier I" sex offender, not a "tier III" sex offender. If Mr. White is correct, his base offense level would be 12 and his total offense level 10. Combined with his criminal history category of III, these revised numbers would result in a Guidelines sentencing range of 10 to 16 months' imprisonment.

At the sentencing hearing, the district court overruled Mr. White's objection to his tier classification. In reaching its conclusion that Mr. White qualifies as a tier III sex offender, the district court relied on allegations in the state indictment and documents from the state prosecution indicating that

the victim was the seven-year-old daughter of Mr. White's girlfriend and that the incident involved contact between the victim and Mr. White. Based on these facts, the district court held Mr. White's state offense was comparable to the federal crime of abusive sexual contact against a minor under thirteen, thereby placing him within the tier III category. See 42 U.S.C. § 16911 (defining tier III sex offenders by comparing their sex offenses to enumerated federal crimes). The district court then sentenced Mr. White at the low end of the Guidelines range, to 18 months' imprisonment.

The district court also imposed special conditions of supervised release. The third special condition prohibited Mr. White from "be[ing] at any residence where children under the age of 18 are residing without the prior written permission of the U.S. Probation Office." The fourth special condition prohibited Mr. White from "be[ing] associated with children under the age of 18 except in the presence of a responsible adult who is aware of the defendant's background and current offense, and who has been approved by the U.S. Probation Officer."

Mr. White objected to the third and fourth special conditions of supervised release, claiming they were a greater deprivation of liberty than necessary. In particular, he objected to the condition's infringement on access to his minor grandchildren and nieces. Mr. White also objected to the special conditions on the ground the district court had unconstitutionally delegated the judiciary's Article III sentencing power to the probation officer. The district court overruled each of Mr. White's objections to the special conditions.

Mr. White now appeals from his conviction and from his sentence for the same reasons advanced in the district court.

*1123 III. DISCUSSION

We begin our analysis by addressing Mr. White's claims that his conviction should be overturned because SORNA violates the U.S. Constitution. We then consider his challenges to the sentence and the conditions of supervised release.

A. *The Constitutionality of SORNA*

[1] [2] We review the district court's denial of Mr. White's motion to dismiss the indictment on constitutional grounds

de novo. See *United States v. Brune*, 767 F.3d 1009, 1015 (10th Cir. 2014). “As a part of our de novo review, however, we must presume that the statute is constitutional.” *Id.* (internal quotation marks omitted). We may “invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds.” *United States v. Morrison*, 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

1. The Commerce Clause

[3] Mr. White first claims his conviction violates the Commerce Clause. Although he acknowledges that we rejected a Commerce Clause challenge to SORNA in *United States v. Hinckley*, 550 F.3d 926, 939–40 (10th Cir. 2008), abrogated on other grounds by *Reynolds v. United States*, —U.S. —, 132 S.Ct. 975, 181 L.Ed.2d 935 (2012), Mr. White argues that our decision has been superseded by subsequent authority from the United States Supreme Court.² Specifically, he contends the Supreme Court’s decision in *National Federation of Independent Business v. Sebelius*, — U.S. —, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012) (*NFIB*), calls into question our decision in *Hinckley*. For the following reasons, we disagree.

To put our analysis in context, we begin with an overview of the Commerce Clause and our application of that jurisprudence in *Hinckley*. Next, we discuss the Supreme Court’s decision in *NFIB* and explain why it is not controlling of the Commerce Clause issue presented here.

[4] The Constitution authorizes Congress to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. Const. Art I, § 8, cl. 3. The Supreme Court has identified three areas that Congress may regulate under the Commerce Clause: (1) “the channels of interstate commerce,” (2) “persons or things in interstate commerce,” and (3) “those activities that substantially affect interstate commerce.” *NFIB*, 132 S.Ct. at 2578; *United States v. Lopez*, 514 U.S. 549, 558, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995); see also *United States v. Morrison*, 529 U.S. 598, 608–09, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000).

The bounds of Congress’s power to regulate the third field—activities that substantially affect interstate commerce—have been defined by the Supreme Court jurisprudence. In *Lopez*, the Court struck down a federal statute prohibiting possession of a gun in a school zone because the activity regulated was purely intrastate and was not an economic

activity which substantially affected interstate commerce. 514 U.S. at 561–63, 115 S.Ct. 1624. Five years later, the Court struck down provisions of the Violence Against Women Act providing a federal civil remedy for victims of gender-motivated violence for the same reasons: the regulated violence was purely intrastate and it did not substantially affect interstate commerce. *Morrison*, 529 U.S. at 609–612, 120 S.Ct. 1740. In both cases, the Supreme Court considered it *1124 significant that neither statute contained an express jurisdictional element requiring some connection with interstate commerce. *Id.* at 611–12, 120 S.Ct. 1740, *Lopez*, 514 U.S. at 562, 115 S.Ct. 1624.

In our decision in *Hinckley*, the defendant relied on *Lopez* and *Morrison* to argue that Congress could not criminalize his failure to register as a state sex offender because there was nothing inherent in being a state sex offender that substantially affected interstate commerce. 550 F.3d at 940. We distinguished the statutes at issue in *Lopez* and *Morrison* because they related solely to intrastate activity which could be regulated only if it fell within the third *Lopez* category by “substantially affect[ing] interstate commerce,” *Lopez*, 514 U.S. at 559, 115 S.Ct. 1624. *Hinckley*, 550 F.3d at 940. In contrast, SORNA “comprises two elements: post-SORNA failure to register coupled with interstate travel.” *Id.* Thus, Congress’s authority to regulate the activity covered by SORNA is confirmed by the first and second prongs of *Lopez*, which regulate the “channels of interstate commerce” and “persons or things in interstate commerce.” *Lopez*, 514 U.S. at 558, 115 S.Ct. 1624. In *Hinckley*, we held Congress could act “to keep the channels of interstate commerce free from immoral and injurious uses.” *Id.* (internal quotation marks omitted). Mr. White asks us to reconsider that decision in light of *NFIB*.

The plaintiffs in *NFIB* challenged the Patient Protection and Affordable Care Act (PPACA), arguing that its individual mandate, which requires individuals to purchase a health insurance policy providing a minimum level of coverage, was unconstitutional. 132 S.Ct. at 2577. In a splintered decision, the Court upheld the PPACA under Congress’s tax power, but at least five justices also concluded the PPACA violated the Commerce Clause. Compare *id.* at 2585–91 (Roberts, C.J., concluding that the PPACA was not a valid exercise of the Commerce Clause), and *id.* at 2645–48 (Scalia, J., joined by Kennedy, J., Thomas, J., and Alito, J., dissenting on taxation power grounds, but agreeing that the PPACA was not authorized by the Commerce Clause), with *id.* at 2615–25 (Ginsburg, J., concurring in part and dissenting in part, and

joined by Sotomayor, J., Breyer, J., and Kagan, J., who all agreed the PPACA was constitutional under the Commerce Clause).³

All of the justices focused their discussion of the Commerce Clause on the third *Lopez* prong and addressed whether the individual mandate was a valid regulation of intrastate activity that substantially affects interstate commerce. Chief Justice Roberts explained that the Constitution *1125 only provides Congress with the power to regulate commerce, which “presupposes the existence of commercial activity to be regulated.” *Id.* at 2586 (opinion of Roberts, C.J.). He concluded the individual mandate did not regulate existing activity, but compelled individuals to become active in commerce by purchasing health insurance. *Id.* at 2587. Because he concluded the law did not, in the first instance, regulate commercial activity or any activity which substantially affects interstate commerce, the Chief Justice concluded it was unsupported by the Commerce Clause. *Id.*

Justice Scalia, joined by Justices Kennedy, Thomas, and Alito, agreed the individual mandate could not be supported by Congress's power to regulate activities that substantially affect interstate commerce. *Id.* at 2647–48 (Scalia, J., dissenting). He noted that the mandate does not apply to persons who purchase health care services or goods, but instead forces persons who are not participants in the relevant health care market to join the market. *Id.* Like Chief Justice Roberts, Justice Scalia drew a distinction between activity and inactivity. *Id.* at 2649. As nonparticipants are, by definition, inactive in commerce, he concluded their activity cannot have a substantial effect on commerce. *Id.* at 2647–48.⁴

Mr. White claims SORNA regulates inactivity by compelling state sex offenders to act and is therefore unconstitutional under the Supreme Court's analysis in *NFIB*. We are not convinced. First, the provision of the PPACA at issue in *NFIB* implicated only the third prong of *Lopez*, the power to regulate intrastate activity that substantially affects interstate commerce. In *Hinckley*, we upheld SORNA as a valid exercise of Congress's power under the first and second *Lopez* prongs: regulation of channels of interstate commerce and regulation of persons in interstate commerce. 550 F.3d at 940. And we concluded that “whether such an activity has a substantial effect on interstate commerce is irrelevant.” *Id.* Thus, *NFIB*'s discussion of the limits of Congress's power to regulate intrastate activity based solely on its effect on interstate commerce does nothing to undermine our analysis in *Hinckley*.

Second, even assuming the Commerce Clause discussion in *NFIB* is a holding and that it is relevant to SORNA, Mr. White's conviction was not based solely on his inactivity. Instead, it is based on his interstate activity—moving from Oklahoma to Texas. But Mr. White argues SORNA should be evaluated solely under the third prong of *Lopez* because his status as a sex offender is a purely intrastate matter. In doing so, Mr. White attempts to sever SORNA's registration provision from its enforcement provision, and then argues SORNA lacks an interstate element. See 42 U.S.C. § 16913 (registration requirement); 18 U.S.C. § 2250 (enforcement provision). *1126 This argument is unavailing. In *United States v. Lawrence*, we held that when reviewing SORNA's federal registration requirements as applied to state sex offenders like Mr. White, we consider both its regulatory and enforcement provisions. 548 F.3d 1329, 1336–37 (10th Cir. 2008). If, taken together, they are a valid exercise of the commerce power, we must uphold the statute. *Id.*

SORNA uses a combination of civil and criminal components to achieve its goal of keeping track of sex offenders. See *Carr v. United States*, 560 U.S. 438, 455, 130 S.Ct. 2229, 176 L.Ed.2d 1152 (2010) (“Section 2250 is not a stand-alone response to the problem of missing sex offenders; it is embedded in a broader statutory scheme enacted to address the deficiencies in prior law that had enabled sex offenders to slip through the cracks.”). The statute's civil component—42 U.S.C. § 16913—“requires all sex offenders to register.” *United States v. Carel*, 668 F.3d 1211, 1213 (10th Cir. 2011) (internal quotation marks omitted). In turn, “SORNA's criminal provision—18 U.S.C. § 2250(a)—imposes criminal penalties for failing to comply with § 16913's registration requirement,” *id.*, only if a state sex offender “travels in interstate or foreign commerce, or enters or leaves, or resides in Indian country,” 18 U.S.C. § 2250(a)(1)(B). Taking these provisions together, SORNA contains an express jurisdictional element requiring interstate travel. See *Morrison*, 529 U.S. at 611–12, 120 S.Ct. 1740; *Lopez*, 514 U.S. at 562, 115 S.Ct. 1624.

Mr. White moved from Oklahoma to Texas without updating his registration, and drove back to Oklahoma every ninety days to maintain the illusion that he continued to reside there. As Mr. White's behavior illustrates, §§ 16913 and 2250(a) directly regulate activity, specifically activity involving the interstate movement of persons and activity that employs the channels of interstate commerce. Accordingly, SORNA is a proper exercise of Congress's Commerce Clause power under

the first and second *Lopez* prongs. That was our conclusion in *Hinckley*, and nothing in *NFIB* causes us to doubt the continuing validity of that decision.⁵

2. The Ex Post Facto Clause

[5] Mr. White next argues SORNA's requirement that pre-Act sex offenders register violates the Ex Post Facto Clause by increasing the punishment for a past offense. *See U.S. Const. art. I, § 9, cl. 3.* We squarely addressed this issue in *United States v. Lawrence*, 548 F.3d 1329 (10th Cir.2008), and upheld SORNA because it is a regulatory statute and any criminal penalties attach only to future failures to register. *Id.* at 1332–36.

[6] Mr. White contends *Lawrence* was wrongly decided in the first instance and that we should reconsider the issue in light of a growing number of state courts holding that state registration schemes violate the Ex Post Facto Clause. But we are bound by the holding in *Lawrence*. “[O]ne panel of this court cannot overrule the judgment of another panel absent en *1127 banc consideration or an intervening Supreme Court decision that is contrary to or invalidates our previous analysis.” *United States v. Nichols*, 775 F.3d 1225, 1230 (10th Cir.2014) (alterations and internal quotation marks omitted). Mr. White does not claim that either exception to the horizontal stare decisis rule is present here and even acknowledged at oral argument that he raised the issue solely to preserve it for possible en banc reconsideration or review by the United States Supreme Court. We therefore affirm the district court on this issue.

3. The Tenth Amendment

[7] As the last constitutional challenge to his conviction, Mr. White argues SORNA violates the Tenth Amendment by directing state officials to implement a federally mandated sex offender registry. The Tenth Amendment provides that the “powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” *U.S. Const., amend. X.* Under the Tenth Amendment, federal officers may not conscript or commandeer state officials into administering and enforcing a federal regulatory program. *Printz v. United States*, 521 U.S. 898, 935, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997). In particular, the “Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory provision.” *Id.*

[8] [9] Notwithstanding this general principle, Congress may constitutionally obtain state cooperation with a federal program by conditioning federal funding on state implementation of a federal mandate. *Kansas v. United States*, 214 F.3d 1196, 1199 (10th Cir.2000); *see also South Dakota v. Dole*, 483 U.S. 203, 206–08, 107 S.Ct. 2793, 97 L.Ed.2d 171 (1987) (same). These arrangements are a constitutional exercise of the spending power so long as (1) the spending or withholding is in the pursuit of “the general welfare”; (2) the conditional nature is clear and “unambiguous []”; (3) the condition is rationally related to the purpose of the federal interest, program, or funding; and (4) the condition does not require conduct that is barred by the [C]onstitution itself. *Pittsburg Cnty. Rural Water Dist. No. 7 v. City of McAlester*, 358 F.3d 694, 717 (10th Cir.2004); *see also United States v. Felts*, 674 F.3d 599, 608 (6th Cir.2012). Congress has set up such a scheme in SORNA, by asking states to implement SORNA in exchange for 10% of federal funding under the Omnibus Crime Control and Safe Streets Act of 1968. 42 U.S.C. §§ 16924, 16925(a).

[10] Mr. White does not claim Congress exceeded its spending power. Instead, he argues SORNA violates the Tenth Amendment by requiring Oklahoma officials to comply with federal sex offender registration even though Oklahoma has not implemented SORNA or accepted conditional funding. Mr. White relies on the website of the Office of Sex Offender Sentencing, Monitoring, Registering, and Tracking (SMART), which indicates Oklahoma is not among the states that have substantially implemented SORNA. SORNA, SMART, <http://ojp.gov/smart/sorna.htm> (last visited 3/9/2015). He asks us to infer from the fact of his conviction, and the lack of a federally run system for registering sex offenders, that Oklahoma officials are forced to administer the federal registration program even though the state has not implemented SORNA. But he has not identified any federal statutory provisions that compel an Oklahoma official to act if the state refuses federal funding, and we decline Mr. White’s invitation to make such an inference.

*1128 As the Fourth Circuit explained, “while SORNA imposes a duty *on the sex offender* to register, it nowhere imposes a requirement *on the State* to accept such registration.” *Kennedy v. Allera*, 612 F.3d 261, 269 (4th Cir.2010); *see also Felts*, 674 F.3d at 602 (“Congress through SORNA has not commandeered Tennessee, nor compelled the state to comply with its requirements. Congress has simply placed conditions on the receipt of federal funds. A

state is free to keep its existing sex-offender registry system in place (and risk losing funding) or adhere to SORNA's requirements (and maintain funding)."). We join all of the federal circuits to have considered this issue in holding that SORNA does not violate the Tenth Amendment. *See United States v. Richardson*, 754 F.3d 1143, 1146–47 (9th Cir.2014); *United States v. Smith*, 655 F.3d 839, 848 (8th Cir.2011), vacated on other grounds by *Smith v. United States*, — U.S. —, 132 S.Ct. 2712, 183 L.Ed.2d 66 (2012) (mem.);⁶ *United States v. Johnson*, 632 F.3d 912, 920 (5th Cir.2011); *United States v. Guzman*, 591 F.3d 83, 94 (2d Cir.2010).⁷

In summary, we reject Mr. White's claims that SORNA violates the Commerce Clause, the Ex Post Facto Clause, and the Tenth Amendment of the U.S. Constitution. Because we uphold the statute, we also affirm Mr. White's conviction for failing to comply with SORNA's registration requirements. We now address Mr. White's challenges to his sentence.

B. Sentencing

Mr. White has appealed two issues related to his sentence. First, he argues the district court improperly classified him as a tier III sex offender, which resulted in an inaccurate calculation of his Guidelines sentencing range. Second, he challenges the conditions of supervised release imposed by the district court as an unconstitutional interference with his right of familial association and as an unconstitutional delegation of sentencing authority to the probation officer.

For the reasons discussed below, we agree that Mr. White should have been classified as a tier I sex offender, and we therefore vacate his sentence and remand for further proceedings. Because we vacate Mr. White's sentence, we also vacate the conditions of his supervised release. But to assist the district court when it considers whether conditions of supervised release are appropriate upon resentencing, we provide guidance on the constitutionality of the challenged conditions. *See Fletcher v. United States*, 730 F.3d 1206, 1214 (10th Cir.2013) (holding that district court erred in dismissing case and giving guidance on issue that “[s]trictly speaking, we may not have to reach,” to provide the district court and the parties guidance on remand).

1. Guidelines Sentencing Range

[11] [12] [13] [14] We review sentences imposed by the district court under the abuse of discretion standard.

*See *1129 Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). A district court exceeds its discretion when it imposes a sentence that is “arbitrary, capricious, whimsical, or manifestly unreasonable.” *United States v. Munoz–Nava*, 524 F.3d 1137, 1146 (10th Cir.2008). When reviewing a sentence for reasonableness, we engage in a two-step process which examines both procedural and substantive reasonableness. *See Gall*, 552 U.S. at 51, 128 S.Ct. 586; *United States v. Verdin–Garcia*, 516 F.3d 884, 895 (10th Cir.2008). We “must first ensure that the district court committed no significant procedural error,” which could include “failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.” *Gall*, 552 U.S. at 51, 128 S.Ct. 586 (internal quotation marks omitted); *see also United States v. Shuck*, 713 F.3d 563, 571 (10th Cir.2013) (affirming a sentence that was both procedurally and substantively reasonable). In examining a sentence for procedural reasonableness, “we review the district court’s legal conclusions *de novo* and its factual findings for clear error.” *Shuck*, 713 F.3d at 570; *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir.2006).

Mr. White claims his sentence is procedurally unreasonable because the district court inaccurately calculated his Guidelines range. To determine whether he is correct, we first explain the significance of Mr. White's tier classification to the determination of his sentencing range. Next we address SORNA's sex offender tier classifications and the proper methodology for deciding whether a sex offender falls within a particular tier. Finally, we apply that methodology to Mr. White and conclude that he does not qualify as a tier III sex offender.

a. The importance of tier classifications for sentencing under the Guidelines

Under the Guidelines, a defendant's sentencing range is determined by a number of factors, including his offense level and criminal history. For defendants like Mr. White who are being sentenced for failure to register as sex offenders, the offense level is dictated by the defendant's sex offender tier classification under SORNA, 42 U.S.C. § 16911,⁸ U.S.S.G. § 2A3.5 & cmt. SORNA classifies sex offenders into three tiers depending on the seriousness of their underlying sex offense. Section 2A3.5 of the Guidelines sets a defendant's

base offense level at 16 if the defendant was required to register as a tier III offender, 14 if the defendant was required to register as a tier II offender, or 12 if the defendant was required to register as a tier I offender.⁹ The district court adopted the PSR's classification of Mr. White as a tier III sex offender and the *1130 PSR's use of the corresponding base level of 16 to calculate Mr. White's recommended Guidelines range of 18 to 24 months' imprisonment. If Mr. White is correct that he qualifies only as a tier I sex offender, his offense level would fall to 12 and his Guidelines sentencing range would drop to 10 to 16 months' imprisonment. Thus, because a defendant's tier classification directly impacts the Guidelines sentence calculation, we must determine whether the district court correctly assigned Mr. White to tier III.

b. Determining a defendant's tier classification under SORNA

Under SORNA, a defendant's tier classification is determined by comparing the defendant's prior sex offense to statutory criteria. For example, if Mr. White's prior offense "is comparable to or more severe than [the federal crime of] ... (i) aggravated sexual abuse or sexual abuse ...; or (ii) abusive sexual contact ... against a minor who has not attained the age of 13 years," he was appropriately classified as a tier III sex offender.¹⁰ 42 U.S.C. § 16911(4)(A). But if he does not qualify as a tier III sex offender, he will be classified as a tier II sex offender if, as relevant here, his underlying offense is "comparable to or more severe than [the federal crime of] ... (iv) abusive sexual contact," irrespective of the victim's age. *Id.* at § 16911(3)(A)(iv). And a sex offender who qualifies as neither a tier III nor a tier II sex offender is a tier I sex offender. *Id.* at § 16911(4)(C).

Our review of Mr. White's tier classification is complicated by the fact that the term "offense" as used in 42 U.S.C. § 16911 is ambiguous. In *Nijhawan v. Holder*, the Supreme Court explained that Congress's use of the words "'crime,' 'felony,' 'offense,' and the like sometimes refer[s] to a generic crime, say, the crime of fraud or theft in general, and sometimes refer [s] to the specific acts in which an offender engaged on a specific occasion, say, *the* fraud that the defendant planned and executed last month." 557 U.S. 29, 34–35, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009). This distinction is significant because comparing a generic offense to a federal crime involves a different methodology than comparing the defendant's specific acts to that federal crime. Thus, the task before us is to determine whether the term "offense" in §

16911 refers to the generic crime or to a defendant's specific conduct.

SORNA is not alone in requiring courts to engage in some form of comparison between a defendant's prior conviction and criteria set forth in a federal statute. For example, Congress has required courts to engage in such comparisons in the context of sentencing enhancements under the Armed Career Criminal Act (ACCA)¹¹ and in the context of deportability under the Immigration and Nationality Act (INA).¹² When Congress has required such comparisons, courts employ two main approaches, depending on whether Congress referenced a generic crime or a defendant's specific conduct: the categorical approach and the circumstance-specific approach.

If a statute refers to the generic crime, courts apply "what has become known as *1131 the 'categorical approach': They compare the elements of the statute forming the basis of the defendant's conviction with the elements of the [predicate] crime." *Descamps v. United States*, — U.S. —, 133 S.Ct. 2276, 2281, 186 L.Ed.2d 438 (2013); cf. *United States v. Dennis*, 551 F.3d 986, 991 (10th Cir.2008) (applying the categorical approach to determine whether an indecent liberties-with-a-minor conviction was a crime of violence for an ACCA enhancement, and rejecting a "categorical-plus" approach that allowed consideration of conduct stated in the charging documents). Under the categorical approach, courts will look beyond the elements of the defendant's previous offense only when the statute under which the defendant was convicted is divisible.

A "divisible statute" is one that "sets out one or more elements of the offense in the alternative." *Descamps*, 133 S.Ct. at 2281. For example, if the defendant's prior conviction was under a statute that criminalizes several types of activity, not all of which fall within the criteria listed in the federal statute, the court cannot determine whether the defendant's commission of the underlying offense is comparable to the federal statute's criteria without more information. E.g., *United States v. Castleman*, — U.S. —, 134 S.Ct. 1405, 1414, 188 L.Ed.2d 426 (2014) (holding that Tennessee domestic assault statute was divisible because not all acts criminalized by it required the use or attempted use of physical force, an element necessary to constitute a "misdemeanor crime of domestic violence" for purposes of 18 U.S.C. § 922(g)(9)); *Shepard v. United States*, 544 U.S. 13, 17, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (holding that the Massachusetts burglary statute was divisible because

it covered entries into boats and cars, as well as buildings, and burglary as a predicate violent felony under the Armed Career Criminal Act was limited to entries into a building or structure). When faced with these divisible statutes, courts apply a “modified categorical approach” under which they consider a limited class of documents, like indictments, jury instructions, plea agreements and plea colloquies, to determine which alternative formed the basis for a defendant’s conviction. *Nijhawan*, 557 U.S. at 41, 129 S.Ct. 2294; *Shepard*, 544 U.S. at 20, 125 S.Ct. 1254. The court then compares the elements of the listed federal crime with the elements of the defendant’s prior offense, using the elements that actually formed the basis of the conviction. *Descamps*, 133 S.Ct. at 2281.

In contrast, where Congress has indicated its use of the terms “offense,” “crime,” or “felony” was intended to refer to the specific acts in which a defendant has engaged on a prior occasion, we use a circumstance-specific approach. *Nijhawan*, 557 U.S. at 34–35, 129 S.Ct. 2294. Unlike the categorical and modified categorical approaches, courts using a circumstance-specific approach may look beyond the elements of the prior offense and consider “the facts and circumstances underlying an offender’s conviction.” *Id.* at 34, 129 S.Ct. 2294. Because a comparison made under the categorical approach may lead to a different conclusion than one made under the circumstance-specific approach, it is important to determine which approach Congress intended for a particular statute.

[15] So, the first question relevant to our review of the district court’s classification of Mr. White as a tier III sex offender is whether Congress intended “offense” as used in § 16911 to refer to a generic crime or to the particular conduct of this defendant.¹³ See *1132 *United States v. Lamirand*, 669 F.3d 1091, 1095–96 (10th Cir.2012) (holding that when interpreting a statute, we attempt to give effect to Congressional intent). To discern Congress’s intent, we apply our usual tools of statutory construction, beginning with an examination of the statutory language. See *Nijhawan v. Holder*, 557 U.S. 29, 38–39, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009) (examining language of the INA and adopting a circumstance-specific approach); *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) (examining language of the Career Criminals Amendment Act and adopting a modified categorical approach to a divisible state statute). If the plain language of the relevant statute does not provide a definitive answer, we must review the legislative history for signs of Congress’s intent. See

Taylor, 495 U.S. at 602, 110 S.Ct. 2143. But in applying these tools to these types of statutes, the Supreme Court has instructed that we also consider the practical difficulties and potential unfairness of applying a circumstance-specific approach, including the burden on the trial courts of sifting through records from prior cases, the impact of unresolved evidentiary issues, and the potential inequity of imposing consequences based on unproven factual allegations where the defendant has pleaded guilty to a lesser offense. *Id.* at 601–02, 110 S.Ct. 2143.¹⁴

[16] Turning first to SORNA’s statutory language, Section 16911(4) defines a tier III sex offender as:

The term “tier III sex offender” means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

(C) occurs after the offender becomes a tier II sex offender. Of significance here is Congress’s reference to the offenses listed in subsection (4)(A) as an “offense described in” sections 2241, 2242, and 2244 of Title 18. The Supreme Court has indicated that a reference to a corresponding section of the criminal code strongly suggests a generic intent. See *Nijhawan*, 557 U.S. at 37, 129 S.Ct. 2294 (holding that a statute that “lists several of its ‘offenses’ in language that must refer to generic crimes,” including *1133 “sections [that] refer specifically to an ‘offense described in’ a particular section of the Federal Criminal Code” invokes a categorical approach); cf. *United States v. Dodge*, 597 F.3d 1347, 1350–51 (11th Cir.2010) (holding that under § 16911(5)(A)(ii) and (7)(H), “a criminal offense that is specified against a minor,” and does not cross-reference any section of the Federal Criminal Code, authorizes a circumstance-specific approach). Thus, subsection (4)(A)’s “as described in” language suggests Congress intended courts to employ a categorical approach

when comparing a defendant's prior sex offense to crimes listed there.¹⁵

Also of relevance to Mr. White's classification, is subsection (4)(A)(ii), which targets abusive sexual contact, as defined by 18 U.S.C. § 2244, only if committed "against a minor who has not attained the age of 13 years." Although the express reference to a specific code section strongly suggests a generic approach, § 2244 does not include an element that specifies the age of the victim. To give subsection (4)(A)(ii) meaning then, the court must consider the specific circumstances to determine the victim's age. Otherwise, a comparison based on the categorical approach will never reveal the age of the victim and therefore never constitute this tier III offense.¹⁶ Thus, the language of this subsection suggests Congress intended courts to look to the actual age of the defendant's victim, but to otherwise employ a generic approach to the section of the criminal code listed.

Examination of the language used to define a tier II sex offender also suggests that Congress intended courts to use a categorical approach to determine the sex offender tier, with the exception that the court should consider the specific circumstances to determine the victim's age. Section 16911(3) defines tier II sex offenders:

The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

- (i) sex trafficking (as described in section 1591 of Title 18);
- (ii) coercion and enticement (as described in section 2422(b) of Title 18);
- (iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a)) of Title 18;

*1134 (iv) abusive sexual contact (as described in section 2244 of Title 18);

(B) involves—

- (i) use of a minor in a sexual performance;

- (ii) solicitation of a minor to practice prostitution; or
 - (iii) production or distribution of child pornography; or
- (C) occurs after the offender becomes a tier I sex offender.

As with tier III sex offenders, SORNA sometimes refers to specific sections of the Federal Criminal Code when defining a tier II sex offender.¹⁷ See *Nijhawan*, 557 U.S. at 37, 129 S.Ct. 2294. Subsection (3)(A) cross-references sex trafficking, coercion and enticement, transportation with intent to engage in criminal sexual activity, and abusive sexual contact "as described in" sections of the Federal Criminal Code. But subsection (3)(A) expressly instructs courts to consider the age of a victim of the generic offenses because it singles out conduct defined in the listed federal crimes "when committed against a minor." Thus, subsection (3)(A) evidences an intent to apply a categorical approach for purposes of comparing the defendant's prior sex offense with the listed section of the criminal code, combined with a circumstance-specific approach with respect to the victim's age. See *Nijhawan*, 557 U.S. at 37–38, 129 S.Ct. 2294 (acknowledging that determining whether an alien falsely forged passports, except in the case of a first offense committed for the purpose of assisting a spouse, child, or parent to violate the INA, may require a hybrid approach because Congress referred to the generic crime of forging passports, but contemplated specific consideration of the underlying facts to determine whether the exception applies).

The legislative history of § 16911 is also instructive on this issue. The Act establishing the Sex Offender Registration and Notification Act is titled the "Adam Walsh Child Protection and Safety Act." Pub.L. No. 109–248, 120 Stat. 587 (2006) (emphasis added). See also *United States v. Mi Kyung Byun*, 539 F.3d 982, 992 (9th Cir.2008) (discussing SORNA's legislative history and holding that for purposes of determining whether a defendant is a "sex offender," the court may consider the actual age of the victim). The "Background and Need for the Legislation" section from a House Report on the Act explained, "The sexual victimization of children is overwhelming in magnitude" and the median age of victims of imprisoned sex offenders in one study "was less than 13 years old." H.R.Rep. No. 109–218(I), at 22–23 (2005). Statements of the Representatives and Senators who discussed the bill agree that one of its major purposes was the protection of children. 152 Cong. Rec. H657–2 (daily ed. Mar. 8, 2006) (statement of Rep. Sensenbrenner) (stating that the purpose of the act is to "better protect our children

from convicted sex offenders"); *id.* (statement of Rep. Poe) (bill will "mak[e] sure that our children are safer" and target "child predators"); *id.* at S8012–2 (statement of Sen. Hatch) (in explaining his support for the bill, stating "I am determined that Congress will play its part in protecting the children of ... America").

From this history, it is apparent Congress intended to punish defendants who committed sex offenses against children more severely than other sex offenders. This supports our conclusion that even when the tier classifications refer to generic crimes that invoke a categorical approach, Congress intended the courts to *1135 also consider the actual age of the victim by looking to the specific circumstances of the defendant's crime. See *Mi Kyung Byun*, 539 F.3d at 992–93 (holding that SORNA's legislative history, "shows that Congress intended to include all individuals who commit sex crimes against minors, not only those who were convicted under a statute having the age of the victim as an element").

Turning to the equitable and practical concerns highlighted by the Supreme Court, we conclude that when SORNA cross-references a specific section of the criminal code, the use of a circumstance-specific methodology should be limited to the determination of the victim's age. By using a categorical approach for the comparison between the defendant's offense and the listed federal statute, the court will avoid many of the problems with a circumstance-specific approach identified by the Supreme Court. See *Taylor*; 495 U.S. at 600–02, 110 S.Ct. 2143. A categorical approach gives the defendant most of the benefits of a plea bargain, strictly confines the need to consult documents from a prior proceeding, and avoids the inequity of relying on allegations of the indictment where the defendant may have had no reason to challenge those assertions. See *id.*; *Descamps*, 133 S.Ct. at 2289 (stating that a defendant may have little incentive to challenge factual allegations not relevant to the elements of the crime with which he is charged). In contrast, a victim's age is a single fact that is easy to prove and, in an ordinary case, not easily disputed.

In light of the text of the statute, its legislative history, and these practical and equitable concerns, we conclude Congress intended courts 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.¹⁸ See *Mi Kyung Byun*, 539 F.3d at 994 (holding that the special concern Congress displayed

for minor victims in both the text of § 16911 and its legislative history evidenced an intent to allow the sentencing court to go beyond a categorical approach *1136 for the limited purpose of determining the age of the defendant's victim(s)). Having so determined, we next apply this approach to Mr. White's prior offense.

c. Mr. White's sex offender classification

In reaching its conclusion that Mr. White is a tier III sex offender, the district court looked to the North Carolina indictment, which alleged his victim was under the age of sixteen at the time of the offense, that Mr. White was then over sixteen years of age and thus at least five years older than the victim, and that Mr. White willfully took and attempted to take immoral, improper, and indecent liberties with the victim for the purpose of arousing and gratifying his sexual desire. The district court also consulted police reports from North Carolina, indicating the victim was the seven-year-old daughter of Mr. White's girlfriend, and that the offense involved physical contact. Although the district court's consideration of the facts relevant to the victim's age was appropriate, it erred by employing a circumstance-specific approach for purposes of comparing Mr. White's North Carolina offense with the federal crimes cross-referenced in § 16911(4)(A). As discussed, this comparison should have been made using a categorical approach.

i. Mr. White's state crime

[17] To apply a categorical approach, we "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the [predicate] crime." *Descamps*, 133 S.Ct. at 2281. Mr. White was convicted of taking indecent liberties with a child in violation of section 14–202.1 of the North Carolina Code. North Carolina defines taking indecent liberties with a child as either (1) willfully taking or attempting "to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire," or (2) willfully committing or attempting "to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years." N.C. Gen.Stat. § 14–202.1(a). Because this statute provides alternative ways in which it can be violated, it is divisible. Thus, we review the indictment under the modified categorical approach to ascertain which portion of the statute formed the basis of Mr. White's conviction. The State of North

Carolina indicted Mr. White under the first alternative: for willfully taking and attempting to take immoral, improper, and indecent liberties with a victim under the age of sixteen for the purpose of arousing and gratifying sexual desire. We now compare the elements of the statute as applied to Mr. White with the elements of the federal crimes listed in § 16911(4)(A) and (3)(A) to determine Mr. White's proper tier classification.

North Carolina has condensed “immoral, improper, and indecent liberties” to simply “indecent liberties,” which are defined as “such liberties as the common sense of society would regard as indecent and improper.” *State v. Every*, 157 N.C.App. 200, 578 S.E.2d 642, 647 (2003) (internal quotation marks omitted). But “neither a completed sexual act nor an offensive touching of the victim are required to violate the statute.” *Id.* Indeed, no physical touching is required to violate the statute. *State v. Nesbitt*, 133 N.C.App. 420, 515 S.E.2d 503, 506 (1999); *see also State v. McClary*, 198 N.C.App. 169, 679 S.E.2d 414, 418 (2009) (holding that giving a child a graphic letter for the purpose of soliciting sex violates the statute); *State v. McClees*, 108 N.C.App. 648, 424 S.E.2d 687, 689–90 (1993) (holding that secretly videotaping an undressing child violates the statute). The elements of Mr. White's state offense therefore include that he: (1) *1137 willfully, (2) took or attempted to take indecent liberties, (3) with a minor, (4) for the purpose of arousing and gratifying sexual desire. Of importance here, physical contact is not an element of the North Carolina crime of which Mr. White was convicted.

ii. Comparable federal crimes

When we compare the elements of Mr. White's state crime to the elements of the listed federal crimes, it is apparent that he is not a tier II or tier III sex offender. As discussed, the only portions of the definition of a tier III sex offender relevant here are § 16911(4)(A)(i) and (ii). These subsections impose tier III classification for sex offenses comparable to aggravated sexual abuse, sexual abuse, or abusive sexual contact against a minor under thirteen, as defined by 18 U.S.C. §§ 2241, 2242, and 2244. With respect to tier II, the only relevant subsection is § 16911(3)(A)(iv), which includes “abusive sexual contact (as described in Section 2244 of Title 18),” when it is committed against a minor.

Both aggravated sexual abuse and sexual abuse require the defendant to have engaged in a sexual act. 18 U.S.C.

§ 2241; *id.* § 2242. In turn, “sexual act” is defined to include (a) genital-genital contact, (b) oral-genital contact, (c) penetration of the genitals with certain sexual or abusive intents, or (d) the direct touching of genitals with certain sexual or abusive intents. *Id.* § 2246(2). Thus, because any violation of §§ 2241 or 2242 requires engaging in a sexual act, it necessarily requires physical contact.

Similarly, abusive sexual contact, which could qualify Mr. White as a tier II or tier III sex offender, is defined by § 2244 to prohibit conduct that would violate §§ 2241, 2242, or 2243, where there was sexual contact, rather than a sexual act. “Sexual contact” is defined more broadly than “sexual act,” but still requires physical contact. *Id.* § 2246(3) (“‘Sexual contact’ means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.”). Accordingly, any violation of § 2244, like violations of §§ 2241 and 2242, requires physical contact.

iii. Mr. White is a tier I sex offender

Because §§ 2241, 2242, and 2244 each require physical contact, Mr. White is a tier III or tier II sex offender under the categorical approach only if his state crime also includes physical contact as an element. Recall, however, that North Carolina does not require physical contact as an element of section 14–202.1(a). Accordingly, Mr. White is not a tier III or tier II sex offender; by default, he is a tier I sex offender. *See 42 U.S.C. § 16911(2)* (“The term ‘tier I sex offender’ means a sex offender other than a tier II or tier III sex offender.”).

The district court erred in treating Mr. White as a tier III sex offender for purposes of calculating his Guidelines sentencing range. The sentence is therefore procedurally unreasonable and we must vacate it and remand to the district court for resentencing.

2. Conditions of Supervised Release

Mr. White next claims, as he did in the district court, that two of the special conditions of supervised release are unconstitutional. Specifically, Mr. White challenges the third and fourth special conditions of his release, which, respectively, prohibit him from being at any residence where children under the age of eighteen reside without the prior written permission of the U.S. Probation Office and from

associating with children under the age of eighteen *1138 except in the presence of a responsible adult who is aware of his background and current offense and who has been approved by the U.S. Probation Officer. Mr. White makes two related arguments on appeal. First, he asserts the conditions infringe upon his substantive due process right of familial association by denying him unfettered contact with his minor grandchildren and nieces. Second, he contends the conditions improperly delegate sentencing authority to the probation officer.

Because we must vacate Mr. White's sentence, we also vacate the conditions of supervised release. But Mr. White is free to raise these challenges on remand, *see Fed.R.Crim.P. 32.1(c); 18 U.S.C. § 3583(e)*, so we briefly consider them here to provide guidance to the district court.

a. The right to familial association

[18] [19] [20] General restrictions on contact with children do not involve a greater deprivation of liberty than reasonably necessary in an ordinary case where a defendant has committed a sex offense against children or other vulnerable victims. *United States v. Smith*, 606 F.3d 1270, 1282–83 (10th Cir.2010). “But restrictions on a defendant's contact with his own children are subject to stricter scrutiny,” *United States v. Bear*, 769 F.3d 1221, 1229 (10th Cir.2014), because “the relationship between parent and child is constitutionally protected,” and “a father has a fundamental liberty interest in maintaining his familial relationship with his [children],” *United States v. Edgin*, 92 F.3d 1044, 1049 (10th Cir.1996) (internal quotation marks omitted). In light of the importance of this liberty interest, “special conditions that interfere with the [parental] right of familial association can do so only in compelling circumstances,” and must “be especially fine-tuned to achieve the statutory purposes of sentencing.” *Bear*, 769 F.3d at 1229 (internal quotation marks omitted).

Mr. White does not claim to have any minor children. Thus, the issue presented turns on the degree to which conditions of supervised release may intrude on his familial association with his minor grandchildren and nieces.¹⁹ To put our analysis in context, we first address the scope of the parental right to familial association. We then explore the extent to which similar rights have been afforded to other family members. Finally, we apply that jurisprudence to the facts

of this case and conclude the record must be developed on remand to resolve this issue.

[21] The liberty interest parents have in the care, custody, and control of their children is a substantive due process right protected by the Fourteenth Amendment. *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). Indeed, it “is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court.” *Id.* The Court first held the Due Process Clause protects a parent's substantive right to “establish a home and *1139 bring up children” and “to control the education of their own” in *Meyer v. Nebraska*. 262 U.S. 390, 399, 401, 43 S.Ct. 625, 67 L.Ed. 1042 (1923). Shortly thereafter, it held restrictions on the “liberty of parents and guardians to direct the upbringing and education of children under their control” are unconstitutional. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35, 45 S.Ct. 571, 69 L.Ed. 1070 (1925). The Court reaffirmed this right in *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and more recently announced “it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.” *Troxel*, 530 U.S. at 66, 120 S.Ct. 2054.²⁰

Although the Supreme Court has also recognized familial rights in persons other than parents, the parameters of that interest are less well-defined. Compare *Moore v. City of East Cleveland*, 431 U.S. 494, 496, 505–06, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (rejecting argument that right of familial association is limited to parents and striking as unconstitutional a city zoning ordinance subjecting grandmother to prosecution for living with her son and two grandsons, one of whom was the child of her deceased daughter), with *Troxel*, 530 U.S. at 60–61, 120 S.Ct. 2054 (2000) (holding unconstitutional a state statute allowing the court to order minor children to exercise visitation with grandparents, over a fit parent's objection). In *Trujillo v. Board of County Commissioners*, this circuit held that a mother and a sister of an adult decedent could bring a § 1983 wrongful death claim based on the loss of their constitutional right to familial association. 768 F.2d 1186, 1188–89 (10th Cir.1985). Citing *Moore*, we explained that the liberty interest in familial relationships includes interests “other than strictly parental ones,” which could include grandparent-grandchild relationships. *Id.* at 1188; *see also Suasnava v. Stover*, 196 Fed.Appx. 647, 657 (10th Cir.2006) (unpublished) (relying on *Trujillo* in upholding the denial of qualified immunity in

a § 1983 action based on child welfare workers' violation of the grandparents' clearly established constitutional right of familial association). But when grandparents are not playing any sort of custodial role, we *1140 have not afforded their right to familial association the same degree of protection as a parental right. *Trujillo*, 768 F.2d at 1189 ("[T]he parental relationship ... warrant[s] the greatest degree of protection and require[s] the state to demonstrate a more compelling interest to justify an intrusion on that relationship" than intrusions on other familial relationships.); *Estate of B.I.C. v. Gillen*, 710 F.3d 1168, 1175 (10th Cir.2013) (explaining in dicta that "[w]hen extending the right [of familial association] to grandparents, however, courts often consider whether the grandparents are 'custodial figure[s]' or 'acting in loco parentis,' and 'whether there is a potential conflict between the rights of the [grandparent] and the rights or interests of the [child's] natural parents.' " (citations omitted) (second, third, and fourth alterations in original)).²¹

These authorities lead to the conclusion that while a special condition of supervised release may only infringe on the parental right to familial association if there are compelling circumstances, a non-custodial grandparent's right to familial association is entitled to less constitutional protection. If Mr. White chooses to pursue this argument on remand, it will be his burden to demonstrate the nature of his relationship to his grandchildren and nieces. The district court is free to consider the degree to which that relationship resembles a parental one and impose conditions of supervised release accordingly. We do note, however, that the district court has already identified several facts relevant to this determination.

Specifically, the district court noted that Mr. White's seven-year-old victim was "close to a relative" and someone he considered "like a daughter." Although the court acknowledged the rehabilitative benefits of access to family, it explained that the conditions did not forbid Mr. White from association with his family. Instead, they merely required Mr. White to obtain prior permission and to be appropriately supervised when in the presence of children. The district court further clarified that the supervising adult could be a relative.

We agree that the specific circumstances identified by the district court here are relevant, and that they are likely sufficient to justify restrictions on a non-custodial grandparent's right to familial association. But if Mr. White's familial relationships are custodial, more information may be necessary. In reversing special conditions of supervised release that infringed on the defendant's parental right of

familial association in *Bear*; we noted the government *1141 had presented no evidence that "in the twelve years since Mr. Bear's sex offense conviction he has committed any sexual offense, displayed a propensity to commit future sexual offenses, or exhibited a proclivity toward sexual violence." 769 F.3d at 1229. And we further stated there was no evidence in the record that Mr. Bear had "continuing deviant sexual tendencies, fantasizes about having sex with children, or has otherwise displayed a danger to his own ... children." *Id.* In light of our decision in *Bear*, the district court may need to consider the length of time since Mr. White's original conviction and any relevant information predictive of his future conduct when deciding on conditions of supervised release.

On remand, the district court should consider the nature of Mr. White's relationship with his grandchildren and nieces and afford him a level of constitutional protection directly proportional to the significance of that liberty interest. The district court should also enter specific findings justifying any conditions of supervised release that infringe on a protected right of familial association. If a parent-like right is impacted, the conditions must be supported by express findings of compelling circumstances.

b. Delegation to the Probation Officer

[22] [23] [24] Finally, Mr. White claims the conditions of supervised release improperly delegated judicial authority to the probation officer. "Article III of the United States Constitution confers the authority to impose punishment on the judiciary, and the judiciary may not delegate that authority to a nonjudicial officer." *Bear*, 769 F.3d at 1230. To decide whether a condition of supervised release improperly delegates sentencing authority to a probation officer, we "distinguish between [permissible] delegations that merely task the probation officer with performing ministerial acts or support services related to the punishment imposed and [impermissible] delegations that allow the officer to decide the nature or extent of the defendant's punishment." *United States v. Mike*, 632 F.3d 686, 695 (10th Cir.2011). Like the review of the conditions of supervised release, "[t]his inquiry focuses on the liberty interest affected by the probation officer's discretion." *Bear*, 769 F.3d at 1230. "Conditions that touch on significant liberty interests are qualitatively different from those that do not," and so allowing a probation officer to decide whether to restrict a significant liberty interest

improperly delegates the judicial authority to determine the nature and extent of a defendant's punishment. *Id.*

As discussed above, the factual record before us is not sufficiently developed to determine the precise nature of Mr. White's relationship with his grandchildren and nieces. Accordingly, we are unable to determine the contours of the liberty interest at stake. But for the purposes of our analysis of this issue, we will assume Mr. White's relationship is sufficiently custodial to qualify for the highest level of constitutional protection. We will further assume the district court made the requisite factual findings indicating that compelling circumstances nevertheless justify restricting Mr. White's access to his minor relatives. For the reasons discussed below, even operating under these assumptions, which create the greatest limits on delegation, the degree of delegation to Mr. White's probation officers here was not improper.

Mr. White relies on *United States v. Voelker*, where the Third Circuit struck down a special condition of supervised release that imposed a lifetime ban on association with minors unless defendant obtained prior approval of a probation officer. [489 F.3d 139, 153–55 \(3d Cir.2007\)](#). The sentencing court provided “no guidance *1142 whatsoever for the exercise of that discretion,” so the probation officer became “the sole authority for deciding if [the defendant] will ever have unsupervised contact with any minor, including his own children, for the rest of his life.” *Id.* at 154. The Third Circuit held the condition was an impermissible abdication of the judiciary's sentencing responsibility, and vacated the condition with instructions for the district court to clarify it on remand. *Id.* at 155.

Mr. White's conditions of supervised release are significantly different than the conditions challenged in *Voelker*. The restrictions here are less onerous than those in *Voelker* because Mr. White was sentenced to only five years of supervised release, rather than the lifetime conditions imposed in *Voelker*. And the degree of delegation in this case is narrower than the delegation in *Voelker*. The sentencing judge here provided guidance to the probation office about the exercise of its discretion when it informed the parties that approval should be granted unless Mr. White poses a safety risk to children, and that the court expected the probation office would approve other family members as supervising adults. The district court also indicated it would remain involved in approving Mr. White's contact with minors if future problems arose, and that it has established guidelines and regularly consults with the probation office about approvals. Under these circumstances, the district court did not improperly delegate the authority to preapprove Mr. White's contact with his grandchildren and nieces, even if a significant liberty interest is implicated. Instead, the district court merely permitted the probation officer to provide “support services related to the punishment imposed.” *Mike, 632 F.3d at 695.*

IV. CONCLUSION

For these reasons, we **AFFIRM** Mr. White's conviction for failure to register in violation of [18 U.S.C. § 2250\(a\)](#), but we **VACATE** his sentence and the special conditions of his supervised release and remand for further proceedings.

All Citations

[782 F.3d 1118](#)

Footnotes

- 1 U.S.S.G. § 3E1.1 authorizes a two-level reduction for acceptance of responsibility, or a three-level reduction if the base offense level is 16 or higher and the defendant assists the prosecution by timely notifying it of his intention to plead guilty.
- 2 Although typically, one panel of this court cannot overrule the judgment of another panel, we may do so if an intervening decision from the Supreme Court invalidates our previous analysis. See *United States v. Brooks, 751 F.3d 1204, 1209 (10th Cir.2014)*.

- 3 As the Eighth Circuit has noted, *NFIB* provides, “no controlling opinion on the issue of whether provisions of the Affordable Care Act violated the Commerce Clause.” *United States v. Anderson*, 771 F.3d 1064, 1068 n. 2 (8th Cir.2014); see also *United States v. Robbins*, 729 F.3d 131, 135 (2d Cir.2013) (“It is not clear whether anything said about the Commerce Clause in *NFIB*’s primary opinion—that of Chief Justice Roberts—is more than dicta, since Part III–A of the Chief Justice’s opinion was not joined by any other Justice and, at least arguably, discussed a bypassed alternative, rather than a necessary step, in the Court’s decision to uphold the Act.”). Ordinarily we would apply the opinion of Chief Justice Roberts because his opinion articulated the narrowest grounds for upholding the individual mandate. *Id.*; see *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’ ” (internal quotation marks omitted)). But because none of the opinions in *NFIB* affect our analysis in *Hinckley*, we leave for another day the precise scope of *NFIB*’s holding.
- 4 Justice Ginsburg, joined by Justices Sotomayor, Breyer, and Kagan, would have upheld Congress’s exercise of the commerce power because Congress had a rational basis for concluding that the uninsured substantially affect interstate commerce. *National Federation of Independent Business v. Sebelius*, — U.S. —, 132 S.Ct. 2566, 2616–18, 183 L.Ed.2d 450 (2012) (Ginsburg, J., concurring in part and dissenting in part). Justice Ginsburg reasoned the decision to forgo insurance was not inactivity but rather an economic choice that Congress has the constitutional power to regulate. *Id.* at 2617. While she disagreed with the Chief Justice and the dissenters’ view that there is a constitutional difference between commercial activity and commercial inactivity, Justice Ginsburg maintained that the decision to self-insure is “an economic act with the requisite connection to interstate commerce.” *Id.* at 2621–24. Accordingly, she would have upheld the PPACA as a valid exercise of Congress’s commerce power.
- 5 Our conclusion is consistent with that of every federal circuit to have considered the issue since the Supreme Court’s decision in *NFIB*. See *United States v. Anderson*, 771 F.3d 1064, 1070–71 (8th Cir.2014) (upholding SORNA as a valid exercise of the Commerce Clause combined with the Necessary and Proper Clause); *United States v. Cabrera–Gutierrez*, 756 F.3d 1125, 1129–32 (9th Cir.2014) (holding that SORNA does not regulate inactivity); *United States v. Robbins*, 729 F.3d 131, 134–36 (2d Cir.2013) (same); *United States v. Rivers*, 588 Fed.Appx. 905, 907–909 (11th Cir.2014) (unpublished) (holding that *NFIB* does not say anything about a statute like SORNA which falls within the first two *Lopez* prongs and is triggered by activity in the form of interstate travel).
- 6 The Eighth Circuit’s decision in *United States v. Smith*, 655 F.3d 839, 848 (8th Cir.2011) was vacated by the Supreme Court with instructions to reconsider it in light of *Reynolds v. United States*, — U.S. —, 132 S.Ct. 975, 181 L.Ed.2d 935 (2012). *Smith v. United States*, — U.S. —, 132 S.Ct. 2712, 183 L.Ed.2d 66 (2012) (mem.). On remand, the Eighth Circuit determined that *Reynolds* did not affect its Tenth Amendment analysis and reinstated that portion of the opinion. *United States v. Smith*, 504 Fed.Appx. 519, 520 (8th Cir.2012) (unpublished).
- 7 The Second Circuit did not cleanly decide this issue because of problems with the defendant’s briefing. See *United States v. Guzman*, 591 F.3d 83, 94 (2d Cir.2010). Still, the Second Circuit held that the defendant’s Tenth Amendment challenge to SORNA had failed.
- 8 The Guidelines do not define sex offender tier classifications, but rather incorporate SORNA’s classifications through the Guidelines’ commentary. Cf. *United States v. Lucero*, 747 F.3d 1242, 1247 (10th Cir.2014) (holding the commentary issued by the Sentencing Commission is binding and “authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline”).

- 9 In addition to determining a SORNA violator's base offense level, a sex offender's tier classification determines the length of his SORNA registration obligation. [42 U.S.C. § 16915\(a\)](#). Tier I offenders must register for 15 years after being convicted of a sex offense; tier II offenders must register for 25 years; and tier III offenders must register for life. *Id.* The tier classification also determines how often an offender is required to register. *Id.* § 16916.
- 10 There are other ways in which a sex offender can be classified as a tier II or tier III sex offender, but they are not relevant here and we do not discuss them. See [42 U.S.C. § 16911\(3\), \(4\)](#).
- 11 [18 U.S.C. § 924\(e\)\(2\)\(B\)\(ii\)](#) (requiring courts to compare a defendant's prior conviction to "burglary, arson, or extortion" to determine if the prior conviction qualifies as a violent felony under the ACCA).
- 12 [8 U.S.C. § 1101\(a\)\(43\)\(M\)\(i\)](#) (defining an "aggravated felony" as "an offense that ... involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000").
- 13 The Tenth Circuit has not yet determined the proper methodology for assessing a sex offender's tier classification. See [United States v. Forster](#), 549 Fed.Appx. 757, 766–69 (10th Cir.2013) (affirming a sentence under either a categorical or circumstance-specific approach).
- 14 In *Descamps v. United States*, the Supreme Court identified a fourth concern arising under the ACCA, which actually increases the maximum statutory penalty available. — U.S. —, 133 S.Ct. 2276, 2288, 186 L.Ed.2d 438 (2013); [18 U.S.C. § 924\(e\)](#). The Supreme Court applied a categorical approach to the comparison required under the ACCA because consideration of the facts underpinning a defendant's prior conviction would raise "serious Sixth Amendment concerns." *Descamps*, 133 S.Ct. at 2288; see *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) ("[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). Because the tier classifications at issue here do not increase the maximum statutory sentences available, we do not address this fourth consideration.
- 15 Congress's intent may be different with respect to subsection (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. See [United States v. Dodge](#), 597 F.3d 1347, 1354–55 (11th Cir.2010) (holding that a circumstance specific approach is appropriate to determine what constitutes a "specified offense against a minor" under SORNA because that subsection used general terms like "includes," "involves," "involving," and "by its nature," which suggest a very broad reading). Because there is no suggestion that Mr. White's prior sex offense falls within [§ 16911\(4\)\(B\)](#), we do not decide which method of comparison Congress intended under it.
- 16 [18 U.S.C. § 2244\(c\)](#) does increase the maximum sentence for abusive sexual contact against an individual who has not attained the age of twelve years. Even if we were to overlook the inconsistency between twelve and thirteen years used in SORNA, [§ 2244](#) does not include a victim's age as an element of the crime of abusive sexual contact. The victim's age is relevant only as a sentencing enhancement.
- 17 Subsection (3)(B) does not cross-reference the criminal code, but Mr. White's prior sex offense does not arguably fall within it. Therefore, we do discuss Congress's intent with respect to this subsection.
- 18 Our conclusion is consistent with the interpretation of SORNA in regulations promulgated by the Attorney General. [Office of the Attorney General; The National Guidelines for Sex Offender Registration and Notification](#), 73 Fed.Reg. 38,030, 38,031, (July 2, 2008) ("[J]urisdictions are not required by SORNA to look beyond the elements of the offense of conviction in determining registration requirements, except with respect to victim age."); *id.* at 38,053–54. Because we reached our conclusion without reliance on these regulations, we need not address the thorny issue of whether it is appropriate to defer to a prosecuting

agency's interpretation of a criminal statute. Compare *United States v. O'Hagan*, 521 U.S. 642, 673–77, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997) (deferring to an SEC interpretation of a criminal statute), *Babbitt v. Sweet Home Chapter of Cmties. for a Great Ore.*, 515 U.S. 687, 703, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995) (applying "some degree of deference" to regulations interpreting parts of the Endangered Species Act that provide for criminal penalties), *United States v. Hubenka*, 438 F.3d 1026, 1034 (10th Cir.2006) (deferring to the Army Corps of Engineers' interpretation of part of the Clean Water Act), *N.L.R.B. v. Okla. Fixture Co.*, 332 F.3d 1284, 1287 (10th Cir.2003) (en banc) (giving "some deference" to the NLRB's interpretation of a labor law that carries criminal penalties), and *United States v. Piper*, No. 1:12-CR-41-JGM-1, 2013 WL 4052897, at *5–7 (D.Vt. Aug. 12, 2013) (unpublished) (deferring to the SMART Guidelines), with *Abramski v. United States*, — U.S. —, 134 S.Ct. 2259, 2274, 189 L.Ed.2d 262 (2014) ("[C]riminal laws are for courts, not for the Government, to construe"), *Whitman v. United States*, — U.S. —, 135 S.Ct. 352, 353, 190 L.Ed.2d 381 (2014) (Scalia, J., dissenting) (arguing deference is inappropriate in criminal cases), and *Crandon v. United States*, 494 U.S. 152, 177, 110 S.Ct. 997, 108 L.Ed.2d 132 (1990) (Scalia, J., concurring) (same).

19 The government contends that the constitutional right of familial association is limited to parent/child relationships. In the district court, Mr. White made no attempt to address that argument or to define the rights enjoyed by grandparents or uncles. In this court, he addressed these issues only by supplemental authority filed prior to oral argument. Ordinarily, arguments inadequately briefed in an appellant's opening brief are waived. *United States v. Cooper*, 654 F.3d 1104, 1128 (10th Cir.2011). But we have vacated Mr. White's sentence and remanded this case for resentencing on other grounds. Under these circumstances, both *Federal Rule of Criminal Procedure 32.1(c)* and *18 U.S.C. § 3583(e)* provide a vehicle for Mr. White to request modification of the conditions of supervised release even if he has waived his challenge for purposes of this appeal. We therefore depart from our usual practices with respect to preservation only to assist the district court on remand.

20 See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the righ[t] ... to direct the education and upbringing of one's children." (citations omitted)); *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982) (discussing "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Parham v. J. R.*, 442 U.S. 584, 602, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course."); *Quilloin v. Walcott*, 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected" because the right to "custody, care and nurture of the child reside[s] first in the parents."); *Wisconsin v. Yoder*, 406 U.S. 205, 232, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come [s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' " (citation omitted)).

21 This approach is consistent with that adopted by other jurisdictions. See, e.g., *Johnson v. City of Cincinnati*, 310 F.3d 484, 499–501 (6th Cir.2002) (holding that a grandparent has a due process right of familial association with her grandchildren if she participates in child-rearing, for instance as an active participant in the lives and activities of her grandchildren with the consent and support of the children's mother, even if the grandmother might not have had a due process right if she had only visited the grandchildren); *Miller v. California*, 355 F.3d 1172, 1175–76 (9th Cir.2004) (ruling that grandparents have no substantive due process right to family integrity and association relative to grandchildren because they had not formed a family unit,

the grandchildren were effectively wards of the state, and the grandparents' interests conflicted with that of the children's mother); *Mullins v. Oregon*, 57 F.3d 789, 796 (9th Cir.1995) (rejecting an argument that a biological grandmother had a constitutional interest in the adoption or society of her grandchildren where she had only maintained occasional contact with her grandchildren and lacked any emotional, financial or custodial history with them); *Ellis v. Hamilton*, 669 F.2d 510, 512–14 (7th Cir.1982) (ruling that a plaintiff who was a child's great-aunt, adoptive grandmother, de facto mother and father, and custodian had a due process right to associate with the child).

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(conspiracy); *United States v. Winbush*, 407 F.3d 703, 707–08 (5th Cir. 2005) (attempt); *King*, 325 F.3d at 114–15 (attempt). The Third Circuit adopted a similarly expansive definition of “involving” in *United States v. Gibbs*, 656 F.3d 180 (3d Cir. 2011), finding that a Delaware conviction for wearing body armor while committing a felony “involve[d]” a serious drug offense where the underlying felony was manufacturing, distributing, or possessing with the intent to distribute drugs. *Id.* at 184–85, 188.

Williams argues that Indiana courts have interpreted the “financing” language to apply to a defendant’s purchase of drugs for his own personal use. The Indiana Court of Appeals persuasively rejected that broad reading in *Hyche v. State*, 934 N.E.2d 1176, 1179 (Ind. App. 2010), explaining that the term “is commonly construed as applying to one who acts as a creditor or an investor and not one who merely acts as a purchaser.” In *Hyche*, the defendant had been convicted of felony murder in a drug deal in which he was trying to buy ecstasy for his personal use. The state court reversed his conviction because he had not been “financing” the purchase with his own money for his own use. The defendant had acted “merely as a purchaser and not as a creditor or an investor,” and “he could no more be deemed to be financing the delivery of ecstasy than a grocery shopper could be deemed to be financing the supermarket’s inventory.” *Id.* at 1180.

To counter *Hyche*, Williams cites two Indiana appellate cases that he contends ruled differently. In *Kibler v. State*, 904 N.E.2d 730 (Ind. App. 2009) (non-precedential), the court vacated a conviction for dealing in heroin on double jeopardy grounds but based its conclusion on the unexplained and unjustified theory that the defendant had “financed” his own pur-

chase of heroin for his own use. In *Vausha v. State*, No.13A01-06070-CR-280, 2007 WL 2595427 (Ind. App. 2007) (non-precedential), the defendant and her husband had teamed up to sell methamphetamine to a neighbor who was cooperating with the police, and the defendant had participated in negotiating the price of the sale.

These cases do not convince us that the Indiana statute actually reaches activity that would not be a serious drug offense under the federal ACCA. Both are non-precedential, and both predate *Hyche*, which is precedential and well-reasoned. Also, *Vausha* was not even a personal-use case. The defendant there financed drug dealing in part by buying “600 cold pills” to make more than three grams of methamphetamine that she then tried to sell. 2007 WL 2595427, at *5.

Hyche provides the most authoritative guidance on the scope of the Indiana crimes of “financing” the manufacture and delivery of cocaine. That scope falls within the federal definition of a serious drug offense under the ACCA.

The judgment of the district court is AFFIRMED.



UNITED STATES of America,
Plaintiff-Appellee,

v.

Richard WALKER, Defendant-
Appellant.

No. 18-3529

United States Court of Appeals,
Seventh Circuit.

Argued May 29, 2019

Decided July 23, 2019

Background: Defendant was convicted in the United States District Court for the

Eastern District of Wisconsin, Pamela Pepper, J., of failure to register as a sex offender in violation of the Sex Offender Registration and Notification Act (SORNA). Defendant appealed.

Holdings: The Court of Appeals, Barrett, Circuit Judge, held that defendant's Colorado offense did not qualify as a tier 2 or tier 3 sex offense under SORNA.

Vacated.

1. Mental Health \Leftrightarrow 469(2)

In deciding whether a prior sex offense qualifies under a particular tier of the Sex Offender Registration and Notification Act (SORNA), as required to determine the applicable registration requirements, the court employs a hybrid categorical approach, under which it first compares the elements of the predicate sex offense to the elements of the relevant federal sex offense, and then considers the specific circumstances of the victim's age. 18 U.S.C.A. §§ 2244, 2250(a)(1).

2. Mental Health \Leftrightarrow 469(2)

Under the hybrid categorical approach for determining if a defendant's sex offense qualifies under a particular tier of the Sex Offender Registration and Notification Act (SORNA), as required to decide the applicable registration requirement, if the elements of the predicate offense are the same or narrower than the federal sex offense and the specific victim's age satisfied the particular tier's requirements, there is a categorical match; but, if the elements of the state conviction sweep more broadly such that there is a realistic probability that the state would apply its statute to conduct that falls outside the definition of the federal crime, then the prior sex offense is not a categorical match. 18 U.S.C.A. §§ 2244, 2250(a)(1).

3. Mental Health \Leftrightarrow 469(2)

Defendant's Colorado conviction for sexual contact with a child under the age of 15 years by anyone who is at least four years older than the child did not qualify as a Tier II or Tier III sex offense, under the Sex Offender Registration and Notification Act (SORNA); it did not categorically match the elements for generic federal crime of abusive sexual contact, which prohibited knowingly engaging in a sexual act with a person who had attained the age of 12 years but was under the age of 16 years or engaging in a sexual act with a person who had not attained the age of 12 years, as the Colorado statute criminalized conduct not covered by the federal statute. 18 U.S.C.A. § 2244(a)(2), (3), & (5); Colo. Rev. Stat. Ann. § 18-3-405(1).

Appeal from the United States District Court for the Eastern District of Wisconsin. No. 2:17-cr-184 — **Pamela Pepper, Judge**.

Jonathan H. Koenig, Attorney, Benjamin W. Proctor, Attorney, Benjamin Taibleson, Attorney, Office of the United States Attorney, Milwaukee, WI, for Plaintiff-Appellee.

Ronnie V. Murray, Attorney, Federal Defender Services of Eastern Wisconsin, Incorporated, Milwaukee, WI, for Defendant-Appellant.

Before Ripple, Rovner, and Barrett, Circuit Judges.

Barrett, Circuit Judge.

Richard Walker was convicted for failing to register as a sex offender between 2016 and 2017, as required by the Sex Offender Registration and Notification Act. He argues that his conviction must be vacated because he did not have to register at that time. We agree. Because his obligation to

register—triggered by a 1998 Colorado conviction—expired after fifteen years, we reverse the district court and vacate Walker's conviction and sentence.

I.

In 1997, Richard Walker sexually assaulted his four- and six-year-old nephews. In 1998, he pleaded guilty to violating a Colorado law that prohibits sexual contact with a child under fifteen by anyone who is at least four years older than the child. COLO. REV. STAT. § 18-3-405(1). Walker was sentenced to four years' probation, but probation was later revoked, and he served a term in prison. After his release, Walker had to register as a sex offender under the Sex Offender Registration and Notification Act (SORNA). SORNA imposes a three-tier progressive registration scheme that tracks the severity of the original offense. Tier I offenders must register for 15 years, Tier II offenders for 25 years, and Tier III offenders for life. *See* 34 U.S.C. § 20915(a).

In 2017, Walker was indicted for failing to register as a sex offender from June 2016 to July 2017. *See* 18 U.S.C. § 2250(a). To prove "failure to register," the government must, among other things, prove that the defendant was in fact required to register. *Id.* § 2250(a)(1). Walker moved to dismiss the indictment, arguing that his 1998 conviction was only a Tier I offense, which would mean that his obligation to register as a sex offender ended 15 years after his conviction and sentence. Because he had no obligation to register between June 2016 and July 2017, he contended, he could not be convicted for failing to do so.

The district court disagreed. It determined that Walker was at least a Tier II offender and denied his motion to dismiss. Walker later entered a conditional guilty plea, preserving his right to appeal the district court's decision about whether the

law required him to register as a sex offender.

At sentencing, the district court had to determine more precisely whether Walker was a Tier II or Tier III offender in order to calculate his guidelines range. The relevant difference between Tiers II and III for purposes of the district court's analysis is the age of the victim: if the defendant's victim was under 13, then he is a Tier III offender; if the victim was a minor age 13 or older, then he is a Tier II offender. *See* 34 U.S.C. § 20911(4)(A)(ii) & (3)(A). Though Walker's conviction under the Colorado statute communicated only that his victim was under 15, the district court looked past the conviction to find that his victims were actually ages four and six. The court thus held that Walker was a Tier III offender and sentenced him to a below-guidelines 26-month term of imprisonment.

Walker appeals, arguing that his conviction must be vacated because he is a Tier I offender and was therefore not required to register during the relevant time.

II.

Walker's conviction and sentence both turn on his tier classification. If he is a Tier I offender, we must reverse the denial of his motion to dismiss and vacate his conviction. If he is a Tier II offender, his conviction stands, but he must be resentenced. If he is a Tier III offender, his conviction and sentence must be affirmed.

A.

As relevant here, a person is a Tier II sex offender if his offense of conviction is "comparable to or more severe than ... abusive sexual contact (as described in section 2244 of title 18)" and is "committed against a minor." 34 U.S.C. § 20911(3)(A)(iv). A person is a Tier III

offender if he commits the same kind of offense “against a minor who has not attained the age of 13 years.” *Id.* § 20911(4)(A)(ii).¹ And if a sex offender does not satisfy the requirements of Tier II or Tier III, then he is a Tier I offender. *Id.* § 20911(2).

[1, 2] Determining Walker’s proper tier classification thus requires us to compare his 1998 Colorado conviction with SORNA’s tier definitions. Because SORNA instructs us to compare Walker’s offense to the “offenses” described in corresponding sections of the Federal Criminal Code (18 U.S.C. § 2244 and offenses listed therein), we employ the “categorical approach.” *See United States v. Taylor*, 644 F.3d 573, 576 (7th Cir. 2011); *see also Nijhawan v. Holder*, 557 U.S. 29, 36–37, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009) (explaining that reference “to an ‘offense described in’ a particular section of the Federal Criminal Code” indicates a generic offense that calls for a categorical analysis); *United States v. White*, 782 F.3d 1118, 1132–33 (10th Cir. 2015). Under the categorical approach, the actual facts underlying the defendant’s conviction don’t matter. Instead, the court compares the elements of the predicate offense—i.e., the facts *necessary* for conviction—to the elements of the relevant federal offense. If

1. There are other ways to qualify as a Tier II or III offender, but none is relevant here. *See 34 U.S.C. § 20911(3) & (4).*
2. Other courts that have applied SORNA’s tier provisions seem to read “whose offense ... is comparable to or more severe than” one of the listed federal “offenses,” *see 34 U.S.C. § 20911(3)(A) & (4)(A)*, as collectively triggering a categorical approach identical to that employed under other statutes, *see, e.g., United States v. Cammerto*, 859 F.3d 311, 314 (4th Cir. 2017); *United States v. Young*, 872 F.3d 742, 745–47 (5th Cir. 2017); *White*, 782 F.3d at 1137. As we note above, our caselaw suggests that SORNA triggers at least that much. It is possible, though, that the phrases

the elements of the predicate offense are the same (or narrower) than the federal offense, there is a categorical match. *See Descamps v. United States*, 570 U.S. 254, 260–61, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013). But if the elements of the state conviction sweep more broadly such that there is a “realistic probability ... that the State would apply its statute to conduct that falls outside” the definition of the federal crime, then the prior offense is not a categorical match. *Gonzales v. Dueñas-Alvarez*, 549 U.S. 183, 193, 127 S.Ct. 815, 166 L.Ed.2d 683 (2007).²

SORNA, however, adds a wrinkle to the analysis. For a sex offender to qualify for Tier II or III, SORNA also requires that his victim have certain characteristics distinct from the elements of the referenced federal offenses—namely, that the victim be under a specified age. The two circuits to have directly considered the implications of SORNA’s age requirements agree that the text compels a circumstance-specific analysis of the victim’s age on top of the otherwise categorical comparison between the state and federal offenses. *See United States v. Berry*, 814 F.3d 192, 196–98 (4th Cir. 2016) (applying “the categorical approach to the generic crimes listed in SORNA’s tier III definition” but reading SORNA’s reference to a victim “who has

“comparable to” and “more severe than” trigger independent categorical commands such that the predicate offense must be *either* comparable to *or* more severe than the federal offense. On this reading, the latter phrase might encompass predicate offenses that prohibit conduct that is not covered by, but is categorically more severe than, that prohibited by the baseline federal offenses. For example, that phrase might encompass a predicate offense whose elements reach victims younger than those included in the federal offense because molesting a younger child is an even more severe offense than molesting an older one. The government does not raise this possibility, however, so we do not address it here.

not attained the age of 13” to be “an instruction to courts to consider the specific circumstance of a victim’s age”); *White*, 782 F.3d at 1135 (“Congress intended courts 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.”).

We join the Fourth and Tenth Circuits in concluding that SORNA’s text compels a hybrid approach. In so doing, we follow the Supreme Court’s analysis in *Nijhawan v. Holder*. See 557 U.S. at 37–38, 129 S.Ct. 2294 (acknowledging that a single provision might call for a hybrid approach—part categorical and part circumstance-specific—when comparing the defendant’s offense of conviction). In *Nijhawan*, the Supreme Court emphasized that the “aggravated felony” provision of the Immigration and Nationality Act “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, 129 S.Ct. 2294. Sometimes that dual language appears in a single provision. The Court identified subparagraph (P) of the aggravated felony statute as one such example. *Id.* at 37–38, 129 S.Ct. 2294. That provision refers to “an offense” that amounts to “forging . . . passport[s]” but adds an exception to that qualifying crime for offenses committed under particular circumstances. *Id.* (alterations in original). The Court explained that while the forging-passports language “may well refer to a generic crime . . . the exception cannot possibly refer to a generic crime . . . because there is no such generic crime.” *Id.* at 37, 129 S.Ct. 2294. If no criminal statute contains both the offense and the exception outlined in subparagraph (P), then it would be impossible for a defendant’s conviction to qualify as a predicate under that

provision, and the provision would be void of any meaningful application. *Id.* Thus, the Court concluded that “the exception must refer to the particular circumstances in which an offender committed the crime on a particular occasion.” *Id.* at 38, 129 S.Ct. 2294; *see also id.* (explaining that, in the same way, subparagraph (K)(ii) would be severely diluted without a hybrid analysis). Similar considerations dictate a hybrid approach in this case.

A person is a Tier II offender only if his prior offense matches “abusive sexual contact (as described in section 2244 of title 18)” and was “committed against a minor.” 34 U.S.C. § 20911(3)(A). And he is a Tier III offender only if his prior offense matches one of the same federal offenses and was committed “against a minor who has not attained the age of 13 years.” *Id.* § 20911(4)(A). While the references to 18 U.S.C. § 2244 trigger a categorical approach, we must also give meaning to the age-qualifiers that appear in both Tier II and Tier III. Only two of the five offenses cross-referenced in § 2244 even refer to age, and none of them have SORNA’s specific age requirements as elements. Cf. *Nijhawan*, 557 U.S. at 38, 129 S.Ct. 2294 (when the statute’s added textual condition appears in only one of three cross-referenced criminal statutes, reading the condition as part of the generic crime would render the other two cross references “pointless”). Under *Nijhawan*, the age requirements are best and most naturally read to refer to the “particular circumstances in which an offender committed the crime on a particular occasion.” *Id.* Because SORNA’s tier provisions highlight victim age as an additional circumstance-specific consideration—apart from the categorical analysis comparing the defendant’s offense to the federal offenses listed in § 2244—we must treat it like one.

The government argues that a circumstance-specific inquiry into victim age resolves this case because knowing the actual ages of Walker's victims (four and six) not only satisfies SORNA's Tier III victim age requirement, but also places his offense within the scope of "abusive sexual contact (as described in section 2244 of title 18)." *See* 34 U.S.C. § 20911(4)(A)(ii); *see also* 18 U.S.C. § 2244(a)(5) (sexual contact with a person who has not attained the age of 12 years constitutes abusive sexual contact). In other words, the government wants to double dip: it asks us to apply SORNA's age requirement as both an independent addition to the categorical analysis *and* an exception within the categorical analysis, thereby collapsing the two-part inquiry outlined above.

That approach is inconsistent with both the text of SORNA—which, as we have already said, calls for a categorical approach—and the Supreme Court's precedent on conducting a categorical analysis. The Court has made clear that in a categorical analysis, there are no exceptions to the elemental comparison. *See Mathis v. United States*, — U.S. —, 136 S. Ct. 2243, 2257, 195 L.Ed.2d 604 (2016) ("For more than 25 years, we have repeatedly made clear that application of the [categorical approach] involves, and involves only, comparing elements."). While it may "seem counterintuitive," *id.* at 2251, it isn't enough to know that Walker's victims were four and six—nor is it enough to know that he satisfies the "against a minor who has not attained the age of 13" requirement of Tier III. We must first consider whether his Colorado conviction is a categorical match to "abusive sexual contact (as described in section 2244 of title 18)." 34 U.S.C. § 20911(3)(A)(iv) & (4)(A)(ii). If it is, we *then* consider the age of the victim to complete the tier-classification determination.

This kind of distinction, derived from the text and structure of the statute, is familiar to our SORNA jurisprudence. *See United States v. Rogers*, 804 F.3d 1233, 1234 (7th Cir. 2015) ("We conclude that the threshold definition of 'sex offense' found in § 16911(5)(A)(i) requires a categorical approach—an inquiry limited to the elements of the offense—but the exception in subsection (5)(C) calls for an examination of the specific facts of the offense conduct."). We follow the same approach in analyzing Walker's case.

B.

[3] We start with a categorical comparison of Walker's Colorado conviction to the generic federal crime of abusive sexual contact as defined by § 2244.

To sustain a conviction under the Colorado statute, a jury must find (or, as here, a guilty plea must admit) that the defendant "knowingly subject[ed]" a child who was "less than fifteen years of age" to "any sexual contact" and that the defendant was "at least four years older than the victim." COLO. REV. STAT. § 18-3-405(1). For its part, § 2244 defines abusive sexual contact as "knowingly engag[ing] in or caus[ing] sexual contact with or by another person, if doing so would violate" any one of five cross-referenced offenses "had the sexual contact been a sexual act." *See* 18 U.S.C. § 2244(a). As relevant here, those cross-referenced offenses prohibit knowingly engaging in a sexual act with another person if that person: is "incapable of appraising the nature of the conduct," § 2242(2)(A); "has attained the age of 12 years but has not attained the age of 16 years" and "is at least four years younger than the person so engaging," § 2243(a); or "has not attained the age of 12 years," § 2241(c). *See id.* § 2244(a)(2), (3), & (5).

Because the cross-referenced offenses (as modified by § 2244) and the Colorado

statute both contain the element of knowing sexual contact with another, the only question is whether the Colorado statute's requirements that the victim be under 15 and at least four years younger than the defendant categorically match the remaining element(s) in any of the federal offenses.

The district court determined that the Colorado statute is a categorical match for § 2242(2)(A) (victim incapable of appraising the nature of sexual conduct). In reaching that conclusion it explained that the federal statute "appears to be very broad," encompassing adult victims with cognitive disabilities, those incapacitated by drugs or alcohol, and seniors with cognitive impairment. The court reasoned that young children are incapable of understanding the nature of sexual conduct. So, it continued, "if one assumes that children under the age of fifteen are 'incapable of appraising the nature' of sexual contact/assault, then § 2242(2)(A) appears to be much broader, and to encompass far more behavior, than the Colorado statute," making it a categorical match.

We disagree. Certainly, many children, and indisputably all children under a certain age, are incapable of appraising the nature of sexual conduct. But the assumption that children under the age of 15 are *categorically* incapable of understanding sexual conduct goes too far. At the very least, it is safe to say that many 14-year-olds understand the nature of sexual conduct. That means that the Colorado statute criminalizes conduct not covered by § 2242(2)(A)—i.e., the state statute "sweeps more broadly" than the federal statute—and there is no categorical match. *See Descamps*, 570 U.S. at 261, 133 S.Ct. 2276.

So that leaves either § 2243(a) (victim at least 12 but under 16, and four years younger than the defendant) or § 2241(c)

(victim under 12). Neither is a categorical match for the Colorado statute at issue here. Though narrower in some respects, the Colorado statute sweeps more broadly than § 2243(a) because it covers sexual contact against some victims under 12, and § 2243(a) does not. Likewise, the Colorado statute is broader than § 2241(c) to the extent that it covers some victims between the ages of 12 and 15, and § 2241(c) does not. In short, a conviction under the Colorado statute doesn't necessarily satisfy the elements of either federal offense and so fails the categorical analysis.

Because Walker's Colorado conviction is not a categorical match with "abusive sexual contact (as described in section 2244 of title 18)," he does not qualify for Tier II or Tier III status regardless of the actual ages of his victims. Walker is thus a Tier I offender. *See* 34 U.S.C. § 20911(2).

* * *

As a Tier I offender, Walker was not required to register during the relevant period. We therefore REVERSE the district court's decision denying Walker's motion to dismiss, and we VACATE Walker's conviction and sentence.



Joseph KRELL, Plaintiff-Appellee,

v.

**Andrew M. SAUL, Commissioner of
Social Security, Defendant-
Appellant.**

No. 18-1100

United States Court of Appeals,
Seventh Circuit.

Argued September 26, 2018

Decided July 24, 2019

Background: Claimant, a former iron-worker, appealed from final decision of